



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

## **The Appointment of Louis D. Brandeis, First Jewish Justice on the Supreme Court**

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The sudden death of Justice Joseph R. Lamar of Georgia on January 2, 1916,<sup>1</sup> created an unexpected vacancy on the Supreme Court for President Woodrow Wilson to fill. Over the next twenty-six days, Washington, D.C., was abuzz with rumors about who President Wilson would appoint to succeed him on the Court. Although Louisiana's Jewish Senator Judah P. Benjamin had been offered a nomination to the Supreme Court by President Milliard Fillmore in 1853, he had turned it down to remain in the Senate, and no Jew since had ever received a presidential appointment to the Supreme Court. When President Wilson announced the nomination of Louis D. Brandeis on January 28, 1916, he precipitated a four-month Senate confirmation battle, the most contentious fight over the confirmation of a Supreme Court Justice in American history until the 1987 Senate battle over the confirmation of Robert Bork.

Brandeis, the nationally known "people's attorney" from Boston and one of the country's most celebrated progressive reformers, had been one of Woodrow Wilson's most influential advisers and political confidants since Wilson's campaign for the presidency in 1912. After Wilson's election, Brandeis played a major role in helping to shape the President's "New Freedom" economic policies and programs. Wilson had

initially hoped to appoint Brandeis to his Cabinet. Much to his disappointment, antisemitic opposition, organized and financed by leaders of Boston's banking and legal establishment, had prevented Wilson from appointing Brandeis as the country's first Jewish Attorney General in 1913. Wilson, however, remained determined to appoint Brandeis to his Cabinet or to the Supreme Court, and the unexpected resignation of Justice Lamar created the Court vacancy that Wilson had been waiting for.

The Brandeis appointment came as a surprise to many politicians and pundits alike. Very few people outside of Wilson's small circle of trusted White House advisers would have anticipated that the President, facing what would be a tough reelection fight only eight months later, would make such a controversial political appointment. At least one important member of Wilson's inner circle, Colonel Edward House, was apparently not consulted beforehand about the Brandeis nomination. When he later heard of the nomination, House was reportedly "appalled."<sup>2</sup>

Brandeis had learned about the possible appointment a few days earlier, but said nothing about it until the White House announcement was made. "I am not exactly sure," he wrote his brother Alfred in Louisville, "that I am to be congratulated, but I am glad the President wanted to make the appointment and I am convinced, all things considered, that I should accept."<sup>3</sup>

Secretary of the Treasury William Gibbs McAdoo, a Brandeis friend and political ally, and President Wilson's son-in-law, was one of two Wilson Cabinet members who first urged Wilson to nominate Brandeis to the Supreme Court. His advice was perhaps not surprising, as it had been Brandeis who had earlier urged Wilson to appoint McAdoo Secretary of the Treasury. Wilson's Attorney General, Thomas W. Gregory also enthusiastically recommended Brandeis, although Gregory, while praising Brandeis as "the greatest lawyer in the United States," warned Wilson that Brandeis's nomination would result in a "tempest."<sup>4</sup>

Gregory's warning, if anything, was understated. President Wilson's unexpected announcement, as the White House had expected, stirred up a torrent of opposition. Appointment of a Justice to the Supreme Court is a lifetime appointment, or until the

appointee retires. It is an opportunity for a liberal President, such as Wilson, to impose his liberal judicial philosophy on his political adversaries for a much longer period than he actually serves in the White House. While this upset Wilson's conservative opponents, Brandeis's long record as a people's attorney committed to progressive reform upset them even more. Only fifty-nine years old at the time of his appointment, Brandeis, his critics feared, might very well enjoy a tenure of more than twenty years on the Court, as indeed he did.

Conservatives reacted with shock and anger to the President's bombshell announcement. The *New York Sun* denounced the appointment of such a radical to "the stronghold of sane conservatism, the safeguard of our institutions, the ultimate interpreter of our fundamental law."<sup>5</sup> Former President William Howard Taft, who had hoped against hope that Wilson would transcend partisan politics and appoint him to the Court, was livid when he heard the news of Brandeis's nomination. "It is," he wrote, "one of the deepest wounds that I have had as an American and as a lover of the Constitution and a believer in progressive conservatism, that such a man as Brandeis could be put on the Court, as I believe he is likely to be. He is a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealousy, a hypocrite . . . who is utterly unscrupulous . . . a man of infinite cunning . . . of great tenacity of purpose, and, in my judgment, of much power for evil."<sup>6</sup> Even the *New York Times* was unhappy with the appointment, lamenting that Brandeis "is essentially a contender, a striver after change and reforms. The Supreme Court by its very nature is the conservator of our institutions."<sup>7</sup>

On Wednesday, February 9, 1916, according to procedure, a subcommittee of the Senate Judiciary Committee, chaired by Senator William Chilton of West Virginia, met to begin discussion of the nomination of Brandeis to the Supreme Court. Over the next three months, the five members of the Senate subcommittee, heard testimony, discussed petitions and other correspondence, and evaluated the criticism and support for Brandeis's nomination, before issuing a report to the full Senate Judiciary Committee. The full Judiciary Committee would then make a recommendation to the Senate, which is empowered by the Constitution to advise and consent on all Supreme Court nominations.

A majority of the U.S. Senate would then have to vote in favor of his nomination before he could be confirmed.

Day after day, for the next four months, there was standing-room-only in the Senate chamber, which was crowded with senators and witnesses, pundits and reporters, and friends and opponents of Brandeis. Never present, however, was the nominee himself. Senate tradition dictated then—and that tradition would continue until Felix Frankfurter’s Supreme Court nomination twenty-three years later—that Supreme Court nominees were not permitted to appear at their confirmation hearings.<sup>8</sup> Thus, Brandeis, under the Senate rules of that time could not speak in his own defense. In his absence, Edward McClennen, a junior partner in Brandeis’s law firm in Boston, moved to Washington for the next several months to lead and coordinate the campaign for Senate confirmation of his colleague’s nomination.

While much of the opposition to Brandeis’s nomination was directed at Brandeis’s reputation as a radical social reformer and vocal opponent of big business and the “money trusts,” there is little question that some of the campaign against the Brandeis nomination was antisemitic in origin.<sup>9</sup> Antisemitism was certainly a factor in the opposition of A. Lawrence Lowell, Harvard University’s virulently antisemitic President. Immediately after the 1912 election, Lowell, an early supporter of the Immigration Restriction League and one of its national vice-presidents, had publicly opposed Brandeis’s appointment to Wilson’s cabinet, notifying the President that Brandeis did not “stand very high in the opinion of the best judges in Massachusetts.”<sup>10</sup> When Brandeis’s Supreme Court nomination was announced, Lowell wrote his good friend Massachusetts’s Republican Senator Henry Cabot Lodge: “Are we to put on our Supreme Bench a man whose reputation for integrity is not unimpeachable? It is difficult—perhaps impossible—to get direct evidence of any act by Brandeis that is, strictly speaking, dishonest; and yet a man who is believed by all the better part of the bar to be unscrupulous ought not to be a member of the highest court of the nation. Is there anything that can be done to make his confirmation less probable?”<sup>11</sup>

Lowell subsequently gathered a petition of protest against Brandeis that had fifty-five signatures, including most notably that of the Boston patrician lawyer Charles Francis Adams, Jr., Treasurer of the Harvard Corporation, former president of the Union Pacific Railroad and descendant of two American Presidents, who shared his brother Henry's antisemitic bias. Besides Adams, the Lowell petition included the names of many of the most eminent Brahmin leaders of Boston's business and legal establishment, such as Sargent, Gardner, Peabody, Shattuck, and Coolidge. Lowell sent his signed petition to his good friend Massachusetts Republican Senator Henry Cabot Lodge who, on Lincoln's birthday, inserted a copy into the *Congressional Record*, before presenting a copy of the document to the Senate subcommittee's chairman, Senator Chilton.<sup>12</sup> Lowell, whose antisemitism was well known, later became notorious for trying to place a quota limiting Jewish admissions to Harvard. To Lowell's evident chagrin, the Harvard Law School faculty, with one exception, publicly endorsed Brandeis's nomination. Brandeis's friend and close political ally Felix Frankfurter, who with Brandeis's glowing recommendation to Dean Roscoe Pound had been appointed to the Harvard Law School faculty the previous year, mobilized nine of his other ten faculty colleagues at the Law School to support the Brandeis nomination. Throughout the four-month long confirmation battle, Frankfurter wrote a score of magazine editorials, letters, and articles in support of his friend. On February 5, *The New Republic* published an editorial, unsigned but written by Frankfurter, reviewing Brandeis's accomplishments, praising him for his judicial qualities and for seeking "to make the great reconciliation between order and justice." At Frankfurter's suggestion, Roscoe Pound wrote to Senator Chilton praising the Brandeis appointment. So did Harvard University's revered former President, Charles W. Eliot, who wrote to Chilton that "I have known Mr. Louis D. Brandeis for forty years and I believe that I understand his capacities and character." Recalling Brandeis as a "distinguished student" at Harvard and referring to his "practical altruism and public spirit," Eliot concluded his letter by saying "that the rejection by the Senate of his nomination to the Supreme Court would be a grave misfortune for the whole legal community, the Court, all American business and the country."<sup>13</sup> "Next to a letter from

God,” Brandeis’s law partner Edward McLennen cheerfully declared of Eliot’s letter, “we have got the best.”<sup>14</sup>

Numerous other letters in support of Brandeis’s candidacy were sent to the Senate Judiciary Subcommittee as well. Among those writing to the subcommittee, or testifying on Brandeis’s behalf, were Newton Baker, the reform mayor of Cleveland, president of the National Consumers League and Wilson’s future Secretary of War, Frances Perkins, who would later be Franklin D. Roosevelt’s Secretary of Labor, Henry Morgenthau, Sr., who had just returned home to America after serving three years as Wilson’s Ambassador to Turkey, Walter Lippmann, the editor of *The New Republic*, *Harper’s Weekly* editor Norman Hapgood, who would later serve briefly as Wilson’s Ambassador to Denmark, and Rabbi Stephen S. Wise.

As anticipated, liberal politicians from across the political spectrum voiced support for Brandeis. Social Reformers in the Democratic Party and Progressive Republicans alike applauded Wilson’s appointment, hailing the Brandeis nomination as an historic moment for America. Within days of Justice Lamar’s death, Attorney General Gregory had met with Senator Robert La Follette of Wisconsin, who was the only senator consulted about the Brandeis nomination prior to the White House’s January 28 announcement. At Wilson’s behest, he asked La Follette “whether Progressive Republicans in the Senate could be counted on to cross party line and vote to confirm Brandeis. La Follette enthusiastically said yes.”<sup>15</sup>

Also, as anticipated, many Southern Democrats vocally opposed Brandeis’s nomination. Brandeis’s law partner Edward McClennen, “later placed anti-Semitism on the top of the list of the reasons for the opposition to Brandeis . . . among Southern Democrats.”<sup>16</sup> Since the Supreme Court vacancy for which Brandeis was being nominated had been created by the death of Justice Lamar of Georgia, Southern Democrats in the Senate expected that Wilson would appoint a Southerner to fill Lamar’s seat. They were disappointed, and some angered, when Wilson did not. Also, as Colonel House reportedly told Henry Morgenthau, Sr., some Southern Senators feared that, if confirmed, Brandeis would try to undo the separate but equal doctrine.<sup>17</sup>

Throughout the long Senate confirmation battle, the anti-Brandeis campaign was largely organized and financed by Henry Lee Higginson, the wealthy head of the most powerful banking house in Boston, a pillar of the Boston Brahmin establishment, and for many years Brandeis's most bitter political foe. He had earlier helped organize and finance the antisemitic campaign that had helped to derail Brandeis's appointment to Wilson's Cabinet. Shocked by the news of the Brandeis nomination, Higginson wrote his close friend Senator Lodge, warning him that Brandeis "has not the judicial quality. It would be well to investigate sundry questions about him."<sup>18</sup> Some opponents of the Brandeis nomination were more explicitly antisemitic. George Wickersham, a former U.S. Attorney General during the Taft Administration and the president of the New York Bar Association at the time of the Senate confirmation battle, attacked Brandeis's supporters as "a bunch of Hebrew uplifters."<sup>19</sup> William F. Fitzgerald, a conservative Boston Democrat and longtime political foe of Brandeis, wrote that "the fact that a slimy fellow of this kind by his smoothness and intrigue, together with his Jewish instinct can be appointed to the Court should teach an object lesson" to true Americans.<sup>20</sup>

At the same time, within days of Wilson's surprise announcement, William Howard Taft began mobilizing opposition to Brandeis amongst the leadership of the American Bar Association. Taft and six other former American Bar Association Presidents, including Elihu Root, the former Secretary of War and Secretary of State, sent a scathing letter of protest to the Senate Judiciary Committee stating that "the undersigned feel under the painful duty to say to you that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States."

Taft, it should be noted, did not share the anti-Semitic bigotry of A. Lawrence Lowell and other vocal opponents of the Brandeis nomination. Taft, who enjoyed close ties to the Jewish community of his native Cincinnati, had appointed Julian Mack as the first Jew to serve as a Federal judge on the U.S. District Court of Appeals, and counted Jewish leaders such as Mayer Sulzberger and Julius Rosenwald amongst his political confidants and friends. He was personally distressed by the anti-Jewish comments of George

Wickersham directed at the “Hebrew uplifters,” especially Walter Lippmann and Felix Frankfurter, campaigning in support of Brandeis.<sup>21</sup> And, as is well known, while serving as Chief Justice of the Supreme Court from 1921 to 1930, Taft eventually developed a genuine affection and respect for Brandeis, despite their longstanding (and continuing) differences on issues of law and politics. Taft reportedly was “won over by the luminous mind and great learning of Justice Brandeis.”<sup>22</sup> In 1923, after two sessions of the Court during which Taft and Brandeis had worked together as colleagues, Taft wrote his daughter Helen about his old rival: “I have come to like Brandeis very much indeed . . . he is a very hard worker . . . He thinks much of the Court and is anxious to have it consistent and strong, and he pulls his weight in the boat.”<sup>23</sup> In 1912, however, Taft had not yet had the opportunity to develop these more charitable views about Brandeis.

More than the opposition of Taft, the equally strong opposition of Massachusetts senior Senator Henry Cabot Lodge’s was of particular concern to Brandeis’s supporters. By longstanding tradition, according to what was known as the rule of Senatorial courtesy, before a President announces the name of a Supreme Court nominee, and sends the Supreme Court nomination to the Senate for confirmation, he must first get the approval of the two senators from the nominee’s state. At the very least, congressional custom mandates, he must notify the senators of his intention. In the case of his nomination of Brandeis, Wilson did neither. Massachusetts Senator Henry Cabot Lodge, the state’s senior senator and a conservative Republican, had close ties to the Boston Brahmin establishment opposing Brandeis’s nomination. As commentators noted at the time, Wilson was not so much defying him, as ignoring him. Lodge’s position of influence, as the senior Senator from the nominee’s state would probably have brought about Brandeis’s defeat had Lodge invoked the rule of Senatorial courtesy. But, to the surprise of many of his Senate colleagues, Lodge, despite his open disdain for both Brandeis and Wilson, did not choose to do so.

Indeed, although Henry Cabot Lodge did urge the American Bar Association leadership to oppose the Brandeis nomination, and did bring A. Lawrence Lowell’s anti-Brandeis petition to the attention of his colleagues in the Senate, he did not take the major



leadership role in mobilizing the political opposition against Brandeis as many had expected he would do. One writer's explanation is that Lodge feared the political repercussions in the upcoming Senate election of November 1916, when he would have to face Massachusetts voters for the first time since the beginning of his Senate career in 1892. Since the ratification of the Seventeenth Amendment to the Constitution three years earlier, which Lodge had strongly opposed, he would no longer be chosen by the state senate that had selected him four times previously; now, for the first time, he would have to campaign for the support of newly-enfranchised voters, that would include many Catholics and Jews. He could not predict, or so the speculation goes, the political impact of what his leading the fight against Brandeis would have on his chances for reelection in November. Indeed, some of Lodge's friends and advisers appreciated the acute dilemma that the Brandeis nomination had caused for the senior Senator from Massachusetts. Arthur D. Hill, a Boston lawyer and close friend who managed Lodge's personal legal affairs and investments, wrote the Senator at once urging him not to publicly oppose the nomination and risk defeat in the election later in the year.<sup>24</sup>

Hill's advice was prescient: Lodge followed Hill's counsel, and won a close, hotly contested reelection bid the following November. Lodge's opponent in that Senate race, John "Honey Fitz" Fitzgerald, the flamboyant former mayor of Boston, applauded Wilson's nomination of Brandeis, as did most of the Irish Democrats in the city. Years later, "Honey Fitz's" grandson, John Fitzgerald Kennedy, would say that the Supreme Court Justice he most admired, and sought to emulate in deciding on his own Supreme Court nominations, was Louis D. Brandeis.

Woodrow Wilson did not consult Jewish leaders, such as Jacob Schiff, before naming Brandeis to the Court, as Theodore Roosevelt had consulted Schiff before appointing Oscar Straus to his cabinet in 1906. Nonetheless, Schiff and many other Jewish leaders, including some who had earlier been Brandeis's critics, came together in support of his appointment during the four months of his Senate confirmation battle. Schiff praised the appointment both publicly and privately, predicting that Brandeis would become "an adornment" to the Court, and that his Senate confirmation would be "an honor to our

people.”<sup>25</sup> Henry Morgenthau, Sr. played an especially prominent role in orchestrating support for Brandeis throughout the Senate confirmation battle, conferring almost daily in strategy sessions in New York with Stephen S. Wise and Norman Hapgood, and serving as the Brandeis campaign’s liaison to Colonel House.<sup>26</sup> Oscar Straus’s brother Nathan, a preeminent Jewish merchant prince and philanthropist, convinced the journalist Arthur Brisbane to write an editorial for the *New York Evening Journal*, in support of the Brandeis nomination. Straus subsequently wrote Brandeis a personal note encouraging him not to be distressed by the opposition for “you will be most admired through the enemies you made.”<sup>27</sup>

Some Jewish leaders, however, were less vocal in their support. For Louis Marshall, as Jonathan D. Sarna has suggested, Wilson’s appointment of Brandeis was “particularly galling,” since during the Taft administration he had lobbied for a Supreme Court appointment for himself and had been bitterly disappointed when he was not selected. In a confidential handwritten note to Marshall, his close friend and associate Cyrus Adler expressed his personal views about the Brandeis nomination that Marshall presumably also shared:

I do not view the nomination of Mr. Brandeis with complacency; he may have sufficient legal learning, but he seems to me to be a partisan and agitator and not the type of fair character and dispassionate type of mind which should be possessed by members of the most distinguished tribunal in the world.<sup>28</sup>

In public, however, Adler like Marshall remained silent. “I have kept silent for many months,” Adler wrote Jacob Schiff, “because I did not want to be accused of endeavoring to injure his [Brandeis’s] confirmation to the Supreme Court.”<sup>29</sup> It may well be, as William Howard Taft later claimed, that Jewish leaders like Marshall and Adler, “all ha[d] to praise the appointment and all hate[d] Wilson for making it.”<sup>30</sup>

On April 1, 1916, the Senate subcommittee voted 3 to 2 in favor of Brandeis’s confirmation. On May 24, 1916, after several weeks of further deliberation, during which Senate Republicans still tried unsuccessfully to defeat the nomination, the Senate

Judiciary Committee as a whole, by a strict party vote of 10 to 8, recommended that Brandeis be confirmed. The full Senate followed its recommendation and, on June 1, 1916, Wilson's Vice President Thomas Riley Marshall, in his role as president of the Senate, announced that Louis D. Brandeis had been confirmed as an Associate Justice of the Supreme Court by a vote of 47 to 22. While the Senate was still in session that afternoon, Brandeis had taken the train from his Boston office to his summer home in Dedham. When he arrived home, his wife Alice happily conveyed the good news, greeting him with "Good evening, Mr. Justice Brandeis."

After finally winning his bitter Senate confirmation battle, Brandeis went on to become one of the most important and influential justices ever to sit on the United States Supreme Court. Legal scholars and historians have consistently confirmed Brandeis's enduring reputation as one of our "greatest" Supreme Court Justices. In each of the several polls ranking or rating Supreme Court Justices in terms of judicial "greatness," conducted over four decades, Brandeis has invariably been ranked, following John Marshall and Oliver Wendell Holmes, Jr. as one of the three greatest justices in American history. During his twenty-three years on the Court, Brandeis played a singular role in developing the modern jurisprudence of free speech and the doctrine of a constitutionally protected right of privacy. As Alan Dershowitz has aptly noted, "The First Amendment's right of free expression, the Fourth Amendment's right to privacy and the due process clause's focus on personal liberty (rather than property) all owe their current vitality to the creative genius of Justice Brandeis, whose dissenting opinions have become the law of the land."<sup>31</sup>

Much of Brandeis's enduring legacy derives, of course, from his having been the first Jewish Justice on the Supreme Court and, unquestionably, one of the greatest Justices in the Court's history. Brandeis's appointment in 1916 set a precedent for more Jewish appointments and greater religious diversity on the Supreme Court. When on January 15, 1932, Justice Holmes retired from the Court at the age of ninety, President Hoover nominated Benjamin N. Cardozo, the Chief Judge of the New York Court of Appeals, to succeed him. In appointing Cardozo, Herbert Hoover became the second President to

appoint a Jew to the Supreme Court. During the next six years, for the first time in American history, two Jews served together on the Supreme Court.

With Brandeis's appointment in 1916 began the tradition of a single, informally designated "Jewish Seat," on the Supreme Court. There was no single "Jewish Seat" between 1932 and 1938, when two Jews served on the Court simultaneously. Both Cardozo's appointment and his untimely death occurred during Brandeis's long tenure. There had been speculation that President Franklin D. Roosevelt intended to appoint his trusted adviser Harvard Law School Professor Felix Frankfurter to succeed Justice Brandeis upon Brandeis's retirement.<sup>32</sup> However, when Justice Cardozo died suddenly in 1938, FDR appointed Frankfurter to fill Cardozo's seat, which came to be known as the Court's "Jewish Seat," that would later be occupied by Justices Arthur Goldberg and Abe Fortas. The emergence of a single, informally designated "Jewish seat," occupied by Justices Cardozo, Frankfurter, Goldberg, and Fortas in direct succession, thus came about after FDR's appointment of Felix Frankfurter to replace Cardozo. Although Brandeis still remained on the Court after Frankfurter's appointment in January 1939, he resigned three weeks later. Upon Frankfurter's retirement from the Court in 1962, President Kennedy appointed his Secretary of Labor, Arthur Goldberg, to the Court's Jewish seat. When Goldberg unexpectedly resigned from the Court in 1965 to accept Lyndon Johnson's appointment as Ambassador to the United Nations, LBJ appointed his close friend and adviser Abe Fortas to replace him. Only with Abe Fortas's resignation in 1969, and President Richard Nixon's appointment of Harry Blackmun, a Protestant, to the seat vacated by Fortas, would the fifty-three-year tradition of a "Jewish seat" on the Court come to an end. It would not be until twenty-four years later that another Jew, and the first Jewish woman, Ruth Bader Ginsburg, would join the Court. The following year, 1994, President Bill Clinton would appointment a second Jew, Stephen G. Breyer, to succeed Harry Blackmun. When Elena Kagan was appointed by President Barack Obama in 2009, she became the eighth Jewish Justice, and second Jewish woman, to serve on the Supreme Court. (Justice Kagan sits on the seat that Justice Brandeis once held.)

Throughout his twenty-three year tenure as a Justice of the Supreme Court, and at the time of his death in 1941, Louis D. Brandeis was among the best-known and highly respected Jews in the United States. During the 1930s, only Albert Einstein, George Gershwin and the great Jewish baseball superstar Hank Greenberg may have eclipsed Brandeis in terms of fame and celebrity. Franklin D. Roosevelt famously called him Isaiah, as did members of FDR's inner circle during the New Deal. Some Christian admirers went so far as to praise him as "the Greatest Jew in the World since Jesus Christ."<sup>33</sup> To this day, Brandeis remains the only American Jew after whom a great university has been named. Part of his enduring Jewish legacy is attributable to his leadership of the American Zionist movement, both prior to and following his appointment as the first Jewish Justice of the Supreme Court.

This distinction as the first Jewish Justice is in some ways ironic, because Brandeis's upbringing was the least Jewish of any of the eight Jewish Justices of the Supreme Court. His parents, well-educated German speaking Jews from Prague, did not observe any Jewish holidays. His mother Frederika, especially, "was adverse to religious enthusiasm of any sort and raised her children to cherish the ethical teachings of all religions and the rituals of none."<sup>34</sup> Brandeis celebrated Christmas every year with his parents and continued to do so when raising his own family. He did not live near or socialize with other Jews, did not belong to a synagogue, and until he discovered the Zionist movement he contributed little to Jewish charities—indeed until then he had nothing to do with organized Jewish life. Nor did Brandeis observe any part of the Jewish dietary laws. Much later in life, even after he had become a leader of the Zionist movement, he was still delighted to receive the hams that his brother Alfred occasionally sent him from Louisville. "There is great rejoicing over the ham—which has just arrived," he wrote, thanking his brother.<sup>35</sup>

Although for the first half century of his life Brandeis was a highly assimilated Jew who cared little about the religious observance of Judaism, by 1914 Brandeis had assumed the leadership of the American Zionist movement. His mid-life "conversion" to Zionism, as it has often been known, and his meteoric emergence as the preeminent

Zionist leader in America, comprise an important chapter in Brandeis's life, that I shall discuss in more detail in my forthcoming book.

Brandeis's formal leadership of the American Zionist movement continued for seven years, from 1914 to 1921. During this period, Brandeis spearheaded a dramatic rise in Zionist movement memberships and fundraising, and helped to organize new Zionist chapters throughout the United States. Brandeis strongly supported the work of Henrietta Szold, the founder of Hadassah (the American Women's Zionist Organization), and Hadassah's program of practical health care in Palestine.<sup>36</sup> Brandeis personally sought and won for the Zionist movement the financial support of several wealthy American Jewish philanthropists, who were his friends, such as the Filene's Department Store Vice President Louis E. Kirstein of Boston, the financier and *Washington Post* owner Eugene Meyer, and Nathan Straus, the president of Macy's. Prominent non-Jews, such as Norman Hapgood, the editor of *Harper's Weekly*, became interested in Zionism because of their friendship with Brandeis, and for the first time the Zionist movement thus "gained access to major non-Jewish journals of opinion."<sup>37</sup>

Beginning in 1917, Brandeis also played a crucial behind-the-scenes role in formulating and winning Wilson administration support for the Balfour Declaration, and helped author what became the official program of the American Zionist movement, the so-called Pittsburgh Program of 1918.<sup>38</sup> Brandeis became so devoted to the Zionist cause that, for a short time in 1917, he gave serious thought to resigning from the Supreme Court to devote himself fulltime to work on behalf of Zionism. Even after stepping down from the leadership of the American Zionist movement in 1921, following a bitter dispute with the eminent European Zionist leader Chaim Weizmann, Brandeis would continue to play an important behind-the-scenes role in Zionist affairs throughout his tenure on the Court during the 1920's and 1930's. As the best-known American Zionist leader of his era, Brandeis gave legitimacy to Zionism, and made it fashionable amongst Jews and Christians alike. Through his leadership of the American Zionist movement from 1916 to 1921, and his continuing involvement in Zionist affairs thereafter, Brandeis was and

remains the only Jewish Supreme Court Justice to have combined service on the Court with a leadership role in American Jewish public life.

Part of Brandeis's enduring Jewish legacy is also attributable to the fact that he was the first Supreme Court Justice to hire Jewish law clerks, setting an historic precedent that subsequent Supreme Court Justices, Jewish and non-Jewish alike, would follow.

The position of the Supreme Court Law Clerk began with the appointment of Justice Horace Gray in 1882. Gray had begun the practice of hiring a law clerk while serving as Chief Judge of Massachusetts' Supreme Judicial Court, and Brandeis, who had graduated Harvard Law School with the highest scholastic average in the school's history, had been one of his clerks. For many years, Horace Gray and other Supreme Court Justices who hired clerks "paid for them out of their own pockets until 1922, when Congress allowed each justice to hire one clerk at an annual salary of \$3,600."<sup>39</sup> In 1924, Congress made law clerk positions at the Supreme Court permanent.

Gray relied on Harvard Law School faculty to select the law clerks for him, as did Oliver Wendell Holmes, Jr. who was appointed to Gray's seat on the Supreme Court in 1902. Upon his joining the Harvard Law School faculty in 1915, Felix Frankfurter selected the clerks for Holmes, and, upon his appointment in 1916, Brandeis asked Frankfurter to do the same for him. The first law student Frankfurter chose for Brandeis, Calvert Magruder, clerked for one year. The next two Harvard students, William A. Sutherland and Dean Acheson, stayed on for two years, and the rest of Brandeis's clerks served for one year each. It has long been assumed that Brandeis, like Holmes automatically took the clerks that Frankfurter recommended. "As for choosing the man," Brandeis told Frankfurter, "I shall leave your discretion to act untrammelled."<sup>40</sup>

Brandeis had encouraged his law clerks to use their Supreme Court clerkships as a springboard to go into law school teaching and/or government service. "Other things being equal," he wrote Frankfurter, "it [was] always preferable to take someone whom there is reason to believe will become a law teacher." Brandeis was notably successful in attaining this goal for his law clerks, as more than half—52 percent—of his law clerks obtained academic appointments.<sup>41</sup> His first clerk, Calvert Magruder, who had been

Frankfurter's student before clerking for Brandeis, later returned to Harvard Law School to teach, becoming a full professor at the age of thirty-one. Magruder worked for several New Deal agencies, before Franklin D. Roosevelt appointed him to a federal judgeship on the U.S. Court of Appeals. Paul Freund, who would teach at Harvard Law School for more than forty years, became one of the foremost legal scholars of his generation, and was considered to have been "the dominant figure of his time in the field of constitutional law."<sup>42</sup> Louis Jaffe, who, upon Frankfurter's recommendation, served as Brandeis's law clerk during the 1934 Court term, was a professor and Dean of the University of Buffalo Law School, before returning to Harvard Law School, where he would teach until his retirement. David Riesman, Brandeis's clerk during the 1935 term, began his academic career as a law professor at the University of Buffalo, where he devoted his early scholarship to analyzing the interplay between law and society. After joining the social science faculty of the University of Chicago in 1949, Riesman would gain both fame and celebrity as one of the most influential and popular sociologists of the twentieth century with his best-selling book *The Lonely Crowd*. Brandeis was also proud of his law clerks who entered government service, such as James Landis, who (on his recommendation) served as a member of the Federal Trade Commission and as Chairman of FDR's Security and Exchange Commission, before beginning an academic career at Harvard Law School, where he would serve as Dean from 1938 to 1946. Over the years, Brandeis would maintain an especially close relationship with Dean Acheson, who clerked for Brandeis from 1919 to 1921. Brandeis would personally recommend Acheson to Franklin D. Roosevelt for appointment as Solicitor General in 1933, and Acheson would later serve as an Assistant Secretary of State and Assistant Secretary of the Treasury, before being appointed Secretary of State by President Truman in 1948. When Acheson was appointed Assistant Secretary of State for economic affairs by FDR, he asked Justice Brandeis to administer the oath of office.<sup>43</sup>

Beginning with Brandeis, Supreme Court clerkships became the most coveted and prestigious attainments, and avenues of upward mobility within the legal profession, for ambitious Jewish law school graduates, especially those coming from poor, immigrant



backgrounds. Several of the Harvard Law School students that Felix Frankfurter selected as law clerks for Brandeis were Jewish. A few of these Jewish Harvard law school graduates first clerked for Julian Mack, Learned Hand, or other Federal judges, before moving up to their Supreme Court clerkships with Brandeis. Mack, the first Jew appointed to a Federal Judgeship, had first met Brandeis in 1887 when, as a law student at Harvard, he had been one of the founders of the *Harvard Law Review*, which Brandeis helped fund and sponsor. Almost immediately upon his appointment to a Federal judgeship on the U.S. Court of Appeals in 1911, Julian Mack had begun a tradition of choosing his law clerks from among the top Harvard Law graduates, as recommended to him first by Harvard Law School Dean Roscoe Pound and then by Felix Frankfurter. Brandeis, like Mack and Frankfurter, was very interested in placing Jewish Harvard Law School graduates who, because of antisemitism still prevalent within the legal profession, would otherwise have had few Supreme Court clerkship opportunities. Prior to Brandeis's appointment, no Jewish law school graduate had ever served as a clerk to a Supreme Court Justice. During the 1920s and the 1930s, the "overwhelming majority" of Brandeis's law clerks were Jewish.<sup>44</sup>

Throughout the 1920s and 1930s, the country's major law schools had few if any Jews on their faculty. During his twenty-five years as a law professor at Harvard, before his appointment to the Supreme Court, Felix Frankfurter was the one and only Jewish member of the faculty. Brandeis sought to change this situation. During his years on the Court, Brandeis had "made a special project of finding law faculty positions for young Jewish lawyers whom he regarded as particularly talented."<sup>45</sup> He was notably successful in this effort. Within a few years of Frankfurter's appointment to the Supreme Court, two of Brandeis's law clerks, Paul Freund and Louis Jaffe, would succeed Frankfurter on the faculty of Harvard Law School, establishing a precedent for the appointment of a growing number of Jewish Harvard Law Professors during the 1950s and 1960s. Brandeis, with the help of Judge Julian Mack, was able to place his law clerk Nathaniel Nathanson on the Northwestern University Law School faculty, which had not hired a Jew since Mack had taught there briefly in the 1890s. Nathanson, who had clerked for

Julian Mack before serving as one of Brandeis's law clerks in 1934, would teach law at Northwestern for several decades, and would be the first of several Jews to serve on the Northwestern Law faculty during his long tenure there. Also, before his appointment at Harvard, Jaffe would break a major glass ceiling for Jews in the American legal profession by becoming the first Jewish Dean of a law school, at the University of Buffalo, in 1948.

One of Brandeis's law clerks, Harry Shulman, would later break another major glass ceiling for Jews in the American legal profession by becoming the first Jewish Dean of Yale Law School in 1951. One of these young Jewish lawyers whom Brandeis was instrumental in placing on a law school faculty was Schulman, his law clerk for the 1929 Court term. In the fall of 1929, when Brandeis was encouraging Shulman to seek a law school teaching position, Frankfurter was still the only Jew on the Harvard Law School faculty, as he had been since his appointment in 1914. There were no Jews on the law school faculties of Yale, Columbia, the University of Pennsylvania, or Northwestern. In October 1929, Brandeis wrote to Frankfurter asking for his help in finding a law school teaching position for Shulman. "It seems to me," Brandeis wrote, "that a great service could be done generally to American law and to the Jews by placing desirable ones in the law school faculties. There is in the Jew a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews."<sup>46</sup> Brandeis specifically mentioned in this letter to Frankfurter that a faculty member at Yale had told him that "the right man there would find no opposition on the score of anti-Semitism."<sup>47</sup> Shulman was apparently the right man: A Russian-born graduate of Brown University and a student of Frankfurter's at Harvard Law School, Shulman joined the Yale Law School faculty in 1930, immediately following his clerkship with Justice Brandeis. At the age of thirty-six, Shulman was first considered for the Yale Law School Deanship in 1939, while Brandeis, who publicly voiced his support for Shulman's appointment, was concluding his final term as a Justice on the Court. Despite the fact that legal scholars and eminent attorneys from throughout the country supported Shulman's appointment as Dean, and that one of the nation's most respected

jurists Judge Learned Hand wrote “my choice remains Harry Shulman,” because of antisemitic opposition to the appointment, Shulman was not selected.<sup>48</sup> When, seventeen years later, in 1953, Shulman’s name was again presented to the Yale Corporation for appointment as Dean of the law school, a new fight broke out “entirely because of the Jewish issue.” An enthusiastic six-page letter of support for Shulman sent by former Brandeis law clerk and former secretary of state Dean Acheson, to his fellow trustees on the Yale Corporation, played a major role in convincing the Yale trustees to confirm Shulman’s appointment as dean.<sup>49</sup> Shulman would be the first of a number of Jews to serve as dean of Yale Law School over the next several decades.

Not all of Brandeis’s Jewish law clerks sought jobs in academia or the government. As Harvard Law School graduates, with a prestigious Supreme Court clerkship now on their resumes, some received (and accepted) job offers from elite Wall Street law firms that had previously hired few (if any) Jews. Henry J. Friendly, for example, the Editor-in-Chief of the *Harvard Law Review*, who legend has it achieved the highest grade point average at Harvard Law School since Brandeis himself was a student there, and clerked for Brandeis in 1929, turned down a teaching job at Harvard Law to accept a more lucrative offer at Root, Clark, one of only two Wall Street law firms with a Jewish partner.<sup>50</sup> Friendly continued to practice law in New York City until 1959, when President Eisenhower appointed him to a federal judgeship, on the Second Circuit Court of Appeals in New York, where he served until his death in 1986, establishing an enviable reputation as one of the greatest American jurists of the twentieth century.

During the 1960s, Henry Friendly and Harvard Law School Professor Paul Freund, one of the nation’s most renowned scholars of constitutional law, who had served as Brandeis’s law clerk in 1934 and, like Friendly, had been one of Felix Frankfurter’s star protégés at Harvard, would be considered for appointment to the Supreme Court by three Presidents.

As the first Supreme Court Justice to hire Jewish law clerks, Brandeis introduced a new dimension of religious diversity that had heretofore been absent from the Supreme Court. Moreover, in hiring Jewish law clerks, and helping them to find employment in

academia and the federal government, as well as in private practice, Brandeis did much to promote the advancement of Jewish lawyers within the American legal profession. This achievement is an important part of his enduring Jewish legacy that should not be forgotten.

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