

BOOK REVIEWS

BLUE SKY LAW. BY LOUIS LOSS AND EDWARD M. COWETT. Boston: Little, Brown and Company, 1958. Pp. xxi, 502. \$15.00.

Morris L. Forer †

Felix Frankfurter has observed that words in statutes are not unlike words in a foreign language, in that they, too, have "associations, echoes, and overtones."¹ The hazards for those who must interpret, apply, and make predictions about the meaning of statutes are multiplied when, as in the case of state legislation affecting the issue of securities, a whole new lexicon must be learned. Even familiarity with the Federal Securities Act² is not immediately helpful, because it employs a differing idiom. *Blue Sky Law*, one of whose co-authors, Louis Loss, is the principal commentator on the federal statute,³ is designed, at least in part, to serve as a guide through the tangle of state legislation.

Even Professor Loss and his co-author do not know precisely who first used the term "blue sky law." It is thought that the term arose in Kansas when promoters of fraudulent enterprises purported to sell building lots in the blue sky, in fee simple, and thus "metonymically they became known as blue sky merchants, and the legislation intended to prevent their frauds was called Blue Sky Law."⁴ In any event since the first of these statutes was passed in 1911, the regulation, directly or indirectly, by states, of security issues or of security vendors or of both has spread, so that at this time every state, except Delaware,⁵ has some sort of blue sky legislation. Despite confusing arguments that the Federal Securities Act, first enacted

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1. FRANKFURTER, OF LAW AND MEN 52 (1956), quoting BARKER, THE POLITICS OF ARISTOTLE at lxiii (1946). Frankfurter was considering the "reading of statutes" by judges and especially by his predecessors on the Supreme Court, but his message is one to legislator and advocate as well.

2. 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a to 80b-21 (1952).

3. See LOSS, SECURITIES REGULATION (1951, Supp. 1955); see also Forer, Book Review, 100 U. PA. L. REV. 927 (1951); Forer, *A Comment on the Amendments to the Federal Securities Act*, 103 U. PA. L. REV. 1020 n.3 (1954).

4. Mulvey, *Blue Sky Law*, 36 CAN. L.T. 37 (1916), quoted at p. 7 n.22.

5. The one-paragraph statute authorizing injunction of "the fraudulent sale or exchange of . . . securities" was dropped in 1953.

in 1933, pre-empts the field or should pre-empt the field,⁶ the blue sky laws have never shown more vitality and at the same time more challenge to administrator and practitioner alike.

State-wide securities acts are of three basic types, with a number of crepuscular shadings. The first and least elaborate of these, the anti-fraud statute, has as its prototype the New Jersey legislation.⁷ Some practitioners, in fact, disregard New Jersey in tabulations of blue sky states, since the statute involved merely defines fraud in broad terms and makes it a misdemeanor.⁸

The second type is that which requires the registration or licensing of persons engaging in the securities business. These statutes may vary greatly. Under most of them, however, including Pennsylvania's, an issuer offering its securities without any dealer or underwriter is nevertheless required to register itself and its selling officers as salesmen.⁹ The Pennsylvania act has the additional requirement that salesmen read the statute itself to ascertain their duties and obligations,¹⁰ a trying enough enterprise for lawyers, let alone for lay corporate officers.¹¹

The third kind of regulatory device is one requiring the registration, qualification, or licensing of the securities themselves. This type of statute also exhibits numerous variations. A good example of the rudimentary variety is that currently in force in New York.¹² A more complex variant involves regulation which is incident to broker-dealer registration; and in this category the authors of this volume have placed Pennsylvania, although

6. See Armstrong, *The Blue Sky Laws*, 44 VA. L. REV. 713, 714 (1958). Mr. Armstrong was formerly chairman of the Securities and Exchange Commission. Another *ci-devant* chairman of the federal agency has unstintingly praised the efforts to obtain uniformity by the states and has argued inferentially the need for such legislation despite the 1933 statute. Demmler, *Progress Toward a Uniform Securities Act*, 8 HARV. L.S. BULL. 16, 22 (1946).

7. N.J. Securities Law, N.J. REV. STAT. tit. 49 (1955).

8. There are no reported cases of civil liability. See New Jersey cases, p. 467. The doctrine of implied civil liability has, however, been applied to violations of blue sky laws, although, as the authors state, the full flowering in the field of securities regulation has grown in the federal domain. See, e.g., *Fischmann v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); *Remar v. Clayton Sec. Corp.*, 81 F. Supp. 1014 (D. Mass. 1949).

9. Pa. Securities Act, PA. STAT. ANN. tit. 70 (1931). Even well-established issuers often distribute their securities without the participation of an underwriter and a dealer selling group in certain types of rights' offerings or sales to employees. See also Pa. Sec. Reg. 610 (1945).

10. So far as can be determined by the present, rather informal compilation of rules, this requirement has never been specifically codified in a regulation. Recently rules have been adopted providing for a photograph of the salesman, Pa. Sec. Reg. 614 (Oct. 14, 1958), and for examinations required of salesman, Pa. Sec. Reg. 620 (Oct. 14, 1958).

11. That such an endeavor would leave the prospective applicant almost completely in the cold as to his duties and requirements and even as to the mode of regulation may have occurred to the commission. An Attorney-General's committee is now studying proposals for the adoption, *vel non*, of the Uniform Securities Act for Pennsylvania, or, in the alternative, for amendment of the present act.

12. N.Y. GEN. BUS. LAW §§ 352-59h (Martin Act).

such categorization may be open to question. In certain other states registration can be effected by filing notice of intention. In some thirty-nine jurisdictions there is full registration. As Loss and Cowett state, the philosophy of these statutes is closer to that of the Public Utility Holding Company Act of 1935,¹³ or the more permissive Investment Company Act of 1940,¹⁴ than to the Securities Act of 1933 (p. 36), to analogize to other statutes administered by the Securities and Exchange Commission.¹⁵

There is, however, a dangerous deceptiveness in an analysis which categorizes and orders the statutes according to basic type. The result is a purely fictional neatness which belies the chaos of state regulation of securities. In practice the lawyer is faced with a welter of exemptions, some 2,800 in number, according to the authors, under which he may seek relief from the requirements of the act. Often, for lack of guidance, these efforts meet with frustration. Regrettably, it is in the task of guiding the practitioner through this tangle of exemptions that the authors are of least assistance. Part of the fault may be due to the very immersion of the senior author in the work of the SEC. Thus, in an age of mergers, nowhere in the index does one find the caption "merger" or "consolidation." One is lost unless, with knowledge of the Federal Securities Act, he goes to the word "sale" and finds thereunder the words "consolidation," "merger," and "no sale theory."¹⁶ And the treatment, thus located, is less than adequate so far as existing statutes are concerned.

It may be that these defects follow from the authors' purpose, which was not to write a hornbook on state laws, but to make an argument for the states' adoption of the Uniform Act. Generally, the problems under state laws arise at the extremes. On the one hand, the small issue (sometimes condignly described as promotional or speculative) because of its size, or intrastate nature, is not subject to federal regulation and therefore does not undergo scrutiny by the Securities and Exchange Commission. The burden of balancing the need to provide a means of access to a source of low cost venture capital, with the often conflicting need to protect the investing public from its own gullibility, thus may fall solely on the state commissions.¹⁷

13. 49 Stat. 803 (1935), 15 U.S.C. §§ 79 to 79z-6 (1952).

14. 54 Stat. 789 (1940), 15 U.S.C. §§ 80a-1 to 80b-21 (1952).

15. Many statutes provide for substantive or qualitative standards applicable to an issue of securities. These standards are, to be sure, less demanding than those which would govern a public utility commission's consideration of a new securities issue of a utility. Moreover, there are also diverse judicial controls and legislative controls in the general corporation codes. See on this latter point the recent survey in Note, *Judicial Control Over the Fairness of the Issue Price of New Stock*, 71 HARV. L. REV. 1133 (1958).

16. See Sargent, *A Review of the "No-Sale" Theory of Rule 133*, 13 BUS. LAW. 78 (1957); Note, *The SEC's No-Sale Rule and Exchanges of Securities Pursuant to Voluntary Reorganization*, 67 HARV. L. REV. 1237 (1954).

17. The authors present heretofore greatly scattered and uncollated material on administration. Even within the limits of their statutory authority, most administrators simply need larger appropriations to do effective jobs.

At the other end of the scale, where large issues such as that of the Ford Motor Company¹⁸ are marketed nationally, the issuer or controlling stockholder is faced with the unenviable task of effecting compliance with the differing and confusing language of the various state acts in time to meet the SEC effective date deadline. It was to meet this problem that the Uniform Act was drafted.

It was obvious, however, that states which had differing types of regulatory systems could not readily be made to agree to a single unitary statute. Accordingly, a tripartite act was considered, which could be adopted in any one or more parts, the fourth part containing general provisions dealing with definitions, exemptions, judicial review, conflict of laws,¹⁹ and investigatory, injunctive and criminal provisions. While the drafters would have preferred complete uniformity, they reasoned that half a loaf would be better than none at all.

The proposed statute inches beyond the present state of the law by incorporating the X-10B-5 concept of fraud.²⁰ Its reach also extends to fraud with respect to the purchase of securities and the giving of investment advice.

While the provisions in part II for registration of brokers-dealers, their agents and agents of issuers, and investment advisers represent an advance in clarity over those in most acts, it is in part III that one finds the greatest improvement over the existing blue sky statutes which impose securities registration. By virtue of the registration by "coordination" provision of part III, securities fully registered under the Securities Act of 1933, as amended, may effectively comply with state law unless a stop order is instituted by being registered under a procedure identical in all the states where securities registration is required and the act is in force.

The end product of the Harvard Law School Study of State Securities Regulation, initiated in 1954 at the request of the National Conference of Commissioners on Uniform State Laws, *Blue Sky Law* is an able if, because of the nature of the subject, uneven work. The authors have performed commendably in dealing with a hodgepodge of state laws, aggravated by a confusion of philosophic approach and legislative intent within each state, and by sloppy draftsmanship often reflecting all too clear evidences of the style Cardozo called "the tonsorial of agglutinative" after the scissors and paste which are its tools (p. 244).²¹ The Uniform Securities Act incor-

18. A merit of the volume is the reproduction of attorney's memoranda with respect to the early 1956 offering of the Ford stock by the Ford Foundation and the 1957 \$30,000,000 offering of the New England Telephone and Telegraph Company debentures.

19. A substantial proportion of the volume under review has appeared in one form or another prior to present publication. Thus, chapter V, "Conflict of Laws: The Blue Sky Laws in Interstate Contracts," had in the main been published as Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209 (1957). See also LOSS & COWETT, A PROPOSED UNIFORM SECURITIES ACT: FINAL DRAFT AND COMMENTARY (1956).

20. See UNIFORM SECURITIES ACT § 10, comment, at 250-52.

21. CARDOZO, LAW AND LITERATURE 31 (1931).

porated *in toto* in the book was approved by the National Conference of Commissioners on Uniform State Laws, the American Bar Association, and the National Association of Securities Commissioners. The act appears here with official comments²² and the draftsmen's commentary. The latter, couched in the almost magisterial style affected by commentators,²³ reflects quite properly the predilections of the authors.²⁴

The volume is not encyclopedic. It presents no cohesive view as Mr. Loss was able to do in his classic study on the federal statute. But it will serve a substantial need, be a source of study and *aperçus*, and be a reliable guide in the areas plotted, for many years to come.

TRAFFIC VICTIMS. BY LEON GREEN. Evanston: Northwestern University Press, 1958. Pp. 127. \$4.00.

Clarence Morris †

This meaty, short book is based on four lectures given for the Rosenthal and Marx foundations. It converges (by trenchantly reviewing the major drifts of tort liability since 1800) on a proposal for dealing with contemporary automobile accidents.

Dean Green writes legal history in the grand manner. He portrays doctrinal sweeps and marches of decisions with the accurate clarity of a master; trunks and main branches he paints strong, and leaves and their veins are indicated rather than reproduced. He paints a vivid picture, showing how nineteenth century tort law favored defendants who drove vehicles, ran railroads, employed workmen, or owned land. Not quite so happy is his explanation for this development; he classifies the nineteenth century, not as a period of rugged individualism, but as a period of group welfare—in the sense that individuals bore hurts so that burgeoning infant

22. 9C U.L.A. 86 (1957). As to the "use of comments" in construing uniform acts, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 808-09 (1958).

23. A certain measure of levity has crept in at the footnotes. Thus, the authors describe the fraud provisions of the federal securities legislation which come into play after proof of use of the mails or a means of interstate commerce with the comment: "The SEC statutes resemble in this respect the Mann White Slave Act under which the sin apparently lies not so much in the lust as in the wanderlust." (p. 43 n.4).

24. Thus, while the definition of "security" in § 401(1) is so phrased as not to exclude so-called "variable annuities," and while succinct reference is made in the official comment to this section and to § 402(a)(5) with respect to exempted securities of insurance companies, the reader is acquainted with the SEC's views on the subject, which one can well assume are the authors'. See *SEC v. Variable Annuity Life Ins. Co. of Am.*, 155 F. Supp. 521 (D.D.C. 1957), 71 HARV. L. REV. 562 (1958), 56 MICH. L. REV. 656 (1958). See also Note, *Variable Annuity: Security or Annuity?*, 43 VA. L. REV. 699 (1957). On the other hand, the test may possibly be different and the need for a state securities commission's regulation less exigent where an existing strong state commission regulates insurance.

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industry could flower and mature (see especially p. 33). "We the people," says Dean Green, chose to keep down the costs of highway use (p. 15), and industrial production (p. 28). "If the courts gave the victims of enterprise [only] slight protection, they were doing what 'we the people' wanted them to do." (p. 34). This comes too close to Savigny's folk spirit and Hegel's group mind for my tastes.

More to my liking is the perceptive sentence with which his historical painting of the twentieth century begins.

"Reactions in the social order and especially in its law are not marked by clear breaks which can be identified by definite dates. They are like the streaks in the morning sky that announce the coming of dawn. They can only be marked by detailed instances here and there over a period of time until it can be said that the old order is on its way out and a new order is on its way in. . . . A new period in tort law was underway . . . long before the other period had come to a close." (pp. 35-36).

Then follows another strong, clear depiction of doctrines developing to assure compensation for more accident victims—Lord Campbell's Act, stricter accountability of injurers of highway users, absolute liability for dangerous land use, the law of industrial nuisance, and so on. More tentatively Dean Green explains, "Perhaps it is near the truth to say that 'we the people' have come to see that it does not pay to place the risks of our industrial society on its victims." (p. 59). And the reasons why we should have wanted such a change are boldly and adequately put (pp. 59-61).

Against this historical background, Dean Green draws darkly a sketch of traffic accident litigation: its impossible issues of fact, its confusing complex of rules, its highly skilled specialist-advocates, its remote control by appellate courts, its liability insurance background. Perhaps some (including this reviewer) might quarrel with details of his drawing. But it is, in the main, perceptive and economical. When now Dean Green trains his personal knowledge and intuitions on the social impact of automobile accident law, he states some conclusions that seem highly probable and others that are more doubtful. Surely he is right when he says, "In the absence of insurance few claims are prosecuted at all." (p. 81). Such was the finding of the Columbia study thirty years ago,¹ and there is no special reason to believe anything has happened since to change this result. I feel much less confidence when he says that, even when motorists are insured adequately against liability, "the pattern of litigation is so forbidding as to deny many claimants access to the courts; hence they accept what is offered

1. REPORT OF THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932).

in settlement, or, if nothing is offered, decline to risk the hazards of litigating their claims." (p. 81). (Emphasis added.) Are those whose claims are more than trivial likely to be so docile?

The proposal Dean Green broaches, he calls "loss insurance." He would require all applicants for car licenses to show that their cars are covered by policies written by private companies (regulated by state commissions) for the benefit of virtually all motor accident victims, hurt in body or damaged in property. He would permit compensatory awards, excepting damages for noneconomic pain and suffering, and subject to a deduction of the first hundred dollars. All payments would be administered by courts (not administrative bodies!). The only issues tried would be whether or not a claimant suffered injury "as a result of the use of a motor vehicle, the extent of the injury and amount of the loss where contested, and the identity of the vehicle involved." (p. 89). Hearings are to be held by masters sitting without juries. Settlements must be filed before masters and approved first by them and thereafter by the court. This system is to be augmented by a fund (contributed to by insurance companies) to care for victims of unidentified hit-and-run drivers and out-of-state vehicles. This is surely an ingenious and carefully developed plan. It provides compensation for all victims incurring substantial losses. It does not suffer from arbitrary and inflation-threatened limits of a compensation scheme. It provides vocations for personal injury lawyers practicing under our present system.

To my mind, however, some doubts occur. Private insurers may hesitate to write "loss insurance" unless rates are attractively and perhaps prohibitively high. Since they must insure cars, by whomever driven, their underwriting skill will be severely taxed and will be an unreliable guide to risks or rate differentials. Perhaps Dean Green should propose that the state be the insurer. Then the state could consider whether the plan should expand beyond automobile victims and cover, with appropriate support, other kinds of presently uninsured risks to life, limb and property.

Next I wonder about the costs of administration. The Conard and Mehr study alerts us to the possibility that a litigation-settlement system (like FELA) can return a much higher percentage of the dollars invested in it to victims than a system administering all claims (like Workmen's Compensation).² With court supervision of every settlement, administrative costs of the Green plan may prove extremely high. Of course, if insurance companies will take advantage of a high percentage of all claimants without this safeguard, perhaps such state supervision is needed. But I am unwilling to posit that they will. Perhaps Dean Green should propose that his plan be tried without this feature, and that it should be added only after investigation proves that particular insurers need this kind of supervision.

2. CONARD & MEHR, COST OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS (1952).

I also wonder whether the Green proposal is going to eliminate delay. Since insurers may insist on trying the damage issue in each case and since they will have little incentive to settle any case, the mountain of litigation might pile pretty high. Would the dispatch resulting from dispensing with fault issues and jury trials come near counteracting this force?

My questions are aimed at points Dean Green knows are controversial. The bulk of this work is valuable and useful—the ripe fruit of the mind of a master of torts, who has taught a generation of torts teachers much.

BOOK NOTES

THE POLITICAL OFFENDER AND THE WARREN COURT.

By C. HERMAN PRITCHETT. Boston: Boston University Press, 1958.
Pp. 74. \$3.00.

This book is a product of the Gaspar G. Bacon Lectures on the Constitution of the United States which were given by Mr. Pritchett in October 1957 at Boston University. The addition of this study to Mr. Pritchett's other works, *The Roosevelt Court* and *The Vinson Court*, completes a trilogy by him on contemporary interpretations of the Constitution by the Supreme Court. This final volume considers the activity of the Court under Chief Justice Warren (1953 to date) in cases involving political offenders.

The book is divided into five lectures. The first summarizes the scope of judicial review of the Supreme Court since 1937, through the anti-New Deal Court, the Roosevelt Court, the Vinson Court, and the Warren Court. The second section, headed "Criminal Punishment for Speech," discusses *Dennis v. United States*,¹ *Yates v. United States*,² and *Jencks v. United States*.³ The third lecture, entitled "Punishment by Legislative Inquiry," considers the cases of *Watkins v. United States*,⁴ *Sweezy v. New Hampshire*,⁵ and also the scope of review by the Warren Court in cases involving the self-incrimination clause of the fifth amendment when invoked in a legislative inquiry. The fourth lecture deals with the Federal Loyalty-Security Program, aliens and naturalized citizens, admission to the bar, and the denial of passports. The concluding section, "The Obligation To Judge," is a summary and evaluation of the record of the Warren Court. This section also considers the merit of Senator Jenner's proposal to limit the reviewing power of the Supreme Court in areas relating to political offenders.⁶

It is the central theme of this book that, although "in seeking to protect the rights of people known to be, or suspected of being, communists, the Court was directly interfering with programs authorized and sponsored by Congress and the executive, programs which all the evidence of recent years indicates are enormously popular" (pp. 12-13), the Warren Court is justified in its decisions upholding the rights of political offenders because it has nevertheless remained within the traditional confines of the scope of judicial review. Mr. Pritchett finds his proof of the Warren Court's judicial conservatism in its reluctance to create new constitutional rights. He finds that the *Yates* decision rests on statutory and evidentiary grounds;

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1. 341 U.S. 494 (1951).
 2. 354 U.S. 298 (1957).
 3. 353 U.S. 657 (1957).
 4. 354 U.S. 178 (1957).
 5. 354 U.S. 234 (1957).
 6. S. 2646, 85th Cong., 1st Sess. (1957).

that "it is only by contrast with the Court's previous submissiveness that the *Watkins* ruling seems startlingly bold" (p. 36); that both *Watkins* and *Sweezy* were decided as improper delegations of legislative power and that the first amendment problem was not reached; that the reversals by the Court of dismissals under the Federal Loyalty-Security Program were on narrow statutory grounds. The author concludes from this review of the cases that "the libertarian effects which the Court has recently achieved have been secured for the most part through the interpretation of statutes, not through the interposition of constitutional barriers" (p. 62), and that "even when it reaches constitutional questions, the Court has tended to treat them in as limited a fashion as possible." (p. 64). But if this is all Mr. Pritchett can prove, he is far from presenting a convincing or adequate answer to the proponents of the thwarted legislation. If the issue is the involvement of the Court in political questions, then scope of review is not a relevant concept; what is needed is a working formula which takes into account all the factors bearing on the wisdom or necessity of judicial intervention. The doctrines of scope of review are merely strictures judicially imposed to guide a Court in determining how much it must decide after it has entered a controversy; they have little relevance when the question is whether the judiciary should enter the controversy at all. The latter is the question being asked of the Warren Court; it is the question which the Jenner proposal would answer in the negative in this area; and it is the question which Mr. Pritchett apparently undertook to answer in this book. Unfortunately this question is not considered until the last six pages and then the answer is given without supporting argument.

Mr. Pritchett frames the issue in these terms:

"[T]he Warren Court of 1957 somewhat resembles the anti-New Deal Court of twenty years earlier, which also undertook to challenge the executive and Congress. . . . The result for the 1937 Court was nearly disastrous, a miscalculation which for a time jeopardized the entire institution of judicial review. . . . Are there factors in the judicial activism of 1957 which differentiate it from the ill-fated machinations of the Court which tried to declare the New Deal unconstitutional, or is the Warren Court engaged in a similarly reckless expenditure of its moral authority which, if persisted in, can end only in bankrupting the institution of judicial review?" (p. 13).

On those occasions when the Court abandons the protection of that body of doctrine which it has fashioned to keep it out of political controversy, it assumes at a minimum the responsibility of recognizing that the question with which it proposes to deal is controversial. Once it does this, it must make a calculation which will involve, in some form or other, a weighing of the possible damage to its prestige as an institution and the consequent imbalance in the constitutional structure, against the value of the interest it is seeking to protect. The very real dangers which inhere in the legisla-

ture's power to restrict the jurisdiction of a court hostile to it, and the loss of universal respect which a "partisan" court suffers, make this kind of calculation imperative. Carl Swisher has said that "when the people are fundamentally divided on basic issues the judiciary will act at its peril if it intervenes unnecessarily to impose a judgment of higher law in support of one political faction and to aid in the defeat of another."⁷ Mr. Pritchett's answer is that this requires the Court to await a substantial consensus of opinion and he brands this "a perversion of the rule [of judicial restraint] which would turn the judicial decision process into a Gallup poll." (p. 72). If the author means by this that a political judgment which the Court is ill-equipped to make is involved, then most commentators will agree heartily with him. But some calculation of the degree of support which a decision will have in the country at large, some assessment of the temper of the community, is a part of every political judgment, whether made by judge or legislator. It seems folly to suppose that courts need not, or do not, make such calculations.

This is not to say that one may not reasonably differ with Learned Hand's contention that the law "must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation."⁸ But the argument for the court which acts in advance of its times or, more narrowly, the justification for the Warren Court's defense of the political offender in the face of strong counter popular pressures remains to be made; Mr. Pritchett has not made it.

J. J. C.

MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE. BY JOHN P. FRANK. New York: Alfred A. Knopf, Inc., 1958. Pp. xi, 302. \$5.00.

The book jacket—for which the author is presumably not responsible—calls this a "lively, informal book about the Supreme Court—how it does its work, reaches decisions, and enforces them—seen from the inside, as if from the Justices' chambers and their conference room." The book is indeed lively and informal, and it may, literally and in small measure, satisfy also the rest of the claim. But its informality becomes also a lack of form and focus; and one might have hoped that a book about the Court could be lively and popular without being scattered, and not infrequently superficial.

Mr. Frank's brush strokes are broad, his swings lively and random. The result is a picture about the Court which must be described primarily

7. Swisher, *Dred Scott One Hundred Years After*, 19 J. POLITICS 167, 170 (1957), quoted at p. 71.

8. HAND, *THE SPIRIT OF LIBERTY* 15-16 (2d ed. Dilliard 1953), quoted at p. 72.

in terms of what it is not. It is not constitutional law, nor constitutional history; it is not political theory, nor a study—whether historical or analytical—of an important institution of American Government. It is rather a collection of reactions, thoughts, opinions, conclusions (from premises and along paths frequently not revealed)—about some of the Court's power and some of its limitations; some of its strengths and some of its weaknesses; some of its Justices; some of the cases; some of its traditions and practices. There are also suggestions for improvement, including a page (pp. 197-98) urging, without argument, substantial changes in Court doctrine and practice on which volumes have been written pro and con.

In view of the claims for the book, and the author's background (including a year as law clerk to Mr. Justice Black), it is inevitable that some readers will turn to this volume for "revelations." Happily, they will be largely disappointed. Inevitably, any putative "Inside the Supreme Court" book by an ex-law clerk, would reflect that he had only one year of direct "inside" knowledge of a court 170 years old; that from where he sat in one corner "inside" the Court during that year there was inevitably much he did not know; that of what he knew, there is much he should not, and does not, tell. And indeed some of what he told, many will think, he should not have told. Mr. Frank, having earlier criticized others for divulging confidential memoranda and statements of Supreme Court Justices (p. 111), cannot resist divulging some tidbits of privacy and confidence of his own (pp. 136-37; see also p. 112).

Mr. Frank has no "villain theory" of the Court, or of its jurisprudence; there are no unsavory personal revelations, no accusations, no insinuations. But if Mr. Frank is generally gentle to those who for him be little, he is lavish with those he deems great. Still, even those who may share his favorites, and his admitted "activist" predilections and views of the function of the Court, might regret that he is less than fair, occasionally, in stating the issues on which his heroes divide from the others. Some judicial control of the jury in civil cases is hardly a nineteenth century innovation by judges intent on disregarding the seventh amendment (*cf.* pp. 31-33). And one may not fairly insinuate that those who did not believe that a denial of due process was proved in *Konigsberg v. State Bar*,¹ "believe that the states should not be required to accord due process to applicants for bar admission." (pp. 177-78).

There are useful portions in the book. It emphasizes the inherent limits of the Court's powers and influence; the physical limitations on the number of cases it can handle; the difficulty of the issues which frequently divide the Court. The layman, and even the lawyer, will get from *Marble Palace* some information, some entertainment, even an occasional insight. It is hardly a profound or a satisfying book about the Supreme Court.

L. H.

1. 353 U.S. 252 (1957).