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SUPREME COURT HISTORY PROJECT: THE WARREN COURT 1957-1961

INTRODUCTION

C. Herman Pritchett*

In his Foreword to the *Harvard Law Review* analysis of the Supreme Court's decisions during the 1963 term, Philip B. Kurland, with characteristic pungency, suggested that, in light of developments on the Court, the time might soon come for "the subject of constitutional law [to] be turned back to the political scientists [for] these students of political affairs realized, before lawyers did, that the true measure of the Court's work is quantitative and not qualitative."¹ Kurland was expressing his lack of enthusiasm for the work of certain political scientists who were treating the Supreme Court as a major policy organ of government and applying to it the same methods of analysis utilized in studying the legislative and administrative processes.

The "judicial behavior" movement, purportedly initiated by this author's 1948 book, *The Roosevelt Court: A Study of Judicial Politics and Values*,² did seek to make considerable use of quantitative methods. In *The Roosevelt Court* quantification was very simplistic. The study centered on non-unanimous decisions of the Court. The premise was that on decision day the Court takes on the aspect of a small legislature in which the members cast votes pro or con on significant issues of public policy, and that these are not random differences of opinion but rather reflect dissimilar value systems and contrasting political, economic and social views.

Two quantitative approaches to the study of judicial behavior were presented by this author in *The Roosevelt Court*.

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1. Kurland, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government", 78 HARV. L. REV. 143, 175 (1964).

2. C. H. PRITCHETT, *THE ROOSEVELT COURT: A STUDY OF JUDICIAL POLITICS AND VALUES* (1948).

The first was an examination and recording of alignments between and among the Court's members in non-unanimous decisions, in a search for consistent voting patterns or blocs. This approach came to be known as bloc analysis. Voting regularities were in fact discovered, and used as a basis for theories as to the value conflicts accounting for these patterns of voting behavior. Such theorizing led to the second approach, which sought to relate the Justices' votes to the dominant issues present in the cases where disagreements were registered. "Box scores," as critics called them, were prepared, giving the number of votes cast by each Justice for or against the constitutional or legal contentions in related sets of cases. These tables made it possible to compare the voting records of the justices on such issues as civil liberties, criminal procedure, taxation, and states' rights.

The Roosevelt Court went no further than bloc and issue analysis. But other students of judicial behavior have subsequently been more innovative, and have utilized much more sophisticated social science techniques. They range from Guttman scaling and small group analysis to Spearman rank order correlations, Shapley-Shubik indexes, and Boolean algebra.

There is considerable disagreement as to the value of these more sophisticated tools for investigating judicial behavior, but the relevance of data on judicial alignments to an understanding of the Supreme Court's product is now fully established. Bloc analysis has, in fact, received the blessing of high authority; the *Harvard Law Review* has for almost two decades included a table of voting alignments in its annual survey of the Court's decisions.

In its Supreme Court Project, the *Santa Clara Law Review* has applied the voting-alignment, bloc-analysis technique in a study of the Warren Court, with very interesting results for lawyers, historians, and the general public. The Warren Court tends to be stereotyped in the minds of most people; it is revered as a protector of civil liberties or condemned as a coddler of criminals. But there was in fact no monolithic Warren Court. It would be more accurate to say that there were seven Warren Courts, for in a real sense every change in its composition resulted in the convening of a new Court.

This proposition is not difficult to support. One Justice can make a great difference in the decisions of a nine-judge bench, for he is more than one-ninth of the Court. He is one-fourth of the Court when it is deciding whether to grant certior-

ari. He is one-fifth of a Court majority. He is a partner in eight of the thirty-six possible dyadic relationships among the justices.

Earl Warren's Chief Justiceship covered sixteen terms and extended through four presidencies. He served with sixteen Associate Justices, who were appointed by five Presidents. When Warren took office in 1953, eight years after Franklin Roosevelt's death, there were still five Roosevelt appointees on the bench, and President Truman had named three. President Eisenhower was to appoint the Chief Justice and four Associates, President Kennedy two Associates, and President Johnson two Associates. Translated into Warren Court judge-years, Eisenhower appointees served sixty-one, Roosevelt appointees forty-five, Truman appointees twenty-two, Kennedy appointees ten, and Johnson appointees six. Three Justices served for the entire sixteen years—Warren himself, plus Hugo Black and William O. Douglas. The other principal figures were John M. Harlan (fifteen years), Tom Clark (fourteen years), William J. Brennan, Jr. (thirteen years), Potter Stewart (eleven years), and Felix Frankfurter (nine years).

There is no easy way to characterize or differentiate the seven Warren Courts. They had some uniformities, but there were more differences. The first Court was of course the Court that handed down *Brown v. Board of Education*,³ the decision, which more than any other, created the public image of the Court during Warren's leadership. Subsequent Courts faithfully followed the *Brown* lead. But on most other issues there were advances and retreats and majorities one term that became minorities the next. Thus, in 1957 the Court marched up the hill to do battle with McCarthy-type congressional investigating committees in *Watkins v. United States*,⁴ while two years later it marched back down again in *Barenblatt v. United States*.⁵

Changes in judicial thinking were usually associated with changes in judicial personnel. The Court, without Frankfurter, could not possibly be the same as the Court with Frankfurter. From 1953 to 1961, the balance between liberal and conservative views could tip in either direction, but the Kennedy and Johnson appointments to the Court gave the last seven years

3. 347 U.S. 483 (1954).

4. 354 U.S. 178 (1957).

5. 360 U.S. 109 (1959).

of Warren's Chief Justiceship a decided liberal-activist character.

For his study of the Warren Court, Professor Galloway has consolidated the seven Warren Courts into three periods. The voting patterns for the 1953-56 terms of the Court, which Galloway characterized as witnessing "the emergence of judicial liberalism," were analyzed in Volume 18 of this journal.⁶ In this issue, the 1957-1960 terms are studied, and the period is characterized as an "abatement in the liberal trend." A third article will cover the 1961-1968 terms and complete this extraordinarily interesting study. Professor Galloway's work is usefully supplemented in this issue by more specialized analyses concentrating on one term (October 1957) and on the voting behavior of individual Justices.

Max Lerner said that the New Deal's encounter with the Supreme Court made it clear to everyone "that judicial decisions are not babies brought by constitutional storks."⁷ Who the Justices are makes a difference, and the precedential value and survival prospects of controversial decisions depend to a considerable degree on the standing of their sponsors and the power relationships on the Court. The investigators engaged in this noteworthy research project have made imaginative additions to the techniques of previous judicial voting analyses, and are providing a solid quantitative foundation for a fuller understanding of Supreme Court decision making.

6. Galloway, *The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609 (1978).

7. M. LERNER, *IDEAS FOR THE ICE AGE*, 259 (1941).