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### Book Review: Two Jewish Justices: Outcasts in the Promised Land. by Robert A. Burt.

Melvin I. Urofsky

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Yet, despite its add-on quality, his final chapter offers sensible generalizations. The Court, he argues, tends toward one of two courses in national security cases. Either it offers ritualistic approval of the challenged actions, or it invokes variants on the political question doctrine to avoid the issues. Notwithstanding efforts to link decisions to unique situations, the former course embeds pernicious doctrines in the Constitution, which makes the latter course preferable although hardly unproblematic. Better still is an approach that defers decisions. May especially recommends that judges utilize the requirement of ripeness, but also allow litigants to return later without meeting roadblocks on mootness grounds. May's discussion of these points is at a high enough level of generality to make detailed responses difficult—and a little unfair. Suffice it to say that as history the final chapter's tie to the post-Armistice interlude is slight.

**TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND.** By Robert A. Burt.<sup>1</sup> Berkeley: University of California Press. 1988. Pp. 165. \$19.95.

*Melvin I. Urofsky*<sup>2</sup>

Professor Robert Burt's interpretive essay on Louis Brandeis and Felix Frankfurter is at once provocative and frustrating. Professor Burt often throws out a brilliant insight that helps us to understand these two men, yet he does not and cannot provide the type of evidence that would confirm his basic thesis—that their Jewishness shaped their judicial outlook. Being Jewish, even as marginally Jewish as these two, must have affected their lives in some ways. Yet Burt's elucidation of how and why their Jewishness led to their jurisprudence is far from convincing.

Burt first became attracted to this topic when, as he relates, he noticed the very high percentage of fellow Jews teaching in law schools such as Yale and Harvard. This led him to wonder why Jews entered the profession, and this in turn led him to the careers of Brandeis and Frankfurter, "two Jews who attained great prominence at a time when the American legal profession generally was inhospitable to Jews." He began his research, and concluded that "Jewishness was distinctively associated with outsider status, with homelessness, for both Brandeis and Frankfurter." Their different

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1. Southmayd Professor of Law, Yale University.

2. Professor of History, Virginia Commonwealth University.

responses to this outsider status had “direct relevance to the issues confronted today by all judges in America, and by all Americans, whether Jews or gentiles.”

The two men, however, did not react to their outsider status in the same way. Brandeis, according to Burt, could have moved “inside,” either into the regular community or into the mainstream of the Jewish community, but instead he chose to be an outsider. As an example, Burt notes that in the fight over his confirmation to the Supreme Court, leaders of the American bar accused Brandeis of not conforming to the canons of the profession. Brandeis “always acts the part of a judge toward his clients instead of being his client’s lawyer.”<sup>3</sup> Later on, however, even friends complained that Brandeis as a judge too often appeared to be an advocate. “If you could hint to Brandeis,” Harold Laski wrote to Holmes, “that judicial opinions aren’t to be written in the form of a brief it would be a great relief to the world.”<sup>4</sup> Thus Brandeis as a lawyer crossed over into being a judge, and as a judge still remained something of a lawyer, and at all times stood at a margin.

The experience of being an outsider himself gave Brandeis “an instinctive sympathy for outsiders,” and this in turn explains his support of reform legislation, both as an advocate and as a judge. Brandeis, according to Burt, espoused judicial restraint because he believed that the purpose of much reform legislation was to help outsiders move inside, to become equal partners in the society. He himself, however, chose to remain an outsider, even when a member of the High Court, the insiders’ citadel of citadels.

Frankfurter, on the other hand, did not like outsider status. An immigrant, he embraced American citizenship with a passion far exceeding that of most native-born Americans. Admitted to Harvard Law School, he became the great champion of that school, holding it up as the paragon to which all other schools should aspire. The Court, of course, became the holy of holies for him, and he condemned any and all who did not revere it as he did.

According to Burt, Frankfurter thus saw himself as “a quintessential insider,” and like most converts, he was more zealous than those born to the faith. As evidence, he cites Frankfurter’s majority opinion in *Minersville School District v. Gobitis*, and then his anguished dissent in the second flag salute case which overturned his *Gobitis* opinion. Frankfurter’s jurisprudence, according to Burt, reflected his gratitude at being allowed “inside,” and thus he de-

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3. A.T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 506 (1946).

4. Letter from Harold Laski to Oliver Wendell Holmes, Jr., (January 13, 1918), reprinted in 1 *THE HOLMES-LASKI LETTERS* 127 (M.D. Howe ed. 1953).

ferred to the majoritarian will when it chose to keep others outside. Despite the fact that he had taken up Brandeis's role as counsel to the National Consumers' League and had defended protective labor legislation, Frankfurter never had Brandeis's "instinctive sympathy for outsiders." Once having entered the citadel, he preferred to keep the rest of the great unwashed out.

The resulting judicial attitudes are described by Burt as those of priest and prophet. Prophets are always and everywhere outsiders, telling unpleasant truths to those who do not want to hear, demanding that people be better than they are, that they adhere to higher truths. Brandeis the prophet (whom Franklin Roosevelt called "Isaiah") preached a law that was compassionate and open, designed to break down the barriers that prevented people from attaining a full and equal role in society. It is this attitude, Burt claims, that informed the *zeitgeist* of the Warren Court, which in decisions affecting segregation and rights of the accused followed the Brandeisian call for compassion and equality. Thus, in *Trop v. Dulles*,<sup>5</sup> the Court struck down a congressional statute that removed citizenship status from members of the armed forces convicted of desertion during wartime, on the ground that deprivation of citizenship was a cruel and unusual punishment.

Dissenting in *Trop*, Frankfurter displayed the attributes of the "priest," the quintessential insider, the keeper of the rituals, the one who adheres to legal formalities. During war, the country needed soldiers; those who shirked that duty could be expelled from the "communion of our citizens."<sup>6</sup> For Frankfurter, the zealous convert, the grateful insider, no punishment seemed too great for those who, for whatever reason, flouted the rituals. Priests fear change that would upset the rules and endanger the status of the priests. If the Brandeis/prophet view informed the Warren Court, the Frankfurter/priest view shaped the Burger Court.

Burt's dichotomy is attractive, and gives us a valuable perspective on the differences between Brandeis and Frankfurter. But he has not convinced me that the insider-outsider attitudes are caused by Jewishness. One is reminded of that old saw about Jewish dentists—they drill from right to left. It is one thing to take someone like Chaim Weizmann, Brandeis's great opponent in the Zionist movement, and show that his Jewishness shaped his life. It is far more difficult to do so in the cases of Brandeis and Frankfurter.

By all accounts, Jewishness played a very minor role in Bran-

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5. 356 U.S. 86 (1958).

6. *Id.* at 122.

deis's upbringing.<sup>7</sup> He never denied his Jewishness, but for the first fifty years of his life never treated it as more important than the color of his hair. Allon Gal has shown that Brandeis did suffer from anti-Semitism,<sup>8</sup> and Ben Halpern has argued that Jewish feelings and ideas permeated the Brandeis family far more than many had supposed.<sup>9</sup> Neither case, however, is that strong. Much of the resentment shown by proper Boston to Brandeis can be attributed to his espousal of unpopular causes, plus the fact that he was not a warm, outgoing person.

While there was some anti-Semitic comment during the battle over Brandeis's nomination to the Court, a close reading of the lengthy hearings, and of the many letters that flooded into the White House, shows that his critics were mainly upset over his allegedly radical economic views as well as his unorthodox legal practices.

Frankfurter's youth had far more Jewishness in it than that of his mentor, but at an early age he abandoned the faith,<sup>10</sup> and except through his Zionist work (which he did only at Brandeis's request) had very little to do with organized religion thereafter.<sup>11</sup> This is not to say that he ignored the issue of anti-Semitism. He fought strenuously against A. Lawrence Lowell's efforts to impose a Jewish quota at Harvard in the 1920s,<sup>12</sup> and he worked hard to place his bright students, especially his Jewish students, in good places in government and academia.<sup>13</sup>

Brandeis had an aloof, unapproachable personality—like many gentiles. Frankfurter was his opposite in this respect—ebullient and at times nasty—again, like many gentiles. To reverse Shakespeare, does not a gentile bleed when pricked and cry when hurt? Are there not gentiles as well as Jews who are compassionate and want to see outsiders let into the social communion? Are there not gentiles as well as Jews who, having themselves become insiders, want to keep others out? As a foundation for his theory, Burt needs

7. L.J. PAPER, *BRANDEIS* ch. 1 (1983); P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* ch. 1 (1984).

8. A. GAL, *BRANDEIS OF BOSTON* 169-73 (1980).

9. B. HALPERN, *A CLASH OF HEROES: BRANDEIS, WEIZMANN, AND AMERICAN ZIONISM* 62-71 (1987).

10. FELIX FRANKFURTER *REMINISCES* 289 (H. Phillips ed. 1960).

11. At the end of his life, however, Frankfurter requested that his memorial service be conducted by Louis Henkin, because "he is my only close personal friend who is also a practicing, orthodox Jew. . . . I came into the world a Jew and although I did not live my life entirely as a Jew, I think it is fitting that I should leave as a Jew." *FROM THE DIARIES OF FELIX FRANKFURTER* 89 (J. Lash ed. 1975).

12. M.E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES* 156-57 (1982).

13. G.E. White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 *ARK. L. REV.* 631 (1986).

to adduce evidence that these syndromes are much more common among Jews than among others.

There are also errors of omission and commission that undermine the book's credibility. In the very first chapter on Brandeis, Burt asserts that "Brandeis is the founding father of the Jewish presence in American law," a startling claim to anyone familiar with the career of Louis Marshall, who not only was self-consciously Jewish, but whose prominence as a lawyer equalled or surpassed that of Brandeis.<sup>14</sup> And in the first paragraph dealing with Frankfurter, Burt asserts that "for Brandeis their friendship was apparently the most intimate male relationship in his adult life." This ignores the lengthy and extremely close ties between Brandeis and his brother Alfred, to whom Brandeis wrote nearly every day of his life.<sup>15</sup>

**THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS.** By William Lasser.<sup>1</sup> Chapel Hill: The University of North Carolina Press. 1988. Pp x, 354. \$32.95 cloth, \$9.95 paper.

*Herbert Hovenkamp*<sup>2</sup>

Professor William Lasser takes issue with one of the most respectable maxims of constitutional theory: the idea that controversial Supreme Court decisions expend part of the Court's stock of political "capital,"<sup>3</sup> thereby reducing its authority. The premise of this maxim is that the Court is a fragile institution. If it wishes to preserve its authority and guarantee maximum compliance with its orders, the power of judicial review must be exercised very sparingly. For Alexander Bickel and even more so for Jesse Choper, this thesis was a central part of an elaborate argument for judicial restraint. "[I]n some principled fashion," Choper concluded, the

14. See M. ROSENSTOCK, *LOUIS MARSHALL: DEFENDER OF JEWISH RIGHTS* (1965); *LOUIS MARSHALL: CHAMPION OF LIBERTY* (2 vols. C. Rezinkoff ed. 1957).

15. *LETTERS OF LOUIS D. BRANDEIS passim* (5 vols. M.I. Urofsky & D.W. Levy eds. 1971-1978).

1. Assistant Professor of Political Science, Clemson University.

2. Professor of Law, University of Iowa.

3. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 23 (1962); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 156 (1980); R.G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 229-31 (1960). See also J. ELY, *DEMOCRACY AND DISTRUST* (1980); W. MURPHY, *CONGRESS AND THE COURT* 2-3 (1962).