



ADVANCE SHEET – SEPTEMBER 30, 2022

President's Letter

Modern Supreme Court justices have in general not been fortunate in their biographers. Justices Field, Fuller and Miller were the subjects of respectable biographies. Justice Holmes was the subject of two good volumes by Mark De Wolfe Howe which did not extend to his Supreme Court years. Justice Brandeis was the subject of biographies by Alpheus Thomas Mason and Melvin Urofsky which largely duplicated one another save for the latter's more elaborate treatment of Zionism. Both suffer from lack of attention to economic and political context. Chief Justice Taft's biographer Henry Pringle was a non-lawyer and a fairly ardent New Dealer; his first volume is adequate but the volume on Taft's Supreme Court years is not perceptive. Mason also wrote an authorized biography of Chief Justice Stone, and a non-lawyer Merlo Pusey a two-volume biography of Chief Justice Hughes. The best comment on these was supplied by my mentor in the law, Chief Judge Frederick Brune, when he met my father, a bookseller and archivist in the fall of 1963 shortly after the publication of the Hughes and Stone books. When my father mentioned them, Chief Judge Brune observed that having read them, he was glad that he was "saved by obscurity from having a biographer."

There has yet to be a first class biography of Chief Justices Vinson, Warren, Burger, or Rehnquist. Justices Douglas and Rehnquist have been the recipients of hatchet jobs. Justices Brennan, Powell and Blackmun have gotten mediocre hagiographies; on reading one of these, one of my good friends exclaimed of the subject "What a mediocre man!"

Against this melancholy background, Professor Brad Snyder's *Democratic Justice*, a biography of Felix Frankfurter, establishes a new gold standard. Professor Snyder is scheduled to speak at the Bar Library on Monday, November 14 at 12:30 p.m. He is the latest in a series of fine younger scholars of American history to speak at the Library, which gives one hope about the survival of fairness and objectivity in a 'politically correct' age; they include Professors Jonathan White of Christopher Newport University; Robert Colby of Virginia Commonwealth University; Neil Maher of several New Jersey Colleges, Randall Kennedy of the Harvard Law School, Jeffrey Rosen of George Washington University and Bradley Birzer of Hillsdale College as well as independent scholars Bill Kauffman, Marion Elizabeth Rodgers, and Stan Haynes.

George W. Liebmann

Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (New York: Norton, 2022, 979 pp., \$45.00)

A life of Felix Frankfurter is a difficult task, for his was a multi-faceted life: as prosecutor, labor investigator and mediator, criminal law reformer, administrative law scholar, adviser to a President on both domestic and foreign affairs and Supreme Court justice. Snyder rightly discerns Frankfurter's most enduring role as that of mentor to a generation of influential lawyers; as his former law clerk Philip Kurland observed: "to know what he did is not to know who he was."

Snyder's account of Frankfurter's youth and student days at CCNY and Harvard are thorough, as his account of the numerous controversies, some involving great causes, in which he was involved, including the Sacco-Vanzetti case, the Mooney-Billings case, the Bisbee deportations, World War I labor controversies and the Balfour Declaration. His account of Frankfurter as administrative law scholar could have been more thorough, as could his account of Frankfurter's greatest legislative achievement, the Norris-La Guardia Act, which ended clashes between the Army and strikers that could have seriously prejudiced national unity during World War II. He does not slight Frankfurter's considerable influence on Lend Lease and the Marshall Plan, nor does he conceal the fact that his subject frequently stepped up to and over the edge of permissible political involvement while on the Supreme Court, almost always to the nation's and the world's great benefit.

More context on the future course of the administrative state would have been valuable, but Snyder is right in ascribing Frankfurter's judicial restraint not to conservatism but to a patient belief in democracy. The book includes a robust defense of Frankfurter's unpopular but prophetic opinion in *Baker v. Carr*, the pioneering reapportionment case.

Frankfurter wrote many opinions, few memorable for their prose. His most remembered opinion, his dissent in the second flag salute case, was published against the advice of several of his friends and colleagues: "as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We are equally attached to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to our shores."

Frankfurter, along with his soul mates Jackson and Learned Hand could be caustic about those he regarded as his intellectual inferiors. Nonetheless, he could be attractively just. The justice who emerges with the most enhanced reputation from these pages is the all-but-forgotten Harold Burton, a fine Senator before he became a fine but not showy judge. Frankfurter ascribed to him "a purity of character not excelled by Cardozo," a considerable tribute. Snyder also properly emphasizes the similarity of concerns, though not similarity of views, of Justices Frankfurter and Black. Frankfurter would have confined judicial activism to the protection of "fundamental concepts of ordered liberty" while Black would more boldly intervene, but only when the issue concerned an explicit guarantee in the Bill of Rights. Black's approach led him to dissent in *Griswold v. Connecticut*, a birth control case, and to insist on constitutional amendments to abolish the poll tax and to allow 18-year-olds to vote in state elections.

Although Snyder is largely immune to the vice of 'presentism', his criticism of Frankfurter's opinion in *Goesert v. Clary* involving discrimination against female barmaids misses the mark. Justice Black shared Frankfurter's view that the Fourteenth Amendment and its 'liberty' clause had nothing to do with gender discrimination, nor were women, after 1920, a 'discrete and insular minority' deserving special protection under the dicta of Justice Stone's famous footnote in the *Carlene Products* case.

Snyder in a footnote refers to Frankfurter's view of the Fourteenth Amendment as 'historically narrow', citing the joint dissent of Justices Frankfurter, Jackson and Roberts in the case of *Screws v. United States*. But the opinions of Justices Black and Douglas in that case, while not totally denying federal jurisdiction over misconduct by state law enforcement officers, a specific intent to deny constitutional rights, remains the standard, a principle important to federalism and to curbing the power of federal policing agencies and the President.

Snyder's book passes over in a footnote one of two great lapses in Frankfurter's record of judicial restraint, his opinions in Establishment Clause cases restraining state governments without support in early history nor in the legislative history and 'liberty' language of the Fourteenth Amendment. This development, fostered by the Hughes Court was founded less on the commands of the Constitution than in reaction against the clerical-conservative governments abroad in the age of Dollfuss, De Valera, and Duplessis.

Frankfurter's greatest departure from principles of restraint was his role in *Brown v. Board of Education*, which included ex parte conversations with his former clerk Philip Elman, one of the federal government's lawyers in the Solicitor General's office. Frankfurter was central to the timing, the result, and the reasoning of the opinion. He procrastinated to avoid a divided court but then against the cautions of Learned Hand and Jackson accepted reasoning which failed to condemn racial distinctions outright and which placed great reliance on 'remedial injunctions', leading to a juristocracy. He wrongly thought that a condemnation of anti-miscegenation laws would cause the South to rise again, and incoherent doctrines were the result. Jackson saw the matter more clearly and in an unpublished concurrence, aborted by his terminal illness, would have rested an unequivocal condemnation of racial distinctions on a hundred years of black educational progress and even, more subtly, on a hundred years of continued miscegenation.

Jackson's proposed condemnation of all racial distinction in law would have invalidated the anti-miscegenation laws 13 years before the Court did so in *Loving v. Virginia*. But *Loving*, when decided in 1967 went off like a damp squib. Jackson's opinion recognized that racial mixing was already a pervasive fact in the South; one may recall H. L. Mencken's only partly facetious observation that the Southern blacks were superior to the poor whites because they had inter-bred with the Southern aristocracy.

Jackson's opinion would have been more acceptable to the South than that of the Chief Justice. It implicitly recognized the reasonableness of segregation when instituted in the wake of slavery. It lauded the progress made under it. It rested on irrefutable statistics about the literacy of the black population, not on highly contestable propositions from social psychology that later provided the basis for claims for racial balancing and forced busing. It recognized the public interest in educational standards: "Each individual must be rated on his own merit. Retarded or subnormal ones, like the same level in whites, may be accorded separate educational treatment.

All that is required is that they be classified individually and not as a race for their learning, aptitude, and discipline." Jackson viewed his joinder in *Brown* as an application of traditional 'rational basis' standards to the facts as they then existed. "I do not find it necessary to stigmatize as hateful and unintelligent the early assumption that Negro education presented problems that were elementary, special, and peculiar. . . . Lately freed from bondage, they had little opportunity as yet to show their capacity for education or even self-support and management." "Equal protection only requires that

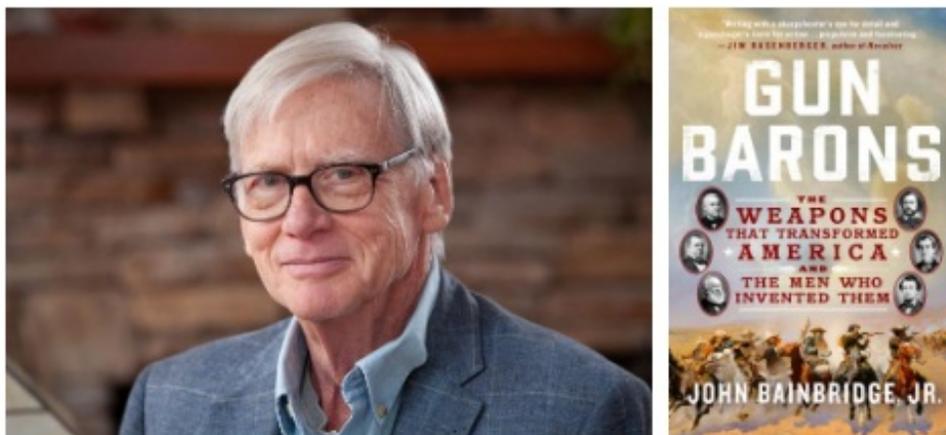
the classifications of different groups rest upon real and not feigned distinctions—mere possession of colored blood, in whole or in part, no longer affords a justification for educational purposes” because of “one of the swiftest and most dramatic advances in the annals of man.” The change was the explosion in the black literacy rate from 10% in 1860 to 89.8 % in 1952. Reliance on this change is a far cry from Chief Justice Warren’s reliance on “the extent of psychological knowledge.”

The first Justice Harlan’s dissenting opinion in *Plessy v. Ferguson* “(in)famously asserted that ‘the Constitution’ is color-blind.” Judge Learned Hand in his Holmes lectures likewise concluded that “race must not be a determining factor, regardless of the values at stake.” Justice Holmes in *Nixon v. Herndon* in 1927 similarly declared: “color cannot be made the basis of a statutory classification affecting the [voting] right set up in this case.” These views of three of our greatest judges, like Jackson’s, would have spared us racial gerrymandering, ‘voting rights districts,’ affirmative action quotas, minority set-asides, patronage for historically black colleges, reparations demands, forced busing, restrictions on school discipline, and a host of other controversial policies, all supported with the best of intentions. Frankfurter’s role in *Brown* was a serious lapse, though Snyder does not treat it as such.

Snyder does not speak much of the submergence of the social ideals of Brandeis, Frankfurter and Jackson--those of the Second New Deal in the ensuing turn to rights founded on sexual license, nor of the sclerosis inflicted by some of the New Deal agencies on transportation and other markets.

Taken in all, this is an exemplary book. Its production is elegant and free of typographical errors. It discusses most of the important issues of Frankfurter’s turbulent era and fully grasps the value and great contributions of its subject. It will remain for a long time the gold standard of Supreme Court biography.

George W. Liebmann



On Wednesday, October 26, 2022, at 5:00 p.m., John Bainbridge, Jr. will speak on his new book *Gun Barons: The Weapons That Transformed America And The Men Who Invented Them*. The presentation will be by way of Zoom. I hope that you might be able to join us for what should be a fascinating program.

John Bainbridge, Jr. is a freelance writer and former reporter for *The Baltimore Sun* and legal affairs editor for *The Daily Record*. In addition to writing *Gun Barons:*

The Weapons That Transformed America and the Men Who Invented Them (St. Martin's Press 2022), he coauthored the nonfiction book, *American Gunfight: The Plot to Kill Harry Truman and the Shoot-out that Stopped It* (Simon & Schuster 2005). Mr. Bainbridge has written articles for magazines, including *Smithsonian* and *Audubon*. He is an attorney who practiced law in both the public and private sectors.

Guns, “gun culture,” and gun control have long been subjects of intense emotion and controversy, increasingly so in recent years. Yet the personal stories of the 19th Century entrepreneurs whose names evoke images of guns have yet to be told in a single, comprehensive narrative in the context of the Industrial Revolution they helped propel. *Gun Barons* tells their stories – which have, surprisingly, largely unexplored connections – and their role in the country’s rise to power. These men were bold individuals who took risks, sometimes signing contracts to make guns when they lacked the factories, workforce, and machinery to do the jobs. Yet they came through in the end.

The subject matter of *Gun Barons* is not only of national interest but has a couple of local angles. Samuel Colt spent time in Baltimore, employing a local gunsmith to make patent models for his revolutionary revolver. Oliver Winchester lived here and started a successful clothing business in town that launched him to eventually becoming a titan of American industry.

Time: 5:00 p.m., Wednesday, October 26, 2022.

R.S.V.P.: If you would like to attend (by Zoom), telephone the Library at 410-727-0280 or reply by e-mail to jwbennett1840@gmail.com. A Zoom link will be forwarded the week of the program.

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The Bar Library would like to acknowledge a new advertiser to its pages, the mediation services of Jim Astrachan. Jim is a top shelf attorney and I am willing to wager an equally top shelf mediator. - J.B.

Ivan Bates to Speak at the Bar Library

On Tuesday, December 6 at 5:00 p.m., Ivan Bates, the next State's Attorney for Baltimore City, will take part in the Library's Lecture Series. It is expected that Mr. Bates will speak on his plans and hopes for the next four years. His remarks will be followed by the Library's traditional wine and cheese reception. We hope to see you there.

Help Us To Serve All Of You

In this issue of the *Advance Sheet* we have announcements and notices for three

upcoming lectures that will be held at the Library in the next several months. There will also be several movies, the next being David Mamet's *Homicide* (look for a flier coming soon). The President of the Library's Board George W. Liebmann, as well as the rest of us, believe it is of vital importance, particularly in these times, for the Bench and Bar to be able to come together for times of collegiality.

In addition to events the Library continues to offer extensive collections as well as access to an expansive number of Westlaw databases. For less than the cost of many yearly supplements you have access to it all. Not just access, but in the case of printed material the ability to borrow it and use it in your very offices. Not just access, but in the case of Westlaw databases, the opportunity to do so from your very own laptops.

A Library membership is one of the clearest examples of a win – win – win situation that I can think of. It allows you an amazing amount of material at a de minimis cost while allowing the Library to continue in the manner that it has done since 1840, and at the same time, benefits your fellow members of the legal profession thus advancing the mechanisms of the law.

The Library needs your support. Please think about the multitude of benefits that accrue to all from a membership.

I look forward to seeing you soon.

Joe Bennett

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Travels Without Charley

Several years ago I think I let all of you in on the not so secret fact that I am not the biggest fan of manned flight. Well, at least when I am the man on the plane. My family and I took several cross country road trips to see our daughter, an officer in the United States Army, and as of several days ago a new mom (welcome to the world Gregory

Ethan). We all discovered what an amazing country this is with so very much to see.

Well, cross country trips are nice, but there is much in this area to see as well. This past weekend my wife and I journeyed to Harrisburg, Pennsylvania for the first time and discovered a truly fine city with wonderful scenery, much to do, and some very nice restaurants. Over the weekend we visited the Fort Hunter Mansion and Park, took a river boat ride, toured the State Capitol and went to the State Museum of Pennsylvania. All were top notch as were Gabriella Italian Ristorante and Café Fresco Center City.

At just about an hour to an hour and a half away, it is a very nice trip to make when you are not looking to cross the country. For you baseball fans, might I suggest a weekend when the Bowie Baysox are in town to play the Harrisburg Senators, the Double A affiliate of the Washington Nationals. They play their games at FNB Field on City Island which is located in the middle of the Susquehanna River. If you are not at the Library, I hope to see you there.

Joe Bennett



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FIGHTING THE BLUES WITH THE FINE ARTS

To go to court is to court disappointment. A lawyer who never lost a case has tried few cases. There are disappointments even when the case isn't tried to verdict. There is motions court—the long and the short. If going to court is part of your practice, you must find a place to fight the blues that accompany the inevitable disappointments inherent in the adversary system. If your practice is here in Washington, you are in luck. Both the local and the federal courts are close by the National Gallery of Art and the National Portrait Gallery.

The National Gallery of Art is just south of the United States District Court. If you have been dealt an adverse ruling by a judge who does not understand the law of summary judgment, I suggest when you leave the courthouse you stroll down to the National Gallery and refresh yourself surrounded by priceless works of art. Enter the main building, walk up to the second floor and turn left and wander around among the Impressionists. There is something

a lawyer can learn from Monet's and Pissarro's Paris street scenes. Up close they are an incomprehensible clutter of colored dots and dashes. Stand back a few feet and they transform into a clearly recognizable busy street. One might say that hundreds of facts, relevant and not so relevant, are converted by the artist into a winning picture that one takes in at a glance. The art of the advocate.

Subtlety is also part of the advocate's art. Things are never black and white. It is the shades of gray that make the difference. Take a look at Manet's "Death of a Toreador." As I recall the picture, Manet sparingly used the blacks and whites to outline the body of the toreador and a dot of red to show the toreador's bleeding wound. In between are the twenty shades of grey that show the skill of the artist.

If the case you lose was tried in the local Superior Court, you leave the court and walk north to Eighth and F streets. There you find the National Portrait Gallery. Within it is inspiration. You will see a stirring portrait of Theodore Roosevelt, caught by the artist in the act of reciting these stirring words:

Far better it is to dare mighty things, to win glorious triumphs, even though checkered by failure, than to take rank with those poor spirits who neither enjoy much nor suffer much, because they live in the gray twilight that knows not victory nor defeat.

Both the National Portrait Gallery and the National Gallery of Art have interior courtyards where one sits alone and meditates and considers life's big questions such as, Why didn't I take another deposition? Why did I assume that the judge had read the papers?

Winston Churchill, in his book *Painting as a Pastime*, says there are many remedies for life's disappointments. He identifies

exercise, travel, play, and other diversions. He then says that what is common to all these is the need to change course when things go bad. He discovered that the best change for him was painting. "Happy are the painters, for they shall not be lonely. Light and color, peace and hope, will keep them company to the end, or almost to the end, of the day." When Churchill was in his state of depression during the lonely 1930's, an artist friend told him to buy a paint box, paints, and some big brushes. Churchill was told that the quality that was needed to get started was not years devoted to the study of drawing, perspective, and the science of color. He was too old for that. All he needed was what he had, courage and audacity. Get big splashes of paint on a canvas and the sooner the better. He started up and discovered that big brushes and lots of paint bring good luck on a canvas. He discovered what everyone who paints discovers. Within the splashes and smears one sees well-drawn landscapes and portraits.

Churchill's studio is preserved at Chartwell, his estate outside London. It is worth a trip to Chartwell just to see Churchill's painting setup. The studio is in a little brick house away from the main house. Visitors are told it is maintained just as it was when Churchill used it. As one can see, he used big brushes and lots of paint.

Churchill had advantages that most amateurs do not have. He had friends who were skilled painters, and when he encountered a problem beyond his competence he had an artist friend look over his shoulder and give him some advice.

There is a photograph in the Chartwell main house of Churchill at lunch with his professional artist friends. One of the artists is Walter Sickert, whose influence can be detected in Churchill's landscapes. In addition to landscapes, Sickert liked to

paint the interiors of music halls and the second-rate music hall performers. A few years ago I came across a book of Sickert's paintings. It looked to me, in my own spirit of audacity, that Sickert's painting called "That Wonderful Mother of Mine" would be easy to copy. It is a picture of a music hall singer all dressed up in white tie and tails, standing at the footlights singing a sentimental ballad in memory of his wonderful mother. Audacity carried me forward, and the picture turned out to be worth my investing in a moderately expensive frame.

The effort to copy the painting of a skilled artist, just making that effort, teaches more about the art and the appreciation of painting than hours of abstract lectures. I commend it to you. It makes no difference that you have no talent. In fact, the absence of talent gives you an insight into the complicated sleight of hand required of the professional artist. Better off doing some work with the oils and brushes than standing in line for a van Gogh exhibit.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times*

Literary Supplement, the Wilson Quarterly, and the ABA Litigation Section's publication. I want to thank former Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the Advance Sheet.

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