ADVANCE SHEET – May 9, 2025

President's Letter

In this issue, we reproduce Judge Learned Hand's eulogy of Mr. Justice Brandeis, delivered in 1942 near the high tide of Hitlerism. Brandeis' views about subjects other than free speech receive little attention now, and it is usually thought that after the retirement of some of the 'four horsemen' FDR and his program had a clear run. What is not remembered is the extent to which three eminent judges, Learned Hand, Brandeis, and Benjamin Cardozo had curbed the New Deal's worst excesses. The critical event was what Roosevelt's entourage called ‘Black Monday’; May 27, 1935, the ninetieth anniversary of which will soon arrive. On that day, the Supreme Court rendered three unanimous decisions.

In the *Schecter* case, the Supreme Court invalidated on both commerce clause and excess delegation grounds, the President's code-making authority over the whole economy. It affirmed the Second Circuit, where a concurring opinion by Judge Learned Hand rejected as inconsistent with federalism an assertion of jurisdiction over all commerce. This was the only case in a judicial career extending over 50 years that Learned Hand was prepared to declare a federal statute to be unconstitutional. The Supreme Court opinion, a windy production, was by Chief Justice Hughes, but the language of Justice Cardozo's opinion on delegation has lived: "This is delegation run riot, not canalized within banks that keep it from overflowing...No such plentitude of power is capable of transfer." Whether the same thing will be said in our time about the President's power over tariffs remains to be seen.

In the *Louisville Joint Stock Bank* case, the Court, speaking through Brandeis, invalidated a mortgage moratorium in the Frazier-Lemke Act, Brandeis delineating creditors' rights that could not be impaired without compensation through eminent domain or otherwise. Greater attention to this opinion would have spared the Biden administration its Supreme Court defeats on eviction and student loan moratoria.

The third May 27 opinion, the *Humphrey's Executor* case now under attack by the Trump administration and partisans of a unitary executive, partially overruled the

earlier decision in the *Myers* case upholding Presidential removal powers from which Brandeis had dissented. The opinion by Justice Sutherland expressly referred to the dissenting as well as majority opinion in the *Myers* case; in it, Justice Brandeis had declared: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but by means of the inevitable friction incident to the distribution of the governmental power among three departments to save the people from autocracy."

In the wake of these three opinions, Brandeis is said to have admonished two of his acolytes, Benjamin Cohen and Thomas Corcoran to go back and tell the President that centralization was over. After the 1936 election emboldened Roosevelt, Brandeis (and Justice Van Devanter) joined Chief Justice Hughes' decisive letter refuting the case for the administration's effort to 'pack' the Supreme Court. His last major opinion delivered in 1938 was that in *Erie v. Tompkins*, returning to state courts determination of the rules of tort law.

Brandeis would not have been pleased by today's American society in which 40% of wholesale and retail employment is concentrated in two corporations as a result of judicial interference with chain store taxes and retail price maintenance laws, and five banks dominate banking, and his Zionist vision of a Mediterranean Denmark did not anticipate the Netanyahu government. But, as shown in Jordan Schwartz's *The New Dealers: Power Politics in the Age of Roosevelt*, he was a champion of public electric power development in the South and West and was responsible for the decentralized features of the unemployment insurance system. The May 27 decisions were the summit of his influence.

George W. Liebmann

An Evening With Chief Justice Matthew J. Fader

On **Tuesday, May 13, 2025, Chief Justice Matthew J. Fader** of the Supreme Court of Maryland will speak on public trust and confidence in state courts in the era of generative artificial intelligence. He will explore the challenges courts face in maintaining that trust and confidence and examine ways they can respond.

Matthew J. Fader is Chief Justice of the Supreme Court of Maryland. He joined the Court, then named the Court of Appeals of Maryland, and was named chief judge in

April 2022. He was previously a member of Maryland's intermediate appellate court, now named the Appellate Court of Maryland, where he served as an associate judge beginning in 2017 and as chief judge beginning in 2018. Before joining the bench, he was a trial attorney with the United States Department of Justice's Civil Division, Commercial Litigation Branch beginning in 1999; an attorney in private practice beginning in 2002; and an assistant attorney general with the Office of the Attorney General of Maryland, Civil Litigation Division beginning in 2010.

Place: Mitchell Courthouse – 100 North Calvert Street – Main Reading Room of the Bar Library (Room 618, Mitchell Courthouse).

Time: 5:00 p.m., Tuesday, May 13, 2025.

Reception: Catering by DiPasquale's featuring their famous prosciutto, cod fish, fruits and cheeses.

Invitees: All are welcome to this **free event.**

R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to **jwbennett1840@gmail.com**.

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MR. JUSTICE BRANDEIS

[1942]

LOUIS DEMBITZ BRANDEIS (1856–1941) was a native of Louisville, Kentucky, and a graduate of the Harvard Law School. He began law practice in St. Louis in 1878. His work as a "people's attorney" in Boston and elsewhere in many important cases involving consumers attracted the admiration of Woodrow Wilson, who wanted him in the Cabinet in 1913. When Brandeis published in 1914 Other People's Money, a powerful analysis of the use and influence of finance on politics and life in the United States, Wilson was more determined than ever to draft Brandeis into his New Freedom Administration. The perfect opportunity came in a vacancy on the Supreme Court, and on January 28, 1916, Wilson made the appointment. Before the nomination was twenty-four hours old it was evident that it would be confirmed, if at all, only after a long and bitter struggle. Seven past presidents of the American Bar Association declared Brandeis unfit for the Supreme Court. These included William Howard Taft, Elihu Root, Joseph H. Choate, and Moorfield Storey. The president of Harvard, A. Lawrence Lowell, joined the opposition, but this was countered happily by a strong endorsement from President Emeritus Charles W. Eliot. The battle raged for three months, and sixteen hundred pages of testimony were taken at hearings. Then, on May 5, 1916, Wilson sent to the chairman of the Senate Judiciary Committee a letter that remains a classic statement of qualifications for public service, particularly on the Supreme Court. A few days later the subcom-

mittee voted, 3 to 2, on straight party lines, for confirmation. The vote in committee, on May 24, was 10 Democrats for confirmation to 8 Republicans opposed. The latter included Borah of Idaho, who years later said this was one of two votes he most regretted in his long career in the Senate. Confirmation was by vote of 46 to 22, with only three Republicans in the affirmative: Norris of Nebraska, La Follette of Wisconsin, and Poindexter of Washington. Those opposed included Harding of Ohio, Lodge of Massachusetts, Curtis of Kansas, Cummins of Iowa, Fall of New Mexico, and Sutherland (later Justice) of Utah. The twentieth anniversary of Brandeis's entry upon judicial duties, his retirement three years later and his death, on October 5, 1941, were occasions for mounting appreciation of his contributions to American economics, government, and jurisprudence. A memorial service was held in the Supreme Court on December 21, 1942. Learned Hand's address on that occasion appeared in the Proceedings of the Bar of the Supreme Court, *317 U.S. xi–xiv.*

A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone not only destroys the whole, but gives the strand itself a false value. So it must be with what I say today; this is no occasion to appraise the life and work of the man whose memory we have met to honor. It would be impossible at this time to do justice to the content of so manifold a nature and so full a life; its memorial stands written at large, chiefly in the records of his court; perhaps best preserved in the

minds of living men and women. Before passing to my theme, I can therefore do no more than allude to much that I can ill afford to leave out: for instance, to his almost mystic reverence for that court whose tradition seemed to him not only to consecrate its own members, but to impress its sacred mission upon all who shared in any measure in its work, even menially. To his mind nothing must weaken its influence or tarnish its lustre; no matter how hot had been the dispute, how wide the final difference, how plain the speech, nothing ever appeared to ruffle or disturb his serenity, or to suggest that he harbored anything but regard and respect for the views of his colleagues, however far removed from his own. Nor can I more than mention the clear, ungarnished style which so well betrayed the will that lay behind; the undiverted purpose to clarify and convince. How it eschewed all that might distract attention from the thought to its expression. The telling phrase, the vivid metaphor, the far-fetched word that teases the reader and flatters him with the vanity of recognition—these must not obtrude upon that which alone mattered: that conviction should be carried home. So put it that all your hearers shall not be aware of the medium; so put it that they shall not feel you, yet shall be possessed of what you say. If style be the measure of the man, here was evidence of that insistence upon fact and reason which was at once his weapon and his shield. Others too must speak of the fiery nature which showed itself when stirred, but which for the most part lay buried beneath an iron control; of that ascesis, which seemed so to increase that towards the end one wondered at times whether, like some Eastern sage, the body's grosser part

had not been quite burnt away and mere spirit remained; of those quick flashes of indignation at injustice, pretense, or oppression. These and much more which would make the figure stand out more boldly against its background, I shall not try to portray. I must leave them to others who can speak more intimately and with more right.

At the risk of which I spoke a moment ago, I mean to choose a single thread from all the rest, which I venture to believe leads to the heart and kernel of his thinking and—at least at this present—to the best of his teaching. I mean what I shall describe as his hatred of the mechanization of life. This he carried far indeed; as to it he lived at odds with much of the movement of his time. In many modern contrivances which to most of us seem innocent acquisitions of mankind—the motor car for instance—he saw a significance hostile to life's deeper, truer values. If he compromised as to a very few, the exceptions only served to emphasize the consistency of his conviction that by far the greater part of what passes for improvement and is greedily converted into necessity, is tawdry, vain and destructive of spiritual values. In addition, he also thought that the supposed efficiency with which these wants were supplied was illusory, even technologically. He had studied large industrial aggregations as few have and was satisfied that long before consolidation reached its modern size, it began to go to pieces at the top. There was a much earlier limit to human ability; minds did not exist able to direct such manifold and intricate structures. But that was only an incident; the important matter was the inevitable effect of size upon the individual, even though it neither limited nor impaired

efficiency. Allied with this was his attitude towards concentration of political power which appeared so often in what he said from the bench. Indeed, his determination to preserve the autonomy of the states—though it went along with an unflinching assertion of federal power in matters which he reckoned truly national—amounted almost to an obsession. Haphazard as they might be in origin, and even devoid of much present significance, the states were the only breakwater against the ever pounding surf which threatened to submerge the individual and destroy the only kind of society in which personality could survive.

As is the case with all our convictions, the foundation of all this lay in the vision of the Good Life. It is, I know, a little incongruous to quote another's vision of the Good Life who was in most respects at the opposite pole of belief and feeling, but nevertheless there comes to my mind a scrap from the inscription above the gate of the Abbey of Thélème:

> *Here enter you, pure, honest, faithful, true*
>
> . . . . . .
>
> *Come, settle here a charitable faith,*
> *Which neighborly affection nourisheth.*

He believed that there could be no true community save that built upon the personal acquaintance of each with each; that thus alone could character and ability be rightly gauged; without that "neighborly affection" which would result, no "faith" could be nourished, "charitable" or other. Only so could latent richness which lurks in all of us come to flower. As the social group grows too large for mutual contact and appraisal,

life quickly begins to lose its flavor and significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us—our hard-won immunity now gone—to epidemics of hallowed catchword and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization—witness the history of law and morals. These many inventions are a step backward; they lull men into the belief that because they are severally less subject to violence, they are more safe; because they are more steadily fed and clothed, they are more secure from want; because their bodies are cleaner, their hearts are purer. It is an illusion; our security has actually diminished as our demands have become more exacting; our comforts we purchase at the cost of a softer fibre, a feebler will and an infantile suggestibility.

I am well aware of the reply to all this; it is on every tongue. "Do not talk to us," you say, "of the tiny city utopias of Plato or Aristotle; or of Jefferson with his dream of proud, honorable isolation; however circumscribed. Those days are gone forever, and they are well lost. The vast command over Nature which the last cen-

tury gave to mankind and which is but a fragmentary earnest of the future, mankind will not forego. The conquest of disease, the elimination of drudgery, the freedom from famine, the enjoyment of comfort, yes even that most doubtful gift, the not-too-distant possession of a leisure we have not yet learned to use—on these, having once tasted them, mankind will continue to insist. And, at least so far as we have gone, they appear to be conditioned upon the co-operation and organization of great numbers. Perhaps we may be able to keep and to increase our gains without working on so fast a scale; we do not know; show us and we may try; but for the present we prefer to keep along the road which has led us so far, and we will not lend an auspicious ear to jeremiads that we should retrace the steps which have brought us in sight of so glorious a consummation."

If it is hard to see any answer to all this, the day has clearly gone forever of societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have any first-hand knowledge of them. Publicity is an evil substitute, and the art of publicity is a black art; but it has come to stay; every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means

to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous. This, the vastest conflict with which mankind has ever been faced, whose outcome still remains undecided, in the end turns upon whether the individual can survive; upon whether the ultimate value shall be this wistful, cloudy, errant You or I, or that Great Beast, Leviathan, that phantom conjured up as an ignis fatuus in our darkness and a scapegoat for our futility.

We Americans have at last chosen sides; we believe that it may be idle to seek the Soul of Man outside Society; it is certainly idle to seek Society outside the Soul of Man. We believe this to be the transcendent stake; we will not turn back; in the heavens we have seen the sign in which we shall conquer or die. But our faith will need again and again to be refreshed; and from the life we commemorate today we may gain refreshment. A great people does not go to its leaders for incantations or liturgies by which to propitiate fate or to cajole victory; it goes to them to peer into the recesses of its own soul, to lay bare its deepest desires; it goes to them as it goes to its poets and its seers. And for that reason it means little in what form this man's message may have been; only the substance of it counts. If I have read it aright, this was that substance. "You may build your Towers of Babel to the clouds; you may contrive ingeniously to circumvent Nature by devices beyond even the understanding of all but a handful; you may provide endless distractions to escape the tedium of your barren lives;

you may rummage the whole planet for your ease and comfort. It shall avail you nothing; the more you struggle, the more deeply you will be enmeshed. Not until you have the courage to meet yourselves face to face; to take true account of what you find; to respect the sum of that account for itself and not for what it may bring you; deeply to believe that each of you is a holy vessel unique and irreplaceable; only then will you have taken the first steps along the path of Wisdom. Be content with nothing less; let not the heathen beguile you to their temples, or the Sirens with their songs. Lay up your Treasure in the Heaven of your hearts, where moth and rust do not corrupt and thieves cannot break through and steal."

The Kaplan Schneider Lecture Series at the Baltimore Bar Library

On Tuesday, November 4, John W. Frece, author of *Self-Destruction: The rise, fall, and redemption of U.S. Senator Daniel B. Brewster* will be appearing in the Main Reading Room of the Library as part of the Kaplan Schneider Lecture Series. Brewster, who represented Maryland in the United States Senate from 1963 to 1969, was indicted in 1969 on ten criminal counts of solicitation and acceptance of bribes.

THEY'RE OFF

Today is opening day, and I am fairly certain that the overwhelming majority of you have not a clue as to what it is that is opening. The answer is that today is the first day of Pimlico's spectacular six day meet which will culminate in the 150th running of the Preakness.

The date was November 1, 1938 and the entire eyes of the racing world were on Pimlico for the match race between Sea Biscuit and War Admiral. Described as the "Race of the Century," 40,000 people attended in person while an estimated 40 million more listened on the radio, including President Roosevelt who interrupted a Cabinet meeting to do so. (The race, if you are interested, may be viewed on Youtube.)

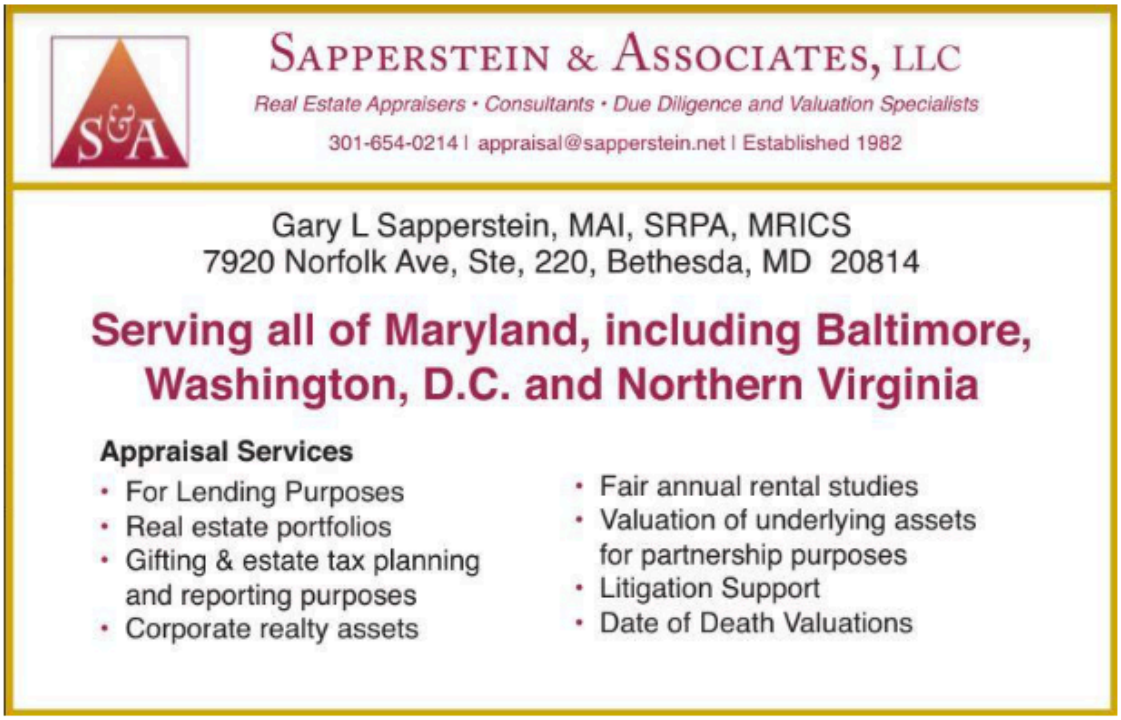
The question then is – what happened? How could it be that it went from everyone having their eyes on Pimlico, to no one either watching or caring. While the homes of the Derby and that of the Belmont maintained their luster, that of the Preakness, well … what can I say. As a promised renovation/rebuild awaits, and after so many delays I think we all might be justified in being a little skeptical, the plight of Pimlico presents an amazing case study on what can happen to even the grandest when neglect, indifference and incompetence rules the day.

Now, while our favorite race course was galloping toward an ignominious fate, those posited with responsibility for our favorite law library were making sure that whatever needed to be done to keep its services and collections not just relevant, but at the forefront, was in fact taking place. Whether it is for treatises on the latest developments in the law or databases found at very few other places, the Bar Library is the place to come.

One last fun fact, when that very first Preakness was taking place 150 years ago, the Library was already in its 35th year of operation. The President of the Board that year was Arthur W. Machen, Sr., then in his eleventh year in that role. He would continue to serve as President until 1915.

I look forward to seeing you soon.

Joe Bennett



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