JUSTICE DANIEL DISSENTING. By *John P. Frank*. Cambridge: Harvard University Press, 1964. Pp. xii, 336. $7.95.

John P. Frank has written a delightful and informative study of Peter Vivian Daniel, who was a Justice of the Supreme Court of the United States from 1841 to 1860. The biographer of a public official must bring to his task perception of the opinions and prejudices, the times and issues through which the subject of his writing lived. This duty Mr. Frank has ably discharged. He is well fitted to undertake this work for he has written a number of books and articles about the Court and the Constitution. Formerly an associate professor at Yale Law School, he now practices law in Arizona and serves on the Advisory Committee on Civil Rules of the Judicial Council of the United States.

Frank's theme is the counterpoint of a changeless man in a changing world. Daniel started as an agrarian and an agrarian he remained—"so true a Jeffersonian that his adherence to the early ideals of Jefferson and the Jefferson party outlasted even the adherence of Jefferson himself." He counted as worst a centralized government, and he also consistently opposed a centralized economy of corporations and banks.

In 1809, at the age of twenty-five, Daniel was elected to the General Assembly of Virginia. For the next fifty years he was occupied with public affairs. From 1812 until 1835 he served on the Virginia Council of State. During his twenty-two years on the Council, Daniel considered nearly every facet of government. Frank's study of the minutes of the Council and his description of the part played by Daniel in governing Virginia provide a valuable commentary on state government in the first half of the nineteenth century.

From the vast number of decisions of the Council in which Daniel participated, Frank has chosen interesting samples. His selections reveal traits that were to characterize Daniel's years on the Supreme Court. From the start of his service on the Council he required almost literal compliance with the written word as a canon of statutory construction. Disagreement with other members of the Council led not to compromise but to dissent. Daniel's work on the Council is primarily of historical interest. A significant exception, however, was his use of acquittal as an appropriate deterrent of coerced confessions. Students of criminal law will welcome Frank's account.

In 1836 President Andrew Jackson appointed Daniel a United States District Judge for the Eastern District of Virginia. Judge Armistead M. Dobie, who wrote a biographical sketch of Daniel, des-

cribed him as a competent and capable trial judge.[1] In this assessment Frank agrees. It was Dobie, formerly Dean of the University of Virginia Law School and a United States Circuit Judge, who saluted Daniel as the last Virginian to sit on the United States Supreme Court, and wistfully added: "Virginia, the acknowledged Mother of Presidents, has, as the Mother of Supreme Court Justices, been sterile for nearly a century. To the best of my knowledge, in that role, she is not now pregnant."[2]

Frank's account of Daniel's appointment and confirmation as a Justice of the Supreme Court is dramatic. Martin Van Buren appointed Daniel in the last days of his administration. Henry Clay marshalled his Whig forces and employed his knowledge of parliamentary tactics to delay a vote on confirmation until after March 4th when General William Henry Harrison would take office. On March 2nd the Whigs departed from the chamber leaving a senator behind to suggest the absence of a quorum. By eleven o'clock at night enough Democrats had been summoned to the chamber, who, when counted with the sole Whig, constituted a quorum. This left the Whig in one of history's minor dilemmas. If he stayed he made a quorum. If he left, no one remained on the floor to suggest the absence of a quorum. Thus, as Frank observes, by the superb irony of the rules of parliamentary procedure, the Senate gave its advice and consent to Daniel's appointment a little before midnight March 2, 1841.

To a court that had to grope with issues arising out of a growing nation undergoing profound change, Daniel brought an articulate faith in the status quo, and his was the status quo of the preceding three decades. It is little wonder that he often found himself in the minority or compelled to concur specially. Frank includes a table of dissents between 1836 and 1864 prepared by Charles Alan Wright, Professor of law at the University of Texas, which shows that Daniel dissented alone forty-six times. This was more than twice as often as any other justice. On the other hand, he wrote more than his fair share of majority opinions.

Frank's study of Daniel's career on the Supreme Court is detailed and fair. He treats comprehensively all of the important cases in which Daniel participated, and summarizes the workaday cases that in every age have constituted the bulk of the Court's docket. At this point the

1. Dobie, *Federal District Judges in Virginia Before the Civil War*, 12 F.R.D. 451 (1952).

2. *Id.* at 471.

biography becomes of necessity a history of the Court during the critical period that preceded the Civil War.

Daniel was a persistent man, and the theme that guided his approach to constitutional cases was an unflagging effort to limit the power of the federal government and the jurisdiction of the federal courts. He held that the federal government lacked power to construct roads or other internal improvements. So intense was his opposition to federal admiralty jurisdiction that he never wrote a majority opinion upon this subject. Repeatedly he protested against permitting corporations to sue or be sued in cases where jurisdiction was based on diversity of citizenship.

Frank reminds us, however, that all of Daniel's career was not in the role of a dissenter. In two of the most famous cases heard by the court, *Swift v. Tyson*[3] and the *Dred Scott* decision, *Scott v. Sandford*,[4] Daniel joined the majority. Ironically the authority of neither case survives. Of more lasting significance has been Daniel's conclusion that the contract clause of the Constitution is subject to the police power of the states.

Historians of the Court have not been charitable to Daniel. Carson, writing in 1902, observed: "His views were marked by a certain degree of eccentricity . . . ."[5] Dobie, in his sketch of Daniel generally followed Carson. After paying tribute to Daniel's high character, he describes him as "always conservative, frequently reactionary, sometimes quixotic . . . ."[6] Charles Warren[7] contents himself with quoting from Daniel's contemporaries. Daniel's unceasing vehemence provoked loyalty in his friends and enmity in his opponents, so Warren could draw on ready sources of either praise or damnation.

Frank's biography is the first full study of Daniel. It includes an account of his personal as well as his official life. His treatment of Daniel is much more sympathetic than others who have commented on his years on the court. Part of this is because of Frank's careful and intensive study of Daniel's personal correspondence and other primary sources of information. Part of it may be attributable to Frank's recognition that Daniel's views were derived from notable predecessors and and were shared by many of his contemporaries. Daniel was not alone in fighting unsuccessfully to fashion an agricultural nation that would

3. 41 U.S. (16 Pet.) 1 (1842).
4. 60 U.S. (19 How.) 393 (1857).
5. 1 CARSON, THE SUPREME COURT OF THE UNITED STATES 302 (1902).
6. Dobie, *supra* note 1, at 471.
7. 2 WARREN, THE SUPREME COURT OF THE UNITED STATES 202, 318 (1935).

never know domination by government and business. Daniel, wrote Frank, "is a kind of bench mark in American history, for by measuring what we have become as against what he was, we discover how far our country has travelled."[8] The measure may vary according to the reader's social and political views, but every student of history will find Frank's suggestion stimulating.

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8. P. viii.

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