

To: Columbia Legal History Workshop

From: Willy Forbath

Re: Jewish Constitutional Moment

This is a lightly edited and enlarged version of a lecture I gave recently. It distills a few episodes and some of the central ideas of a book-in-progress. It is utterly lacking in footnotes and scholarly apparatus. But Jeremy was kind enough to encourage me to present it to you anyway. I am very much looking forward to discussing it with you!

THE JEWISH CONSTITUTIONAL MOMENT

Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism¹

Nation states have constitutional moments. Nations or peoples without states – national, ethnic or racial minorities – have comparable moments. Call them moments of constitutive politics, when the most basic questions of group identity and group interests are up for grabs, and when ordinary people are deeply involved in debates about what constitutes and binds them together as a distinct “nation,” what structures of authority and forms of governance ought to

¹ Please do not cite, quote or circulate beyond this workshop. While this lightly edited lecture is still basically un-footnoted, I would be remiss not to acknowledge the work of Yiddishist Rivka Schiller, who sat for several weeks in the YIVO archives with me, translating and discussing the journalism and papers of Isaac Hourwich and others.

prevail among them, who is authorized to represent and defend them, and what rights they must demand and enjoy.² This essay is about a forgotten Jewish constitutional moment a century ago, in 1915-19. It explores a titanic clash among American Jews, or more precisely, among Jews in the United States, fighting over what it would mean to be both American and Jewish in the twentieth century.

In this critical battle, lawyers, and particularly constitutional lawyers, played outsized roles, using their practical and imaginative resources to invent and champion rival accounts of American Jewishness. Radical and conservative, some speaking for the old Jewish elites and others for the new Jewish immigrant masses, lawyer-leaders were key founders and representatives of the first national Jewish organizations and served not only as advocates but as wordsmiths and public intellectuals, powerbrokers and strategists, as well as authority figures and ethno-cultural heroes in a time and place when other authority figures and other markers of difference and authenticity had faded. At the end of the day, they had hammered out many of the basic terms of Jewish belonging and apartness in twentieth-century America, and reached a kind of constitutional settlement.

This Jewish battle also left a lasting imprint on American liberalism, writ large. Bringing

² I am using “constitutional moment” in this simple and purely descriptive sense. Bruce Ackerman famously coined the phrase and put it to work in constitutional theory. See cite to Ackerman, *We the People* – vols 1-3 [with titles for each of the 3]; see also Ackerman article with “constitutional moment” or “moments” in the title (I think). For Ackerman, the idea of a constitutional moment does legal and normative as well as descriptive work. For him, it encapsulates a process of fundamental constitutional change whose legitimacy does not rest on the rules laid down in Article V but instead on an elaborate and evolving pattern of “higher lawmaking” norms, a common law of higher lawmaking that, Ackerman argues, has governed constitutional transformations outside Article V. For a critical but appreciative assessment of the first two volumes of *We, the People*, see Forbath, *The Politics of Constitutional Change*, Yale LJ Symposium.

During Ackerman’s “constitutional moments,” basic institutional arrangements and basic questions of national identity are up for grabs; and in such moments, social movements, ordinary voters, reformers and politicians and parties all occupy the constitutional-political stage – and so it is here. The phrase also seems apt because this Article is a study of how lawyer-leaders, all of them constitutional lawyers, fashioned Jewish American identities using materials of constitutional law and culture, and because the battle at the heart of the story revolves around the content of a Jewish “Bill of Rights.”

together disparate currents of Reform Judaism, Jewish nationalism and American constitutionalism, along with unfamiliar streams of legal and constitutional thought that were circulating through transnational networks of Jewish radicalism, the battle was among the first sustained encounters between nineteenth-century liberalism and twentieth-century pluralism. In a vigorous constitutional idiom, these thinkers and advocates wrote a first draft of modern America's continuing engagements with the competing claims of liberalism and pluralism, integration and separatism, individual and group rights, universalism and particularism, belonging and apartness on the part of ethno-racial minorities.

In the annals of legal and constitutional scholarship, we are familiar with minority groups' struggles for full membership and first-class citizenship rights in the American community. These are contests to expand the borders of belonging.³ But virtually all of America's ethno-racial minorities have quested not only for belonging but also for *apartness* in American life. They have assailed exclusion and discrimination; but like the Jews in this story, they also have strived to remain, in some crucial and controversial respects, peoples apart, with attachments to other real or, as historians often say, "invented" and "imagined" nations and homelands. Yet, while we have great novels and social and cultural histories about the "invention" *in America* of national or trans-national identities apart from the American one – of becoming African, Lithuanian, or Italian in America, we have little *legal* history of the nationalist and "separatist" side of either immigrant or African-American experience. We know a great deal about the legal construction of these groups' otherness and subordination, and lawyers' part in efforts to resist

³ See Barbara Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (2010).

and dismantle these constructions in the quest for equal citizenship. We know very little about the role of law, lawyers and legal and constitutional imagination in the forging of hyphenated ethnic identities. And we know almost nothing about how lawyers have figured in the intra-group conflicts and choices that are inescapable when people pursue both belonging and apartness, striving to become fully accepted, first-class members of the dominant national community, while remaining peoples apart, loyal to their separate minority identities.

One reason we know so little about the legal history of so important a feature of American experience as the forging of ethnic or “hyphenated” American identities is that legal history, including the legal history of African-Americans and immigrant or “white ethnic” Americans, is written in a national frame - in terms of American constitutional, labor, property and immigration law, the American law of slavery, and so on. These ethnic or hyphenated identities, however, are diasporic or transnational ones. They arose out of the relationship between people in the United States and their real and imagined kin elsewhere, and the processes in which these identities were formed involved the movement of people and ideas across national borders.

So, my talk today sketches an experiment in doing legal history in a transnational frame, putting diasporic experience at the center. We’ll uncover the remarkable circulation of ideas about minority “group rights” that polyglot émigré Jewish lawyers and revolutionaries brought back and forth across the Atlantic from legal and constitutional battles abroad, in Europe and Russia – where the fate of Jews and other minorities hung in the balance, in contests and campaigns whose impact on American legal and social thought and constitutional imagination has gone unexamined.⁴

⁴ Such leading commentators on twentieth-century pluralism and multi-culturalism as Werner Sollors and David Hollinger have underscored the lack of “resources for group claims” in U.S. law and constitutionalism. (Hollinger) We’ll see how a transnational Diasporic constitutionalism provided a language of group and national rights with which thinkers like Louis Brandeis and Horace Kallen first thought and expressed American

The historical backdrop for this epic battle was the mass immigration of almost two million Jews from Russia and Eastern Europe during the decades bracketing the turn of the last century. Their arrival generated conflicts with an increasingly hostile state and society, as well as conflicts between them and the older, smaller Reform Jewish community and its elite of established lawyers, bankers and merchants whose parents and grandparents had come from Germany and Central Europe in the mid-19th Century.

With their vast numbers, their thicker, “foreign” kind of Jewishness, and all the ancient hatreds clinging to them as the old world’s most despised ethno-racial and religious outcasts, the newcomers crowded in New York’s Lower East Side and other new “Jewish ghettos” became the paradigmatic “unassimilable” new immigrants in the eyes of growing numbers of native-born Americans during this era of mass immigration from the peripheries of Europe. Leading voices in Congress and in popular and high culture questioned Jews’ “racial fitness” for American citizenship. Jews, they said, were destined to remain foreigners, loyal to their own kind, shifty, untrustworthy, and unwilling and unable to join the national community. It seemed only a matter of time before the nation’s gates would clang shut.

A deeply committed set of Reform Jewish leaders were determined to keep the gates open. Yet, these well-established and well-heeled Reform Jews also were anguished by the Anti-Jewish feelings the newcomers stirred up. The Reform Jewish leaders were determined to shape the Americanization of the newcomers in their own image, and to remain the unchallenged spokesmen of American Jewry. But by the time the battle heated up, the newcomers had their

own lawyer-leaders, organizations and ideas about what it might mean to be both American and Jewish.

I am not alone in thinking that Jewish lawyers have played an outsized role in American Jewish culture and politics.⁵ But I've got some new things to say about how lawyer-leaders during this constitutional moment a century ago fought over and went a long way toward working out Jewish American identities for themselves and a good portion of American Jewry. In this talk, I will focus on three of them: two famous Jewish lawyers, Louis Marshall and Louis Brandeis, and a forgotten one, Isaac Hourwich.

I'll introduce each of them as we proceed; all three played key roles in this constitutional moment, using their practical and imaginative powers to instill their rival accounts of Jewishness into fellow Jews and Jewish organizations, fighting for hearts and minds, fighting for communal, state and international recognition for what each of them contended were the constitutional essentials of Jewishness in the modern world. I use the words constitutional essentials in a rather literal sense; for the climactic fight was over the language of an authoritative "Jewish Bill of Rights." Rights talk became the medium for expressing and arguing about the terms of Jewish belonging and apartness.

Fundamental issues were at stake: What forms of Jewish particularity fit with full membership in the American community? Must Jewishness be recast as a private religious faith, or a private memory, and nothing more—publicly invisible, with no group claims on the law or polity? Or should Jews constitute themselves anew as a "people apart," a distinct "nation" and

⁵ See Jerold Auerbach, *Rabbis and Lawyers*, and the important recent work of Jim Loeffler. For my own larger work-in-progress in this vein, see William Forbath, *Jews, Law and Identity Politics*: http://www.utexas.edu/law/faculty/wforbath/papers/forbath_jews_law_and_identity_politics.pdf

even a separate “race”? Could they create a Jewish public sphere and Jewish political organizations, even a kind of Jewish para-state, a Jewish Congress as “a representative and sovereign body of American Jewry,” with links to similar bodies abroad, without raising the lethal spectre of a Jewish “state within the state”? What self-understanding could Jews claim, what structure of feelings could they inhabit, what narratives of belonging and apartness could they tell themselves without cutting themselves out of the promise of American life?

Lawyer leaders like Marshall, Brandeis and Hourwich championed what emerged as two competing positions. The first drew on classical liberal legal materials; the second on rival progressive and leftist legal ideas. The first was, in many respects, a deeply assimilationist account of American Jewishness that grew out of the outlook and experience of the well-established reform Jewish elite. The second constitutional vision of American Jewishness was a pluralist one, inspired by a diasporic constitutional imaginary that new emigres and revolutionaries – like Hourwich and his comrades - brought with them from revolutionary movements in Tsarist Russia.

Reform Judaism in America – Sealing the Enlightenment Bargain

This pluralist outlook was a newcomer, its seedbed 19th century European nationalism. Let us start with the older rival: the Reform Jewish elite’s classical liberal vision of Jewishness, which harked back to the 18th century. Reform Judaism was a child of the Enlightenment, fashioned to outfit Jews for equal citizenship in an Enlightened liberal state.⁶ Enlightenment liberalism’s

⁶ MICHAEL A. MEYER, *RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM* (1988).

answer to the “Jewish Problem” was that Jews were to be welcome as members of the new liberal polity as long as they ceased to be publicly Jewish and abandoned their corporate existence as a self-governing community—subordinate and vulnerable but also legally and socially insulated and apart.⁷ “We must refuse everything to the Jews as a nation,” a liberal Parisian nobleman famously declared in 1789, “and accord everything to the Jews as individuals.”⁸

This was a bargain many middle- and upper-class Jews welcomed. The Enlightenment held out a brave new world of liberal learning and letters, a civic life in common with gentiles, political liberty, material opportunity and “careers open to talent.” Some Enlightenment Jews gravitated toward the kind of Deism and “natural religion” favored by Benjamin Franklin and Thomas Jefferson, but the pioneers of Reform refused to abandon Judaism. Instead, they reinvented it.

Re-forming Judaism into a “religion” was arduous. “Religion,” in this (liberal, Protestant) sense, was a voluntarily chosen private faith. Judaism was none of these things. It was public, not private; compulsory, not voluntary; and a system of laws and practices, not chiefly a matter of belief or faith.⁹ What was more: Judaism named a people and a nation, no less than a “religion.” So, Reform Jews had to reinvent both Judaism and themselves. No longer a people apart, they were - or hoped to become – American, French or Prussian citizens, of the Jewish faith. They cut away traditional Jewish law and ritual, rejected “rabbinical legalism” and centered their Judaism on the “universal” moral teachings of the prophets. The aim was not solely to fit the liberal mold; it also was to reanimate Judaism among “modern,” “enlightened”

⁷ DANIEL SCHWARTZ, *THE FIRST MODERN JEW: SPINOZA AND THE HISTORY OF AN IMAGE* (2012).

⁸ Count Stanislas-Marie-Adelaide de Clermont-Tonnerre, “Speech on Religious Minorities and Questionable Professions” December 23, 1789, in *THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY* 88 (Lynn Hunt, ed., 1996).

⁹ Leora Batnitzky, *How Judaism Became a Religion* (2011)

Jews, who found much Jewish tradition stifling and hollow. So, Reform Jews cast off Jewish garb and dietary laws, ceased worshipping in Hebrew, and built Reform synagogues that resembled neighboring churches.

Whatever they cast off, however, Reform Jews were not yet citizens of most of the new nation states or old empires of Europe. What Jews and Gentiles alike called “Jewish emancipation” involved the struggle for repeal of what Germans called the “Jews Statutes”: all the legal bars and disabilities excluding Jews from the polity, social life and most trades and professions. So, from its beginnings, Reform Judaism was partly a constitutional project: a dream of legal and civic equality and equal rights for a subordinate and outcast group.

Emancipation seemed on the horizon in 1848, as revolutions swept across Germany and Central Europe, and Reform Jews were prominent among the revolutions’ financiers, leaders and foot soldiers. The defeat of these republican revolutions and the repression and reactionary measures that followed brought tens of thousands of republican “’48ers” to the U.S. from Germany and Central Europe. Fleeing dispossession and imprisonment, Jewish ‘48ers bulked large among the immigrants, carrying their militant liberal republicanism with them, along with “memories of recurrent group trauma,” exclusion and violence.¹⁰

For them, the United States seemed the utopian dream of an Enlightened liberal state brought down to earth; here, there were no Jews statutes, and legal and civic equality were facts on the ground. The small Reform Jewish community assimilated easily into the worlds of fellow German immigrants and the commercial life of towns and cities where they settled, chiefly as merchants, peddlers and shopkeepers. Their male offspring carried on in commerce, or became

¹⁰ See Ira Katznelson, “Between Separation and Disappearance: Jews on the Margins of American Liberalism,” in Birnbaum & Katznelson, *Paths of Emancipation: Jews, States and Citizenship* (1995).

lawyers and bankers.

As the second generation came of age in the U.S., Civil War, slave emancipation and Reconstruction brought forth a transformed Constitution. The Civil War instigated the creation of a modern nation state and an intensified nationalism centered on the Reconstructed Constitution, inscribed with equal rights for all persons born or naturalized in the United States. This Constitution, as the leaders of the victorious Union expounded it, brimmed with new national guarantees of equality of opportunity and freedom of contract, trade and conscience; it seemed to embody the Reform Jewish outlook and the Reform elite's social aspirations. If Reform Judaism had been fashioned to outfit Jews for equal citizenship in an Enlightened liberal state, this was the liberal constitution it was looking for!

The Wedding with Classical Liberal Constitutionalism

Small wonder, Reconstruction Era constitutionalism flowed swiftly into Reform Jews' public discourse and self-understandings. In the 1870s and '80s, well-heeled Reform Jews began sending their scholarly sons like Louis Brandeis and Louis Marshall to the nation's elite law schools. There, the young scholars embraced the task of mastering constitutional jurisprudence, taught by the leading lights of late 19th century classical liberal legal thought. At Columbia, Marshall encountered Thomas Cooley's famous 1868 *Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union*, the founding text of laissez-faire constitutionalism. He made his own Cooley's master precept that the Fourteenth Amendment condemned all "class legislation," whether aimed at favoring or redistributing

wealth and bargaining power among economic actors, or at classifying and burdening individuals on the basis of race, color, nationality, or creed: a precept that Marshall would put to work over the next four decades in classical liberal fashion, on behalf of business clients and, with equal zeal, poor Russian Jews, Southern blacks, and other racial others, much as Cooley himself may have imagined.¹¹ (Brandeis mastered classical liberal legal and constitutional discourse and used it brilliantly as a young attorney.¹² By the time he enters our story, however, he will have become one of classic legal liberalism's most prominent and biting critics, and would fashion his account of American Jewishness and minority rights out of other cloth.)

The 1870s and '80s also saw American Reform Judaism create its first national organizations and hammer out its first programmatic theological statements. Here too we find a great investment in American higher law. The canonical 1885 Pittsburg Platform of Reform Judaism was crafted by the era's preeminent Reform Rabbi, Kaufman Kohler. Kohler was chief rabbi of Temple Beth-El, one of the famous Reform Jewish cathedrals on Fifth Avenue, akin to Temple Emmanuel, where Louis Marshall served as president of the congregation and where Kohler often presided. The rabbi's son Max was at Columbia Law School himself in '85; soon, he would join Louis Marshall and other Temple Beth-El and Emmanuel congregants among the lawyer-leaders defining and defending Jews' contested standing on the American scene. Max stands out among this crowd, however; for he also was on his way to becoming the country's

¹¹ On Cooley, see Forbath, "Ambiguities of Free Labor"; "Caste, Class and Equal Citizenship." The other famous Louis - Brandeis - famously wanted no part in the Reform Jewish elite and had no use for classical legal liberalism. In his fifties, Brandeis, we'll see, would become leader and spokesman of American Zionism and the American Jewish Congress movement, and craft a rival account of the terms of Jewish belonging and apartness, out of different constitutional and international legal materials. But that lay decades in the future, during the 1910s and World War I. See *infra* ___-__.

¹² See, e.g., Warren & Brandeis, *The Right to Privacy* (1890).

first Jewish civil rights lawyer – inventing what would become a durable Jewish American identity, folk hero and authority figure unto itself.

Understanding the construction of Max’s calling returns us to Kaufman Kohler’s canonical Platform of Reform Judaism. The gist of it was the proud declaration that Judaism had safeguarded monotheism through thick and thin, bequeathing “the God-idea” to her “daughter religions,” “Christianity and Islam.” For millennia, that had been the “mission” of “the Jewish people.” They were “priests of the one God,” and as such, they lived a “national life” apart, governed by the “Mosaic and rabbinic laws.”¹³ Dwelling under their own laws and authorities, Jews were forever assailed as disloyal, a “state within the state.” But they had no choice. Living under Jewish law was essential preparation for “the realization of Israel’s great Messianic hope”: the “restoration of the Jewish state,” and with it the full flowering of mankind’s exemplary, “priestly” nation.

But that was then; and this was now. Now, the old Messianic hope morphed into a new and “modern” one. Jews no longer needed to maintain their legal apartness. At least in the Enlightened West, gentiles had gotten the message. The “moral and philosophical progress” of the day had brought about a “universal culture of heart and intellect” that rested on “the moral laws” at the heart of Judaism. In the hopeful nineteenth-century liberal consciousness of Rabbi Kohler and his Reform rabbinic colleagues, “moral progress” and “the spirit of broad humanity of our age” had relocated “Israel’s great Messianic hope”; America and the Western world were the new venue “for the establishment of the kingdom of truth, justice, and peace among all men.”¹⁴

¹³ “The Pittsburg Platform” (1885)

¹⁴ Id.

Thus, for American Reform Jewry – and Reform Jews were still the bulk and the best organized, most established of American Jewry, the Enlightenment bargain was sealed. We Jews, Kohler’s Platform proclaimed, “consider ourselves no longer a nation, but a religious community, and therefore expect neither a return to Palestine...nor the restoration of any of the laws concerning the Jewish state.” More broadly still, they declared, Jewish law no longer binds us, except in its moral precepts.¹⁵ Henceforth, Kohler and his fellow Reform rabbis and lay and lawyer leaders would say, “Our Zion is America.” Not Jewish but American law rules over us; we are Americans of the Jewish faith. As another 1880s Reform convention put it in a letter to President Cleveland, the “pillars” of Jews’ belonging to America were “equal rights” and “assimilation.” Indeed, more than one enthusiastic Reform rabbi sermonized: “our Torah is the Constitution.”¹⁶

The blunt, cartoonish formula, substituting the secular higher law for Torah is striking; it evokes a structure of feelings about Jewish belonging in America that is bound to prompt a twenty-first century American Jew to ask: Why choose? Why not opt for both Torah and Constitution? Isn’t that the genius of the American scheme, the gist of our freedom of religion? But this first generation of Reform Jews in the U.S. felt they did have to choose. Or, perhaps: felt they had to, and also chose to choose.

On one hand, these Jews or their parents had arrived from Germany and Central Europe, as Ira Katznelson has put it, with “memories of recurrent group trauma.”¹⁷ They were still haunted by the Jew hatred hanging over the notion of Jews as a “state within the state,” obedient to their

¹⁵ Id.

¹⁶ Quotes in Forbath, “Jews, Law and Identity Politics,” supra note ____.

¹⁷ See Ira Katznelson, “Between Separation and Disappearance: Jews on the Margins of American Liberalism,” supra note ____.

own laws and authorities, disloyal to whatever larger state and polity in which they found themselves. Many of their families had risked all in the defeated 1848 revolutions for a legal and political order that would welcome them as citizens in exchange for putting their own law behind them. They were ready to proclaim fealty to the U.S. Constitution in no uncertain terms. On the other hand, many of these families arrived from the old world already estranged from the universe of Jewish laws and traditions that observant Jews, then and now, deem central and binding; in their baggage was a Judaism already recast as a modern “religion.” Like Kohler and his fellow Reform rabbis, they set about developing and elaborating that ideal, in an American key.

Fighting the Tsar of Ellis Island

No sooner had the rabbis hammered out their American platform, however, than mass immigration of “poor Russian Jews” began to burgeon. By 1900, they were arriving at close to one hundred thousand each year, and mostly staying in New York or heading to one of a few other new urban “ghettoes.” Lawmakers and the popular and highbrow press were beginning to depict the Jewish newcomers as America’s “new race problem,” the “race problem of the North.” Recall, this was still the “open doors” era as far as European immigration was concerned. Individual “infirmities” were grounds for exclusion – disease, mental illness, prostitution, pauperdom – not “race,” which marked the Chinese Exclusion laws. The liberal virtue of the existing laws restricting European immigration was that they determined exclusion by what Theodore Roosevelt called the “individual qualit[ies] of the individual man,” rather than his “race . . . nation . . . [or] creed.”¹⁸

¹⁸ See Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905).

But this old liberal order was under fire. Henry Cabot Lodge and scores of other hard-nosed nativists and cognoscenti of the new eugenics in Congress were calling for blunt “racial quotas” and other proxy bars to keep out the “unassimilable,” “inferior races” of Southern and Eastern Europe, “Hebrews” foremost. Then, in 1903 began a wave of pogroms – the most famous in Kishinev. Two decades had passed since the Tsarist regime had set loose this dreaded form of ethnic cleansing against the Jews.

The numbers arriving at Ellis Island rose further, assisted by Reform Jewish philanthropy. Poor Jews were becoming a sizeable portion of the city’s population. And this provoked an intensification of racialized fear and loathing on the part of many patrician New Yorkers. The Commissioner of Ellis Island – a blue blood reformer, friend and appointee of President Roosevelt named William Williams – decided to push back. He tightened up the enforcement of various provisions like the bar on persons likely to become public charges, excluded attorneys and other advocates from the hearing rooms on Ellis Island, and began deporting hundreds of would-be Jewish emigrants weekly. Clashes erupted, and protest meetings were called. The Yiddish papers proclaimed: “Pity Is Unknown at Ellis Island; Severe Discipline”; “Russian Conditions Prevail; Only the Lash Is Wanting.” “Yesterday 250 Persons Detained in the Inquisition Bastille”; “Deported Number Thousands.” “The masses are rising against the tyranny on Ellis Island. The people of the East Side are planning to make a demonstration against the barbarous new interpretations of the immigration laws...[A] movement is now on foot...asking for the removal of Commissioner Williams” and demanding that the U.S. government formally protest against the pogroms and use its muscle to press the Tsar’s regime to halt them.¹⁹

¹⁹ Records of the Immigration and Naturalization Service, Series A, Subject correspondence files. [microform] Briesen Commission Investigation of the Ellis Island Immigration Bureau, under the Administration of Commissioner Williams (1903), Reel 8 [Briesen Commission Investigation], pp. 166, 366.

Creating the American Jewish Committee – “Faith Jews” versus “Race Jews”

By the early 1900s, the new immigrants on the Lower East Side had built an impressive landscape of organizations – not only the Yiddish press; but hundreds of landsmanschaftn and scores of great socialist unions. Also afoot were some tiny new Zionist and Jewish Nationalist outfits who seized on the Kishinev crisis and the mass deportations at Ellis Island to call for a new national organization – a *Jewish Congress*, a “new Sanhedrin,” they dubbed it, to speak with one voice for all “American Israel” – and bring the “Jewish people’s” demands to Congress and the White House. On the Upper West Side, the leadership of the Reform Jewish elite was thoroughly alarmed. Of course, it was essential to respond to the massacres in Russia and the deportations on Ellis Island. But the reckless crowd of radicals on the Lower East Side could not be allowed to speak for American Jewry.

This is what brought about the creation of the American Jewish Committee (AJC) in 1906. The AJC swiftly became the premier organizational vehicle of the Reform Jewish elite; it remained so for the rest of the twentieth century and still looms large today. The leading founders were corporate attorneys and investment bankers. Rabbi Kohler was not among the founders, but his son Max, the immigration and civil rights lawyer, was there, and immediately became a member of the AJC’s powerful Executive Committee. At the helm was Marshall himself, along with the great Wall Street banker and philanthropist Jacob Schiff. Marshall would remain the AJC’s president, chief strategist and spokesman for the next two decades. By ’06 Marshall already had emerged as one of the nation’s leading constitutional lawyers; from the 1900s-1920s, Marshall may have won as many constitutional cases in the nation’s high courts as

any private appellate advocate of his generation, appearing chiefly on behalf of business corporations but also for racial minorities, always wielding the language of classical liberalism.

Remember, late 19th century liberal constitutionalism prized formal legal equality and condemned what was called “class legislation,” including laws that classified and burdened individuals on the basis of race, color, nationality, or creed. This harmonized perfectly with the Reform elite’s yearning to preserve what Jim Loeffler nicely calls Jews’ “legal invisibility” in America. The flip side of this outlook was that Jews in America must maintain *a public-political invisibility*. Individual Jewish citizens should take a lively interest in American politics; but they must shun a Jewish group presence in politics or public life.

No wonder, then, that Louis Marshall responded in high dudgeon to the Zionists’ and Jewish nationalists’ calls for a Jewish Congress. Wrote Marshall to his friend and soon-to-be fellow AJC founder, Cyrus Adler, “national organization is in the air and we should take the initiative and avoid mischief.”²⁰ Adler concurred: “Shall we wait until the Russians push us aside and speak for all American Jewry, or shall we lead the movement and give it a sane and conservative tone?” At an emergency gathering of Upper West Side and Lower East Side notables, Marshall declared that any national organization must be “some kind of religious body”; it can’t smack of Jewish “sovereignty” or Jewish “nationality” or “race.” Those ideas were “inconsistent with the American conception of government” and threatened to give rise to “a Jewish question here” in America. Marshall read out language that would find its way into the new organization’s

²⁰ “What I am trying to avoid more than anything else is, the creation of a political organization, one which will be looked upon as indicative of a purpose on the part of the Jews to recognize that they have interests different from those of other American citizens...We can, however, all unite for the purpose of aiding all Jews who are persecuted, or who are suffering from discrimination in any part of the world on account of their religious beliefs; and we can at the same time, unite for the purpose of ameliorating the condition of our brethren in faith, who are suffering from the effects of such persecution and discrimination...”

charter: the AJC would set its face against “infringement of the civil and religious rights of Jews” and vowed to “alleviate the consequences of persecution.”²¹

Marshall was relieved when the clamor for a Jewish congress subsided. And the AJC, under his leadership, positioned itself as the ideal outfit to engage in “quiet diplomacy,” speaking behind the scenes in the corridors of power for American Jews and their oppressed “co-religionists” abroad. At the same time, Marshall, more firmly than most other patrician reform Jewish leaders, already grasped that the future belonged to the new immigrants: their numbers, their cultural and political energies, their urgency and determination to act publicly on their own behalf, and on behalf of the Jewish millions in Russia, made that certain. The uptown Reform elite’s continued power, and even relevance, depended on coming to grips with the leaders and organizations of the Lower East Side and somehow incorporating them into its own projects and outlook, while angling to stay in charge.

For the next quarter century, the uptown elite would entrust Marshall with the delicate task of formulating the terms of Reform Jews’ major public political engagements as Jews, in ways that upheld the self-contradictory, but existentially necessary, fiction that these were not a Jewish politics – not political engagements, but something else: intercessions on behalf of co-religionists as private citizens, not “Jewish interests” or a “Jewish politics.” Louis Marshall would set about finding the most cautious but effective ways of coming to grips with the Lower East Side and its dramatically different outlook: its utter indifference to the classical liberal notion of Jewishness as a “private faith,” its socialist politics, and what soon emerged as a growing insistence on a “national,” openly public-political, self-assertive group identity.

²¹ THIRTY-FIFTH ANNUAL REPORT OF THE UNION OF AMERICAN HEBREW CONGREGATIONS at 6258 (1909)

One Lower East Side Zionist called the Uptown Reform Jews, like Marshall, Kohler and Adler “faith Jews” and himself and his comrades “race Jews.” Startling today, perhaps. But not surprising in an era when poor Russian Jews were seen and saw themselves as racial outsiders, and, like many African American intellectuals and activists in this same era, were determined to make something positive out of that racial identity, even as they demanded that it not be used to exclude them from equal membership in the larger national community. During the 1915-19 constitutional moment, we’ll see, as he clashed and cooperated more and more with “race Jews” like Isaac Hourwich, the deeply conservative but deeply pragmatic “faith Jew” Louis Marshall found himself pushed to reshape his ideas about Jewish rights and Jewish political identity, admitting new ideas and new kinds of rights talk undreamt of in classical liberalism.

A “Mission Mapped Out by Our Great Seers of Yore” – Inventing the Jewish Civil Rights Lawyer

But we should be clear. Not everything that Louis Marshall and his young law partner, Max Kohler did in the pre-World War I era was quiet diplomacy and behind the scenes. Their classical liberal outlook had a militant aspect when it came to keeping the law free of racial classifications and assailing those in place, not only regarding Jews but all racialized outcasts. Immigration law and its administration were where Jews’ treasured legal invisibility was most threatened in this era, and Marshall and Kohler responded vigorously to every threat. They lobbied tirelessly in Congress to quell efforts to enact racial classifications and racial barriers against Jewish immigration. Enlisted by Lower East Side editors and attorneys, Kohler led the legal challenges to Commissioner Williams’ new regulations in the hearing rooms at Ellis Island,

and brought habeas suits in federal district court challenging them. Kohler assailed the whole constellation of Williams' substantive and procedural reforms, orchestrating a many-sided campaign of quiet diplomacy and loud protests, sophisticated lawyering, and intense lobbying to halt the "deportations" and turn back Williams' new regime as a species of "administrative lawlessness" and persecution. This marked the beginning of two decades of litigation challenging efforts like Williams' to discourage mass emigration of Jews and other racial others from the Tsar's empire and work de facto racial barriers into the immigration law's administrative fabric.

Kohler became the leading litigator and scholarly expounder of the anti-classification principle and other liberal legal and constitutional precepts on behalf of racialized new immigrants. The treatment of racial outsiders at the gates lay at the intersection of two rich veins of classical liberal constitutionalism: racial equality embodied in the anti-classification principle, and the clash between procedural due process and unfettered bureaucratic discretion. As a matter of doctrine, these veins ran out quickly in the immigration law context. But Kohler mined them for all they were worth and carved out space for judicial review of "non-reviewable" administrative determinations, appealing to due process and the courts' skepticism about administrative finality. In this space, he usually managed to prevail on the merits, with constitutionally inflected statutory interpretations. His arguments resonated with outlooks on the bench. The young Learned Hand and the venerable Justice Holmes wrote opinions echoing Kohler's briefs and arguments, invoking "our constitutional heritage."

Kohler's militant and sophisticated advocacy in courts and the press collided with some of his AJC colleagues' rigid insistence on safeguarding Jews' legal invisibility and never conceding Jews were a race or a people. Kohler seized the nettle. He invoked the liberal Constitution's

anti-classification principle, likening Jews to blacks and Asians – and disparaging *Plessy* and the Chinese Exclusion laws, as he condemned the immigration authorities classifying and ill-treating Jews as a race, and defended the Reform Jewish elite’s organized efforts on their behalf. If the Czar’s laws made Russia’s Jews racial outsiders and brought state violence down on them, Kohler would demand special liberality on their behalf, as Jews. Drawing Jews’ “racial identity” into public and legal discourse was inescapable, Kohler would point out, because Anti-Semitism here and abroad made it a social fact.

When the editors of *der Tog* and *Forverts* enlisted him in the ’05 battle against Commissioner Williams, Max was already well equipped to handle the work. Graduated from Columbia law school in 1893, Max’s first job had been as an Assistant U.S. District Attorney, as they were then called, for the Southern District of New York. Shortly after he began the job, he was given a special assignment to prosecute and deport Chinese merchants and laborers under the Chinese Exclusion Law, which he did from 1894 to 1898.²² Max then left government to become a partner of Louis Marshall’s, and began representing Chinese immigrants facing deportations from New York.²³ Switching from prosecution to defense work was as common then as it is now. A number of former Assistant U.S. District Attorneys who had prosecuted the Chinese Exclusion Law in San Francisco also took this route, working on retainer to the city’s wealthy Chinese merchants.²⁴ By contrast, for the next three decades, Kohler would do his voluminous immigration work on behalf of Chinese, Jewish, “Arab” and “Slav” immigrants for free.²⁵

Perhaps it was a yearning to expiate his guilty complicity (while exploiting his expertise) in

²² *An Assistant United States Attorney*, N.Y. TIMES, Dec. 8, 1895; see also Max Kohler, *Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed*, N.Y. TIMES, Nov. 24, 1901, at 9.

²³ Statement of Max J. Kohler, Max J. Kohler, Box 1, Folder 5 (undated) (on file with the American Jewish Historical Society).

²⁴ See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 70 (1995).

²⁵ See Memorial to Max J. Kohler Box 1, Folder 12 (1934-1936) (on file with the American Jewish History Society) (After leaving government, Kohler “never accepted any remuneration for services in immigration cases...”).

the deportation of Chinese laborers and merchants that led Kohler into pro bono immigration work. Perhaps being assigned to master the machinery of expulsion, while being heir to the family-forged faith in the liberal Constitution as the Reform Jews' "New Covenant" made defending the rights of racial others at America's gates seem an inescapable calling.

For his part, on the Bima at Temple Emmanuel, Max's father repeatedly explained and justified the Reform Jews' stubborn combination of assimilation and apartness in terms that might have predicted such a calling. Reform Jews were no longer a nation or people with a separate national destiny involving a return to Zion, and no longer bound by Jewish law, hewing only to Judaism's universal precepts. "Why then," asked Rabbi Kohler, would not Reform Jews "throw down" the "ragged mantle" of the eternal "wandering Jew" and "melt" and be "absorbed" into the larger gentile community? Why not convert? Why not intermarry? Why stay stubbornly apart? His answer was the "arduous" and "priestly" work of justice-seeking, which Jews had to do "for all humanity."²⁶ This, according to Rabbi Kohler, was the "mission mapped out by our great seers of yore"—"the godly men . . . who consecrated their lives to the practice of the law."²⁷ Only then, could the "priest-people" fulfill their destiny—scattered amongst the nations in order to "bring the Law forth from Zion," not the old rabbinic law, but the moral law of the Constitution, "human rights" and "freedom."²⁸

The "practice of law" was an oddly modern way to describe the work of pre-modern rabbis in rabbinic courts. But this was a distinctly modern, secular, and American re-interpretation of Jews' "mission." Reform Judaism was built around a new conception of Jews' role in history: keeping Judaism's rigorous monotheism and "universal ethics" alive among the nations of the

²⁶ See Rabbi Kaufman Kohler, *Wandering Jew*, Box 1, Folder 4 (1888) (on file with the American Jewish Historical Society).

²⁷ KAUFFMAN KOHLER, *JEWISH THEOLOGY: SYSTEMATICALLY AND HISTORICALLY CONSIDERED* 346, 365 (1918).

²⁸ *Id.*

world. But in the hands of Kaufman Kohler, this idea subtly changed register, into a more secular language of justice-seeking—from a calling to keep alive the religious sources of modern liberal ideals to a calling to pursue those ideals themselves. In this, one can sense a double movement: a secularization of religious commitments and a sacralization of a secular calling, a modernist mingling of religious and secular modes of thought and feeling, which Max Kohler, Louis Marshall and their generation of lawyer-leaders were set to enact. Here was a basis for renewing Jewish particularity—resisting “absorption” into the dominant community, affirming one’s solidarity with the others, outcasts and downtrodden – but doing so as a member of a respected bourgeois profession and in terms of Enlightened, “universal” values enshrined in the U.S. Constitution.

We can speculate: Without this identification with and seeing oneself in racial outsiders, without taking on arduous law work on their behalf, what exactly did one’s Jewishness amount to for an earnest and conscience-stricken, young corporate lawyer praying in English in an elegant Fifth Avenue cathedral? Like his father’s modernized “Godly men of yore,” Max could “consecrate” his public life “to the practice of the law” to bring “human rights and freedom” forth from Zion.

Thus, in the early 1900s, Max Kohler became America’s first “Jewish civil rights lawyer,” representing racial outsiders at the gates and joining Louis Marshall in appellate work for the new NAACP.²⁹ The two attorneys invented what would become an enduring Jewish American

²⁹ David Levering Lewis, “Parallels and Divergences: Assimilationist Strategies of Afro-American and Jewish Elites from 1910 to the Early 1930s”, *Journal of American History*, Vol. 71, No. 3 (Dec., 1984), pp. 543-564 remains the classic treatment of this first generation of Reform Jewish “civil rights lawyers” and their involvement in the founding and early work of the NAACP. Levering Lewis’s thesis is that fighting Jim Crow and the racial classification and stigmatization of African Americans was a “displaced” way for these “highly assimilated Jews” to address and combat the threat that Jews too would be legally cast as racial others in the nativist climate of the day. For Jews like Marshall, Levering Lewis argues, it seemed reckless even to raise the prospect of Anti-Jewish laws in the U.S. Instead, they used Jim Crow statutes as a kind of “stalking horse”; if they were unconstitutional, then “a fortiori” so would be laws classifying Jews as an “undesirable” or “inferior race.”

There is much to the Levering Lewis thesis. But it overlooks that most of the racial outcasts these first Jewish civil rights lawyers publicly defended were Jews, often on just the ground that they were being subject to “race prejudice.” Well before the founding of the NAACP in 1910 and throughout the 1910s, Marshall and Kohler were litigating and advocating in the press and public hearings on behalf of Jewish immigrants,

folk hero and authority figure unto itself. Representing racial outsiders before the nation's high court, the high-powered Jewish lawyers showed that Jews belonged in the temple of America's civic religion. Linking American Jewishness to defending the rights of racial others, they made expounding the Constitution's *universal* promises a way of affirming Jewish American *particularity*: as a justice-seeking people apart. Civil rights lawyering would prove a long-lived way for American Jews – and not only liberals, but leftists too – to rise in the social order, becoming an insider, while remaining in some morally and imaginatively significant ways an outsider, publicly enacting both one's apartness and one's solidarity with the outcast and the fallen, the stranger at the gates.

Diasporic Legal Imaginaries – Rehearsing the Jewish Constitutional Moment in Russia

claiming precisely that they were being subject to “race discrimination” by the Immigration Bureau and nativist lawmakers and pundits. Even as they adamantly denied that Jews were a “race” at all, they did not shy from publicly confronting the social fact that Jews were seen as an alien race. Acutely conscious of how different they were from these newcomers, they also saw themselves in the unassimilated “poor Russian Jews.” For his part, Kohler also contended against the “racial classification of the Negro,” as well, assailing the moral, constitutional and scientific bona fides of the racial sciences. He liked to quote Josiah Royce: “Give men’s apprehensions a name—and they dignify it.”

As we shall see, however, Levering Lewis is on the mark in his shrewd observations that these elite Reform Jewish attorneys’ encounters with poor Russian Jewish immigrants on the Lower East Side were imbued with much the same kind of anxious and overbearing paternalism that the elite African American attorneys at the NAACP in New York brought to their dealings with poor Southern blacks recently arrived in Northern cities.

Other Jewish lawyer-leaders traded in invidious distinctions between the “great [color-coded] divisions of mankind” over against the specious racialization of Jews and other white racial others. They contributed to the invention and circulation of the new category of “ethnic group” to affirm Jewish difference, while pushing back against racial classifications. See Forbath, *Jews, Law & Identity politics*, supra note __: “We have seen the evasions of class inequality inscribed in Kohler’s and Marshall’s constitutionalism; Brandeis’s evasions ran along racial lines. His account of “group equality” and “minority,” “national” and “group rights” drew a circle around what Brandeis called “the white nationalities.” Like Simon Wolf, Brandeis tacitly excluded non-whites from his working definition of the pluralistic national community constituted by the Constitution – an exclusion that echoes in the striking (and largely neglected) degree of taciturn silence and occasional indifference to racial equality in Brandeis’s jurisprudence. The circle around “white nationalities” implicated Brandeis’s account of group rights in the fraught historical construction I mentioned earlier: the distinction between the emerging category of white “ethnic groups” whose differences are chiefly “historical” and “cultural” and the category of color-coded “races” whose differences are somehow deeper and more “natural.” Kallen’s accounts of America as a “cooperative of diversities” and a “federation of national cultures” also pushed African Americans aside, acknowledging that they also had a “culture” – indeed, one that had shaped America “deeply,” but tersely noting that their situation presented a “different subject,” one which Kallen never addressed. His evasions likewise contributed to the discursive gulf that was beginning to emerge between what Kallen and other advanced Jewish thinkers had begun to call “ethnic groups” and the differences marked off by “race.” Kohler, by contrast, rarely failed to condemn and combat Jim Crow and Asian exclusion laws under the liberal Constitution he was expounding and defending.”

The Lower East Side press gave much coverage and applause to the devoted work of the patrician law partners fighting back against the deportations at Ellis Island and the clamor for racial bars against Jews and other new immigrants in Congress. So, when World War I broke out, and with it new calamities for the Jews of Russia, Louis Marshall and the AJC had some hope of deference, as the acknowledged representatives of American Jewry when it came to matters of state. That is not how it turned out during the constitutional moment we have almost arrived at.

The constitutional moment's catalyst was the rage and anguish on the Lower East Side brought on by the massacres and mass expulsions of Jews at the hands of the tsar's armies. Pogroms that dwarfed Kishinev were being reported - slaughter and expulsions on scale not seen for centuries. What kind of political campaign would American Jews undertake against these catastrophes? Relief work was not enough. War-time pogroms dramatized that the bare right to life was insecure and would remain so, and the prospect of post-war treaty-making stirred hopes of transforming the legal status of Jews in the czarist as well as the Hapsburg and Ottoman empires. What actions would American Jewry take against the czar, to strike back, to demand rights? "How to save what could be saved now and gain what could be gained when war ended," and peace treaties, new maps, new states, new constitutions were drawn up? The yearning for action among the Jewish masses in NY and elsewhere, with friends and family in harm's way, found no response from the established leadership and big organizations of either the uptown Reform Jewish elite or the downtown new immigrant working-class.

To be sure, Jewish diplomacy by Western "Hofjuden" on behalf of "Ostjuden" in Eastern Europe and Russia had an established tradition. Louis Marshall and the AJC could look back at their own successful efforts to prod the Congress and White House to terminate the nation's

trade treaty with Russia in 1911 in protest against official Anti-Semitism. Already in 1914, Max Kohler began assembling documents drawn from the Napoleonic Wars and from the Congress of Berlin. Marshall and Kohler were mindful, then, of the possibilities of post-war treaty-making. But it did not even occur to them to mobilize the masses. Quite the contrary. Their *modus operandi* was quiet diplomacy.

More surprising at first blush was this: silence on the politics front was also the order of the day from the major Jewish unions and socialist organizations of the Lower East Side and America's other large Russian Jewish working-class communities. The Jewish labor movement had no tradition of Jewish politics. A Jewish politics demanded solidarity with other Jews; but class struggle was the watchword of the great labor organizations: solidarity along class lines, not lines of nationality, race or religion. In the New York garment trades, class struggle was an intramural affair. Most of the employers and "class enemies" were fellow Jews; to say nothing of the *Shtadlanim*, the AJC's Wall Street plutocrats like Jacob Schiff and Louis Marshall. It was fine to collaborate with the employers and the bourgeois crowd on relief work. It was unthinkable – at first - to work with them to create a new mass organization, claiming to stand for Jewish rights and interests.

This was more than an instrumental calculation; the inhibitions against assertive Jewish politics ran deep. Few questioned Marx's basic tenets: Jewishness as a social and cultural identity was irremediably narrow, backward-looking and tribal, steeped either in capitalist selfishness or else in the benighted social ethics and customs of crumbling pre-industrial trades and callings. And as for Jewish "rights," they remained what Marx dubbed them in *On the Jewish Question*: better than nothing, in the sense that Jewish emancipation promised to put Jews on an equal plane with others in the alienated realm of spiritual affairs and the "formal" sphere of

political equality; but worse than nothing, a snare and illusion, when it came to real human emancipation. Unlike socialism, liberalism left space for religious and other particularistic identities, in their proper, “private” place, in civil society. But orthodox socialism rested on rejecting and overcoming just this distinction. What place was there for Jewishness in this equation?

Breaking out of these intellectual and existential constraints was the singular achievement of late nineteenth and early twentieth-century, Russian Jewish socialist nationalists like Chaim Zhitowsky and the tiny underground organizations they founded, like the Bund. Zhitowsky and his brilliant New York-based comrade-in-exile, Isaac Hourwich became charismatic models of how one could be both a “good socialist” and a “good Jew.” “*Vos mer mentsh, alts mer yid un vos mer yid, alts mer mentsh,*” they would tell their mostly young audiences in Minsk and Odessa, and later, New York and Chicago, meaning by “mentsh” the new socialist International man.

Revolutionaries since they were teenagers, Zhitowsky and Hourwich knew first-hand the fierce rejection of Jewishness one encountered from socialist leaders and activists – many of them Jews themselves. One’s Jewishness was only an obstacle to proletarian solidarity whether the proletariat was Russian or American. In Russia, bear in mind, the Jewish working class dwelled in the towns and cities of the Pale. They spoke no Russian. Their only languages were Hebrew, in Cheder, and Yiddish in everyday life. Both Zhitowsky and Hourwich came from enlightened bourgeois Jewish families in Minsk. Unlike offspring of the Jewish masses, they were educated in Russian. Many such young Russified Jews knew Hebrew, but no Yiddish, which the Jewish bourgeoisie largely scorned.

Young revolutionaries, like Chaim and Isaac, with a bourgeois education, would be assigned the task of organizing workers' education circles and – unbelievably – were directed first to draw Russian into their Yiddish-speaking recruits, and only then educate them about Marx and political economy. For some Jewish revolutionaries, assimilation into the socialist International was a welcome route out of a pinched Jewish parochialism, a path to a brave new cosmopolitan world. But Hourwich and Zhitowsky saw it differently. They wanted to have it both ways – for themselves and for their working-class comrades. One could be both a proud Jew with his own particular national language and national heritage and a proud member of the International.

It was scandalous to try to force Jewish workers to abandon their own language, Zhitowsky began proclaiming in the 1890s. It was self-mutilation. And what was more, the supposed cosmopolitanism and internationalism of the socialist leaders who demanded this sacrifice were nothing but a veiled form of Russian chauvinism; just as all such assimilationist demands were not truly universalist – but a masked particularism. Yiddish, not Russian, was the language of Jewish socialism, and Zhitowsky built up a theory of modern socialist Jewish national identity resting on Yiddishkeit. Linguistic renaissance, after all, was the currency of modern nationalist movements like the Irish. Why not Yiddish? “*Vos mer yid, alts mer mentsh.*”

The 1890s-1900s were a moment of heightening nationalist agitation throughout the old multi-national empires of Europe – Austria-Hungary as well as Russia. The vision of new independent Finnish, Serbian, or Polish nation states arising out of the overthrow of empire animated much of this pre-War nationalism. This was a seedbed of Russian Zionism. But Hourwich and Zhitowsky took their inspiration from and honed the ideas of a different band of more heterodox legal thinkers and reformers who hoped to see Austria-Hungary and Russia reconstituted not as myriad nation states but as big, federated commonwealths of multiple

nationalities, whose constitutions would vouchsafe “the most complete equality of rights for all languages and nations.” Not only nationalities with some geographic or territorial basis like the Poles, but what these legal and political thinkers called “non-territorial nationalities.” What were the Jews, after all, but the non-territorial nationality *par excellence*?

In this milieu, it seemed essential to demand Jewish “nationality” rights. As Zhitowsky elaborated the idea: national rights meant not only cultural and language rights, but also a modern and democratic reinvention of the old corporate forms of Jewish communal life. Thus, he called for politically autonomous, self-governing Jewish institutions and alongside that, Jewish representatives in the legislatures of the imagined post-revolutionary federations. “For if all the nationalities in Russia,” Zhitowsky and the Jewish national socialists declared, “anticipating a constitution, demand autonomy, we must not stand aloof...[S]o long as we are a nation, we must demand national rights; we have no other alternative; we must be privileged equally with all nations.”

Then in 1905, there arrived a first short-lived constitutional moment – not in the U.S.A. but in Russia, a dress rehearsal for the constitutional ideas of this transnational diasporic network of Jewish nationalism. The costly Russian defeat in the Russo-Japanese war precipitated mass unrest, and a reform-minded Tsar instituted a call for parliamentary elections and constitutional reform. Hourwich – already in the U.S. (as we’ll see) - rushed back to Russia to take part in the revolution and join Zhitowsky in running for the Duma. Bundists and other diasporic non-territorial nationalists like these two came out of exile and out of underground and ran for office, along with Zionists.

For the first time in Russian history, Jews were thrust on to the public political stage and had to consider just what rights Jews wanted in a new liberal Russia, which seemed, briefly, to be in

the making. During that short-lived revolution, ordinary Russian Jews were drawn not so much to the bourgeois Jewish liberals nor to the orthodox socialists, but to the heterodox constitutional ideas of socialist Zionists and Diasporic nationalists, whose platforms demanded not only Jewish emancipation, the inherited formula of civil and political equality, but also new-model “national” or group rights, group representation, and various forms of semi-autonomous social and cultural group self-governance.

The defeat of the '05 revolution sent Hourwich back to New York, and with him, Zhitowsky and hundreds of other Bundist, socialist Zionist, and Jewish “autonomist” activists, intellectuals and advocates into American exile. They brought the new diasporic nationalism and its constitutional imaginary to the Lower East Side, where they encountered the fiercely anti-nationalist outlook of New York’s great Jewish labor organizations and Jewish socialist party and press. So, the newcomers founded small American branches of the Bund and Poele Zion, along with tiny new outfits like the Jewish Socialist Agitation Bureau; and via the Bureau, Hourwich and Zhitowsky went on the lecture circuit, bringing the constitutional imaginary of Diasporic socialist nationalism to big audiences at Cooper Union and Carnegie Hall, and immigrant Jewish communities around the country, creating a stir among adventuresome young radicals with their visions of a “Jewish national program” in a “United Peoples of America” and of the U.S. as a “federation of nationalities.”

The Constitutional Moment Arrives

Then, however, came the outbreak of World War I and the massacres and mass expulsions. And in the U.S. in 1915, as in Russia a decade earlier, these tiny organizations and their

outlandish outlook were thrust into sudden prominence. Into the vacuum left by the political silence and quietism of the American Jewish Committee and the great socialist unions stepped Hourwich, Zhitowsky and the tiny bands of Bundists and socialist nationalists. They gave voice to the hunger of the new immigrant masses for action on behalf of Jews abroad, in harm's way. Ironically, the very aversion to united political action on the part of mainstream Jewish leadership enabled the unorthodox radicals to seize the occasion and raise the ideological stakes and imaginative horizons of how American Jews might respond.

Hourwich, Zhitowsky and their socialist nationalist bands dusted off the Jewish Congress banner they had raised in the wake of Kishinev. Back then, Zhitowsky and the other Bundists and Poole Zion revolutionary exiles had barely arrived. Now, they had had almost a decade to spread their heterodox ideas; more important, now, there was a much vaster yearning for action and much more angry frustration with established leaders and organizations among the new immigrant masses. Once again calling themselves the Jewish Congress movement, this time the radical upstarts launched an unprecedented frontal attack on the "old world despotism" of the "*Shtadlanim*," the old German Reform Jewish elite and their "self-appointed" American Jewish Committee of wealthy bankers and lawyers, claiming to speak on American Jewry's behalf – via "quiet diplomacy" and high-level contacts – to the U.S. Presidents and Congress on matters of Jewish interest. Over against this benevolent but demeaning "despotism," the radicals called for constituting American Jewry on a new basis, as a "democratic nation and people," an "American Israel," with newly *chosen* leaders, a "permanent Jewish Congress," authorized to speak for all American Jews.³⁰ The radicals also made plain what they thought the substance of

³⁰ Here in "the great American republic," Hourwich proclaimed, "[w]e can no longer submit to a self-appointed body of men, our benevolent despots." Not only was the Congress idea the American way; it also promised to give American Jews more clout than the AJC's old world ways of "secret diplomacy." Freely chosen representatives of American Jewry, Hourwich explained, would "speak to the politicians with the one word they understand: power...That a Congress can indeed achieve, [for it will] represent the Jewish masses, two million strong...not a gathering of

the imagined Congress's agenda should be. It should demand that the U.S. government champion for Jews in post-war Russia and Eastern Europe a panoply of rights, a "Jewish Bill of Rights," brimming with individual but also group rights and national rights, "minority rights," the very rights which the Russian "masses" themselves had rallied around in 1905-07. Some Congress movement spokesmen tacitly, others openly, demanded much the same rights for Jews in America. Either way, the radicals forced into the unavoidable conversation about what was to be done for Russian Jews a deeper and more contentious debate about the nature of Jewish politics and the meaning of Jewishness in America.

Part of the genius of Congress Movement leaders like Hourwich was to wed what was most "foreign" about their ideas – "group rights," "nationality rights," a "national program" – to what was most "American": an elected Congress as embodiment of American principles of democracy and self-determination, a constituent assembly to hammer out a "Jewish Bill of Rights."

It was no wonder that Hourwich was deft at wedding Russian Diasporic nationalism to American constitutionalism. *He lived in both worlds.* A seasoned revolutionary in Russia and an accomplished Progressive reformer on the American scene, a brilliant attorney, economist, and statistician, but also a popular journalist and speaker, Hourwich had an uncanny knack of grabbing hold of the central insights, idioms and analytical tools of Progressive American jurisprudence, institutional economics, political science and sociology, while remaining, at the same time, immersed in the far-flung international networks and debates of Jewish nationalism and Marxist internationalism.³¹ He did pioneering scholarship on the economics of immigration

ten of the wisest." Around this Congress, we must "create what we lack: a Jewish public and a Jewish public opinion...then you may be certain that the Congress and Senate and politicians...will heed what such a movement has to say."

³¹ Hourwich arrived in New York in 1890, at 27, a veteran Social Revolutionary, educated in both law and economics at St. Petersburg and, like many of his cohort, already seasoned by a five-year exile in Siberia. He completed a second PhD in economics at Columbia, then taught statistics briefly at University of Chicago, until he was fired for joining the People's Party (which struck a familiar note for Hourwich, echoing the SR program of peasant/proletarian radicalism), prompting a return to New York, where with his new law partner, Meyer London, Hourwich helped

and pioneering lawyering for the garment workers' unions.

But the reason Hourwich was greeted on the NY streets as “the professor” is because every year he turned out dozens of vivid essays that contemporaries said were the Yiddish masses’ – or at least the mass readership of the Yiddish papers – main introductions to American law, history, government and political economy. From Hourwich, the readers of *Forverts*, *Freiheit* and *Arbeiter Stimme*, learned in pungent, well-turned Yiddish about Tom Paine and James Madison, the Federalists and Anti-Federalists, the labor injunction, the trusts and anti-trust, about U.S. cities’ political machines, the dynamics of American party conventions and the machinations of party bosses, and the latest word on electoral reforms like proportional representation, fusion tickets and direct democracy, along with the conflicts amongst IWW syndicalism, Debsian socialism, and AFL voluntarism. From Hourwich, the new immigrants also got Yiddish translations of Marx and reports on the Bund, Poete Zion and the intricate debates in the exiled and underground Russian press between Jewish socialist nationalism and orthodox socialist internationalism, as well as first-hand accounts of the 1905-07 Russian Revolution (in the form of “Letters” from Minsk, Vilna and St. Petersburg, where, as we’ve noted, Hourwich had hastened back to enlist as a revolutionary participant-observer and Jewish nationalist-socialist candidate for the Duma, and from whence he returned, brimming with fresh constitutional ideas

found the New York branch of Debs’s American Socialist Party. Unlike London, however, or the great majority of immigrant Jewish socialists in 1890s New York, Hourwich was drawn to the offbeat, new currents of socialist Jewish nationalism and socialist Zionism circulating around the edges of international socialism during the late ‘90s. He became an avid correspondent and long-distance comrade of Chaim Zhitowsky, and also played a long-distance role in the formation of the Russian Bund, regularly dispatching huge bundles of Yiddish socialist and anarchist papers to Russia, where the Yiddish press was outlawed and underground publications scanty. Hourwich’s mailings were not merely propaganda but prized prefigurations of what a flourishing radical Jewish public sphere might be like. Meanwhile, the Bund, along with Zhitowsky and his circle, provided Hourwich with a vibrant model and an intellectual/theoretical passageway for a union of international socialism and Jewish nationalism, at a time when socialist orthodoxy reigned supreme in New York.

When the Revolution of 1905 broke out, as we’ve observed, Hourwich promptly lit out from New York for home, to Minsk, Vilna and St. Petersburg, to observe, report and participate in the socialist and Jewish politics of the unfolding revolution. He sent back dozens of “letters” and reports to the Yiddish papers, and he ran for the Duma. Returning in 1907, Hourwich resumed his many callings in the U.S., while also helping to found New York branches of Poete Zion, the Bund, and, as a vehicle for Zhitowsky and himself to go on the lecture circuit, the Jewish Socialist Agitation Bureau, bringing the constitutional imaginary of Diasporic nationalism to big audiences in New York, and to immigrant Jews across the country.

he would improbably put to work on the American scene.)

Lower East Side trade unionists would introduce Hourwich as “the smartest Jew in New York,” and as the Congress movement took shape in 1915, “the professor” had the intellectual and imaginative resources, along with the local knowledge and insight, and locally earned authority and gravitas, to present the constitutional outlook and demands of Russian Diasporic nationalism in a way that spoke to the experience and feelings of the immigrant working-class Jewish communities of America.

You can imagine that as World War I broke out, Hourwich and the Congress Movement provoked no small amount of rage and angst on the part of Louis Marshall. At the same time, you can imagine that Hourwich’s appeals mobilized much support and sympathy on the Lower East Side and beyond. The immigrant neighborhoods were riveted by his demand that American Jewry must get over “the old Jewish fears” and “Jewish silence” and stand up against Jewish suffering; the immigrant neighborhoods also shared Hourwich’s resentment at the Hofjuden’s heavy-handed paternalism.

Louis Marshall, however, was used to such provocation, and he and the AJC bided their time. So did the machers of the big Jewish unions. For most of 1915, the prevailing view among AJC and labor leaders alike was that the Congress Movement was a flash in the pan and would fade away. Remember they had seen the Congress Movement once before, a decade earlier, when figures like Zhitowsky first arrived – and the Kishinev pogrom had aroused the Lower East Side. And the Congress Movement probably would have faded away, for sheer lack of organizational heft and strategic resources. That calculation was up-ended, however, by the fortuity of Louis Brandeis’s “conversion” to Zionism and his sudden ascent to leadership of American and world Zionism, shortly after the war in Europe began. The story of Brandeis’s

“conversion” to Zionism and his assumption of war-time leadership is a familiar one.³² But Brandeis swiftly grasped that Palestine was not a cause likely to arouse the majority of ordinary Jews into action; what resonated – on the Lower East Side as it had in Russia itself - was *not* a homeland or state in Palestine, but the dream of Diasporic nationalists: safety and better lives, individually and collectively, via modern communal institutions and a panoply of individual and group rights for the oppressed Jewish millions *where they actually were*, in Russia and Eastern Europe themselves. So, encouraged by Horace Kallen, Brandeis welded his Zionism to Diasporic nationalism, and along with becoming chief of the Zionist federation, Brandeis took over the Congress Movement’s helm, as well. He made his own the Congress Movement’s outlandish vocabulary and vision of “Jewish rights” (as well as their canny argument about the superiority of the democratic-American versus the despotic-old-world model of Jewish political authority).

Brandeis made the Congress Movement’s foes his own, as well. He had never had any use for New York’s Reform Jewish elite and had long been inclined to see a Jacob Schiff or Louis Marshall as just another plutocrat and parvenu. Brandeis welcomed a battle against the AJC for the hearts and minds of the new Jewish millions in America. Brandeis brought to the Jewish Congress Movement a great access of money and social and cultural capital, a cadre of corporate lawyers and Progressive jurists like Felix Frankfurter, and his own towering reputation as the

³² Zionism gave the profoundly reticent Brandeis a new sense of belonging. It helped that the Jewish homeland of Brandeis’s imagination was bathed in Progressive light: a scene of small-scale, cooperative agriculture and enterprise, imbued with science, cooperative ownership of land and industry, and participatory democracy. After Justice Brandeis had helped craft and bring President Wilson on board the Balfour Declaration in 1917, he drew up a plan for the reconstruction of Palestine. The 1918 “Pittsburgh Platform,” as it came to be known, called for “political and civil equality irrespective of race, sex, or faith,” a comprehensive “system of free public instruction,” “ownership and control by the whole [Jewish] people” of utilities, natural resources, and land, and the application of the “cooperative principle... in all agricultural, industrial, commercial, and financial undertakings.” Thus, the national homeland was to be governed by a “Jewish spirit” that was “essentially modern”—and in harmony with Brandeis’s Jeffersonian brand of advanced American Progressivism. It was revealing of Brandeis’s continuing deep identification with the WASP establishment that he constantly described the Jews of Palestine as the “true Pilgrims” of the 20th century; like the “Puritan” founders of New England, Zionists were “pioneers” in the Arab “wilderness.” The Arabs were the “Indians.” We will return to the moral blind spots of this Puritan pioneer vision of Jews and Arabs in Palestine at the end of my talk.

greatest of all Jewish-lawyers as Jewish-folk-heroes. He was known across America as the “People’s Attorney,” and at the very moment he emerged as the leader of Zionism and the Congress Movement, he also became the nation’s first Jewish Supreme Court justice - by far the most prominent Jew in America. Brandeis had no immediate intention of forsaking his newfound role in Jewish politics merely because he had become a Supreme Court Justice!

And so with the ruthless and resourceful Brandeis as its national spokesman and grand strategist, and locally famous figures like Hourwich on the ground, agitating, educating and organizing the Yiddish-speaking masses, the Congress Movement provoked an epic constitutional battle. We’ve flagged the questions on the table: What forms of Jewish identity and particularity fit with full membership in the national community? Could Jews constitute themselves anew, as a distinct nation and a separate “race” without cutting themselves out of the promise of American life?

Grabbing hold of the outlandish constitutional vocabulary of his new Russian comrades, Justice Brandeis hammered out his own answers to all these questions. Zionism, Louis Marshall said, was *anti-American*. Zionism, Justice Brandeis serenely declared, made Jews “*better Americans*.” Pluralism – understood as the idea that law must embrace the significance of groups as sources of power and identity in social and economic life - was already part of Brandeis’s philosophy. Already a pluralist and group rights maven in regard to labor and trade associations, Brandeis took hold of the groups-rights-laden outlook of Hourwich and Zhitowsky and wove them into a new group-rights-based account of Jewish belonging and apartness in American life.

The gist of the new constitutional theory that Justice Brandeis began preaching to American Jewry and the nation at large was that free and equal individuals only develop in the context of

free and equal groups; and such groups, in turn, need “group rights” and “group equality.” Without such constitutional precepts, neither Jews nor members of America’s other “minority races and nationalities” could flourish. Happily, the true genius of the American Constitution was that it constituted us as a community of free and equal individuals constituted, in turn, by free and equal groups, nations and peoples. Group rights and group equality promised to underwrite and safeguard ways of governing human difference that extended classical liberalism’s regard for freewheeling “individuality” to the plane of groups and peoples.³³

Under this constitutional dispensation, the modern Jew could be both an American patriot and yet free to “assert his Jewish nationality.” This demanded a constitutional order that protected political action and organization based on group difference and national aspirations, and a regime of social governance that both protected and supported group educational and cultural associations. Such an order was essential, if the U.S. was to gain “the full benefit of [the Jews’] great inheritance.” The notion that the official U.S. constitutional order embraced any of these things was the purest legal fiction, but when Justice Brandeis declared it to packed meetings across the country, it became a cultural fact.³⁴

³³ This same year, 1915, Horace Kallen wrote his seminal “Democracy and the Melting Pot” for the Nation. Widely seen as the foundational text of cultural pluralism, Kallen’s essay nowhere uses that phrase nor even the word, pluralism. Having enlisted Brandeis in the Zionist cause, Kallen also introduced his famous friend to the writings of Simon Dubnow and the ideas of an émigré group of liberal and socialist Diasporic Russian Jewish nationalists with whom Kallen had joined in a “reading circle.” From his readings and discussions with this “secret” group, and their passionate critiques of conventional nationalism (including Herzlian Zionism) and the nation state, Kallen seems to have garnered inspiration and keywords for his famous essay: Not “ethnicity” or “cultural pluralism,” but the émigrés’ discourse of “national rights,” a “federation of nationalities” and a “commonwealth of nations” supplied Kallen’s toolkit for reimagining a democratic America. Depicting the essay as one about cultural pluralism glosses over its genesis in that international conversation, as though Kallen were offering a distinctly American solution to the problem of difference.

So interlaced were the Diasporic nationalist and anti-Herzlian/homeland-not-nation-state Zionist threads of this group’s outlook that we find Kallen boasting during this period that Zionism provides an answer to the “international anarchy” that flows from the “confusion” of “nations” with undivided “sovereignty” and the “nation state.” Zionism was a form of deep federationism in Kallen’s view. Brandeis, for his part, seems never to have embraced this outlook. He staunchly promoted a nation state ideal for Jews in Palestine, even as he was helping to fashion a pluralist ideal – a commonwealth of nations - for America. See infra ___-___.

³⁴ Historians have traced cultural pluralism’s intellectual origins to Kallen’s studies with William James at Harvard, and to the intellectual milieu of the Menorah Journal, which was produced at Harvard. That is a bit like claiming that Madison’s constitutional thought sprang from his studies at Princeton (or, to be more precise, the College of New Jersey). James’ theory of value pluralism was important background, to be sure; but it didn’t supply Kallen’s keywords and conceptual scaffolding. It was in the arena of real constitutional politics, in the clash of rival Jewish movements, organizations and their rival views of what rights Jews ought to demand and defend in the U.S. and abroad on behalf of oppressed Jews in the old world: in these battles - and thanks to the fresh blast of unfamiliar diasporic constitutional ideas learned from émigré comrades - that cultural pluralism first took shape and found its critical vocabulary.

Speaking of the Jews' "great inheritance," we should pause long enough to underline a rather striking difference between Brandeis, on the one hand, and the Russian radicals, on the other. Simply put, Brandeis was much like Louis Marshall and the AJC in this: they were Jewish exceptionalists. For Isaac Hourwich, Jews were a nation, like any other nation, no better but also no worse. Hourwich often mocked the romance of nationalism. He paraphrased Descartes: "Are we Jews a race and a nation? The answer is: `They beat us. Therefore, we are.'" In other words, we Jews have no choice but to acknowledge our national culture, our "racial peculiarities" and to embrace them with pride. For, unless we do so, we will be crushed. By contrast, for Brandeis as for most of the Zionists he knew best, as for Reform Jews like Louis Marshall, Jews were not just another nation or people; they were an exceptional people. Why, they were *always already proto-Americans*, in the old-fashioned, racialized WASP sense of the word! Just as the American WASP elite claimed that American liberty sprang from their Teutonic and Anglo-Saxon ancestors, so Marshall and Brandeis boasted that the historical roots of the U.S. Constitution and American democracy lay in Hebrew soil.

Unlike Marshall, however, Louis Brandeis came not to praise classical liberal constitutionalism, but to bury it. When it came to the "Jewish Problem," Justice Brandeis lectured his Congress Movement audiences, "Liberalism" was a "failure." It did far too little "to eliminate the anti-Jewish prejudice." Liberalism promised Jews equality but supplied no ground on which to build group dignity and self-respect. The problem with classical liberalism was that it gave Jews and other minorities individual rights and individual equality before the law, but it could not "protect as individuals those constituting a minority," without "realiz[ing] that protection cannot be complete unless *group equality* also is recognized." Liberalism counseled

assimilation as the solution to Anti-Semitism; but, Brandeis proclaimed, the solution lay elsewhere, in the “Assertion of Jewish Nationality.” Zionism enabled Jews “to shake off the false shame which has led men who ought to be proud of their Jewish race to assume so many alien disguises. . . .”

With his rhetoric of race pride and his new constitutional vision of group rights and group equality, Brandeis helped make American Zionism into a plebian “national assertion” of public Jewishness, bound up with what Brandeis memorably called the new immigrant Jew’s “right to his own peculiarities, which he should no longer have to hide.” Brandeis had caught hold of the new immigrants’ determination to become American and yet be free from the demeaning pressures of social conformity and demands to blend in—from government, gentiles, and the Reform Jewish elite.

For his part, Isaac Hourwich created the Jewish Congress’s electoral machinery and chaired the committee that crafted the voting system. Ever the participant-observer and educator, Hourwich reported on these proceedings in the Yiddish press, using the up-to-date Progressive tools of analysis of republican institutions - and the perils of elite or “clique” or simple two-party domination of party conventions and the electoral process - he had mastered over the prior decade. And when the ballots were counted, the balance tilted toward the nationalists. Their newer, thicker, more public, political and controversial account of Jewishness as an ethno-racial, “hyphenated” American identity with “multiple loyalties” – and of America as a pluralist nation of many peoples - had gained legitimacy and substantial sway, and would go on to transform the Jewish institutional and ideological landscape.

Brandeis and the Congress movement had by no means routed Louis Marshall and the AJC. (No constitutional settlement ever entirely routs one side of the argument and enshrines the

other.) But they had permanently broken the hegemonic grip the AJC and their account of American Jewishness had hitherto enjoyed on Jewish politics and forced them to cede a significant portion of power and to change some basic precepts. Brandeis and company were seizing the mantle of “representative” leaders of the Jewish “masses.” Holding on to power compelled Marshall and the AJC to find common ground with Brandeis’s and even the émigré Russian Jewish nationalists’ ideas and programs. President Wilson himself directed the AJC and the American Jewish Congress to join forces and send a single delegation to the Paris Peace talks. Over a period of months, Marshall and Kohler fought and negotiated with Hourwich and other Congress Movement leaders, hammering out a Jewish Congress agenda and drafting a Jewish Bill of Rights, which they and their clashing constituencies could live with. It was a Bill brimming with group rights and national rights.

By then, Marshall had learned – and even partly made his own – constitutional ideas undreamed-of in his old liberal philosophy. In Paris 1919, this hitherto ardent foe of group rights and nationality rights would become their most effective champion, prodding and guiding the U.S. representatives on the Committee on New States to inscribe group and national rights into the Minorities Treaties. Back in the U.S. in the 1920s, an elderly Marshall would enter the constitutional fray on behalf of the rights of Jews’ and other minorities’ rights to carry on schools in their “foreign languages” - bringing that particular group right home from Paris, translating it into a classical liberal idiom, but also drawing the pluralist arguments he’d learned from Hourwich and Brandeis firmly into his domestic constitutional repertoire.

So it was that in this constitutional moment, rival lawyer-leaders fought over and hammered out a grammar of Jewish belonging and apartness in the U.S., working with the

disparate materials of Reform Judaism, Zionism and Diasporic nationalism and American and transnational legal and constitutional imaginaries. Over time, their rival views would combine in new ways. Thus, the hyphenated Jewish-Americanism associated with the Congress Movement and the new immigrant “Russian Jews” made its own what had been the invention of the German Reform Jews: the conviction that “defending the rights of others” under the liberal Constitution lay at the heart of Jews’ distinct ethno-cultural identity as a “priestly,” justice-seeking “people apart,” even as it affirmed their secure place in the American community, as guardians of its sacred text. By the 1940s, the American Jewish Congress had become the hub of dozens of “progressive” Jewish organizations dedicated on one hand to a Jewish homeland, and on the other, to the proposition that the “survival of ‘Jewish distinctiveness’ in the United States depends on pursuing the rights of America’s oppressed minorities.” Zionism combined with social democracy and devotion to “minority rights” and civil rights activism to become the hallmarks of the “Jewish liberal” in American life. Out of this milieu, the ranks of civil rights lawyers of elite German Reform Jewish origins, like Max Kohler, were swelled by a new and bigger generation of civil rights lawyers, activists and supporters from the Lower East Side and other Russian Jewish communities.

Meanwhile, Justice Brandeis’s defense of “group rights” never ripened into a program of constitutional change in the U.S. During the interwar years, “group rights” and “group equality” continued to serve as a moral and rhetorical resource against the forces of “100% Americanism.” As legal material, however, group, nationality, and minority rights remained lodged in the post-war treaties, where they stood for the increasingly vain hope of safeguarding vulnerable Jewish institutions and associations in Eastern Europe. When freedom of association finally gained a doctrinal foothold in U.S. constitutional law, it was not as a group right, as Brandeis had cast it,

but as an individual right in the panoply of “preferred rights” in the post-New Deal constitutional settlement. By then, Jewish lawyer-leaders had come to believe that Jewish institutions and associational life in the U.S. could rest on the sparser legal bases of individual rights, much as Brandeis’s classical liberal foes in the AJC had insisted all along.

Lessons

Let me draw a few lessons from this forgotten story. The first is this. Group rights did a great deal of important work in this constitutional moment. Today, the Jewish-American establishment and the American legal establishment both scorn “group rights.” They associate the idea with left-wing academics playing at identity politics of an irresponsible and noxious sort. After all, the establishments will tell you, the U.S. has achieved a working system of cultural pluralism, with a reasonable balance of cultural group autonomy and individual liberty, without enshrining group rights. Even a sophisticated Jewish political theorist with unimpeachable pluralist credentials like Michael Walzer sometimes seems to share this view.

What is more, if we turn the clock back a century, and return to the U.S. in 1915, we find that the language of group rights and national rights seemed foreign and out of place to assimilation-minded Jewish liberals, like Louis Marshall, and Jewish socialists like Morris Hillquit. So, it is no wonder that Jewish historians today seem to assume that the Congress Movement’s critics were right, that group rights were just what their contemporary critics called them: a Russian solution to a Russian problem – a piece of intellectual baggage that émigré thinkers like Hourwich needed to put aside in the U.S., an ill-fitting, foreign, even dangerous, set of ideas.

That view was mistaken. Hourwich and Brandeis had it right. Group rights were a

Diasporic solution to a common problem. Conceptually, organizationally and emotionally, group rights were indispensable in the fashioning of a legal and political grammar and a durable constitutional narrative of Jewish belonging and apartness in America. The work of this Diasporic constitutional imagination in the U.S. had more in common with its work in Minsk or Vilna than we remember.

As professional rememberers – what Eric Hobsbawm called us historians – and as legal thinkers, we can do better. The conceptual mistake is to think that because we in the U.S. have no formal legal or constitutional categories that go under the name of “group rights,” it is, therefore, possible to imagine the legal framework for even the most liberal forms of cultural or political pluralism without some underlying notion of group autonomy and some set of constitutionally guaranteed or functionally entrenched rights of the kind that may be exercised *only collectively*, through participation in some corporate body.

But that is not so. However you label it (and at different times in different contexts Americans have given it myriad labels, from the individual right of property or contract to individual freedom of association to the individual right to engage in concerted action), some conception of group or corporate rights is indispensable to any pluralist order. Some form of entrenched group rights is necessary. Without them, no meaningful pluralism is legally secure.

All of this was perfectly clear to legal Progressives like Brandeis. Legal Progressives a century ago were obsessed with group rights; and for years before his encounter with Zionism and the Congress movement, Brandeis had used the phrase frequently regarding the (unrecognized) rights of organized labor and trade associations. In the cultural arena, it was not hard for a Brandeis or Hourwich to envision government denying radical journals and organizations the use of the mails, shutting down their offices and meeting halls, forbidding the

use of public buildings for teaching Yiddish, forbidding the teaching of Yiddish entirely. All of this Hourwich predicted during this constitutional moment; and, of course, all of it happened before the moment ended. All of these endangered activities, in turn, involved the exercise of “group rights” by a Brandeis’s or Hourwich’s legal lights. These were “group rights” marking off zones of “negative liberty.” But the idea had other, “positive” dimensions, as well – it fairly overflowed with constitutional meaning – in their imagined pluralist America.

Who knows? Perhaps Hourwich’s romantic friend, the spell-binding Chaim Zhitowsky was right. Maybe the American future held in store efforts by “American Israel” to create great Yiddish universities, and in that case, working-class Jewish Americans might want to make “positive rights”-style claims on the public fisc to their fair share of public resources for such national projects.

Bear in mind that *none* of these ideas had any present legal traction, and it was hardly a foregone conclusion that after the well-nigh inevitable – and ardently imagined - overthrow of constitutional laissez-faire, modern constitutional law in the U.S. would eventually take shape around a new array of *individual* rights. Quite the contrary: Most advanced Progressives imagined otherwise. Group rights, they thought, were sure to be part of the new constitutional firmament. So, in his remarkable flights of creative-higher-lawmaking in speeches for the Congress movement, Brandeis used “group rights” and “group equality” as underspecified legal-constitutional concepts. Like all new, abstractly phrased constitutional precepts, their particular meanings and instantiations for Jews or other “national and racial minorities” would hinge on what the future held.

Jewish American thinkers today are far more prominent as critics than architects of group-based and multi-culturalist strands of contemporary legal and political thought. We tend to

forget how much the Jewish radicalism of a century ago had in common with the black radicalism of that day – think DuBois and his visionary mix of equal citizenship, black “separatism” and transnational black solidarity. Instead, since the 1960s, Jewish liberals have heard “group rights” and remembered anti-Jewish “quotas.” We have heard “black nationalism” and forgotten when Jewish nationalism meant not only Zionism but demands for group autonomy, separate cultural institutions and proportionate group representation in the Diaspora. We forget when “group rights” and “nationality rights” signified solidarity with oppressed Jews demanding just such rights in Eastern Europe and Russia, and how, in that moment in the U.S., “group rights,” “group liberty” and “group equality” signified a posture of Jewish cultural and public-political group self-assertion, a demand for group respect and recognition. We don’t recall when the emergence of separate, Yiddish-speaking public spheres brimming with restive unions and revolutionary communist, socialist and nationalist politics in the cities’ crowded Jewish “ghettoes” seemed as menacing to the city fathers, Jewish and Gentile, as black nationalism in the crowded black “ghettoes” seemed a couple generations later.

Nor do we recall how, in the 1900s, high-brow journals like *Menorah* and popular dailies like *Forverts* saw Jewish legal and social thinkers working through the competing claims of integration and separatism, liberalism and pluralism, individual and group rights, universalism and particularism, belonging and apartness – some insisting on the overriding wisdom of one pole or the other, but many refusing to choose, mediating the tensions between them, and, like DuBois, imagining and demanding both. Recalling this moment when Jewish longings and aspirations gave rise to a trans-national constitutional imaginary might have enabled Jewish liberals in the turbulent ‘sixties to see something more of themselves in the racial others whose nationalist ideas and group rights claims they found so dismaying and indefensible.

My final take-away to offer you is this. We haven't world enough or time today to survey Louis Brandeis's various accounts, in this same period, of the kind of constitutional order he envisioned for the Jewish state in Palestine. He offered these ideas in the very same moment in which he forged his compelling critique of classical liberal constitutionalism as a snare and illusion, and a peril to human freedom and dignity, because it granted Jews only individual rights and failed to recognize and safeguard group or national rights – in equal measure for Jews and all other “national or racial minorities.” There could be no modern constitutional democracy without this. When it came to Palestine's Arabs, however – those whom Brandeis likened to the “Indians” of the American frontier, Brandeis's imagined constitution for the Jewish homeland offered only individual rights. This was no oversight, but a feature Brandeis hoped to bake into the Jewish state. His noble vision of a new progressive, pluralist constitutional dispensation only went so far.