Such shortcomings as this book has as a scholarly endeavor, in fact, are the shortcomings of the present primitive stage of legal research on the periphery of contract proper.

One thing is clear: the research and study which other scholars have poured into law-review articles and treatises, Kessler and Sharp have put into this book. Its real meaning, I believe, has inadvertently been set down by one of the authors in his review of Corbin's great treatise:

> This reviewer can well imagine that there will be some students who will take fright when reading this book because their sense of security requires a diet of black letter law, an oversharpening of doctrinal issues, and a treatise which makes things simpler and clearer than they are, which is rich in myth, and which unquestioningly accepts rationalizations at face value. But if the student is willing to hear out the author with patience, he will be richly rewarded. He will begin to realize that the security he is longing for is a false security; that our living law of contracts is not a closed system of harmonious rules but an open system of social action rich in dynamic complexity and full of contradictions; that the scenes where ideals are in conflict are constantly shifting. A reading of the book will therefore be a constant invitation to work at the concretization of our notions of justice and to create working rules of our own.[30]

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[30] Kessler, Symposium Review of Corbin on Contracts, 61 Yale L.J. 1092, 1094 (1952).

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Civil Liberties and the Vinson Court. By C. Herman Pritchett. Chicago: University of Chicago Press, 1954. Pp. xi, 297. $5.00.

On June 21, 1946, the President of the United States issued a commission announcing "[t]hat reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Fred M. Vinson, of Kentucky I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief Justice of the United States."[1] On October 3, 1953, Mr. Justice Black, on behalf of the Court, delivered a eulogy in which he said: "His colleagues of this Court respected him for his integrity and ability. They loved him for his kindness, sympathy, understanding and fairness. We join the Nation in lamenting the death of this capable and loyal public servant."[2] The President's commission followed a form of long standing. The memorial remarks of Mr. Justice Black followed a somewhat less rigid but nonetheless required formula. Thus, the Supreme Court career of the late Chief Justice was both opened and closed with phrases of doubtful applicability. Historians may find hyperbole in the words "wisdom," "learning," "ability," "understanding," and "capab[ility]," as applied to the Supreme Court's thirteenth Chief Justice.[3]

[1] Appointment of Mr. Chief Justice Vinson, 329 U.S. v, vi (1946).

[2] Death of Mr. Chief Justice Vinson, 346 U.S. VII (1953).

[3] My prediction as to the historical evaluation of the late Chief Justice's role on the Supreme Court is by no means universally shared. Professor Francis A. Allen who served Vinson so well

If one were to compare him with his two immediate predecessors—using these words as criteria—he would come out a poor third. On the same basis for evaluation, he comes closer to the bottom than the top of the list of colleagues who served with him on the Court. The appellation "Vinson Court" is valid as a chronological description of the Court from October Term 1946 to October Term 1953. Probably in but one other way was the Court during this period "the Vinson Court": Vinson, during his term of office, was in the majority more often than any other Justice.

Certainly in no sense could Vinson have been considered the "leader" of Justices Black, Frankfurter, Douglas, Murphy, Jackson, or Rutledge. Mr. Justice Reed was often in agreement with Vinson, but which, if either, was the "leader" cannot be known from this distance.[4] Mr. Justice Reed during this period seems to have adhered to views which he had expressed long before Vinson reached the Court. If Vinson was a "leader" at all it was of Mr. Justice Clark and Mr. Justice Minton and perhaps of Mr. Justice Burton, whose deep respect for the office of Chief Justice of the United States may have carried over to the man. From time to time Professor Pritchett uses the phrase "the Court over which Vinson presided";[5] at other times he refers to the Court "under Chief Justice Vinson's leadership."[6] The former is accurate; the latter is doubtful.

One of Vinson's primary failings was his lack of understanding of the role of the Chief Justice of the United States. As Professor Pritchett announces in the very first paragraph of his book: "The Chief Justice is, of course, only one of nine members of the Supreme Court. . . . His actual authority over his colleagues is rather limited, to be sure, and stems primarily from his role as presiding officer at the judicial conferences . . . and from his power to assign the writing of opinions."[7] Vinson came to the Court with a concept of the Chief Justice's relationship to the Associate Justices as "one and eight" rather than "one of nine." Whether because he felt it necessary to respond to the demands of the newspapers for an "administrator" to fill the vacancy left by the death of Harlan Fiske Stone, or for the reason suggested by John Frank,[8] he was ill-prepared

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as a law clerk for two years has recently written an evaluation of his Chief's legal thought. Allen, Chief Justice Vinson and the Theory of Constitutional Government: A Tentative Appraisal, 49 Nw. U. L. Rev. 3 (1954). Professor John Frank has also been somewhat kinder to Vinson. Frank, Fred Vinson and the Chief Justiceship, 21 Univ. Chi. L. Rev. 212 (1954).

[4] See Frank, op. cit. supra note 3, at 243–44. [5] P. 20. [6] P. 2. [7] P. 1.

[8] "In short, our society is filling the familiar reservoir of public officials from which we draw Supreme Court appointees with men who are equipped to handle broad responsibilities better than even great details; they are not quite cut out for the judicial job. Such men, when they transfer to the judiciary, may try to carry their institutional pattern with them; Vinson, as has been noted, turned the once lonely job of Chief Justice of the United States into a staff operation. Yet such a transfer can never be a complete success. Vinson, without doubt, was responsible for every vote he ever cast, for every Yes or No; but a judicial opinion is a mass of subordinate decisions, and nothing in the exigencies of the office require that these be left to the subordinates to make." Frank, op. cit. supra note 3, at 246.

to take on the role. He initiated the office of an administrative assistant to the Chief Justice who functioned—at least temporarily—as a bulwark between the Chief Justice and other members of the Court, as well as cutting him off for a time from the best-functioning Clerk's and Marshal's offices that any Court could expect to have. And to make matters worse, he filled the post with a person incapable of performing the functions assigned to him. The office of administrative assistant to the Chief Justice—since abolished—was only one of the ways in which the late Chief demonstrated his lack of feeling for his new post. Even those who felt most strongly in favor of his appointment lost much of their enthusiasm.

As a Justice of the Court, if we use the measure of Professor Pritchett's statistics, a voting record, Vinson must be grouped with Justices Reed and Burton.[9] On the basis of a different measure, there is a strange parallel between the Supreme Court careers of the late Chief Justice and the late Mr. Justice Murphy. (It is "strange" because their respective views on the issues which came before the Court were very far apart indeed.) Neither had any great intellectual capacity. Both were absolutely dependent upon their law clerks for the production of their opinions. Both were very much concerned with their place in history, though neither had any feeling for the history of the Court as an institution. Both felt somewhat constrained by the limits on their political activity necessitated by the judicial office. Each had desires for a non-judicial role in government. Neither dealt with the cases presented as complex problems: for each there was one issue which forced decision. Each felt a very special loyalty to the President who had appointed him. Both were more impressed with the office which they held than with the function they were called upon to perform.

These, however, are not the matters with which Professor Pritchett is concerned in *Civil Liberties and the Vinson Court.* He is concerned once again with "trying to probe the influence of judicial personality on judicial decisions."[10] And his methods still emphasize statistical analysis of "the data supplied by the Court's non-unanimous decisions."[11]

For several reasons, this is a better book than his last venture along similar lines: *The Roosevelt Court.*[12] For one thing it represents somewhat of a reduction of emphasis on the statistical analysis: Professor Pritchett is here concerned to a greater extent with the contents of the opinions, the reasons as well as the results, the grays as well as the blacks and whites. Moreover, he now makes available to the reader—to a greater degree—the data on which the statistical tables are based. Thus, a note to Table 9 sets forth the cases included in the tabulation "classified according to the six headings used in the table."[13] Presumably one could, through the use of this note, discover the cases on which some of the other tables are based. He has now recognized that the search-and-seizure cases belong

[9] See the tables on pages 181 and 182. [10] P. vii. [11] Ibid.

[12] The Roosevelt Court: A Study in Judicial Politics and Values (1948).

[13] P. 190.

in the category of civil liberties.[14] And he seems to have a firmer grasp of the distinction between the Court's function in relation to constitutional and non-constitutional problems.[15]

In spite of these improvements, there is much to criticize in this book. There are many errors of fact, some large, some small. For example, he says: "During the term prior to his [Vinson's] appointment, dissents had been filed in over half the opinions handed down by the Court. The 1944 term had been marked by thirty five to four decisions, the ultimate in judicial disagreement. This record seems to be attributable to strained personal relations on the Court. Jackson had reacted to his failure to obtain the Chief Justiceship by releasing a bitter attack on Justice Hugo Black for the pressure he had allegedly brought to block the appointment."[16] The facts are that Mr. Justice Jackson was at Nuremberg during the entire term which preceded Vinson's appointment and, of course, his Nuremberg statement did not come until the end of the 1945 term. This could hardly have been a contributing factor to the "strained personal relationships" which purportedly resulted in the divisions of the Court which Professor Pritchett describes. He says of the 1945 term that there were "only eight justices sitting during the entire term."[17] In fact, for a part of the term, there were only seven Justices sitting. There are misquotations from opinions.[18] He ignores the memorandum decisions, which seem to me peculiarly susceptible to his form of analysis, since generally they reveal votes without reasons. Some of the authorities he relies on are of doubtful value,[19] and he ignores others of which he should have been aware.[20] While none of these things is important in itself, it causes me to question the validity of statements and conclusions of which I have no direct knowledge.

My major objections to the book are (1) his extensive reliance on statistical analysis; (2) his failure to substantiate many of the questionable assertions

[14] See p. 146 et seq. Cf. The Roosevelt Court 152–55, 91–136 (1948); Kurland, Review of Pritchett, The Roosevelt Court, 58 Yale L. J. 206, 208 (1948). It would be interesting to know whether Professor Pritchett's removal of the search-and-seizure cases from the "crime-and-punishment" category to the "civil-liberties" category occurred before or after the change of position by Mr. Justice Black and Mr. Justice Douglas.

[15] See, e.g., pp. 224–26. [16] P. 2. [17] P. 21.

[18] An interesting misquotation occurs on page 269 n. 27, where he attributes to Mr. Justice Jackson the statement that it was Hercules who pulled down the pillars of the temple. John Frank made the same error. See Frank, op. cit. supra note 3, at 232. This error existed in the opinion as originally reported, 21 U.S. Law Week 4242, 4246, but not in the Supreme Court Reporter to which Pritchett refers, 73 S. Ct. 625, 633, nor in the official reports to which Frank refers, 345 U.S. 206, 220.

[19] E.g., for the proposition that "the Roosevelt Court killed substantive due process almost as dead as the proverbial doornail," he cites as authority, Wood, Due Process of Law, 1932–1949 (1951). P. 255 n. 8.

[20] E.g., when talking of the action of the California Un-American Activities Committee and the case of Tenney v. Brandhove, 341 U.S. 367 (1951), he cites other authorities but omits Barrett, The Tenney Committee (1951). P. 265 n. 16.

which he makes; and (3) what I think is his continual lack of comprehension of the judicial function.

(1) So far as the use of the statistics is concerned, Professor Pritchett recognizes their deficiencies:

> 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."[21]

But he goes on:

> 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.[22]

Then:

> Obviously, it is impossible to identify all the values which each justice may have related to the decision of a case. But the working hypothesis suggested by the material of the preceding chapters is that a decision involving civil liberties questions will be primarily influenced by the interaction of two factors. One is the direction and intensity of a justice's libertarian sympathies, which will vary according to his weighting of the relative claims of liberty and order in our society. . . .
>
> The second factor is the conception which the justice holds of his judicial role and the obligations imposed on him by his judicial function. . . .[23]

It seems to me that he is here falling into the very errors of which he has taken note: those matters which are translatable into numbers are worth consideration; those matters which are not translatable into numbers are not worth consideration.[24] Therefore, you must assign numerical equivalents to all matters with which you wish to deal. These are errors of not uncommon occurrence in modern research.[25] But what are the statistical translations of the "direction and

[21] P. 189. The inside quotation is from John Frank's review of The Roosevelt Court. Frank, Book Review, 34 Iowa L. Rev. 145 (1948). On this, Pritchett comments: "Moreover, it must never be forgotten that the hard certainty, the calm objectivity, which make a statistical table so convincing are to a considerable extent illusory. Actually, subjective judgments of the analyst—as to what the 'real' issue was in the case, as to how judicial decisions should be translated into Yes and No votes—play a great part in producing the 'objective' evidence for the box score." P. 275 n. 5.

[22] Pp. 189–91. [23] P. 191.

[24] Cf. "He was greatly afraid that, by an unconscious bias, statisticians might select only those facts which their machinery was adapted to handle to the neglect of others at least equally important." Pigou, Alfred Marshall and Current Thought 15 (1953).

[25] Compare the following from an associate professor of sociology at Columbia about sociologists: "The first camp is that of the Scientists, who are very much concerned to be known as such. Among them, I am sure, are those who would love to wear white coats with an I.B.M. symbol of some sort on the breast pocket. They are out to do with society and history what they believe physicists have done with nature. . . . Among The Scientists, the most frequent type is The Higher Statistician, who breaks down truth and falsity into such fine particles that we cannot tell the difference between them. By the costly rigor of their methods, they succeed in trivializing men and society, and in the process, their own minds as well." Mills, IBM plus Reality plus Humanism-Sociology, The Saturday Review p. 22 (May 1, 1954).

intensity of a justice's libertarian sympathies" or "the conception which the justice holds of his judicial role"? Professor Pritchett is still unable to demonstrate which is the "libertarian" side of the case in the more difficult problems with which the Court deals.

In short, Professor Pritchett's statistics add nothing to an analysis of the Court and its function. Indeed, they are misleading because they suggest the possibility of numerical equivalents where none exists.

(2) There is an inadequacy of documentation or demonstration of some of his statements which may best be shown by example. On the very first page he says: "Harlan F. Stone had been a brilliant Associate Justice, but his ineptness in the exacting role of Chief Justice was, to some extent at least, a contributing factor in the disintegration of the Court which occurred between 1941 and 1946." There is no evidence put forward that the Court had "disintegrated" during this period nor that Stone's actions as Chief Justice contributed to such "disintegration." Even if one accepts as common knowledge Mr. Chief Justice Stone's incapacities to preside properly over the conference, there is no showing how this or his other failings caused or contributed to such dire results. It would be nice to learn, too, who it was who "alleged" that Hugo L. Black's appointment to the Court was a " 'spite' appointment to embarrass the Senate."[26] Some of the conclusions which the author draws are equally troubling: "As would be expected, Black and Douglas dissented vigorously, but Minton unexpectedly joined them, which may serve as an index to the weakness of the Vinson opinion."[27] If so, it is a strange index indeed: one evaluates the weakness of an opinion by the presence of *some* members of the Court on the other side, not by the content of the opinion. And again: "Or perhaps Douglas and Black, disturbed by the trends on the Vinson Court and the declining influence of the preferred-position argument, felt it necessary to take an increasingly dogmatic position in the opposite direction."[28] To me, if not to Professor Pritchett, this is a charge of dereliction of judicial duty and ought not to be lightly made.

(3) His failure to appreciate fully the judicial process is evidenced by such a statement as this: "Finally, we may note the *jurisdictional guise* in which the self-restraint philosophy sometimes presents itself. Frankfurter, the keeper of the Court's jurisdictional conscience, has manifested great concern about the

[26] P. 17. I find no such evidence cited in either John Frank's or Charlotte Williams' biography of Mr. Justice Black, unless it is a statement like this: "It is altogether possible that President Roosevelt who played the game of politics with great relish and consummate skill enjoyed the prospect of seeing the conservatives of the Senate confronted with the alternatives of voting to confirm a pronounced New Dealer or deserting the rule of Senatorial courtesy by which all senators set such store." Williams, Hugo L. Black 14 (1950). Cf. Ickes, The Secret Diary of Harold L. Ickes, Vol. II: The Inside Struggle (1954).

[27] P. 62. Pritchett is here speaking of Vinson's opinion in Feiner v. New York, 340 U.S. 315 (1951).

[28] P. 49. Pritchett is speaking here of Mr. Justice Douglas' failure to reconcile his opinion in Poulos v. New Hampshire, 345 U.S. 395 (1953), with his position in Saia v. New York, 334 U.S. 558 (1948).

technicalities of jurisdiction; he has insisted that parties have a real and substantial interest in the litigation they inaugurate and has demanded that the Court protect itself from accepting cases which for any reason are not fully ripe for judicial review."[29] I do not mean to suggest that jurisdictional and procedural questions may not be used to avoid responsibility for responding to an essential question or to reach an unjustifiable result. Baron Parke still lives in our law. I do object to categorizing all such questions, and especially the requirements that the parties have a substantial interest and that the case be ripe for adjudication, as jurisdictional "guises." History shows how important these requirements are to the proper functioning of the Court in our system of government.[30] It should be remembered, even by political scientists, that it was early decided that our Constitution did not impose on the Court, except in a limited area, the power to decide when it should have power to decide. Until that principle is rejected jurisdictional problems must be resolved on their own merits.

In summary, the book is one which will interest every student of the Court. It could be better. Indeed, I would have found it much better if Professor Pritchett's judgments had coincided more closely with mine.[31]

PHILIP B. KURLAND*

[29] P. 220 (emphasis added).

[30] "Sometimes issues have been decided of the gravest importance which a court, if better advised, could with propriety have left undecided, and which the judgment of history suggests should have been left for decision at a later date and perhaps by other arbiters. I am thinking, for example, of two cases which Chief Justice Hughes, in his Columbia lectures during his interregnum, referred to as among the Court's self-inflicted wounds—the *Dred Scott* case and the *Income Tax* cases. No graver issue was ever decided by the Supreme Court than that in the *Dred Scott* case; and it was presented in circumstances which suggested that the Court had no business dealing with it at all. A colorable transfer of ownership of Scott from his Missouri master to a brother-in-law in New York was relied on to create diversity of citizenship between Scott and the defendant and so to provide a basis for relitigating in a federal circuit court the issue which a Missouri court had decided adversely to Scott. This maneuver proved successful, so far as jurisdiction was concerned, and the case was presented on an agreed statement of facts, though it would seem that, in a genuine lawsuit, evidence would have been introduced to show the character of the transfer and to indicate that Dred Scott was simply a pawn in a jurisdictional game.

"In the *Income Tax* cases as well the self-inflicted wound could have been averted. The plaintiff stockholder could show irreparable injury through payment of the tax by his corporation only if the corporation would have been without a remedy at law to recover the tax. Such a remedy was open to it if it paid the tax under protest. All that was necessary for the protection of the stockholder was a decision requiring the corporation to pay under protest and thus protecting its rights in the event that in another proceeding the tax should be held unconstitutional." Freund, On Understanding the Supreme Court 83–84 (1949). See also ibid., at 50.

[31] Cf. "It seems to me more and more clear that the only honest people are the artists, and that these social reformers and philanthropists get so out of hand and harbour so many discreditable desires under the disguise of loving their kind, that in the end there is more to find fault with in them than in us. But if I were one of them?" Woolf, A Writer's Diary 17 (1st Am. ed., 1954).

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