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Frank: Marble Palace. The Supreme Court in American Life

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MARBLE PALACE. The Supreme Court in American Life. By *John P. Frank*. New York: Knopf. 1958. Pp. xi, 302, x. $5.

The new assertiveness of the Supreme Court has encouraged fresh appraisal of its role in the American culture. Mr. Frank thinks that perhaps the oddest aspect of the uproar, to use his words, is the sense of surprise that goes with it. For, on at least four occasions in the past—1803, 1857, 1895, and 1935—the value of the Court in the American system was brought into sharp challenge. Despite the authority of Holmes to the contrary, the Court did not then dwell in the quiet of the storm center as these controversies lashed the political countryside. The justices stood in the full sweep of the blow, gowns whipping like sails, writs racing like scud. And when the fury abated, the Court was not always without hurt. It took time to recover from the Dred Scott case and the Bloody Assizes of 1935 and 1936, but recovery was eventually complete, and the Court may be expected to survive the current disturbance.

In the present controversy state judges have recently rebuked the Court by unprecedented resolution. Eminent deans like Erwin Griswold have counseled patience, calmness, and understanding. The distinguished

Learned Hand has argued that the justices more faithfully served their highest and most noble function when they exercised the celebrated reserve that Stone advised them to maintain in the *Butler* case. Publishing before the cases in the 1957 term, Bernard Schwartz, in an otherwise excellent book, prematurely greeted the Court's seeming withdrawal from gross intervention in the legislative process as a long needed constitutional revolution. Long ago, however, in a brilliant article, Walton Hamilton and George Braden had warned that the Court had not adjourned but merely recessed, and so it has proved. The *Marble Palace* by John P. Frank is one of the latest of the works stimulated by the new interest in the Court.

Mr. Frank is the author of what many in the universities and colleges—certainly in political science departments and perhaps elsewhere—quickly judged to be the best case book in constitutional law in a decade and a half when it first appeared in 1952. The essays introducing groups of cases were thoughtful and scholarly expositions of the work of the Court in the political context in which it can most fruitfully be understood; and many highlights of comment and perception gleamed in a rich and smooth text. He talked of the law of the Court like an informed student of politics. In his latest work, he talks of the politics of the Court like a lawyer. For him, the "marble palace," though distant from people who do not live in marble palaces, and this means most, is a haven for fine fellows who do and should exercise autonomous political power, and who are probably saving the people from the excesses of democracy, although they are not doing it very well.

This new book on the Supreme Court is divided about half and half between shop talk and a summary analysis of groups of cases under general headings. It seems to be an effort to write for a popular audience, that is, one without a technical background in either the cases or the history of the Court. The first seven chapters comprise the shop talk; and the next eight constitute the summary statement of the work of the Court in important areas. In the shop talk chapters, Mr. Frank draws upon his own experiences at the bar, as a clerk to Mr. Justice Black, and upon a large number of judicial biographies; and under appropriate headings he discusses the practicalities of power, the justices as people, the Chief Justices as people, methods of persuasion in litigation before the Court, and methods of decision. There is also a chapter on the law as literature, the burden of which is that most judges don't write well.

In the next eight chapters, the author sets the table of discussion with "The Court and Democratic Theory," and then serves a menu of special functions of the Court—consideration of its work in holding the balance between the Federal Government and the states, and among the three branches of the Federal Government; its work on speech and press; color and crime; the regulation of the economy; and the conduct of international relations. A final chapter discusses the future of the Court in a burst of

rhetoric containing one apostrophe (pp. 292-293) that goes on for 29 lines.

The range of comment in the shop talk chapters is very wide, and much of it is very interesting. In the phrase of one of the local dialects of social science, Mr. Frank was a "participant-observer" in the Court, and he communicates something of the fascination of close and continuous involvement with fateful affairs. Here is a melange of insights born of the author's experience and reinforced here and there out of the experience of judges now long dead. Here too are ironical obliquities, the expressive familiarities of craftsmen who see through, but still love, an ancient and enduring institution they serve—monkish jokes about the church. The shop talk is long on ancedote and short on interpretation, which is the way good shop talk should be; and some of it is written in a colloquial idiom that may or may not bring it and the author close to the reader. Thus in speaking of the lawyer whose precious time is being used up by hectoring judges with excessive questions, Mr. Frank says, "This can be terrible. It happens." (p. 105) In speaking of a view held by the Court: "Some rule of law." (p. 146) Or a badly briefed and inadequately argued case may require the justices to "shoot from the hip," whether through the robes or outside, it is not said. (p. 114)

Mr. Frank is concerned as a craftsman with points of style; and although his scholarly work has a brilliance and clarity that this more popular effort lacks, yet the words spring easily into the consciousness and the flow of meaning they bear is smooth and sustained. In the chapter on the law as literature, he thinks that lawyers and judges produce little of literary value, and deplores the euphuistic opacities of Frankfurter. He thinks that much of the responsibility for this lack of higher literacy rests upon the system of legal education, that Socratic law school professors embarrass students and thereby encourage the manufacture of elliptical answers, festooned with dependent clauses beginning with words like "if" and "but." This does not sound like a very convincing explanation for a condition that existed centuries before the law schools were established, and Mr. Frank thinks that it might be "speculative and shaky." (p. 140)

Perhaps the sociology of the law and not the education of the lawyers provides a clue to the clots of jargon that disfigure the speech of lawyers and the writings of the judges. The bar and the bench are brotherhoods, status groups who use a specialized vocabulary through which they communicate with each other, and by means of which they identify the initiate and exclude the merely vulgar from the mysteries. The gangs of New York—the Purple Dragons and the Royal Egyptians—are also brotherhoods who, within the group, habitually employ an esoteric idiom. Rabelais understood the historic propensity of the bar very well; and Hamlet upon looking into an empty skull (a lawyer's he thought) asked where now were the quiddities, the quillets, cases, tenures and tricks. In the beginning was the word, and ever since, the command of jargon has been a badge of

power and status. Whatever the original justification for words of art may have been or is, the institutionalization of bad prose may be a form of secrecy, not free of ulteriority. But this may be as speculative and shaky as the explanation of Mr. Frank.

There is frequent reference even in the shop talk chapters to the cases of the Court and some of these references, as well as remarks about some of the judges, require comment. For example, Mr. Frank lists "outstanding pre-Civil War Justices" to make the point that most of the best ones did not have previous judicial experience before appointment to the Court. And then he sets out a post-Civil War list (p. 43) that includes, among others, George Sutherland and Pierce Butler. However arguable the presence of Sutherland might be in a list of the best justices since the Civil War, Butler surely has no place in it, and one would not think Brewer either. Later references to Butler contradict his elevation by the author to the ranks of the best. Thus, Mr. Frank refers to Butler's ruthless domination of the University of Minnesota during World War I; (pp. 49-50) and he comes to speak of him as "one of the most extreme examples" of the lack of judicial temperament in the history of the Court. (p. 67) Such contradictions leave the impression that some of the text was dictated but not read.

There are other peculiarities. The issue in the Income Tax cases was not whether the "government could constitutionally take two percent of incomes over twenty thousand dollars." (p. 88) It is inexact to say that the rule of the Dred Scott case was "that slaves could not be kept out of the territories." (p. 34) Although the Dies Committee in the late thirties created a sensation, to say of it that it reopened the old wars over speech and press may underestimate the significance of the Fish Committee in the early thirties and the McCormick-Dickstein Committee in the middle thirties. (p. 188) The Court, says Mr. Frank, "helps to keep the democratic machine in balance and to prevent it from running off wildly in one direction or another." (p. 157) Just why a democracy should not be allowed to run off wildly in any direction it chooses is not clear to persons free of the Federalist mystique.

These are minor peccancies, scarcely worth mentioning, and deservedly overlooked if the principal statement of the text had been without blemish; but here there are big issues of interpretation that Mr. Frank does not resolve, two at least. The first is whether there is room in a democracy for an aristocracy of the robe. The second is whether the Court should have one standard or a double standard in dealing with civil liberties and economic regulations. In discussing the first question, Mr. Frank does not deny the non-democratic nature of the Court, an agency of the government that wields important political power without responsibility to any constituency. In his chapter on the Court and democratic theory, Mr. Frank says that the justices may get out of touch with the people (p. 148), that

it is important that they keep in touch with the people (pp. 149-150), and that diversity of background among the justices is "the best protection against an excessively rarefied atmosphere" in the Court. (p. 153) The conflict between the institution and democratic theory is acknowledged (p. 155) and three answers are suggested: that the country is not a pure democracy anyway; that the Court does not make policy; and the third, which is the position Mr. Frank favors. This is an admission that the Court does make policy. And this is a good thing, because it is a "check to democratic impulsiveness" (p. 159), so long as it does not check democratic impulsiveness too hard, as when the Court is out of touch with the "dominant thought of its time." (p. 154)

The next five chapters report on the way in which the non-democratic Court has fulfilled its functions in various fields; and on the basis of Mr. Frank's own conclusions, it is hard to justify the Court in the roles in which he analyzes it. Has it worked significant results in the maintenance of the Federal system? Mr. Frank says "the really stupendous alterations in federal-state relationships have been largely the product of forces that the Court could neither direct nor control." (p. 178) Has the Court been the proverbial palladium of liberties, the shield and buckler of elementary freedom? Mr. Frank says that with respect to freedom of speech and press, the Court before the twentieth century "had no effect on American political liberties." (p. 183) When it moved into this area between 1918 and 1930, "it upheld not the freedom, but the restraint of the freedom" (p. 188); and although some assistance to elementary liberty was supplied between 1930 and 1945, the Court after 1945 abdicated the field it had started to occupy. (p. 189) All in all, "the role of the Court in preserving the basic American liberties of freedom of speech and of the press has been slight. Its entry into the field on any terms is barely thirty years old, and it has served more as a ratifying than a restraining body." (p. 195)

How about the Court as a champion of due process in criminal cases? In the supervision of state criminal justice in the past twenty-five years, says Mr. Frank, "There is no area on the civil-rights horizon in which the lines of Court policy are more fuzzy and unclear than in this one." (p. 223) Mr. Frank does think, however, that the Court has "maintained a clean line" (p. 216) in habeas corpus and martial law cases, but this conclusion is certainly shaded by the *Vallandigham* case which the Court dodged, and Mr. Frank does not mention, the *Milligan* case which was decided when the Civil War was safely over, the Hawaiian cases which the Court got after World War II was over and the Government had already restored the writ (p. 217), and the lynching of Yamashita with the Court's help. (pp. 135-137) As to the civil rights of Negroes, it is hard to see where the whole record of the Court deserves much applause when it is considered that the justices gutted the powers of Congress in the Civil Rights cases of 1883, made segregation the law of the Constitution in *Plessy*, enforced

the white primary until 1944, enforced restrictive convenants until 1948, and did not undo the damage of the *Plessy* case until almost sixty years later. In the regulation of the economy, the Court enforced its business views for at least forty years before it was intimidated into changing them. And in the field of international relations, the Court just goes along as indeed it should. It certainly simplifies governance for the Court to enforce the same foreign policy as the rest of the country, without developing one of its own.

The second question—the question of the double standard—is rather more implicit than otherwise in Mr. Frank's work, although it is directly connected with any judgment to be made about the role of the Court in the American culture. Since 1937, the reasonable man has come to guide the review the justices give to acts of economic regulation. Since few statutes are inherently unreasonable (it takes majorities to enact them), most legislation that regulates the economy is valid, and is presumed to be so. But the reasonable man might think that statutes to promote the security of the country (however foolish) were necessary. The reasonable man should lead the judges to support such statutes also, but some are reluctant to do so. Instead the presumption of validity is reversed and there is talk about preferred freeedoms, two Fourteenth Amendments, clear and present dangers, and so on. It is amusing to some that the reactionaries of 1935 supported the Court then and deplored it in 1957, while the progressives of 1935 deplored the Court then and applauded it in 1957. In all of the rhetoric about shields and bucklers, palladiums of liberty, and marble palaces, it is never made clear that what is involved is not the Court at all but what Mannheim saw as the tension between the Ideologues and the Utopians. It's not the principle of the thing at all that divides the two camps; it's the money. That is to say, judgment about the role of the Court seems to be a variable of the partisan commitment; and its utility in the American system is often measured not on objective grounds, but by the degree that it seems to serve partisan goals.

Mr. Frank attempts to hazard some forecasts about the short range and the long range in the Court, but since he cannot know what the partisan tendency in the country or the Court is going to be, the conclusions must necessarily be indecisive. As he looks into the short range future, Mr. Frank forecasts that the Court will "continue the path of moderation in the interpretation of regulatory statutes;" will hew to the now established line in race relations; and probably will speak on issues of civil liberty with "the voices of general moderation." It is significant to the author that seven important newspapers, among which he includes the *New York Times* and the *Arizona Daily Star,* support recent trends in the Court, all of these papers also being "voices of moderation." In a thin mixture of metaphors, Mr. Frank expects that the "weight of the Court" will "stay generally in line" with "the spirit of these and similar voices."

But what of the Court in the more distant future? Well, the country is getting bigger and the Court isn't. To cope with an expected increase in the volume of its business, there are five devices that the Court can use: to enlarge the staff of the Court (clerks, that is) and delegate greater responsibilities to them—a bad but perhaps necessary solution, he thinks; to increase the use of orders without opinions; to eliminate time-consuming diversions that cut production, like too extensive opinions, too many dissents, and too many concurrences; to stop being too erudite and precious and to solve "the big problems" by "hitting hard" because "every blow must count," although this does not always mean the "ax" and never the "scalpel" (p. 290); and finally, as a device for coping with volume, the Court "can use its discretionary power to hear more cases." (p. 290) How the Court is to cut down on its load by hearing more cases is not immediately clear.

Mr. Frank's book is not a major work, either of analysis or popularization. It is most interesting when he talks about the Court as an institution; and less useful when he talks about its product. But however its contents may be judged, the appearance of the book is a pleasant sign of the revival of interest in the Court as a member of the federal trinity. In its new found vigor, perhaps it will remember the price of hubris in the recent past.

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