Constitutionalism, Human Rights, and the Genealogy of Jewish American Liberalism: A Comment

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Samuel Moyn has written a brilliantly detailed yet wide-ranging essay about Louis Henkin's "drastic self-reinvention" as "the leading American legal advocate of human rights." What light, asks Moyn, does Henkin's Jewishness shed on his emergence as "the premier [American] contributor" to the international human rights movement? What did Judaism or Jewishness have to do with it? And what does that, in turn, tell us about the shape and arc of American Jewish politics and identities and their relationship to human rights advocacy in the twentieth century?[1]

Moyn's essay has three main threads. First is Henkin's late-blooming career as the United States' preeminent, "iconic" human rights lawyer. Henkin was fifty before he wrote anything on the subject of human rights; and well over fifty before his sudden conversion to the view that fostering international human rights law was a promising avenue for human betterment, and international human rights advocacy an exhilarating, high-powered calling. The conversion happened in the mid- to late-1970s, and this makes Henkin's career a study in the Moyn thesis about the sudden, unpredictable, contingent, and conjunctural take-off of the human rights

[1] Samuel Moyn, "Louis Henkin in Human Rights History: Jewish Politics Temporary and Terminable," in the present volume. All further quotations from Moyn refer back to the same essay unless otherwise noted.

enterprise in just those years.[2] Henkin is the Moyn thesis as biography. Both before and after his conversion, Henkin tossed off many lines that confirm various aspects of the Moyn thesis.

The essay's second thread concerns whether Judaism should be understood as a seedbed of human rights and a source of Jews' long involvement with international human rights advocacy. Here, again, Moyn finds much in Henkin to confirm his own powerful take on human rights history. Like Moyn, Henkin spurned the idea that religion is where to look for the origins of human rights, and Judaism, least of all. Religion, generally, and Judaism, in particular, sound in the key of duties, not rights, wrote Henkin. Religions have not been inclined to set up individual rights over against society, government or God. Henkin was an observant Jew, more steeped in Judaism, by far, than most other Jewish human rights advocates or scholars of his generation. Having set out to explore the commerce between the two, Henkin concluded – and Moyn seems to agree – that Judaism "lacked any notion of natural rights, as distinct from the ethic of duties that divine law imposes on the Jewish people."[3] "Yet more radically," Moyn notes, Henkin denied that Jews ever "affirmed a rationalistic conception of law of any sort," unlike the "rationally available moral principles" found "in Christian natural law traditions, let alone like those that modern human rights provide."[4] Judaism, Henkin emphasized, offers moral and human values of "a very high order," but "not protection for the stranger." Despite Judaism's injunctions to be kind and charitable to the stranger, it offers the stranger nothing like *rights*. For rights, the stranger must look elsewhere.

To which Moyn responds, "Amen." But then, insofar as Jews have had a long, intimate involvement with the pursuit of international human rights, why is that so? The answer, both

[2] Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard, 2010). See, especially, the sections discussing Henkin, 201-211.
[3] Quoted in Moyn, "Louis Henkin."

[4]In his recent *Christian Human Rights* (2015), Moyn complicates his own views about the influence of Protestant theology on human rights - not as original seedbed, however, but rather as recent ideological shaper of contemporary human rights discourse. See Samuel Moyn *Christian Human Rights* (Philadelphia, 2015).

agree, is in virtue of what Moyn calls "the politics of the Jewish people." Jews must care about human rights, not because Judaism enjoins them to; it doesn't. Rather, they must do so because of their historical experience as a vulnerable "minority" – because, quite simply, as Henkin wrote his brother and sister-in-law in a terrifically revealing 1944 letter Moyn uncovered, and to which we will return: like other "minority groups," Jews live in "glass houses."[5]

Not the religious tenets, then, but "the political experience of Jews made them natural partisans" of human rights; and it was "no wonder" that in states where Enlightenment brought Jewish emancipation, "that Jews embraced the new human rights," and no wonder that soon after, "[w]hat is now called 'Jewish internationalism' was born." From the late nineteenth century onward, prominent Jews, residing chiefly in Western Europe and the United States, undertook international advocacy and private diplomacy on behalf of oppressed fellow Jews, dwelling in states and imperial regimes that continued to deny Jews the rights that emancipation secured or, at least, promised. These private diplomats proved pioneers of the "primitive international human rights movement of the nineteenth century," in Henkin's words. This movement's work, in turn, "much of it in behalf of Jews, proved fertile seed for an international law of human rights," Henkin explained, "undermining the notion that the way sovereign states treat their own inhabitants, even their own citizens, is not the proper business of anyone else."[6]

If you find it hard to make out whose potboiler history of Jewish human rights advocacy we are tracing here – Henkin's or Moyn's? - that is because Moyn's essay weaves them together so tightly, they become one. One, that is, until we arrive at precisely this point, where Moyn pauses to underscore a particular feature of that history in relation to which he means to situate

[5] Quoted in Moyn, "Louis Henkin."

[6] Quoted in Moyn, "Louis Henkin."

Henkin, making Henkin no longer merely a fellow student but an historical subject in his own right. Moyn draws our attention to the dual politics or "twinned strategies" that Jews pursued in the "international space." Jews strove for supranational protection of Jewish rights, seeking "to install human rights above the nations so that international law would protect individuals… from states that failed to do so." "At the same time, however, Jews sought national self-determination for themselves, and indeed [quoting Henkin] 'contributed to the triumph' of that principle, after…1917."[7] These twin goals, Moyn notes, had an "uneasy co-existence" from the start - an uneasiness, which "Henkin papered over." And no wonder, for on Moyn's account, the central "puzzle" of Henkin's own history lies in the seemingly blithe way he managed to become "the famed [international] human rights lawyer he did *on Jewish grounds*" at the very moment, in the mid-1970s, when "Jewish internationalism" and its dual politics fell apart.

Whatever uneasiness attended the enterprise, Jewish advocates "in the international space" were relatively comfortable championing both their "twin goals" for many decades, roughly from the 1910s through the mid-1970s. They promoted the international human rights project ("minority rights, internationally protected") on one hand, and the Jewish homeland project (the principle or "national right" of self-determination), on the other. Only "after the Six Days War," in the 1970s, did Jews, who were active, like Henkin, in international affairs, see "a choice open up…between the defense of the State of Israel or the defense of international human rights." The mid-'70s may have been the take-off moment, when international human rights became a serious, mainstream enterprise in international affairs, but it was also the moment when the paired goals or "twinned strategies" of Jewish internationalism unraveled.

[7] Quoted in Moyn, "Louis Henkin."

From this perspective, Henkin's preeminent role, commencing in the mid-'70s, in making international human rights a central focus of international legal practice and scholarship, and his newfound, tireless enthusiasm for international human rights as worthy, fruitful legal material, emerge as the puzzle that Moyn's essay sets up and aims to solve. For, as Moyn observes, Henkin's passionate embrace of human rights advocacy arrived just at the moment when escalating attacks on Israel at the UN, Soviet-Arab diplomatic assaults, the legitimization of the PLO, and the branding of Zionism as racism all led to a profound crisis in the Jewish political world. How was it, Moyn asks, that Henkin could find the energy and conviction to throw himself into the international human rights project and become its most prominent and inspiring legal academic spokesman, at just the moment when international human rights norms had begun to "seem too threatening to be dependable, let alone exhilarating" from the perspective of Jewish internationalism?

How did Henkin emerge and flourish as an icon of international human rights law, while remaining an observant Jew, a Zionist, and a leader in the American Jewish Committee (AJC) - even as Jewish politics and the AJC swung away from the international human rights community? How is it that "Henkin became the famed human rights lawyer he did *on Jewish grounds*" in this dispiriting conjuncture?

That is Moyn's question, and the third strand of the essay provides his answer. This seems to me the heart of the essay. Shrewd and compelling, it is this strand I mean to develop and, perhaps, deepen, with some brief forays and reflections backward and forward in the history of Jewish American liberalism.

Henkin's devotion to human rights was grounded in his Jewishness, but, argues Moyn, it was a *"fervently American"* Jewishness. More pointedly, and paradoxically, Henkin's was a "long-

husbanded Jewish identity" whose chief expression was not any form of Jewish nationalism nor any other explicitly Jewish values or commitments, but instead "the defense of constitutional liberalism": a Jewish identity, in other words, which was "much more that of a proud American nationalist," an "American liberal nationalist" for whom America's "liberal constitutional principles, however honored in the breach" were what "made it great."

Indeed, much of Louis Henkin's scholarship, from the mid-1970s onward, consisted of a stream of learned but accessible lectures, essays and books about the affinities and continuities (real and imagined) between American constitutionalism and international human rights. Thus, Henkin would argue, international human rights were American rights writ globally – improved, enlarged, and brought up-to-date. Americans should get over those strains in our political culture that have viewed international law as foreign matter, and have shunned the notion of binding the United States to charters like the International Covenant on Civil and Political Rights, which the U.S. would not ratify until 1992.

Strikingly, as both Henkin and Moyn underscore, while the 1960s were a golden age of constitutional liberalism, it was only in the 1970s that it occurred to "constitutional liberals" to press "America to commit to international human rights." And in journalism as well as scholarly works like *The Rights of Man Today* (1978), Henkin did his part, proclaiming that the International Covenant "has made our ideology the international norm"; its forefather was none other than Tom Paine, who "would have welcomed international human rights."[8]

There is a tender spot here, however. Just what is Jewish about this? Taking Henkin's "heartfelt" efforts to Americanize international human rights and to "interpret and expound the

[8] Quoted in Moyn, "Louis Henkin."

U.S. Constitution so as to make the American polity… part of an international rights regime" for all they are worth, how exactly do these efforts express or flow from a *Jewish* American identity?

Steeped in American constitutional law and history, an accomplished constitutional scholar with a long involvement in international law and an intimate familiarity with that particular precinct of domestic law where foreign affairs intersect with constitutional doctrine around matters like the Treaty Power, Henkin was professionally well-equipped for his "drastic self-reinvention" as an international human rights maven. But why should we see Henkin's well-timed investment in the human rights enterprise as an expression of his Jewishness? Why not see it simply as a case of a Jewish liberal who, acknowledging the real perils of international human rights continuing to be wielded as a "cudgel" against Israel, chose to put his liberal commitments ahead of his Jewish ones? That is how Henkin saw it.

To be sure, there is a familiar strain of Jewish liberalism that sets up the "universal," "justice-seeking" elements of Judaism over against the "particularistic" or "parochial" ones, and on this Jewish ground, defends a posture of weaned affections for Zionism or Israel, insofar as fealty to actually existing Zionism or Israeli state policy threatens to short shrift the universalist commitments of one's Judaism. But as Moyn shows us, that was not Henkin's outlook.

To the contrary, we have seen, Henkin insisted that Judaism played no part in forging his felt commitment or professional calling to human rights. Indeed, Moyn shows us that Henkin was at pains to insist, privately as well as publicly, that neither his Judaism nor even his Jewishness had much to do with his liberal universalist feelings and ideals: which returns us to Moyn's prooftext, the fascinating war-time letter Moyn uncovered from Henkin, the young G.I. in Italy, writing to his brother and sister-in-law about whether they, or he, ought to replant themselves "in a Zionist Palestine." For his part, Henkin thinks not; he is unwilling to "exchange… my American

roots" for new ones there. "For all my Jewishness and tradition, my education and heritage is largely American… Even my universalism or humanism, as I like to think, it is largely American." America, he goes on, "molded me" and instilled "a firm, fervent belief in the principles of a country which to me negate any chauvinistic devotion to country – even this country itself." Given this, Henkin was leery about buying into a "modern Zionism," which, should it succeed, might or might not prove any better than the mine run of "self-interested" or "chauvinistic" nationalist projects: "I hold no brief for nations and races and their continued existence as such." Even when he does point to a Jewish affinity for human rights, Henkin ascribes it only to the generic experience of minority group experience, not even the distinctive pathways of Jewish history. Jews, in other words, ought to be devoted to the rights of outcasts, just as "all minority groups… should," as a simple matter of enlightened self-interest. Even there, however, Henkin finds his fellow Jews falling short, regarding the preeminent minority rights struggle at home – the battle to topple Jim Crow - which had already engaged Henkin's moral imagination:

> I never got the impression that the "average Zionist" was any more liberal than the "average American." … I've seen lots of Jim Crow sentiment among Jews…the *only* liberal causes I've ever seen most of the Zionist leaders associated with were the self-interested ones.[9]

This was a remarkably cynical and inaccurate assessment of American Zionist leadership. However, it is vivid testimony to Henkin's feelings about the sources of his own civil rights liberalism, and to his dim view of Jewish nationalism.

But if Henkin was persuaded that the wellspring of his civil rights liberalism was his American "heritage" and not his "Jewishness," Moyn thinks otherwise. And I agree. What Henkin thought of as his Americanness is, in fact, more deeply, historically understood as a Jewish

[9] Quoted in Moyn, "Louis Henkin."

identity, a distinctly *Jewish* way of being American. The prooftext situates the young Henkin in a "long tradition of American Jewish legal liberals," Moyn explains, and "whose most meaningful and sometimes sole enactment of Jewish identity was the defense of constitutional liberalism."

This seems exactly right, as far as it goes. It does not explain, however, quite what it means to claim that "defending constitutional liberalism" should be understood as a person's enactment of Jewish identity. What is *a priori* Jewish about this pattern of behavior and thought? Here, we do well to reach back into the "long tradition of American Jewish legal liberals" to which Moyn alludes, and which I have been studying.[10] I want to suggest that Jewish constitutional and international lawyers in the nineteenth and early twentieth centuries produced and passed along some of the basic categories of thought and structures of feeling that Henkin would inhabit and take for granted, and that enabled and constrained him to experience and interpret his Jewishness and Americanness as he did. I'll go further, and briefly sketch how the first couple generations of these Jewish lawyer-leaders invented, fought over and hammered out some of the basic terms of Jewish belonging and apartness in twentieth-century America, not only for themselves but for "Jewish liberals," generally.[11]

We need to remember that until the late eighteenth and early nineteenth century, it was not possible to speak of Judaism as a "private affair" or a "private faith," as Moyn and Henkin do, nor to draw the distinction they draw between "Jewish politics" and Judaism, the religion. For most of its history, Judaism was *not* a "religion" in this (liberal, Protestant) sense at all. It was public, not private; compulsory, not voluntary; and a system of laws, practices and government, not chiefly a

[10] Moyn is gracious in quoting a work-in-progress of mine that examines this tradition, and I draw on it here. See Forbath, "Jews, Law and Identity Politics in the Progressive Era": http://www.utexas.edu/law/faculty/wforbath/papers/forbath_jews_law_and_identity_politics.pdf

[11] Jerold Auerbach first explored this terrain in a brilliant and quirky book, to which I remain deeply in debt. Jerold Auerbach, *Rabbis and Lawyers: the Journey from Torah to Constitution* (Albany, 1990).

matter of belief or faith. What was more: Judaism named a people and a nation, a "race" no less than a "religion."[12] All these ways in which Jewishness confounded the category of "religion" would remain salient and vexing, even as Judaism was reinvented for a liberal modernity.

That reinvention assumed a particular form in the work of the generations of Jewish lawyers, most of them from German-Jewish Reform religious backgrounds, who sought to complete the arduous work of making American Jewishness into a "religion" and a "private affair." From its beginnings, Reform Judaism was, in important part, a constitutional project: a dream of legal and civic equality and equal rights for a subordinate and outcast group. These lawyers sought to realize this dream precisely by embracing the American Constitution as a new sacred text and enacting its interpretation and exposition as a new, sacred calling. Radical and conservative, some speaking for the old Reform Jewish elite and others for the new Jewish immigrant masses, these late-nineteenth and early-twentieth-century Jewish lawyers were not simply courtroom advocates but what I have called lawyer-leaders: key founders and representatives of the first national Jewish organizations, who 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.[13]

Two generations of such Reform Jewish lawyer-leaders-*cum*-authority-figures, had fashioned and passed along this Jewish liberal identity, and this intensely felt investment in liberal constitutionalism and civil rights liberalism, before Henkin inherited it, and gave it his own twist.

The liberal offer of individual emancipation in exchange for collective self-effacement yielded

[12] See Leora Batnitsky, *How Judaism Became a Religion* (Princeton, 2011).

[13] *See* Forbath, "Jews, Law and Identity Politics in the Progressive Era" [*hereinafter* JLIP] supra note 23. *See also* Forbath, "The Jewish Constitutional Moment: Diaspora, Group Rights and the making of American Jewishness and Modern Liberalism," [SSRN cite], [*hereinafter* JCM] at 8, 33.

mixed, ambiguous results in Europe before World War I. The United States, by contrast, 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 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, promised formal legal equality to all and condemned what was called "class legislation," including laws that classified and burdened individuals on the basis of race, color, nationality, or creed. Brimming 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![14]

Over the next few decades, Reconstruction Era constitutionalism flowed swiftly into American Jewish public discourse and self-understandings. It also shaped the identities and world views of the first generation of Jewish lawyers to emerge at the forefront of the American legal profession. Men like Louis Marshall and Max Kohler attended and excelled at elite law schools in the late nineteenth century, imbibed classical liberal legal and constitutional learning, and emerged as leading constitutional lawyers in the coming decades. Founders of the American Jewish Committee and pioneers of "Jewish internationalism" in the U.S., these men were also the first generation of American Jewish lawyers working at the intersection of constitutional and international law. As they engaged with the issues of the day - immigration, labor strife, racial subjugation, the plight of oppressed minorities at home, at the nation's gates, and abroad, they

[14] *See* Forbath, JCM at 13.

made defending the rights of the stranger into a Jewish calling that, several decades and two generations later, Louis Henkin would take up.[15]

Let us focus on just one of Henkin's forbears here – Max Kohler. Unlike Louis Marshall, Kohler is a largely forgotten figure, but a revealing one for our purposes. Marshall is better remembered because he led the American Jewish Committee (AJC) for its first two decades, and was also among the country's premier constitutional lawyers, appearing chiefly for business corporations but also for racial minorities, on behalf of the newly founded NAACP, always wielding the language of classical liberalism.[16] Max Kohler was Marshall's young partner, close friend and fellow founder of the AJC. Unlike Marshall, he worked almost full-time on immigration and what we would call civil rights. From the 1890s through the 1920s, Kohler advocated tirelessly against Chinese Exclusion and other race-based immigration measures, and against Jim Crow. Kohler and Marshall thus were the first of what would become an enduring twentieth-century Jewish-American folk hero, the Jewish civil rights lawyer.

What prompted this momentous bit of what Professor Moyn might call "self-reinvention"? The standard account runs along the same instrumental lines that Henkin and Moyn suggest. "[A]ll minority groups," said Henkin, really ought to be fighting Jim Crow and championing the Constitution's neglected guarantees against discriminatory laws. For "highly assimilated" Reform Jews like Kohler and Marshall, so the classic version of this instrumental thesis goes, fighting Jim Crow laws was a "displaced" way to address the threat that Jews too might be legally cast as racial others in the nativist climate of the day. If it seemed reckless even to raise the prospect of Anti-Jewish laws in the U.S., they could use Jim Crow statutes as a kind of "stalking horse"; if the latter

[15] *See* Forbath, JLIP, 6-10.
[16] See generally, M. M. Silver, Louis Marshall and the Rise of Jewish Ethnicity in America (2013).

were unconstitutional, then "a fortiori" so would be laws discriminating against Jews.[17]

There is much to this. But there is a deeper story of how and why interpreting and making claims on the U.S. Constitution on behalf of racial others became a Jewish calling. First of all, this instrumental account overlooks a critical fact. Most of the racial outcasts that Kohler and Marshall first defended were not, in fact, blacks; they were Jews being turned away at Ellis Island.[18] Not proxy racial others; but Jewish ones. Well before he began to train his fire on Jim Crow, Kohler was litigating and advocating in the press and public hearings on behalf of Jewish immigrants, claiming that they were being subject to "race discrimination" by the Immigration Bureau and nativist lawmakers and pundits.[19]

This revision reminds us that it was the mass immigration of "poor Russian Jews" from the peripheries of Europe and the Tsar's empire that brought urgency and depth to Reform Jewry's embrace of the U.S. Constitution as a source of Jewish American identity. But this revision only begins to unfold the deep and thorny problem for which rights lawyering was a solution. How could a well-heeled, proudly assimilated Reform Jew affirm and act upon – rather than shamefully shun – his fellowship with the despised racial others, the allegedly "unassimilable" "poor Russian Jews" at the nation's gates? And how do so without fatally wounding his own claim that his Jewishness is no ethno-racial marker at all, but simply his religious "faith," as a full-fledged American? How could he make something meaningful of his Jewishness, felt and understood as ineradicable membership in a *people apart*, while carrying on the project of assimilation and unassailable belonging in America?

Max Kohler's father outlined the beginnings of an answer. Kaufmann Kohler was late

[17] 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.
[18] *See* Forbath, JLIP 43-44; Forbath, JCM 29-31.
[19] *See* Forbath, JLIP at 38.

nineteenth-century America's preeminent Reform rabbi. He hammered out American Reform Judaism's first programmatic theological statement, the canonical Pittsburg Platform of Reform Judaism of 1885.[20] Anxious in context but confident in tone, the heart of Kohler's Pittsburgh Platform was the proclamation that "We Jews 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."[21] Jewish law only binds us in its moral precepts. Henceforth, Kohler and his fellow Reform rabbis and lay lawyer leaders would repeatedly say, "Our Zion is America." 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 about the Constitution supplanting Torah law.[22] These blunt, cartoonish formulas indicate that Henkin was not wrong when he wrote in 1983, "It has been suggested that for generations of Jews the Constitution has been a substitute for the Bible." Certainly, I am suggesting that for this generation of Reform Jews, as mass immigration began to stir up Jew hatred in their new Zion, it seemed time to seal the Enlightenment bargain unequivocally. Louis Henkin may have believed "America's true genius" was "that both systems" – Torah and American constitutionalism – "could co-exist," and one could "opt for both," and, as Moyn puts it, "never have to choose." But these Jews felt they *did* have to choose. Or, perhaps: both felt they *had* to, and also *chose* to choose. Most had arrived in the middle decades of the nineteenth century 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 being recast as a modern, liberal-Protestant-style "religion." It was a good time to proclaim fealty to the U.S.

[20] "The Pittsburgh Platform," The Pittsburgh Conference (1885) (quoted in Michael Berenbaum, *Pittsburgh Platform, in* 16 ENCYCLOPAEDIA JUDAICA 190 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007)).
[21] *Id*.
[22] AUERBACH, *supra* note 25 at 22.

Constitution in no uncertain terms.

If the "new immigration" spurred Reform Jews to declare that the Constitution was their new Torah, it also called forth a vast, decades-long campaign of social, political and legal action. It seemed only a matter of time before the nation's gates would clang shut. The campaign to keep them open thrust Max Kohler along with Marshall into central roles defining and defending Jews' contested status and identity, on the American scene as well as at the gates. It lent their classical liberal outlook 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 Kohler responded vigorously to every threat.[23] Enlisted by Lower East Side editors and attorneys, Kohler led successful legal challenges to new regulations in the hearing rooms at Ellis Island, and brought habeas suits in federal district court challenging them. For the next two decades, Kohler and Marshall orchestrated a many-sided campaign of quiet diplomacy and loud protests, sophisticated lawyering, and intense lobbying to halt the "race prejudice," "deportations," and "administrative lawlessness."[24] At the same time, Kohler became the Reform Jewish elite's leading authority on international law and made his own the intersection of international and U.S. constitutional law that Louis Henkin would occupy at Kohler's alma mater, Columbia Law School, half a century later. With Marshall and others, he led a startlingly successful campaign to prod Congress and the White House to terminate the nation's trade treaty with Russia in protest against the empire's official Anti-Semitism.[25]

For his part, on the Bimah at Temple Emmanuel, New York's great Reform Jewish cathedral

[23] *See* Forbath, JLIP at 37-39; Forbath, JCM at 23.
[24] *See* Forbath, JLIP at 35; Forbath, JCM at 29.
[25] *Id*. *See also* NAOMI W. COHEN, NOT FREE TO DESIST (1972).

on Fifth Avenue, while Max was still in law school, Rabbi Kohler gave a sermon on "The Wandering Jew" that seemed to predict and prefigure his son's calling – and also answer a question that the Rabbi's own 1885 Platform of Reform Judaism had left hanging.[26] 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 the Rabbi, 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 remain a people stubbornly apart? His answer was the "arduous" and "priestly" work of justice-seeking, which Jews had to do "for all humanity." 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 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 world. But in the hands of Kaufmann 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

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

mingling of religious and secular modes of thought and feeling, which Max Kohler was set to enact. Here was a basis for renewing Jewish particularity — resisting "absorption" into the dominant community, and affirming one's identity as – or identification with – the outsider group, one's solidarity with the despised 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.

Linking American Jewishness to defending the rights of racial others, Kohler 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 patrician Reform Jewish liberals, but new immigrant Russian and East European Jewish leftists too - to rise in the social order, becoming an insider, while remaining in some morally and imaginatively significant ways an outsider, publicly enacting one's solidarity with the outcast and the fallen, the stranger.

The greatest challenge to this civic religion or even political theology was the rise of the Zionist movement, which made its own claims on Jewish loyalties and offered its own prescriptions for Jewish responses to antisemitism.[29] For this reason, among others, the new immigrants on the Lower East Side did not make it easy for the uptown, patrician Reform Jews to represent them and advocate on their behalf – or preside over their Americanization. The newcomers had their own ideas about what it meant to be both American and Jewish. And by the early 1900s, they had their own lawyer-leaders and their own organizations; indeed, they 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.

[29] *See generally* Forbath, JCM; Jonathan Frankel, *The Jewish Socialists and the American Jewish Congress Movement,* 16 YIVO ANNUAL FOR JEWISH SOCIAL SCIENCE 226 (1976).

These tiny outfits were a big thorn in the AJC's side. Everything that Rabbi Kohler and the AJC insisted Jews were not, these Jewish nationalists insisted Jews were: a distinct nation, a "race," and a people with its own public political creed and claims to a homeland and statehood in Palestine. They had a constitutional vision and vocabulary of their own that polyglot émigré Jewish lawyers and revolutionaries brought back and forth across the Atlantic from legal and constitutional battles abroad. They demanded individual civil rights and liberties, about which the Lower East Side nationalists and the uptown establishment liberals were on the same page, but they also demanded group rights and "national rights" of communal autonomy and national self-determination - in Palestine, of course, but also in the Diaspora, in Russia and even in the U.S.[30] So, the nationalists assailed what they saw as the Reform Jewish elite's cowardly assimilationism and called instead for race pride and "national self-assertion"; it was high time to create a robust and democratic Jewish public sphere and Jewish politics. Thus, they called for a Jewish Congress, a kind of Jewish para-state: "a representative and sovereign body of American Jewry," with links to similar bodies abroad.[31]

You can imagine, on the Upper West Side, Max Kohler, Louis Marshall, and Jacob Schiff were 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, their rights advocacy and their Jewish internationalism. And it remained so in the 1960s and '70s, when the AJC proved the site where, Professor Moyn has told us, Louis

[30] *Id.*
[31] *See* Forbath, JCM, 49-51. *See also* Frankel, *supra* note 48; James Loeffler, *Nationalism without a Nation? On the Invisibility of American Jewish Politics*, JEWISH QUARTERLY REVIEW, Vol. 100, No. 3 (Summer 2015) 367-398.

Henkin found his calling as an international human rights lawyer, reinventing himself at the last possible moment he could have done so "on Jewish grounds" – the last Jewish internationalist, as it were, in the line that began with Max Kohler.

What remains to be understood about this tradition is its relationship to Zionism and the kind of Jewish American identity the lawyer-leaders of this Jewish nationalist movement were forging, as they challenged the AJC's claim to speak for American Jewry. Moyn, you will recall, describes Jewish internationalism's relationship to the Zionist project of Jewish "national self-determination" and nation- and state-building as one of "uneasy co-existence" until the 1960s and early '70s. That is not how it seemed to the AJC's founders and leading practitioners of Jewish internationalism in 1906. ?" 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.[32] The conflict between the AJC and the Jewish Congress movement did not end. Nor did the AJC's anti-Zionism and anti-nationalism soften much for several more decades. Elsewhere, I reconstruct these early battles and rival ideas about Jewish rights at home and abroad in some detail. Here, I have sketched the beginnings of these largely forgotten battles, and will touch even more lightly on some of the later ones, only to suggest some lines of continuity between Henkin and his liberal Jewish internationalist forbears (and successors) that Professor Moyn leaves unexamined. To be sure, one central element of the early AJC's adamant attacks on Zionism was the fear that Jewish demands for national self-determination and group rights would stoke the fire of antisemitism in the U.S by raising the specter of disloyalty and

[32] *See* Forbath, JCM at 27.

a Jewish "state within the state." It was essential for prudential reasons to get right what rights American Jews were championing, for Jews abroad and Jews in the U.S.; and in both regards, the AJC would hear of nothing but classical liberal ones. But this founding generation of American Jewish internationalists also had principled misgivings about Zionism very much akin to Henkin's. They were crystal clear about the poisonous, illiberal aspects of ethno-racial nationalism and indeed, all nationalisms – with the notable exception of American civic nationalism, whose blind spots they (like Henkin) overlooked. Like Henkin at his most withering, the AJC founders were deeply skeptical about whether Jewish nationalism, if and when it had a state at its disposal, would prove any different - any less tribal, any more liberal than the European nationalisms from which Jewish nationalism drew so much of its inspiration. They would have found nothing to disagree with in the young Henkin's worries about Jewish "chauvinism"; nor with the older Henkin's conviction that once Israel was a fact on the ground, its beleaguered right to exist had to be fiercely defended.

Yet despite their convictions about the superiority of liberalism to nationalism, Kohler, Marshall, and the early AJC held no monopoly on liberalism itself. For American Zionists also fashioned their own strain of American Jewish liberalism. And they claimed as their own the greatest of all Jewish-lawyers-as-Jewish-folk-heroes, Justice Louis Brandeis.

As he rose to the head of the American Zionist and Jewish Congress movements during World War I, Brandeis responded to the AJC critique of nationalism with his own version of American Jewish liberal thought.[33] Zionism, said Max Kohler, Louis Marshall, and the AJC, was *anti-American*. Zionism, Louis Brandeis serenely declared, made Jews *"better Americans."* Pluralism – understood as the idea that law must embrace the significance of groups as sources of

[33] *See* Forbath, JLIP 67-68; Forbath, JCM 44-47.

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 the Jewish nationalists and wove it into a new group-rights-based account of Jewish belonging and apartness in American life.[34]Incorporating Progressives' insistence on the centrality of groups in American life, this account of "group rights" and "group equality" defended American Jews' and other minorities' "right to be different," to assert multiple public loyalties and to be "hyphenated Americans" – loyal to the U.S. but also to their own "nation," "race," or "people."[35] So it was that Jewish Progressives around Brandeis, including Horace Kallen, Stephen S. Wise, and Judah Magnes invented what came to be called cultural pluralism.

Historians have traced cultural pluralism's intellectual origins to Kallen's studies with William James at Harvard and the intellectual milieu of Jewish students there. But that is a bit like claiming James Madison's constitutional thought sprang from his studies at the College of New Jersey. Cultural pluralism took shape and found its keywords and conceptual scaffolding in the arena of real constitutional politics, in the clash of rival Jewish movements, organizations and their rival visions of Jewish and minority rights. Indeed, as I show in the longer work this comment previews, both Brandeis and Kallen first thought, expressed and defended the cultural pluralist outlook in the diasporic constitutional language they learned from émigré comrades in the Zionist and Jewish nationalist movement.[36]

Zionism, Jewish nationalism, and "hyphenated" immigrant identities, more generally, they

[34] *Id.*
[35] *Id.*
[36] *See* Forbath, JLIP 58-60; Forbath, JCM 33 n.88.

declared, were all "True Americanism."[37] When it came to the nation's Jews and other minority "races and nationalities," equal citizenship in America demanded not only individual but "group equality," freedom of expression and association demanded not only individual but "group rights."[38] . 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. Thus, group rightswere essential to a democratic Constitution, said Brandeis, and essential, as well, for the "American Israel," the "hyphenated" Jewish-American identity he championed. 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. Thus, Brandeis put the thicker, more public, political and controversial, "hyphenated" conception of American Jewish identity that was afoot on the Lower East Side on the road to respectability.

The conflict between these two strains of American Jewish liberalism – one group-ist, the other individualist – carried on over the next several decades, sometimes flaring into open conflict over Zionism and, later, over affirmative action. At the same time, I am inclined to think that Kohler's generation's focus on classical liberal rights as a touchstone for international as well as domestic advocacy carried on in the next generation – into an era, when, on Moyn's account, this staunchly individualist idea of human rights found no purchase "[e]ven within the ambit of Jewish organizations like the AJC," where he writes, "it was a peripheral topic rather than a major concern" compared to "the natural right of the Jewish people" to "their own sovereign state," which was warmly championed and celebrated. "No one," he tells us, "has made the case" that leading

[37] Louis D. Brandeis, "True Americanism, Oration at Faneuil Hall (July 4, 1914)," in L. Brandeis, ed. *Brandeis on Zionism: A Collection of Addresses and Statements by Louis D. Brandeis* (New York, 1942), p. 3.
[38] Brandeis, "True Americanism," p. 3.

Jewish internationalist outfits like the AJC "committed to [this] idea of human rights in the 1940s… as the specific project consecrated in the United Nations program."

But unless I misread him, that is exactly what James Loeffler has argued was the case regarding the AJC and its strenuous politicking around the creation of the United Nations and the crafting of its program and its Declaration of Human Rights.[39] Confronted by their Zionist rivals' post-war triumphs, the second generation of AJC leadership reckoned that simply being against or, at best, ambivalent about, Jewish statehood was not a recipe for continued prominence in post-war America. The old liberal Jewish internationalist outfit also needed something to be for – and what they settled on, in Loeffler's vivid reconstruction, was rebooting the organization's old liberal Reform Jewish mission by championing in the corridors of American power the idea of putting individual, and not group or national, human rights at the center of the UN program and Declaration.

Fast forward, now, to the 1960s, when we arrive at Moyn's "last possible moment" and the terminal undoing of Jewish internationalism's twinned goals and the end of their "uneasy co-existence," in Moyn's telling. Again, I am no expert. But I am less confident than Moyn that Henkin's work for the AJC in this period - exploring the promise and perils of international human rights, and getting his brief but decisive head start toward international human rights stardom - was really at the last possible moment, as far as Jewish internationalism is concerned, at least at the AJC. To my amateur eyes, things look different. The old liberal internationalists at the AJC *still* seem to have been fairly riveted on championing human rights – and what is more, on championing human rights *in* Israel – well after Moyn tells us that the AJC and its kin "deprioritized human rights rapidly as the latter became cudgels to attack the Israeli occupation

[39]James Loeffler, "The 'Conscience of America': Human Rights, Jewish Politics, and American Foreign Policy at the 1945 United Nations San Francisco Conference," *Journal of American History* (2013) 100 (2): pp. 401-428.

(or Israel itself), especially after 1967." In the 1970s, it seems, the AJC was still "Jewish ground" where one might find the twinned projects uneasily carrying on. Frustrated by obstacles to defending Israel and human rights, in the '70s, the AJC made a major investment in funding a human rights organization in Israel, modeled on the ACLU.[40] Dedicated to defending the rights of Israeli Arabs and Jews, ACRI became Israel's preeminent human rights outfit and seems a major thorn in the present government's side and a darling of left liberal Jewish American friends of Israel. Moyn's "last possible moment" may have been a longer time in coming than Moyn thinks.

CONCLUSION

And Louis Henkin, with his stubborn misgivings about and skeptical commitment to the Zionist project, seems to have had much more in common than Moyn allows with both past and future Jewish liberal rights mavens. Where Moyn seems to me exactly right, however, is his suggestion that Henkin, as he ushered international human rights work into the legal-professional limelight, was modeling for late twentieth- and early twenty-first century Jews what U.S. constitutional civil rights advocacy had been in the early and mid-twentieth century: a calling and cultural space for enacting a distinctly Jewish form of belonging and apartness in the American establishment, a consummate insider, who also stands apart, with the outcast and the stranger – a calling that Rabbi Kohler and his son, Max invented over a century ago.

Which brings us to a final twist and puzzle in the intergenerational tale of Jewish internationalism, which Moyn's brilliant essay evoked and I have tried to fill in. Following Moyn, I have explored the striking continuities of liberal sensibility – of liberal categories of thought and

[40] Michael Galchinsky, "The American Jewish Committee and the Birth of the Israeli Human Rights Movement," *Journal of Human Rights* 5.3 (July-September, 2006): pp. 303-321.

structures of feeling - about one's Jewishness and one's Americanness, which linked Henkin to forbears like Kohler. But in doing so, like Moyn, I have glossed over a rather striking difference and discontinuity, which bears one more moment's worth of attention.

Reform Judaism may have been, as I have suggested, a seedbed of Jewish American liberalism. However, Louis Henkin – unlike Max Kohler or Louis Marshall and the other founders of the AJC or most AJC leaders of his own generation – was not a Reform Jew. And neither was Henkin like these other figures in being of German or Central European origins. Henkin was an orthodox and observant Jew, and one of the "poor Russian Jews," to boot - one of the very last arrivals of the mass immigration from the Tsars' empire. Born in Belarus, he emigrated with his family to the Lower East Side – where his father remained a rabbi and Talmudic scholar - in 1923, just a year before the gates clanged shut. A last possible moment, indeed!

Given the conventional uptown/downtown narrative of American Jewish politics, one might have expected that the Belarus-born, Lower East Side-bred Louis Henkin would, at some point, at least, embrace the nationalists' thicker, more public-political and "hyphenated" conception of American Jewish identity – much as Brandeis's lieutenant and Henkin's own mentor, Felix Frankfurter did, in his young radical days. Why, instead, did Louis Henkin always seem to hew to the American Jewish Committee's classical liberal brand of Jewishness?

No doubt, this is a question that scholars may explore as Louis Henkin's life and career become subjects of more sustained study. But permit me this last speculation. Perhaps, it was partly *because* Henkin remained an Orthodox and observant Jew that he always felt so at home on the liberal individualist side of these ongoing clashes over Jewish identity politics. One reason Zionism held such great appeal for the restless offspring of Orthodox Russian Jews on the Lower East Side was because it was a way to remain faithful to a thick, deeply felt and communally

involving Jewish identity at the same time as one parted ways with the traditional but confining and unwanted world of Jewish observance. That was part of young Frankfurter's story. But if, instead, one made one's ambitious way into the larger world of American life and law, while remaining tied to Orthodox Judaism, then secular Jewish nationalism might exert a far weaker tug; for one already had a deeply felt, communally involving Jewish identity in hand, as one set about forging one's life's work and identity in that larger world.

Moyn, in his conclusion, writes: "For Henkin, then, [liberal] America perfectly suited his compartmentalized identity in which observant Judaism remained a private affair and constitutional liberalism a public faith." But I rather think that Henkin could inhabit a "perfectly suited… compartmentalized identity" (observant Judaism as "a private affair" and "constitutional liberalism a public faith") partly because these earlier generations led the way in crafting just such liberal structures of thought and feeling, and, unlike Henkin, both chose and felt they had to choose between Jewish and American law. If I am right, then we may have a new angle on how it was that a Louis Henkin could bear such a striking resemblance in outlook and sensibility to his first-generation forbears at the AJC, across such gulfs of time and social geography.