

David G. Dalin. *Jewish Justices of the Supreme Court: From Brandeis to Kagan.* Waltham: Brandeis University Press, 2017. 384 pp. \$35.00, cloth, ISBN 978-1-61168-238-0.

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For a century and a quarter after the adoption of the 1787 Constitution, the United States Supreme Court was a bastion of white Anglo-Saxon Protestants. Until the twentieth century there were no Jews on the court and only two Roman Catholics. Today, by contrast, the court has five Roman Catholics, three Jews, and Neil Gorsuch, who was raised Roman Catholic but worships in an Episcopalian church with his wife. David G. Dalin's absorbing book is indispensable for understanding the court's eight Jewish justices: Louis D. Brandeis, Benjamin N. Cardozo, Felix Frankfurter, Arthur J. Goldberg, Abe Fortas, Ruth Bader Ginsburg, Stephen G. Breyer, and Elena Kagan. It is well written, based on a wide reading of mainly secondary sources, and will appeal to readers interested in American Jewish history, the history of the Supreme Court, particularly its demographic transformation, and American ethnic history. Perhaps it will encourage other scholars to investigate the Jewish penetration of other bastions of the American elite, such as the great New York City banks and law firms, Ivy League universities, and the highest rungs of leading corporations.

The initial challenge in writing any collective biography is its rationale. In this case, did these justices have enough in common besides Jewish ancestry to justify such a volume? Any Jewish religious or ethnic ties that bound these eight justices

are elusive. Only Brandeis, an active Zionist, played a prominent role in organized American Jewish life, although Goldberg served for a few years as the president of the American Jewish Committee and as an overseer at the Jewish Theological Seminary. None of the justices were religiously observant, however that might be defined, nor played a major role in Jewish cultural life. But, as Dalin correctly notes, they did share one important trait. This was the liberalism which for the past century and a half has been crucial in defining American Jewish identity.

Goldberg spoke for all the justices when he claimed that his concern for social justice, peace, and human rights stemmed from his Jewishness. Breyer agreed. He published an essay in the *New Republic* in 1998 titled "Zion's Justice" in which he argued, as had Brandeis, that being a good Jew and a good American were symbiotic, and that the essence of Zionism was the creation and maintenance of a Jewish state based on "democracy and social justice" (p. 277). With the exception of Cardozo, who was nominated by Herbert Hoover, the other Jewish justices were selected by liberal Democratic presidents: Brandeis by Woodrow Wilson, Frankfurter by Franklin D. Roosevelt, Goldberg by John F. Kennedy, Fortas by Lyndon Johnson, Ginsburg and Breyer by Bill Clinton, and Kagan by Obama. And all eight nomi-

nees, including Cardozo, were considered by their contemporaries to be liberals.

Frankfurter has been described as the only “conservative” among the Jewish Supreme Court justices, but this is because he maintained that courts should give the benefit of the doubt to the will of the people as expressed through their elected representatives. Frankfurter opposed the courts’ overturning of local, state, and federal reform measures passed during the Progressive and New Deal eras, and he was praised by liberals who favored such legislation. Only later, when the tables were turned and Frankfurter refused to overturn laws passed by conservative legislatures, would liberals portray him as a conservative even though he had been intellectually consistent. Frankfurter’s belief in judicial discretion, however, did not prevent him from opposing local and state laws requiring racial segregation or appointing the court’s first black clerk.

Four of the eight Jewish justices—Cardozo, Frankfurter, Goldberg, and Fortas—were confirmed by voice vote, and the votes for Ginsburg (96-3), Breyer (87-9), and Kagan (63-7) while recorded were overwhelming. The theme of anti-Semitism runs throughout Dalin’s book, most notably in the case of Brandeis, but even he won easily, 47-22. The selection of Brandeis in January, 1916, set off the most rancorous wrangle over a Supreme Court nomination up to that point. Thomas W. Gregory, Wilson’s attorney general, had warned Wilson that nominating Brandeis would set off a “tempest” (p. 46). Gregory was prescient, but there is no unanimity among historians as to the major cause of this wrangle.

Some historians, including Dalin, claim that much of the opposition to Brandeis was rooted in anti-Semitism.^[1] But Brandeis’s liberal politics was probably more important, and a more conservative Jewish nominee would likely have met little resistance. Sixteen years later the Senate would approve Cardozo with little dissent. The *New York Times*, then under Jewish ownership,

got to the heart of the matter. It editorialized that Brandeis was “essentially a contender, a striver after change and reforms. The Supreme Court by its very nature is the conservator of our institutions” (p. 46). Six former presidents of the American Bar Association also questioned Brandeis’s fitness to serve on the court. Former president William Howard Taft, Wilson’s predecessor and certainly no anti-Semite, agreed. He described Brandeis as “a muckracker, an emotionalist for his own purposes, a socialist prompted by jealousy, a hypocrite ... a man of infinite cunning ... of great tenacity, and, in my judgment, of much power for evil” (p. 46). Taft, while serving on the Court during the 1920s and seeing Brandeis firsthand, would become an admirer of his colleague. Even some Jews questioned Brandeis’s suitability for the court. Cyrus Adler, the chancellor of the Jewish Theological Seminary, described him as “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” (p. 51).

Dalin emphasizes the opposition of Harvard’s president, A. Lawrence Lowell, to the selection of Brandeis. A few years after the Brandeis controversy, Lowell, a vice president of the Immigration Restriction League, would institute a quota limiting Jewish enrollment in Harvard College. It is indicative of American public opinion at this time that Lowell’s public criticism of Brandeis centered on his judicial temperament rather than on his Jewish background. By contrast, the Harvard Law School faculty, including Dean Roscoe Pound, overwhelmingly supported Brandeis. Some Democratic senators from the South opposed Brandeis, but this was because they wanted a southerner to receive the appointment and feared that Brandeis might vote to overturn racial segregation.

Today there are three Jews on the Supreme Court, and this at a time when Jews comprise no more than 2 percent of the country’s population. Perhaps the most noteworthy aspect of this is that

the media and the public have not considered it to be noteworthy at all. There has been more interest in the fact that all the justices attended the law schools of Harvard and Yale. The religious and ethnic demographics of the court indicate just how far the country has come.

Note

[1]. On anti-Semitism and the Brandeis appointment, see especially Thomas Karfunkel and Thomas W. Ryley, *The Jewish Seat: Anti-Semitism and the Appointment of Jews to the Supreme Court* (Hicksville, NY: Exposition Press, 1978).

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