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JEW, LAW AND IDENTITY POLITICS

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INTRODUCTION

Interpreting and expounding the U.S. Constitution seems to be a Jewish calling. Bound up with elite Jewish lawyers’ long involvement with constitutional law has been an intimate identification with the U.S. Constitution on the part of American Jews more broadly. And no wonder: Constitutional lawyers shaped important aspects of what it means to be a Jewish American. A century ago, central figures in the first generation of nationally prominent Jewish lawyers crafted an enduring grammar of Jewish belonging to and apartness from the national community, and with it key terms of American Jewish identity, out of the materials of constitutional law.

Generations of scholars have had much to say about how and why Jews became prominent in the “learned professions” like law, both in the U.S. and elsewhere.¹ But they have left largely unstudied how law figured

¹ For accounts of and efforts to explain the outsized proportion of Jews in the U.S. legal profession, see Eli Wold, *The Rise and Fall of the WASP and Jewish Law Firms* 60 STAN L. R. 1803,1836-39 (2008); Jerold S. Auerbach, *From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience*, 66 AM. JEWISH HIST. Q. 249 (1976); Russell G. Pearce, *The Jewish Lawyer’s Question*, 27 TEXAS TECH L.R. 1259, 1261-3 (1996); CHARLES E. SILBERMAN, A CERTAIN PEOPLE: AMERICAN JEWS AND THEIR LIVES TODAY 96-7 (1985). On Jews in the learned professions over the 20th century, see Thorstein Veblen, *The Intellectual Pre-eminence of Jews in Modern Europe* 34 POL. SCI. QUARTERLY 33(1919); Talcott Parsons, *The Sociology of Modern Anti-Semitism* in JEWS IN A GENTILE WORLD (ISACQUE GRAEBER & STEUART H. BRITT, eds., 1942) at 113, 156; Nathan Glazer, *Social Characteristics of American Jews* in THE JEWS: THEIR HISTORY, CULTURE AND RELIGION (LOUIS FINKELSTEIN, ED., 1949); Mariam K. Slater, *My Son the Doctor: Aspects of Mobility Among American Jews* 34 AM. SOC. REV. 359 (Jun. 1969); PAUL MENDES-FLOHR, DIVIDED PASSIONS: JEWISH INTELLECTUALS AND THE EXPERIENCE OF MODERNITY (1991); SEYMOUR MARTIN LIPSET AND EARL RAAB, JEWS AND THE NEW AMERICAN SCENE (1995); David A. Hollinger, *Why are Jews Preeminent in Science and Scholarship? The Veblen Thesis Reconsidered* 2 ALEPH 145 (2002).

in the creation of Jewish American ethnic and cultural identities. That is the subject of this Article. Insofar as Jews have come to be at home in the precincts of constitutional law, this Article explores the forgotten origins of these developments. It reveals much not only about the making of American Jews but also about law's part in cultural history and how to study it.

By the Progressive Era, a handful of Jews had reached the upper ranks of the legal profession. As advocates, jurists and high government officials, and as founders and spokesmen of the leading national Jewish organizations, they fashioned visions of American Jewishness, drawing deeply on the Constitution as they interpreted and invented it: its "ancient Hebraic origins," its individualism and its promises of racial justice, equal opportunity, and the "right to be different." Near the heart of the legal establishment, yet defending the outsider, they felt they were bringing to earth the teaching of contemporary rabbis that the Constitution was American Jews' "new Covenant." Weaving together disparate strands of Reform Judaism and Zionism, and classical liberal and Progressive constitutionalism, they also clashed bitterly over the politics and meaning of American Jewishness, and the resources and constraints of constitutional law shaped their rival views, just as their battles reshaped and added new resources to the constitutional culture on which they drew.

This ferment was brought about by the mass immigration of almost two million Jews from Russia and the peripheries of Europe to America during the decades bracketing the turn of the last century (1890-1910). The new immigrants made New York the city with the largest Jewish population in the world, and they disrupted the small world of the older Reform Jewish elite of successful lawyers, merchants and bankers whose parents or grandparents had come from Germany and Central Europe in the mid-nineteenth century. The vastness of this mass immigration, along with the newcomers' poverty, their "foreign" kinds of Jewishness, and the mounting hostility with which much of native-born, gentile America greeted them, combined to produce a crisis for the old Reform community. 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, impoverished radicals or wealthy money-lenders, loyal to their own kind, unwilling and unable to join the national community.

Thus, the encounter between the older American Reform Jewry and the Jewish newcomers in the U.S. stirred questions of Jewish American identity. What is it to be an American? What is it to be a Jew? How does

one embrace being an American while keeping one's separate identity as a Jew? What forms of Jewish particularity fit with full membership in the national community? Must Jewishness be recast as a private religious faith and nothing more—publicly invisible, with no distinctive social identity and no group claims on the law or polity? Or could Jews publicly remain a “people apart,” a distinct “nation” and even a separate “race,” while participating fully and equally in American society? What self-understanding could Jews claim without cutting themselves out of the promise of American life and bringing down on themselves – what already seemed to be brewing - some American variant of European Anti-Semitism?

These questions fueled the politics of Jewish-American identity in the Progressive Era, and lawyers crafted the answers Jewish organizations gave to them. The questions arose most sharply on the terrain of immigration law and policy. This was where government guarded entry into the nation and the body politic, deciding who was welcome and citizenship-worthy, and who was not. Thus, this was where hostility and opposition to the mass immigration from the peripheries of Europe was focused, and had to be met. Here the categories and terms of entry and belonging and exclusion and unworthiness were enacted and implemented, challenged and revised: in the hearing rooms of Ellis Island, in the Executive offices of the Secretary of Commerce and Labor, in federal courts and commissions and Congressional hearings and lawmaking, and in the broader popular and highbrow public debates surrounding them. Here, too, competing views of the kinds of “racial” and other “traits” would-be newcomers were thought to possess and the kinds they were thought to need in order to become “Americans” vied with one another. And alongside these debates about the human differences that distinguished the new immigrants at the nation's gates were debates and inquiries about the effects of the millions already here on the nation's industries, politics and society, about whether the newcomers were “assimilable,” what was needed to “Americanize” them, what aspects of old-world identities needed to be shed, and who should manage their “Americanization.”

As a practical matter, it is not surprising that lawyers took the lead in representing Jewish interests in these battles. Law was the language of state power, and lawyers were the U.S.'s governmental elite, with a much broader sphere of authority in both public and private life than elsewhere. Litigation, policy-making, private organization- and public state-building, working within the government and lawyering, lobbying and debating outside it about both the “Immigration Problem” and the “Jewish Problem”—these were sites of practice but also occasions for fashioning new and durable accounts of the terms of Jewish entry and belonging.

What clinched the outsized role of elite lawyers in forging Jewish American identities, however, was law's symbolic part in defining American nationhood; that is what enabled these attorneys to imbue their advocacy and policymaking with large cultural significance, drawing on law's symbolic resources to shape the public meaning of Jewishness in America.²

In Europe, national belonging was fashioned, above all, around ideas of common descent and shared origins. In the U.S., however, the felt attachments of identity and ideology that were coming to be called nationalism remained grounded in the liberal republican precepts that animated the Revolution, and these attachments became bound up with the very legal texts on which the state rested.³ In the U.S., the nation—"We, the People"—was felt to be constituted and defined by law. To make one's way into the legal elite, then, was to gain not only a prestigious career, but also access to the very language of national belonging and, perchance, opportunities to interpret and even shape its meaning.

As such, for most of the nineteenth century, the law- and constitution-based language of American nationalism had a distinctly liberal tenor as far as European immigration was concerned: Every European newcomer, in becoming an American citizen, was said to re-enact the Founders' freely given consent to the laws and Constitution of the new republic and become a member of "We, the People." No matter their ancestry, shared loyalty to this ongoing experiment in self-rule bound citizens together as a nation. This was the narrative around which the Jewish playwright Israel Zangwill constructed his famous play, *The Melting Pot*. The true American is not the "old stock" American by descent but the newcomer: the American by active consent, replenishing the nation's liberal ideals and contributing to the ever-new "race" of an immigrant nation.

But the U.S. was not all that exceptional. Alongside the liberal, consent-based notion of national belonging flourished a rival descent-based account of American nationalism. It held that the thin gloss of consent-based constitutional patriotism was not enough to make foreigners into Americans. Only some groups of would-be Americans—Northern European, Anglo-Saxon or Teutonic and Protestant—had the right stuff to become new members of the national community. For African Americans and Asian, Mexican and Native Americans, this racialized American

² Jerold Auerbach first explored this terrain in a brilliant and quirky book: *RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION* (1990). Auerbach, however, is not a lawyer, and his work isn't concerned with the actual work of Jewish attorneys, the immigration question, or the forms and structures of legal and constitutional thought. But Auerbach lit on the centrality of law and lawyers to creating Jewish American identities twenty years ago. His account has much to say about religious and historical authenticity and about traditional forms of Jewish law and life against which the embrace of American law and lawyer-leadership is judged hollow. I make no such claims. Examining, without lament, a Jewishness shaped by the ruptures and changes of modernity, Americanization and reform, I remain deeply in Auerbach's debt.

³ See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* -- (2007)

nationalism was the dominant one throughout the nineteenth and early twentieth centuries, against which the inclusive promises of the Reconstruction Amendments strained.⁴

After the turn of the century, this racial vision of American nationhood increasingly was turned against the “new immigration.” Almost everywhere outside the South, “old stock” white Americans came to see the new immigrants from the peripheries of Europe as the most pressing “race problem” of the day, while the “hordes” of “poor Russian Jews” pouring into New York’s Lower East Side became emblematic of these new immigrants as racial others. In this climate, America’s Jews, and especially Jewish lawyers, delved deeply into the liberal law- and Constitution-based ideas of American nationhood. Reform Judaism was a child of the Enlightenment, and America had always seemed the Reform Jews’ vision of the Enlightened liberal state. But it was during the Progressive Era’s legal and political contests over who could become an American and what Americanization entailed that constitutional ideas became central to Jews’ answers to questions about what it meant to be a Jewish American. And as Jews divided over what kinds of Jewish particularity and how assertive and public a group identity were compatible with belonging in America, their lawyer-leaders framed that contest in constitutional terms as well.

Thus, elite Jewish attorneys came up with not one but two competing and overlapping accounts of American Jewishness. The first seized on classical liberal legal and constitutional materials; the second on rival Progressive ideas. The first was a deeply assimilationist account of American Jewishness that grew out of the outlook and experience of the Reform Jews. The intensely individualistic precepts of the late nineteenth century’s classical legal and constitutional liberalism 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.⁵ Emphasizing equality of opportunity and freedom of contract, trade and conscience, these constitutional precepts mirrored both the Reform Jewish attorneys’ social aspirations and also the ideals at the heart of Reform Judaism’s long-standing dream of an Enlightened

⁴ That African Americans were “America’s Jews” was an observation common among both Black and Jewish writers and journalists in the Progressive Era. See ERIC SUNDQUIST, *STRANGERS IN THE LAND: BLACKS, JEWS, AND POST-HOLOCAUST AMERICA* __ - __ (2005) (quoting writers and journalists). Like African Americans in the U.S., in other words, Jews were the most despised and subordinated racial others in Eastern Europe and Russia. New Jewish immigrants swiftly saw the parallels between the old world’s “Jews statutes” and rampant Anti-Semitic violence, and America’s Jim Crow laws, lynchings, and race riots: these riveted the attention of New York’s Yiddish press, which proclaimed its solidarity with the victims. See also HASIA DINER, *IN THE ALMOST PROMISED LAND: AMERICAN JEWS AND BLACKS, 1915 – 1935*__ (1977). Among elite Jewish attorneys, and the Reform Jewish elite in general, we will find sometimes similar, solidary and sometimes more ambivalent responses to Jim Crow and the color line. See *infra* __, __ & n. __ .

⁵ See generally WILLIAM WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886 – 1937* (1998); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1998).

liberal state in which Jews would enjoy full civic and legal equality. This account of American Jewishness, as we will see, yoked together “equal rights” and “assimilation” as the twin pillars of Jewish belonging, and shunned a Jewish group presence in politics or public life.

The second constitutionally shaped vision of American Jewishness was a pluralist one, inspired by Progressive legal thought. Insisting that formal equality and classical individual rights could not assure real justice, Progressives contended that legal and constitutional doctrines must take account of groups and their particularities.⁶ 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.” Jewish Progressives invented cultural pluralism and wove it into a constitutional outlook. Zionism, Jewish nationalism, and “hyphenated” immigrant identities, more generally, they declared, were all “True Americanism.”⁷ This too became part and parcel of American Jewishness.

I have built the body of this Article around accounts of four prominent Jewish attorneys to catch something of the lived experiences and structures of feeling that imbued the cultural work that law and lawyers did. The four parts also trace successive moments in the Progressive Era’s battles over the shape of immigration law and policy and the terms on which newcomers would gain entry at the gates and membership in the nation. Some of these attorneys shaped that law and policy; they also were architects and leaders of the key national associations and institutions of Reform Jewish life and of American Zionism.

Simon Wolf was the eldest of these attorneys, and he was the leading representative of the German-Jewish Reform elite in a critical but forgotten round of administrative and legislative battles over proposals to categorize, identify and count the new immigrants, including “Hebrews,” as separate and distinct “races” in the national census. Oscar Straus was the most scholarly; his writings lent a pioneering “historical” gloss to the (then new) sentiment that American Jews had a deep, organic link to the U.S. Constitution. Straus was also the first Jewish cabinet member, serving as Theodore Roosevelt’s Secretary of Commerce and Labor, and standing atop the machinery of exclusion—the Immigration Bureau—at a critical

⁶ On progressive legal and constitutional thought, see MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992); William Forbath, *Politics, State-Building, and the Courts, 1870 - 1920*, in *CAMBRIDGE HISTORY OF LAW IN AMERICA*, VOL. 2 ___-___ (Michael Grossberg & Christopher Tomlins, eds., 2008).

⁷ Louis D. Brandeis, True Americanism, Oration at Faneuil Hall (July 4, 1914), in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 3, 3 (Zionist Organization of America ed., 1942).

moment. As such, Roosevelt made him the administration's go-to expert on "minorities" affairs. Straus championed a constellation of new "liberal" regulations and restraints on immigration that enabled Roosevelt, and later Taft and Wilson, to offer substitutes for the racialized bars on Jews and others demanded by nativists in Congress. Max Kohler was the nation's first Jewish civil rights lawyer. His father and grandfather were the leading Reform rabbis of the late nineteenth- and early twentieth-century, but Kohler's main work was defending hundreds of Jews and other racial outsiders threatened with expulsion at the hands of the Immigration Bureau. Father and grandfather made the American Constitution a sacred text and "new covenant" in Reform Judaism. Max helped make "defending the rights of others" under the Constitution a way of affirming American Jews' belonging, even as it affirmed their ethno-cultural identity as a "priestly," justice-seeking "people apart."

Wolf, Straus, and Kohler belonged to the broad Progressive camp, but when it came to fashioning an idiom and understanding of American Jewishness, they all worked with classical liberal legal materials. By contrast, Louis Brandeis's contribution to Jewish American identity was forged out of the Progressive counter-tradition. Probably no prominent Jewish American of his generation tried harder to fit into the upper-class white, Anglo-Saxon, Protestant world of Boston Brahmins than Brandeis. Estrangement from that world, friendship with young Jewish nationalists at Harvard, and immersion in the Jewish labor movement and Jewish nationalism on New York's Lower East Side brought a kind of conversion. Shortly before becoming the nation's first Jewish Supreme Court justice, Brandeis became the leader and spokesman of American Zionism. Zionism enraged the Reform Jewish elite by insisting Jewishness was everything they insisted it was not: a race, a nation, and a set of convictions that were inherently public and political; Zionism, they said, was "anti-American." Yet, Justice Brandeis serenely declared: Zionism made Jews "better Americans."⁸

His argument ran through the Constitution. When it came to the nation's Jews and other minority "races and nationalities," equal protection demanded not only individual but "group equality," freedom of expression and association demanded not only individual but "group rights."⁹ These were essential to a democratic Constitution, said Brandeis, and essential, as well, for the "American Israel," the "hyphenated" Jewish-American identity he came to champion. The most assimilated of the Jewish lawyers we will encounter, Justice Brandeis put the thicker, more public, political and controversial, "hyphenated" conception of American Jewish identity that

⁸ *Id.* at ____.

⁹ *See infra* ____.

was afoot on the Lower East Side on the road to respectability.

As much as this is a study of law and rights talk in the making of American Jewish culture and identities, it also is a study of the adventures of ideas about rights and how they change in the dialectics of legal, intellectual and political battle. The accounts of Jewish separateness and belonging that these lawyers fashioned did not stand still. Their rival renderings and critiques of individual and group rights changed over time, reshaped by the exigencies of the cases and causes they defended, and by their own bitter contests for power and authority over Jewish life and politics. Thus, for example, we'll see how the stern individualism of a Simon Wolf clashed with and then gave way to the more militant and sophisticated advocacy of Max Kohler, as the latter wove group-based claims into his cases and public arguments against the Immigration Bureau, pushing against his older colleague's 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, 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 concluded, because Anti-Semitism made it a social fact.

Still, for many years, Kohler and the rest of the legal leadership of the Reform Jewish elite were united about keeping their own brand of "race pride" and their own separatist impulses a matter of "private" life and elite sociability, while they assailed the "public assertions" of Jewish nationhood and the "group rights" and "nationality rights" claims that Brandeis and the Zionist and Jewish nationalist movements championed. Yet, by the story's end, we'll see, these ardent liberal foes of group rights end up among group rights' and national minority rights few influential and effective advocates in the international arena.

The outbreak of World War I and the prospect of post-war treaty-making sparked a clash between Brandeis and the Reform elite over the rights American Jewry should press the U.S. to champion on behalf of Jews in post-War Russia, Eastern Europe and Palestine. The conflict over Jewish rights abroad also became a dramatic public contest over the meaning and politics of Jewishness in America. In it, Justice Brandeis and his lawyer

lieutenants in the Zionist movement grabbed the mantle of “representative” leaders of the Jewish “masses.” As a result, the Reform Jewish lawyer-leaders found themselves compelled to find common ground with Brandeis’s and émigré Russian Jewish nationalist legal thinkers’ renderings of “Jewish rights.” Holding on to power constrained them to learn – and they partly made their own – group rights ideas undreamed-of in their old liberal philosophy.

The nationalists, for their part, discovered over time that while group and national rights claims were indispensable in the international sphere and equally so in public discourse at home – in battles against 100% Americanism and on behalf of Jewish nationalism, a Jewish public sphere and an imagined pluralist America; nevertheless, in court, individual rights claims seemed able to do much of the work they wanted, or at least as much as they hoped to accomplish there. The 1920s were no time for robust pluralist ideas to find any traction in the courts. So, they came to champion “group rights” in political battles and to construct durable legal frameworks for the kind of autonomous political and cultural associational life they sought, but what constitutional protections they secured in court came by making classical liberal precepts do some new work for “minorities.” Out of strategic necessity, they ended up on much the same doctrinal ground as their sincerely liberal-minded foes. These developments presaged other new weddings and mash-ups of liberal and pluralist/nationalist ideas about rights and Jewish American identity during the decades ahead. So, we will conclude by glimpsing the American Jewish Congress in the 1930s and ‘40s as it becomes the hub of scores of 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 depend[ed] on pursuing the rights of America’s oppressed minorities.” Zionism melded with devotion to the Constitution, “minority rights” and civil rights activism to become the hallmarks of the “Jewish liberal” in mid-20th-century American life.

Historiographical and Methodological Excursus: The Work of (Trans-National) Lawyering and Individual and Group Rights Talk in Defining Group Belonging and Apartness

In recent work on the history of immigration, as well as in the writing of African-American history, diaspora is a central theme. Virtually every “outsider” or “in-between” ethno-racial group has quested for both belonging and apartness in American life. These groups waged contests for full membership or “first-class citizenship” in the national community. But

they also strived to remain, in some crucial and controversial respects, peoples apart, with attachments to other real or, as we historians often say, “invented” and “imagined” nations and homelands. Thus, we have a literature on 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 great social, cultural and political histories of many diasporas. But we have precious little *legal* history of this nationalist, “separatist” side of either immigrant or African-American experience.

For some groups, pre-eminently African-Americans, we have whole libraries of important work on both the legal construction of groups’ racial otherness and subordination, and on their efforts to resist, elude, dismantle and supplant these constructions in the quest for first-class, rights-bearing citizenship. But we seem to know little of the legal dimensions of these same groups’ so-called “separatist” efforts to imagine, create, and defend relatively autonomous ethno-racial or national group associations, group publics (or, as Nancy Fraser puts it, “counter-publics”) and group politics, and the working out of their attendant claims against state or private interference and oppression as well as for public recognition and respect.

This lacuna opens on to another, larger one. We have, I think, no deep understanding of the law’s and legal and constitutional imagination’s part in the way that 20th century America worked out its particular accommodations between liberalism and pluralism in the governance of ethnic and racial difference. One reason for this, at least with respect to Jewish history, but also, I suspect, with respect to other groups, is that the history of diasporic identities is a resolutely trans-national history.¹⁰ It concerns the circulation and movement of people and ideas – including, we’ll see, legal ideas – across national borders and, therefore, outside the national frame within which almost all of this legal history has been written. Accordingly, we know very little about how trans-national law, lawyering, and legal and constitutional imaginaries figured in the ways these groups conceived and fought and compromised over and combined their dual quests for belonging and apartness – either in contests among themselves or with the larger state and society.

By examining the work of these Jewish lawyers in a trans-national frame, this Article, and the larger project from which it springs, opens up a moment in legal-cultural and legal-intellectual history before the modern liberal – New Deal/Carolene Products footnote 4 – paradigm of civil liberties and civil rights law took shape, when forgotten trans-national

¹⁰ See, e.g., Nikhil Pal Singh, *Black Is a Country: Race and the Unfinished Struggle for Democracy* (2004); Matthew Jacobson, *Special Sorrows: the Diasporic Imagination of Irish, Polish and Jewish Immigrants in the United States* (1995).

constellations of ideas about individual and group rights were afoot and vying to supplant the old liberal constitutional order and become the new liberalism. In this moment, Jewish legal and social thinkers and activists (and it may be African-Americans and others) were imagining and exploring many possible legal and constitutional marriages of liberalism and pluralism, different from the one we chose – different even from the ones we can remember contemplating.¹¹

To speculate a bit further for the purpose of this workshop and this work-in-progress: During this moment, it seems to me, black and Jewish thinkers were inventing a new politics and language of diasporic nationalism. Figures like W.E.B. DuBois, on one hand, and, on the other, Louis Brandeis, Horace Kallen and the Russian Jewish nationalists of the Lower East Side were thinking inside and outside the national frame: about belonging to the American polity but also to transnational solidarities with oppressed groups in overseas empires, about being a diasporic “nation apart” inside the “American nation,” and creating semi-autonomous publics and public political associations based on those trans-national “racial” solidarities. At odds with the more conventional, classical liberal constitutional thinking of most of the black and Jewish elites in these decades, figures like DuBois and Brandeis (and less remembered figures like Israel Friedlander, Isaac Hourwich and Chaim Zhitowsky) wedded the liberal-republican vocabulary of individual rights and national citizenship with a pluralist vocabulary of “group rights” and “group equality,” arguing that individual freedom and dignity and individual flourishing and development for members of despised and stigmatized “minorities” and “nationalities” demanded more than the classical liberal-republican lexicon of rights had to offer. Liberalism without pluralism was not enough. (Likewise, they also held, liberalism without some variant of what they called “industrial democracy” or “socialism” was not enough either. While this paper won’t explore it, their pluralism and championing of group rights also spoke to how 20th century America should govern the sphere of labor and capital.)

American Jews would continue to venerate Justice Brandeis for the rest of the twentieth century. His portrait hung in the offices of countless

¹¹ In Part V., *infra* at ____, I describe the contexts out of which Brandeis’s understanding and uses of “group rights,” “group equality” and “group liberty” arose; and I unpack and analyze the various elements of legal meaning Brandeis and his collaborators attached to these ideas in their quest for a pluralist constitution at home, as well as the cultural work the ideas did in Jewish politics and public spheres. Part V. also sketches the legal and cultural meanings of these ideas for Brandeis’s and his legal-lieutenants’ Russian émigré legal-intellectual allies and interlocutors in their quest for pluralist constitutions abroad. I will explore these encounters (and clashes) more fully as I delve into the papers of key Russian Jewish lawyers next Fall.

Jewish liberal attorneys. As blacks' and other non-whites' civil rights became an article of faith for Jewish liberals, they would overlook Justice Brandeis's own silences on that front. More ironically, though, from the late 1960s onward, as Jewish liberals grew estranged from black nationalism, black "separatism," and "black power," and later, from various strands of "multi-culturalism": they would forget just how much the pluralist/nationalist/minorities' "group rights" discourse of their own icon, Brandeis (and, often enough, the rights talk of their own parents or grandparents) prefigured the rights talk and aspirations of these off-putting African-American thinkers and social movements. They heard "group rights" and remembered anti-Jewish "quotas." They heard "black nationalism" and forgot when Jewish nationalism meant not only Zionism but demands for group autonomy, separate cultural institutions and proportionate group representation in the Diaspora.¹² They forgot when "group rights" and "nationality rights" signified solidarity with oppressed Jews demanding just such rights in Eastern Europe and Russia, and how, at the same time, in the U.S., "group rights," "group liberty" and "group equality" signified a posture of cultural and public-political group self-assertion, a demand for group respect and recognition.¹³ They could not recall when the creation of separate, Yiddish-speaking Jewish public spheres brimming with restive unions and 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 generation later. They forgot how high-brow journals like *Menorah* and working-class Yiddish dailies like *Di Varhayt* saw Jewish legal and social thinkers working through the competing claims of integration and separatism, liberalism and pluralism, individual and group rights, belonging and apartness – and, by and large, refusing to choose, mediating and living with the tensions between them, and, like DuBois, imagining and demanding both.

I. THE BIRTH OF REFORM JUDAISM

Reform Judaism was a child of the European and American

¹² See *infra* ___.

¹³ Legally, "group rights" in the American context, we'll see, chiefly meant the right to form and carry on, free from public and private molestation, what were seen by public and private authorities (including the uptown Jewish elite) as "foreign" and subversive political and cultural associations. A zone of what we would call negative liberty, in other words, but one conceived in group terms, much as Brandeis often spoke and wrote of trade union freedoms as group liberties, decades before the Court recognized freedom of association as an individual first amendment right. See *infra* ___.

Enlightenments, fashioned to outfit Jews for equal citizenship in an Enlightened liberal state.¹⁴ The unspoken premise of Enlightenment liberalism's response to the "Jewish Problem" was that Jews were to be welcomed as members of the liberal polity so long as they ceased to be recognizably, publicly Jewish and abandoned their corporate existence as a self-governing community—subordinate and vulnerable but also legally and socially insulated and apart.¹⁵ "We must refuse everything to the Jews as a nation," declared a liberal Parisian nobleman in 1789, "and accord everything to the Jews as individuals."¹⁶

This was a bargain many 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 Judaism refused to abandon the faith. Instead, they reinvented it, hopefully embracing a new meld of private faith and public citizenship.

Re-forming Judaism into an Enlightened faith meant cutting away traditional Jewish law and ritual, rejecting "rabbinical legalism" and centering their Judaism on the "universal" moral teachings of the prophets. Reform Judaism aimed both to fit into the liberal (and Protestant) Enlightenment mold and to reanimate the faith among "enlightened" Jews, who found much Jewish tradition stifling and hollow. As patriotic Americans, Frenchmen and Prussians, they cast off Jewish garb and dietary laws, ceased worshipping in Hebrew, and built Reform synagogues that resembled neighboring churches.

Just as classical liberal Enlightenment ideas imbued the trans-Atlantic struggle for slave emancipation that began in the late eighteenth and early nineteenth centuries, so the dream of legal and civic equality and equal rights for a subordinate and outcast group lay at the heart of what Jews and Gentiles alike called "Jewish emancipation." Jewish emancipation centered on 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. In the German states, as elsewhere, repeal was still incomplete in the mid-nineteenth century, with rights granted only to be revoked. The defeated republican revolutions of 1848 and the reactionary measures that followed in the 1850s drove Reform Jews to the United

¹⁴ MICHAEL A. MEYER, *RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM* (1988).

¹⁵ DANIEL SCHWARTZ, *THE FIRST MODERN JEW: SPINOZA AND THE HISTORY OF AN IMAGE* (2012).

¹⁶ 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).

States, where they bulked large among the tens of thousands of republican “48ers” who emigrated from Germany and Central Europe. Fleeing dispossession and imprisonment, these Reform Jews arrived with memories of recurrent group trauma, exclusion and violence. For them, the United States seemed the utopian dream of an Enlightened liberal state; 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 as merchants, peddlers and shopkeepers. Their male offspring carried on in commerce, or became lawyers and bankers.

As the second generation came of age in the U.S., slave emancipation brought forth a transformed Constitution. The Civil War and Reconstruction 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. That Constitution, as the leaders of the victorious Union expounded it, seemed to embody the Reform Jewish outlook and the Reform elite’s social aspirations.

II. SIMON WOLF AND THE RACIAL CLASSIFICATION OF JEWS

The most senior of these Reform Jewish attorneys was Simon Wolf, a Washington lawyer and lay leader of the Reform Union of American Hebrew Congregations. Less sophisticated and commanding as a lawyer and more deferential toward gentiles than the others, Wolf represented the New York-based Hebrew Sheltering and Immigrant Aid Society in its constant administrative appeals on behalf of would-be immigrants excluded and detained at the ports of entry; he was the German-Jewish Reform elite’s unofficial, full-time representative in the corridors of Executive power for almost two decades at the end of the nineteenth century.¹⁷ So in 1898, when the Immigration Bureau decided it was time to begin counting the newcomers from Southern and Eastern Europe according to their race, it was Simon Wolf who responded.¹⁸

A. “Race” Defined?

To nativists and immigrant advocates alike, it was a given that the new

¹⁷ See ESTHER PANITZ, *SIMON WOLF: PRIVATE CONSCIENCE AND PUBLIC IMAGE* 17 (1987). Michael J. Churgin, *Lobbying by Jewish Organizations Concerning Immigration: A Historical Study* 83 U. DET. MERCY L.R. 947, 948 (2006) highlights Wolf’s role connecting official Washington with Jewish immigration organizations. See also Michael J. Churgin, *Immigration Internal Decisionmaking: A View From History* 78 TEX. L. REV. 1633, 1634 (2000).

¹⁸ See SIMON WOLF, *THE PRESIDENTS I HAVE KNOWN FROM 1860 – 1918*, 238 (1918).

immigrants belonged to “races”—they were not *white ethnics*.¹⁹ That term did not exist.²⁰ “Race” defied the line we draw between biology and culture. It ran through one’s blood, and yet it covered moral, intellectual and emotional qualities,²¹ like meekness, impulsiveness, and independence, and human capacities like rationality and intelligence.²² So, “race” seemed salient for sorting out which of these new immigrant groups were fit for self-government and American citizenship.

Between the 1880s and 1910s, ideas about race were in flux. The brand of scientific racism called eugenics was then an avant-garde perspective, gradually making headway among academic and patrician advocates of immigration restriction. The eugenicists held that the new immigrants belonged to inferior races, lacking the moral and political capacities for democracy and self-rule. What we consider to be cultural traits, they considered racial ones that were hard-wired and immutable.²³ But only in the 1920s did the eugenicists’ theories come to dominate the immigration debate.²⁴

During the Progressive Era, the dominant way of thinking about race was neither the eugenicists’ view, nor the culturalist view that would succeed it by mid-century, wherein the biological component of “race” captures no socially or morally salient qualities at all.²⁵ Instead, the Progressive Era’s prevailing uses of “race” had their moorings in Lamarckian thought; “races” denoted groups with socially salient differences of character, morality, habits of mind and intelligence that were *both* hereditary and changeable.²⁶ These

¹⁹ See DAVID R. ROEDIGER, WORKING TOWARD WHITENESS 14 (2005) (noting that “race” was “a term that ecclesiastically described the alleged divisions of humanity”).

²⁰ See *id.* at 18 (noting that the term “white ethnic” did not come into use until about 1970).

²¹ Richard Weiss, *Racism in the Era of Industrialization*, in THE GREAT FEAR: RACE IN THE MIND OF AMERICA 134-35 (Gary Nash & Richard Weiss eds., 1970).

²² See *id.* On popular forms of this understanding of “race” with respect to the new immigrants, see generally DAVID R. ROEDIGER, *supra* note __. On high-brow and academic understandings of race, see generally GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION (1982); George W. Stocking, Jr., *The Turn-of-the-Century Concept of Race*, 1 MODERNISM/MODERNITY 4 (1994); THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1997).

²³ Having rediscovered Mendellian genetics, the eugenicists insisted that any upward “evolution” in the new immigrants’ genetic material would take hundreds of generations. In the meantime, intermarriage between “old stock” Anglo-Saxon, “Teutonic” or “Aryan” Americans and new immigrants with their “inferior racial stock” threatened a “reversion to the lower type” and, therefore, Anglo-Saxon “race suicide.” See generally MADISON GRANT, THE PASSING OF THE GREAT RACE; OR THE RACIAL BASIS OF EUROPEAN HISTORY (1916).²⁴ See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860 – 1925, at 150-52 (2002).

²⁴ See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860 – 1925, at 150-52 (2002).

²⁵ MARK S. WEINER, AMERICANS WITHOUT LAW 88 (2006) (“The culturalist position was developed especially by and frequently associated with Frank Boas, who dedicated his life to dismantling the eugenicists’ biological classification of race and their ascription of unchanging, inborn mental characteristics to human groups.”).

²⁶ See Stocking Jr., *Turn-of-the-Century Concept of Race*, *supra* note _ at 10. (“Lamarckianism made it extremely difficult to distinguish between physical and cultural heredity. What was cultural at any point in time could become physical; what was physical might well have been cultural...Culturally conditioned behavior patterns would thus tend to become part of the genetic makeup of subsequent generations in the form of inherent tendencies or proclivities.”).

traits were passed along through “blood lines,” yet they changed through the direct interaction of individuals and their social and physical environments.²⁷ Some thought change took many generations; for these thinkers, the “backward traits” of the Southern and Eastern Europeans and Russians were practically immutable. But at least an equal number of influential participants in the Progressive Era debates thought the new immigrants’ “inherited racial traits” swiftly “wore off” and gave way to new “American” ones—in one or two generations, depending on the extent of immersion in the American “environment.”²⁸

Many others, including most of the era’s Commissioners of Immigration, were uncertain about just what “racial traits” the different new immigrant “races” brought with them and just how changeable the traits were.²⁹ It seemed crucial to find out how many of these different “races” were making their way en masse to the U.S. Then, state- and university-based producers of social knowledge could track down what traits and capacities they had and how they were fitting in.

If the “races” to which the new immigrants belonged simply matched their country of birth, then identifying, counting, and tracking them would have posed no special problems. But most of the new immigrants came from multi-national empires like Russia and Austro-Hungary.³⁰ Thus, collecting data about place of birth, as the Bureau already did, was “useless.” Russia, the Commissioner at Ellis Island pointed out, had “over a score” of different “races or peoples” within its borders; the Austro-Hungarian monarchy “at least fifteen.”³¹ The “Hebrews...flocking to this country” from both those empires were a case in point. These Jewish immigrants “[had] changed conditions completely in certain trades here . . . but statistically we have no record of their arrival,” since “they are lumped up with the Poles, people of a distinct race and of different capacities and who have gone into entirely different fields of industry.”³²

With a go-ahead from Washington, the Commissioner at Ellis Island consulted with anthropologists and other racial scientists to create a list of the world’s “forty-one races or peoples.”³³ He then instructed the Island’s

²⁷ *Id.*

²⁸ See, e.g., JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 7 (A. M. Kelley 1967) (“racial differences” between South and Eastern European immigrants and “old-stock” white Americans vanish within one or two generations).

²⁹ See 1906 COMM’R. GEN. OF IMMIGR. ANN. REP., at 60 (Describing the new immigrants as “almost if not quite unassimilable”). See also MATTHEW PRATT GUTERL, THE COLOR OF RACE IN AMERICA: 1900 – 1940, at 17-27 (2001).

³⁰ See 1906 COMM’R. GEN. OF IMMIGR. ANN. REP., at 6.

³¹ Edward F. McSweeney, Report to T.V. Powderly, June 18, 1898, Office of U.S. Commissioner of Immigration, New York, N.Y., Box 143, File 16464, Immigration Subject Correspondence, RG 85, National Archives, Washington, D.C.

³² *Id.* See also Victor Safford, Letter to T.V. Powderly, from Barge Office, New York, June 8, 1898, Box 143, Immigration Subject Correspondence, RG 85, National Archives, Washington, D.C.

³³ On the making of the list of “Races or Peoples,” and the new procedures for front-line inspectors, see the

front-line inspectors to use this list and a series of new questions to classify the new arrivals by race.³⁴

For many newcomers to the U.S., the classification at the gates began a process of creating stronger European national and racial identities than they'd had at home.³⁵ Most of the new immigrants were rural peasants and laborers who saw themselves more as natives of a village or region than as members of a nation or race.³⁶ But the Immigration Bureau's new requirement of determining their "race" meant their first encounter with American officialdom began a process of naming a new identity of race or peoplehood, most often keyed to the language they spoke.

In U.S. cities, immigrant church leaders, newspapers, trade unionists, and party bosses encouraged many new immigrants to submerge their provincialisms into a broader patriotism, their local dialects into a language. As much as the new immigrants became Americans, they also became Italians, Lithuanians, and Czechs; and as Italian-, Lithuanian-, and Czech-Americans, they defended their rights and the rights of their countrymen to come, contribute, and belong to America. They supported nationalist movements to liberate oppressed countrymen at home,³⁷ and generally welcomed the new racial classifications.

By contrast, however, America's Reform Jewish elite was adamantly against the Immigration Bureau's plan to classify Jews as a "race" or "people." This opposition, however, was complicated by the fact that so many Jewish newcomers arrived with a well-developed sense of Jewish nationhood.³⁸ Various brands of spiritual and secular (often socialist) Zionism abounded, giving strident modern voice to the slumbering old religious ideals of Jewish nationhood and a Jewish homeland.³⁹ Yet, Reform Jews wanted no part of this Jewish national revival.⁴⁰ The estrangement ran deep and went to the heart of what I've called the nineteenth-century Reform Jewish leadership's classical liberal conception of Jewish belonging in America.

Zionism scandalized Reform Jews by asserting that Jewishness was everything Reform Jews insisted it was not: a race, a nation, and a set of

testimony of Dr. M. Victor Safford, Surgeon, United States Immigration Service, Port of New York, to the U.S. Industrial Commission of 1899. 15 U.S. INDUS. COMM'N. REP. at lxvi (1901).

³⁴ *Id.*

³⁵ See MATTHEW FRYE JACOBSON, SPECIAL SORROWS: THE DIASPORIC IMAGINATION OF IRISH, POLISH, AND JEWISH IMMIGRANTS IN THE UNITED STATES 7 (2002)

³⁶ *Id.*

³⁷ See *id.* at 288-89.

³⁸ Israel Friedlander, *The Division Between German and Russian Jews (1912)* in THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 486 (Paul Mendes-Flohr & Jehuda Reinharz, eds., 1980); see NAOMI COHEN, THE AMERICANIZATION OF ZIONISM 1897 – 1948, at 39 (2003) ("By Americanizing its religious principles . . . Reform's leaders became the most vehement critics of Jewish nationalism in the United States.")

³⁹ See COHEN, THE AMERICANIZATION OF ZIONISM *supra* note __, at 3-14.

⁴⁰ See, e.g., Speech of Rabbi David Philipson, __ PROCEEDINGS OF THE CENTRAL CONFERENCE OF AMERICAN RABBIS (1894).

beliefs that were inherently public and political. The Central Conference of American Rabbis complained that Zionism stirred up the old hate-filled allegations that Jews “are foreigners in the countries in which they are at home.”⁴¹ Said Simon Wolf: “Speaking as an American, I cannot for a moment concede that one can be at the same time a true American and an honest adherent of the Zionist movement.”⁴²

Not every prominent Reform Jew viewed the world of the new immigrants in this way. For some, the new immigrants’ exuberant *Yiddishkeit* and impassioned meld of socialist and Zionist ideals held out the promise of a more vibrant and “modern,” but also more deeply Jewish, kind of American Jew.⁴³ Thus, a handful of important Reform rabbis like Stephen Wise and Judah Magnes became leaders of American Zionism in the 1890s, embracing and hoping to harness the new immigrants’ cultural and political energies.⁴⁴ Their writings would be a thorn in Simon Wolf’s side, as he sprang into action against the Immigration Bureau’s new practice of inquiring into new immigrants’ religion and classifying the Jewish newcomers as members of the “Hebrew race.”⁴⁵

B. Debating “Race” in Congress

Speaking for the Union of American Hebrew Congregations as well as the Hebrew Sheltering and Immigrant Aid Society and other associations of the German Reform Jewish elite, Wolf protested to the Commissioner General of Immigration about classifying Judaism as a race rather than a religion.⁴⁶ “[T]he religious proclivities of the individual are no concern of the United States”; yet, in the immigration inspectors’ forms for questioning, categorizing and labeling new arrivals, “Jews alone” were nevertheless being “singled out” for religious classification. Enumerating groups—or one group—by religion, the government was using its “administrative functions” in a way “never contemplated in the Constitution.”⁴⁷

The Reform Jewish Congressman from Chicago Adolph Sabath raised the issue with the Commissioner of Ellis Island at a hearing of the U.S. Industrial Commission in New York.⁴⁸ “Hebrew,” Sabath complained, “is the only religion that is distinctively and particularly brought out in the

⁴¹ *Id.* at 84.

⁴² *Id.* at 107.

⁴³ See generally HASIA R. DINER, *LOWER EAST SIDE MEMORIES: A JEWISH PLACE IN AMERICA* (2002).

⁴⁴ See COHEN, *THE AMERICANIZATION OF ZIONISM*, *supra* note __, at 55.

⁴⁵ See Simon Wolf, Testimony Before the United States Industrial Commission 1899, at 234 in *SELECTED ADDRESSES AND PAPERS OF SIMON WOLF* (Union of American Hebrew Congregations eds., 1926).

⁴⁶ See *id.*, at 215.

⁴⁷ See *id.*, at 234, 239-40.

⁴⁸ See 15 U.S. INDUS. COMM’N. REP. 92 (1901).

[Immigration Bureau's] last annual report."⁴⁹ The Commissioner was unapologetic. "In some cases the mother tongue might give us an idea of the races, but sometimes the tongue would not do that, and then we had to ask what their religion was. . . . [A]sking the religion is simply a means to this end."⁵⁰

Despite the Commissioner's response, Wolf's and Sabath's protests won them half a loaf. The forms filled out by front-line inspectors no longer included a question about religion. But the forms continued to list "Hebrew" as a race or people, inspectors continued to determine who was a "Hebrew," and "Hebrews" continued to be tallied.

The matter came to a head again a few years later in more bitter and protracted fashion, as the work of the famous Dillingham Immigration Commission got underway in 1907.⁵¹ The Immigration Commission adopted the Immigration Bureau's list of "races or peoples" and sent out scores of investigators and social scientists to gather information and compile statistics about the different new immigrant races' effects on their communities.⁵² The Commission's massive surveys covered dozens of industries in all the nation's major cities, canvassing over ten million individuals, immigrant and native-born, and classifying them according to nativity and "race," correlating immigrants' "racial identities" to their industrial occupations, wage rates, children's years of education, union membership, and home ownership, as well as imprisonment, institutionalization, pauperism, and dependency on charity. Completed in 1911, the surveys filled forty-two volumes and became the Progressive Era's central study of the new immigration.⁵³

As the surveys got underway, the Immigration Commission lit upon the idea of extending these investigations to the *entire population*, via the upcoming 1910 U.S. Census.⁵⁴ Senator Dillingham, who headed the Commission, brought to the Senate Census Committee this idea of

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The Dillingham Commission was created as part of a deal that Roosevelt and his Secretary of Commerce and Labor, Oscar Straus struck with Speaker Joseph Cannon in exchange for eliminating the literacy test from Congress's agenda. *See infra.* at ___. *See also* ROBERT F. ZEIDEL, IMMIGRANTS, PROGRESSIVES, AND EXCLUSION POLITICS: THE DILLINGHAM COMMISSION, 1900-1927, at 34 (2004). This research was published as 1 U.S. IMMIGR. COMM'N. REP., ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION 17(1911)

⁵² *See* ZEIDEL, *supra* note ___, at 77-80 (2004) (surveying the Commission's plan to compile data regarding immigrants' assimilation and effect on established communities); John Lund, *Boundaries of Restriction: The Dillingham Commission*, 6 UNIVERSITY OF VERMONT HISTORY REVIEW, at 27 (Dec. 1994) (the Commission "consolidate[d] immigration statistics and simultaneously collect[ed] economic and sociological data on how and where immigrants lived and worked.").

⁵³ U.S. IMMIGR. COMM'N. REP. (1911). Thus, for example, the Commission's city by city and industry by industry accounts of the new immigration's impact on wages, working conditions and working-class living standards contained table after table of dire "racial statistics" comparing figures for native-born and new immigrant workers and their families, with the latter designated by "race." *See, e.g.*, 6 U.S. IMMIGR. COMM'N. REP., IMMIGRANTS IN INDUSTRIES, BITUMINOUS COAL MINING 666 (1911).

⁵⁴ WOLF, PRESIDENTS I HAVE KNOWN, *supra* note ___, at 236-65.

introducing “race” into the list of categories to be canvassed by the census-takers.⁵⁵ Of course, there already was a race question on the census forms. This was the “color” question—and it was designed to classify the population as White, Negro, American Indian, and Oriental.⁵⁶ But adding the Immigration Bureau’s and Commission’s new list of forty-one races or peoples would teach volumes about the “other white races” who were arriving every day. The Senate swiftly adopted the change and the House seemed poised to do so.⁵⁷

Simon Wolf and the leading organizations of the German-Jewish Reform elite responded in high dudgeon.⁵⁸ In 1906, the Reform elite created what would remain its premier organization for decades to come, the American Jewish Committee (AJC).⁵⁹ Spurred by the pogroms sweeping across western Russia, a group of prominent New York Reform Jews organized the AJC to unify and lead American Jewish efforts to press the U.S. government to take action against Czarist policies, to help Russian Jews in harm’s way, and to manage the increasing Exodus to America.⁶⁰ Lawyers loomed largest in the new organization, followed by wealthy financiers and businessmen, and a number of nationally prominent Reform rabbis.⁶¹ Oscar Straus and the young Max Kohler were there, playing leading roles, as were the nation’s highest ranking Jewish federal judge, Julian Mack,⁶² and the corporate attorney and soon-to-be NAACP founder Louis Marshall.⁶³ Reflecting its lawyer-leadership, the organization’s constitution announced its purpose in rights talk, and reflecting its Reform Jewish vision, it made no mention of group or national rights but instead set its face against “infringement of the civil and religious rights of Jews” and vowed to “alleviate the consequences of persecution.”⁶⁴

The AJC took its campaign against the new census category to Washington, relying on the political connections of members like Simon Wolf and Jacob Schiff, the leading Wall Street financier and backer of

⁵⁵ Senator Simon Guggenheim, observed at a Senate Census Committee hearing a few months later that the impetus for tallying the new immigrants’ “races” in the 1910 census came from Dillingham. *See also* WOLF, PRESIDENTS I HAVE KNOWN, *supra* note __, at 236-65.

⁵⁶ On the provenance and history of the “color” question, see Claudette Bennett, *Racial Categories Used in the Decennial Censuses, 1790 to the Present*, 17 No. 2 GOVERNMENT INFORMATION QUARTERLY (2000); U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790-2000, 34-36 (2002).

⁵⁷ Joel Perlmann, *Race or People: Federal Race Classifications for Europeans in America, 1898-1913*, at 16-17, (Levy Economics Institute at Bard College, Working Paper No. 320, 2001).

⁵⁸ *See id.* (describing the Reform Jewish challenge to the addition of “race” to the 1910 census).

⁵⁹ *See* NAOMI W. COHEN, NOT FREE TO DESIST: THE AMERICAN JEWISH COMMITTEE 1906 – 1966, at 4-18 (1972).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² On Judge Mack, *see infra* note __

⁶³ An avowedly elite organization, the AJC put aside talk of democratically representing the Jewish communities for which it aimed to speak. The AJC pursued its purposes through quiet diplomacy and connections. The Yiddish press and East European (and East Side) Jewish leaders dubbed them *Hoffjuden*, or court Jews.

⁶⁴ THIRTY-FIFTH ANNUAL REPORT OF THE UNION OF AMERICAN HEBREW CONGREGATIONS at 6258 (1909)

President Taft. Wolf and Schiff worked behind the scenes with Congressman Sabath and Simon Guggenheim, a Philadelphia-born German Reform Jew who ran his family's mines in Colorado and represented that state in the Senate.⁶⁵ Senator Guggenheim scheduled hearings where the AJC could present its case. Representatives of other new immigrant groups also weighed in, but no other group's leadership was so aroused against the Senate's decision to usher racial classifications of the new immigrants into the census.⁶⁶ By this time (the middle of the first decade of the twentieth century), the idea of counting Jews as a race had taken on sharpened significance. No longer was it simply a matter of keeping religion out of government's categorizing of newcomers. The racial sciences were turning harsher and more deterministic, and organizations like the new Immigration Restriction League (IRL)—founded by the viciously anti-Semitic Madison Grant and Prescott Hall—sponsored and promoted the views of patrician nativists and eugenicists.⁶⁷

Wolf and the Reform Jewish leadership had seen enough of how Jews fared with the racial sciences of Europe.⁶⁸ Race science was the handmaiden of the modern theory of Jew hatred, an outlook that proudly dubbed itself Anti-Semitism. It was too late to prevent Senator Dillingham's Commission from adopting the Immigration Bureau's infernal list of races. But you had only to look at the "Jews Statutes" of the old world, or the fate of America's legally classified racial others, to see that racial classification of Jews in the official census threatened much worse.

In December 1909, the Dillingham Commission held hearings addressing the proposed incorporation of the Immigration Bureau's racial classification scheme into the census.⁶⁹ Simon Wolf had the floor as the hearings commenced.⁷⁰ He argued that, as an immigrant, "the Jew...should

⁶⁵ See WOLF, PRESIDENTS I HAVE KNOWN, *supra* note __, at 236-65.

⁶⁶ See 41 U.S. IMMIGR. COMM'N. REP., STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION (1911). By far the most numerous, longest and most high-brow statements were the work of Jewish organizations and individuals; and these were also the most internally divided, about whether Jews were indeed a "race" or "people," and about how the matter of racial difference was determined. *Id.* at 265-279.

⁶⁷ See HIGHAM, *supra* note __, at 152.

⁶⁸ See VICTORIA HATTAM, IN THE SHADOW OF RACE: JEWS, LATINOS AND IMMIGRANT POLITICS IN THE UNITED STATES, at 35-39 (2007).

⁶⁹ See ZEIDEL, *supra* note __, at 96-100.

⁷⁰ *Hearing Before the Immigration Commission, 61st Cong.* (1910), reprinted in 41 U.S. IMMIGR. COMM'N. REP., STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION 266 (1911). Judge Julian Mack spoke along with Wolf for the Reform Jewish establishment. A Progressive federal circuit court judge, with degrees from Harvard, Berlin and Leipzig, a founder with Jane Addams of Hull House and with Strauss and Kohler of the American Jewish Committee, Mack was rooted in the life and government of Chicago from experience as a municipal reformer and pioneering juvenile court judge. He drew on that experience—and tacitly alluded to the practice of racial segregation in American schools—in bringing down to earth what the AJC feared might loom if, via the proposed new census categories, the Dillingham Commission's scheme of classifying Jews as a race apart were drawn into governmental practice. Especially distressing was the Commission's decision to classify by race not only foreign-born newcomers but also their U.S. born children and grandchildren:

not be classified as belonging to a race, because he does not land as a Jew, but comes as a native of the country in which he was born.”⁷¹ And “if the classification is religious, then I most solemnly protest, as it is contrary to the spirit and genius of our institutions.”⁷²

None of this impressed Henry Cabot Lodge, the Senate’s brilliant patrician nativist and one of the three senators on the Dillingham Commission. For Lodge, it seemed self-evident that Jews were a race, and he could not believe that Wolf sincerely thought otherwise.⁷³ Lodge knew enough about Jewish life and letters to be familiar with some of the ways in which even assimilated Western European and American Jews thought about themselves in racial terms:

Senator Lodge: Do you mean to deny—I want to understand your position—that the word “Jew” is a racial term? . . . How would you classify Benjamin Disraeli? Was he a Jew?

Mr. Wolf: He was born a Jew.

Senator Lodge: No, he was not born a Jew, for he was baptized in a Christian church.

Mr. Wolf: He was born of Jewish parents, and subsequently at a certain age was baptized.

Senator Lodge: He was baptized as a Christian. He then ceased to be a Jew?

Mr. Wolf: Yes; religiously he ceased to be a Jew.

Senator Lodge: Ah! Religiously. He was very proud of the fact that he was a Jew and always spoke of himself in that way. Did the fact that he changed his religion alter his race?

Mr. Wolf: It did not alter the fact that he was born a Jew; not at all; and I know the Jewish people throughout the world have claimed him, Heine, Borne, and others, who were born of their blood . . . but they ceased to be Jews from the standpoint of religion.⁷⁴

Caught in the grip of contradiction, talking the language of blood and race, Simon Wolf stumbled. Then Lodge turned to other writings.⁷⁵ Many learned American Jews—Rabbis Stephen Wise and Judah Magnes among

Your classification, for the purposes of your work, is not merely of those coming in. You are classifying the Americans. You are classifying the American children in the schools racially. You would call my child in the school racially a Jew. I would call my child in the school racially an American.

Id. at 273.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.* at 267.

⁷⁵ *Id.*

them—said that Jews were indeed a race and a nation.⁷⁶ In response, Wolf changed tack, and turned to the Constitution:

So far as citizenship of the U.S. is concerned, we know only the great divisions of the human family—White, Black, American Indian and others. Otherwise, we will land ourselves in justifying discrimination against classes of citizens, which will result in a destruction of the American idea of the equality of all citizens.⁷⁷

C. “Faith Jews” vs. “Race Jews”

Lodge made no comment on the arresting constitutional distinction Wolf drew between the “great [color-coded racial] divisions of the human family” and the new racial divisions among whites that Lodge championed and Wolf opposed. One might imagine Wolf meeting Lodge halfway, agreeing that Jews were an historical “people,” and offering Lodge something like the (fraught and fictional) distinction contemporary Americans draw between racial and ethnic groups. But Wolf and Reform Jews of Wolf’s generation did not want to offer U.S. lawmakers, administrative state officials, or race scientists some more historical, less biological, concept like “ethnicity” with which to categorize Jews as a group. They didn’t want the state or the scientists to categorize Jews as a group at all. This did not suit Henry Cabot Lodge or the Immigration Bureau. Nor did it suit the many American Jews, especially new immigrants, who dubbed themselves “race Jews” (as opposed to Wolf, Strauss, Kohler’s and the Reform establishment who called themselves “faith Jews”).⁷⁸ Wrote one rabbi in a Philadelphia Jewish paper, Senator Lodge was a “better Jew” than Wolf, for he refused to deny the existence of the Jewish race. Zionists, in particular, assailed Wolf’s efforts before the Commission. If anything threatened to stir up anti-Jewish feelings, it was not the affirmation of racial identity, but the “shifting, unmanly and undignified pretense of representatives of a people, who against fact and history, and against their own private convictions, disown the racial and national birthright.”⁷⁹ Nor did the establishment’s stance suit the new generation of Progressive Jewish thinkers who would make their peace with or join the ranks of Jewish nationalism. It is only somewhat of a simplification to say that members of this next generation of thinkers invented the ethnic group idea—to valorize and safeguard (rather than

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ ERIC L. GOLDSTEIN, *THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY*, at 89, 93-96 (2006).

⁷⁹ Bernard G. Richards, *Jews against the Jewish Race*, HEBREW STANDARD, Jan. 7, 1910.

suppress) group difference, while averting the racial classification of Jews.⁸⁰

But what Wolf and other representatives of the Reform Jewish elite could not win through debate with the senators from New England, they won through political clout.⁸¹ Dillingham and Lodge's idea of incorporating the Immigration Bureau's list of races into the census died in the conference committee.⁸² Uncounted in the census as different "races," the new racial categories were on their way to becoming "ethnicities."

III. OSCAR STRAUS FORGES A "LIBERAL IMMIGRATION POLICY"

From the 1890s until World War I, roughly 17 million immigrants arrived in the U.S.⁸³ Given the mounting hostility toward the waves of newcomers, it's really a wonder that the gates remained open for as long as they did. The War temporarily halted immigration. Then between 1921 and 1924, a period of heightened nativism, white supremacy, and political reaction, Congress enacted nationality and so-called "racial quotas" to shut the gates on the "new immigration" from Russia and Southern and Eastern Europe. Congress tried to close them much sooner. Four times between 1891 and 1917, Congress enacted a stern literacy test intended to keep out the bulk of new immigrants (especially Jews).⁸⁴ And four times Presidents Cleveland, Taft and Wilson vetoed the measures (Wilson vetoed twice).⁸⁵ During his White House tenure, Theodore Roosevelt kept the literacy test and other harsh exclusionary measures like "racial quotas" for Russians and Southern and Eastern Europeans from ever reaching a vote.⁸⁶ Even when a majority in Congress favored harsh immigration restrictions, neither party could afford to become a national vehicle for anti-immigrant politics.⁸⁷ On one hand, both parties included lawmakers with rural constituencies whose native-born sons and daughters were flooding into the same urban labor markets as the new immigrants: the largest internal migration in U.S. history collided with the largest immigration from abroad.⁸⁸ On the other hand, any anti-immigrant party would face the combined forces of

⁸⁰ See *infra*. ___-__.

⁸¹ See PANITZ, *supra* note __, at 102-106.

⁸² See 60 CONG. REC. S2181 (daily ed. Jan. 20, 1909); see also Perlmann, *supra* note __, at 2-3.

⁸³ See Claudia Goldin, *The Political Economy of Immigration Restriction in the United States*, in *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* 223, 223 (1994).

⁸⁴ DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGIN OF DIVERSE DEMOCRACY* 78-79 (2002).

⁸⁵ *Id.*

⁸⁶ See ZEIDEL, *supra* note __ at 34.

⁸⁷ DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 8 (2002).

⁸⁸ See Goldin, *supra* note __, at 223, 239 (arguing that anti-immigrant sentiment was driven by fear of the effects of immigration on jobs and wages, as many Americans "saw the future of their children . . . in the nation's cities and factories").

politically powerful industrial employers who wanted the gates kept open for cheap labor and the new immigrants' own political organizations,⁸⁹ which could and did sway presidential elections in crucial cities and states.⁹⁰ However, if every president until World War I responded to the cross-cutting politics of immigration by blocking the harsh, racially coded restrictions, each also needed something to offer the anti-immigration crowd.

The solution to this political bind was plotted by Teddy Roosevelt and his immigration advisor Oscar Straus, whose cabinet position as Secretary of Commerce and Labor placed him atop the Immigration Bureau.⁹¹ Prior to joining the administration, Straus had led key Reform Jewish organizations devoted to aiding and Americanizing the new Jewish immigrants. Both Straus and, as we will see, Kohler, were on the executive board of the American Jewish Committee; and both founded and served on the board of the Baron de Hirsch Fund, which underwrote and supervised transatlantic efforts to aid poor Jews fleeing Russia and to "distribute" them into the U.S. hinterlands.⁹²

In office, Straus helped pen Roosevelt's attacks on the race-laden immigration restrictions afoot in Congress, and helped fashion and implement the President's alternative "liberal" measures to diminish immigration's pressure on wage standards without discriminating against racial groups.⁹³ But Straus was a man of letters as well as a high state official. He produced the first sustained, scholarly version of what became a central narrative of Jewish belonging, chronicling the "Hebrew origins" of the American Constitution.

A. *The Jewish "Origins" of the "Republican Form of Government" in America*

Straus's family left Germany and settled in Georgia before the Civil War, bringing with them a long attachment to Enlightenment liberalism and a "universalist" "ethical" Reform Judaism.⁹⁴ Straus's father, Lazarus Straus, a prominent Bavarian merchant banker, suffered financial setback and faced imprisonment for joining the failed 1848 liberal Revolution against the authoritarian German provinces.⁹⁵ Like thousands of other

⁸⁹ See TICHENOR, *supra* note __, at 48 (explaining that the failure of nineteenth-century nativists was due to powerful immigrant voting blocs and Republican "ambitions for economic development").

⁹⁰ See *id.* at 74 -75. (explaining that "increased voter support from all ethnic groups except Irish Catholics" more than offset McKinley's lack of nativist support in 1896.)

⁹¹ Oscar S. Straus in *Roosevelt's Cabinet*, N.Y. TIMES, Oct. 24, 1906. (Straus was the first Jew to hold a cabinet post.)

⁹² See *infra* __-__.

⁹³ See *infra* __-__.

⁹⁴ NAOMI W. COHEN, *A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS* 3-4 (1969).

⁹⁵ *Id.*

German “48ers,” including Simon Wolf’s family and Louis Brandeis’s family,⁹⁶ Lazarus Straus immigrated to the U.S., where he began as a peddler and then, via old world connections in wholesale merchandizing, became a successful store owner and merchant.⁹⁷ Lazarus’s two older sons, Isidor and Nathan, went right into the family business, a small crockery import firm, L. Straus & Sons, which eventually owned Macy’s and other new “department stores,” but the scholarly Oscar was encouraged to continue his studies.⁹⁸

Straus enrolled in Columbia College, when being Jewish still marked one as half-outcast.⁹⁹ But only half: in the fall of ’71, Straus entered Columbia Law School, studied common law under Theodore Dwight, imbibed Reconstruction Era constitutionalism from the famous Prussian émigré and great treatise writer, Francis Lieber, and left law school equipped for and socialized into elite New York practice.¹⁰⁰ He joined the firm of Ward, Jones & Whitehead, and then formed a new firm with Simon Sterne, a Reform Jew with a sizeable practice in banking and railroads and a reputation as a free trader, publicist and municipal reformer.¹⁰¹

Straus became friends with Joseph Choate, and immersed himself in the new, lawyer-led elite liberal reform movement whose adherents became known as “Mugwumps.” Mugwumps were Republicans who spurned Grant for Cleveland, founded the Association of the Bar of the City of New York and countless other reform clubs and associations, assailed the spoils system and Tammany Hall, and championed free trade. In their writings, judicial decisions and legal practice, Mugwumps created classical legal liberalism and the constitutional outlook that found its *locus classicus* in Thomas Cooley’s *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*.¹⁰²

Given the family business and history, it was perhaps natural that Straus would gravitate to free trade and high-minded liberalism. But it was his ambitious scholarly bent that led him to identify so deeply with the liberal legal intelligentsia’s historical-mindedness. In the early 1880s, he took time off to write an ambitious book, *The Origin of Republican Form of*

⁹⁶ *Id.* at 4-5; see also MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 3-8 (2009) (the Brandeis family settling in Louisville, Kentucky).

⁹⁷ See COHEN, A DUAL HERITAGE, *supra* note __, at 4-5.

⁹⁸ *Id.*

⁹⁹ Years later, he wrote a former professor, using the familiar biblical trope of outsidership, as he recalled keenly felt social “slights” despite academic success: “I came to Columbia in 1867, almost a stranger to a strange land: I was under many disadvantages, comparatively poor, not as well dressed as most of my classmates, with no social standing and a Jew. For the latter offense I was even excluded from the literary society of the undergraduates. Often was the day I returned home with a heavy heart, because of some slight on the part of someone or other of my classmates.” *Id.* at 10.

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.* at 12.

¹⁰² See *id.* at 17-20. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (7th ed. 1903).

Government in the United States of America.¹⁰³ Straus may have been spurred by the much-admired work of Henry Adams and his famous research seminar at Harvard in the late 1870s on the “Teutonic” origins of “Anglo-American law” and the “Teutonic germ” of American liberty. With the “Teutonic germ” theory and arduous research, Adams and his illustrious students, including the young Henry Cabot Lodge, produced a racial account of the origins of American law that became the hallmark of serious American legal thought for a generation and soon would lend intellectual heft to the argument that Jews and other “alien races” were unfit for the rigors of republican self-rule and American citizenship.¹⁰⁴ Straus’s book provided a Jewish germ theory, locating the deep roots of the U.S. Constitution in ancient Israel and the “Hebrew Commonwealth.” This was a trope already common in Reform rabbis’ weekly sermons in the 1880s, but Straus’s book marked the trope’s first elaborate, scholarly treatment.

“The Hebrew Commonwealth,” claimed Straus, was the world’s “First Federal Republic,” and its influence was “paramount” in inspiring the U.S. Constitution.¹⁰⁵ Straus was conversant with what mid-nineteenth-century scholars in Germany and France had begun to call the “Hebraism” of seventeenth-century religious and political thought.¹⁰⁶ The term referred to the seventeenth-century revival of Hebrew learning among scholarly gentiles who began reading not only the Torah but rabbinic materials in Hebrew. Political thinkers like Locke, Grotius, Selden, and Milton began interpreting the “Hebrew Bible” as a kind of “political constitution designed by God for the children of Israel.”¹⁰⁷

Thus, Straus knew that the Puritans in Massachusetts Bay were not alone in studying the Old Testament in the original Hebrew; that Cotton Mather’s custom of sporting a kippah or yarmulke as he studied Torah in

¹⁰³ *Id.* at 15.

¹⁰⁴ See DAVID RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2012). Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 218-19 (1964) (quoting Adams, *Essays in Anglo-Saxon Law* 1 (1876)). Henry Cabot Lodge, *The Restriction of Immigration* 29 NORTH AMERICAN REVIEW (Jan 1891); see also KING, *supra* note __ and TICHENOR, *supra* note __ on Lodge’s arguments.

By the 1890s, Adams’s own racial views would take a harsh and dourly Anti-Semitic turn. In New York’s Reform Jewish elite, he saw a dismal sign of the times, with which he felt “more than ever at odds...I detest it, and...live only to see the end of it, with all its infernal Jewry. I want to put every money-lender to death, and to sink Lombard Street and Wall Street under the ocean...We are in the hands of the Jews. They can do what they please with our values...” To Charles Milnes Gaskell – July 31, 1896, in *LETTERS OF HENRY ADAMS, 1892-1918*, VOL. 2, 338 (W.C. Ford, ed. 1938).

¹⁰⁵ OSCAR STRAUS, *ORIGIN OF REPUBLICAN FORM OF GOVERNMENT IN THE UNITED STATES OF AMERICA* 79-80 (2d ed. 1901).

See *id.* at xxxviii. (discussing contemporary article on “Hebraism” of French Revolution). For a recent examination of Hebraism in the discourse of the American Revolution, see generally Nathan R. Perl-Rosenthal, *The “Divine Right of Republics”: Hebraic Republicanism and the Debate over Kingless Government in Revolutionary America*, WM. & MARY L.Q., July 2009, at 535.¹⁰⁷ See generally ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT* (2010).

¹⁰⁷ See generally ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT* (2010).

colonial Boston was not as wacky in the Atlantic culture of his day as one might imagine.¹⁰⁸ For his part, Straus focused chiefly on eighteenth-century New England, where the evidence of constitutional Hebraism was abundant. The colonists' break with England, their rejection of monarchy and mixed government, and their embrace of republicanism all demanded religious sanction. "Ministers preached politics as well as religion," Straus observed.¹⁰⁹ "The pulpit was the most direct way of reaching the people."¹¹⁰ From the pulpit, the colonists heard the Hebrew prophets' stern warnings against the perils of human monarchs and learned about God's preference that His chosen people choose "a free commonwealth and to have himself for their king."¹¹¹ Straus parsed dozens of sermons from the 1770s and '80s including Harvard College President Samuel Langdon, D.D.'s 1775 election day sermon "delivered before the Honorable Congress of Massachusetts Bay":

The Jewish government, according to the original constitution which was divinely established, was a perfect republic. And let them who cry up the divine right of kings consider, that the form of government which had a proper claim to a divine establishment was so far from including the idea of a king, that it was a high crime for Israel to ask to be in this respect like other nations. . . . Every nation, when able and agreed, has a right to set up over itself any form of government which to it may appear most conducive to its common welfare. The civil polity of Israel is doubtless an excellent general model.¹¹²

Straus goes on to trace how the "civil polity of Israel" informed the Founders' conceptions of popular sovereignty, republicanism, the separation of powers, federalism the division of power between national and subnational governments, and so on. Straus also imbues the "Hebrew Commonwealth" with more up-to-date, nineteenth-century marks of enlightened constitutionalism:

[T]he children of Israel, who had just emerged from centuries of bondage, not only recognized the guiding principles of civil and religious liberty that "all men are created equal," that God and the law are the only kings, but also established a free commonwealth, a

¹⁰⁸ *Id.* See also Perl-Rosenthal, *supra* note __, at .

¹⁰⁹ STRAUS, ORIGIN OF REPUBLICAN FORM, *supra* note __, at 77.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 119.

¹¹² *Id.* at 120-21. Langdon served as a delegate to the 1788 New Hampshire convention to ratify the Constitution.

pure democratic-republic under a written constitution, “a government of the people, by the people, and for the people.”¹¹³

Thus along with the ancient Israelites’ legacy to and affinity with Abe Lincoln, the book showed off Straus’s Americanism, his scholarly chops and his claim as a Jew to what Adams and Lodge treated as a WASP monopoly: to carry the seeds of American liberty. For our purposes, what matters is not the historical accuracy of Straus’s Jewish origins thesis, which seems as slight as its “Teutonic” rival. It is the work the thesis did in supporting and outfitting the Reform Jewish elite’s identification with America’s basic law and the task of safeguarding and elaborating that law. Identifying the origins of American constitutionalism in the Hebrew Bible would become a mainstay of rabbis’, lawyers’ and scholars’ narratives of Jewish belonging.¹¹⁴

B. Toward a New “Liberal Immigration Policy”: Alternatives to Nativist Racism

By the time Straus was preparing to move from New York to Washington and join the Roosevelt administration in 1906, the old climate of liberality toward Jews remained among some stalwart WASP Progressives like the President, but most of the City’s elite were thoroughly alarmed by the masses of poor Russian Jews flocking to the Lower East Side.¹¹⁵ Jews were fast approaching 25 % of the city’s population.¹¹⁶ There were more poor, unassimilated Jews in the city than its Jewish elite could manage or its gentile elite would stomach.

As mass immigration fanned the flames of fierce nativist politics, Straus brought his constitutional creed to bear on the work of immigration reform. An immigration bill was already pending in Congress when Straus took up his cabinet post in June 1906.¹¹⁷ Sponsored in the Senate by Senator Dillingham of Massachusetts and drafted in part by Lodge and the new IRL, the bill included both unvarnished racial quotas and the IRL’s more

¹¹³ *Id.* at 117.

¹¹⁴ Straus’ *Origin* and the lectures upon which it was based attracted significant attention and were echoed by countless Jewish rabbis and writers. See BETH WENGER, HISTORY LESSONS: THE CREATION OF AMERICAN JEWISH HERITAGE (2010) at 38-39 (In late nineteenth and early twentieth centuries, Straus’s ideas “became familiar refrains in the writings and public proclamations of American Jews.”) A review of the first edition of *Origin* in 15 THE MAGAZINE OF AMERICAN HISTORY WITH NOTES AND QUERIES 104 (1886) noted “so much attention” drawn to Straus’ lectures. See also 7 AMERICAN HISTORICAL REVIEW 398 (1902) (reviewing second edition to same effect).

¹¹⁵ See Guerl, *supra* note __, at __-__; OTIS L. GRAHAM, JR., UNGUARDED GATES: A HISTORY OF AMERICA’S IMMIGRATION CRISIS 29-43 (2004) (describing proposed restrictions from Southern and Eastern Europe to preserve “New York’s ‘old stock’”).

¹¹⁶ U.S. IMMIGR. COMM’N. REP., ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION 247 (1911).

¹¹⁷ EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, at 137-143 (1981).

popularly acceptable measure for stopping great numbers of undesirable new immigrant “races” at the gates: the literacy test. Over lunch in the White House, Straus made his case against the test.¹¹⁸ Like outright quotas, it was bigoted and illiberal, and was aimed against the supposedly “inferior races” from Southern and Eastern Europe and Russia. If they were largely illiterate, it was only for lack of opportunity, not want of the stuff that made fine Americans.

Straus offered two liberal alternatives to “racial” immigration laws. The first involved putting more teeth into the existing system to diminish the flow of new immigrants without resort to racial bars. The second was a program of what Straus called “Distribution.” If Lodge and the nativists in Congress wanted to close the gates on the new immigrants, that was chiefly because of the “congestion” of new immigrants in the nation’s cities. Instead, Straus proposed a government effort to divert or remove some portion of the new immigrants from their “foreign colonies” in New York and other big cities, with their ghettos and slums and contentious labor markets, and distribute them across the country to the many places where their labor would be welcome and they would much more readily assimilate.¹¹⁹

Roosevelt agreed with Straus’s proposals. To Straus’s ideas, he added the quintessential Progressive notion of establishing an ambitious independent commission to examine the immigration problem, and he encouraged Straus to work with the autocratic Speaker of the House, Joe Cannon, to kill the immigration bill’s literacy provision and “racial” quotas and parlay these liberal alternatives into the new law.¹²⁰

C. “Rigid Enforcement” of “Liberal Laws”—the “Individual Qualities of the Individual Man”

The liberal virtue of the existing laws restricting European immigration, in contrast to the measures championed by Lodge and the nativists in Congress, was that they determined exclusion by what Roosevelt called the “individual qualit[ies] of the individual man,” rather than his “race . . . nation . . . [or] creed.”¹²¹ Not only that, Straus explained, the existing laws picked out for exclusion individuals who lacked the grit and uprightness that a liberal nation demanded.¹²² They excluded “idiots,” “insane persons,” “felons,” and “anarchists,” along with “paupers,” indentured

¹¹⁸ COHEN, A DUAL HERITAGE, *supra* note __, at 153.

¹¹⁹ See *infra* __ on “distribution”.

¹²⁰ See *infra*. __ on provision for a new division of the Immigration Bureau to manage distribution. Roosevelt’s idea for a major commission would become the Dillingham Commission. See *supra* __.

¹²¹ See Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905).

¹²² *Immigration Conference Musters 500 Delegates*, N.Y. TIMES, Dec. 7, 1905 (reporting Straus’s speech at the first National Immigration Conference at Madison Square Garden).

workers, and persons “likely to become a public charge.”¹²³

Two other existing restrictions—against “induced” and “assisted” immigration—became the focus of Straus’ proposal to bolster the “liberal” regime. Existing law barred induced immigration, a category that included those who were “imported” as “contract labor” and had their passage paid for by American employers or foreign labor brokers, and immigrants whose coming was a result of “promise of employment through advertisements printed and published in any foreign country.”¹²⁴ Recognizing that labor brokers in Southern or Eastern Europe avoided formalities like written contracts, Straus moved to broaden the definition of “induced” to include anyone who set sail in response to more informal “offers or promises of employment” or “agreements oral, written or printed, express or implied.”¹²⁵ The bar on “assisted” immigration was also widened. Under existing procedures, immigrants whose passage was paid or who were “assisted by others to come” were put to the burden of “show[ing] affirmatively” in a BSI hearing they did not belong to “one of the foregoing excluded classes” (particularly persons “likely to become a public charge”).¹²⁶ This procedure was based on the theory that not only American employers and the foreign brokers with whom they dealt, but also foreign governments and foreign charities, were promoting and paying for emigration to be rid of their own paupers and misfits.¹²⁷ Straus proposed turning such assisted immigration from a burden-shifting category into a new excluded and deportable class encompassing those whose way was paid by “any corporation, association, society, municipality, or foreign government, either directly or indirectly.”¹²⁸

As Straus saw it, a constitutional standard unified these restrictions. That standard was at the heart of cases like *Lochner* and classical legal liberalism’s view of free labor. The true American worker was a free-standing market actor selling his labor as he thought best.¹²⁹ The desirable

¹²³ Immigration Act, ch. 551, §1, 26 Stat.1084 (1891).

¹²⁴ Immigration Act, ch. 551, §3, 26 Stat.1084 (1891).

¹²⁵ Immigration Act, ch. 1134, §2, 34 Stat. 898 (1907). Of course, immigrants swiftly learned to deny that they came in response to any advertisements (already barred by the older laws) or any other specific offers or promises of employment. See BROUGHTON BRANDENBERG, IMPORTED AMERICANS: THE STORY OF THE EXPERIENCES OF A DISGUISED AMERICAN AND HIS WIFE STUDYING THE IMMIGRATION QUESTION 2-3 (1904); Memorandum by John Gruenberg, Immigration Inspector at Ellis Island Reel 6, pp. 90-92.

¹²⁶ Immigration Act of 1903, ch. 1012, § 2, (32 Stat.) 1213, 1214. The statute also provided – with studied ambiguity – that the burden-shifting requirement was not intended to “prevent persons living in the United States from sending for a relative or friend.” *Id.*

¹²⁷ See, e.g., Memorandum by John Gruenberg, Immigration Inspector at Ellis Island (1904), INS PAPERS, Reel 6, pp. 90-103.

¹²⁸ *Id.* The burden-shifting requirement remained in place in Straus’s bill, and in the final legislation, for immigrants whose way was paid by other individuals; and the provision about not “prevent[ing] persons living in the United States from sending for a relative or friend” was omitted.

¹²⁹ See *Straus Says that Taft is No Reactionary*, N.Y. TIMES, Apr. 29, 1909. (Straus extolling the freestanding, unassisted immigrant). On *Lochner* and classical legal liberalism’s views of free labor and liberty of contract, see William Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985). See also William Forbath, *Politics, State-Building, and the Courts*, *supra* note ___, 643. Of

immigrant fit this standard, having the industry to save up and get himself and his family to the U.S. and the capacity to support them once they were here.¹³⁰ Those who failed to measure up to this sternly individualistic ideal were the proper targets for exclusion. In his 1906 annual message to Congress, President Roosevelt sounded Straus' themes: "[M]ost of the undesirable class [of immigrants] does not come here of its own initiative. [They are] wheedled, cajoled, imported and assisted by [unscrupulous American employers and their foreign labor brokers as well as] the agents of the great transportation companies." The standard at the gates must be "the individual quality of the individual man," and never "whether he is of one creed or another, of one nation or another . . . [or] whether he is Catholic or Protestant, Jew or Gentile"¹³¹

Congress enacted the new measures in 1907.¹³² The quotas and literacy test were struck, and the bars on induced and assisted immigration expanded. In addition, the 1907 reforms included authorization for an independent Commission on Immigration (which, it was understood, would be chaired by Senator Dillingham), and for establishing a Division of Information within the Immigration Bureau to begin the work of Distribution.¹³³ Soon enough, however, the individualistic features of these laws would collide with Straus and his Reform Jewish cohort's own efforts at solidarity with their "race or creed." Aiding the emigration of Jews from Russia and Poland would bring them up against the limitations and dilemmas of embracing classical liberal constitutionalism as a vocabulary of belonging.

course, the moral precept of liberty of contract could be seen as safeguarding, not condemning, the new immigrant's decision to enter an agreement abroad to work for an American employer or to obligate himself to work off a debt to a "padrone." Precisely this view occurred to federal judges who often construed the contract labor provisions of immigration law narrowly and strictly, in order to discourage officials from barring immigrants whom the judges regarded as having had the moxie to make their way in the U.S., and whose circumstances did not seem those of helpless serfs or "coolies." See, e.g., *United States v. Edgar*, 45 F. 44 (Cir. Ct. E.D. Mo. 1891) (contract under the Act requires all the formality of any other contract, including consideration and mutual assent); *United States v. River Spinning Co.*, 70 F. 978 (Cir. Ct. R.I. 1895) and *United States v. McElroy*, 115 F. 252 (Cir. Ct. D. N.J. 1902) (both cases finding that the alleged contract was not particular enough to violate the Act). Rulings like these helped spur Straus's revision.

¹³⁰ See Forbath, *supra* note ___, at 63.

¹³¹ Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1906). The nation breached this liberal norm with regard to Asian immigrants, when it enacted the Chinese Exclusion Law in 1885. Many Reconstruction-bred Republicans in Congress railed against this first "racial bar" in the nation's immigration laws. On the politics of Chinese exclusion, see ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS AND THE CHINESE EXCLUSION ACT* (1998). The same year, 1885, also saw Congress pass the first Contract Labor Law, aimed against "imported labor" or "white coolies" from Europe. This was another demand from organized labor. As the phrase "white coolie" suggests, many labor leaders and lawmakers were inclined to see the new immigrant workers from Europe in racialized fashion too. But for others, the contract labor bar was a way to draw a non-racial line that excluded dependent and "unfree" labor and welcomed free standing Southern and Eastern European immigrants no matter their "race." See William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924," at 14 (2009) (unpublished manuscript, on file with author).

¹³² See Immigration Act, ch. 1134, §4, 34 Stat. 898 (1907).

¹³³ HUTCHINSON, *supra* note ___, 136-143 (1981) (describing the provisions of the final act); See also Immigration Act, ch. 1134, §39, 34 Stat. 898 (1907).

IV. MAX KOHLER: INVENTING THE JEWISH CIVIL RIGHTS LAWYER

A. “Rigid Enforcement” in Practice: Trouble at Ellis Island

From the early years of his administration, Roosevelt had taken steps to dramatize his commitment to a “vigorous” but “liberal” immigration policy. In 1902, he appointed a fellow blue-blooded New Yorker and tough-minded Progressive reformer named William Williams as the new Commissioner of Immigration at Ellis Island.¹³⁴ A Wall Street attorney and member of several elite civic associations, Williams threw himself into the task of “cleaning up” Ellis Island—planting trees and greenery, renovating dining halls and waiting rooms, and rooting out both graft and “lax enforcement” of the immigration laws.¹³⁵

The Commissioner changed Ellis Island’s administrative regime in ways that seemed to square with the President’s outlook and Straus’s later efforts to give more bite to existing laws. Williams sent out a raft of circulars to the front-line inspectors, demanding more rigorous application of the various statutory grounds for exclusion, strict observance of the burden-shifting requirement for assisted immigrants, more exacting standards for determining who was “likely to become a public charge”, and new rules for conducting Board of Special Inquiry hearings.¹³⁶ Longstanding practices and long held understandings were put aside in the name of “strict enforcement.” Henceforth, every immigrant whose way was paid for by an American friend or relative would be deemed an “assisted immigrant,” be subject to a Board of Special Inquiry hearing, and be required to show “beyond doubt” that he did not fall within one of the excluded categories. At the hearing, a friend or relative’s assurances of support while a newcomer sought work would no longer remove the taint of “likely to become a public charge,” unless the assurances came from a relative legally obligated to support the newcomer. Likewise, the amount of money each immigrant was required to have in hand was raised to twenty-five dollars. Another circular removed the would-be immigrant’s right to counsel, reading the longstanding statutory provision that the “public” be “excluded” from Board of Special Inquiry (BSI) hearings to preclude the presence of

¹³⁴ *William Williams Accepts*, N.Y. TIMES, Apr. 2, 1902. (William Williams replaces Commissioner Thomas Fitchie)

¹³⁵ *Ellis Island Improved*, N.Y. TIMES, July 12, 1903. (Major changes made to Ellis Island under Commissioner Williams watch, including landscaping renovations, implementation of a roof garden, as well as barge services.) On Williams’ campaign to root out graft by firing a number of corrupt Ellis Island officials, see N.Y. Public Library, Williams Papers files; INS files re Fitzpatrick & others.

¹³⁶ See Reports and other documents, William Williams Papers, Box 2, Folders 13-15 (1903-1904) (on file with the New York Public Library).

counsel or immigrant aid society advocates.¹³⁷ Thus, hearings were streamlined, and the numbers of detentions and expulsions soared.¹³⁸

Just as Williams' new regime was getting underway at Ellis Island, violence in Russia brought new urgency to Jewish emigration. Reports of the Kishinev Pogrom of 1903 spurred Reform Jewish elites in New York City, London, Paris, and Berlin to ratchet up their efforts to aid Jewish emigration from Russia. The leading figure in New York was Jacob Schiff, the tireless German Jewish philanthropist and chief of Kuhn, Loeb and Company, the second largest investment banking house on Wall Street.¹³⁹ As the leading financier among New York's German-Jewish elite, Schiff was the U.S.'s nearest counterpart to Europe's Baron de Hirsch and the Rothschild family.¹⁴⁰ In Kishinev's wake, Schiff, Straus, Kohler and other leaders of New York's Reform elite set about expanding the network of agencies to assist Russian Jews, including deeply impoverished ones, with emigration.¹⁴¹

Between Kishinev and World War I, some 1.8 million Jews emigrated from Russia and elsewhere in Eastern Europe as pogroms, state violence and official intolerance intensified and economic circumstances worsened.¹⁴² Already in 1903, as the numbers burgeoned, thousands landed - and hundreds were detained - each week at Ellis Island, caught in the screens of Commissioner Williams' improved administrative machinery.¹⁴³ Jewish organizations took the lead protesting the truncated procedures at Board of Special Inquiry hearings, the "twenty five dollar" requirement, and the "arbitrary and inhuman" methods of inspections.¹⁴⁴ Clashes erupted, and protest meetings were called. The Yiddish newspapers 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

¹³⁷ *Societies to Plead for Immigrants*, N.Y. TIMES, January 4, 1903 at 6.

¹³⁸ See Reports, William Williams Papers, supra note __; 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, at 10 [Commission Report].

¹³⁹ See NAOMI W. COHEN, JACOB H. SCHIFF: A STUDY IN AMERICAN JEWISH LEADERSHIP xi (1999); also STEPHEN BIRMINGHAM, OUR CROWD: THE GREAT JEWISH FAMILIES OF NEW YORK 151-339 (1996).

¹⁴⁰ See COHEN, JACOB SCHIFF, supra __ at 47.

¹⁴¹ See ROBERT A. ROCKAWAY, WORDS OF THE UPROOTED 27-28 (1998). See also COHEN, NOT FREE TO DESIST, supra note __, at 57.

¹⁴² SAMUEL JOSEPH, JEWISH IMMIGRATION TO THE UNITED STATES: FROM 1880 TO 1910, at 93 (1914).

¹⁴³ *Id.*

¹⁴⁴ *Societies to Plead for Immigrants*, N.Y. TIMES, January 4, 1903 at 6.

Williams.”¹⁴⁵

B. Justice-Seeking and Jewish Apartness and Belonging

The “barbarous new interpretations of the immigration laws” on Ellis Island, the uproar they prompted on the Lower East Side, and the response of the city’s Reform Jewish elite return us to Max Kohler. Son of Rabbi Kaufman Kohler, and grandson of Rabbi David Einhorn, Max Kohler sat with Jacob Schiff on the board of New York’s Baron de Hirsch Fund, the international organization dedicated aiding Russian emigrants, and with Simon Wolf on the boards of the Hebrew Sheltering and Immigrant Aid Society and the Union of American Hebrew Congregations.¹⁴⁶ If Wolf was the cautious elder statesman of the old German-Jewish elite in Washington, and Straus its first representative in the highest reaches of the Executive Branch, Max Kohler was among its premier litigators and legal advocates and did most of the challenging immigration law work. With Schiff and others, including Adolph Ochs, German Reform Jewish owner and publisher of the *New York Times* and his nephew Cyrus Sulzberger, a fellow founder of the AJC, Kohler would assail the whole constellation of substantive and procedural reforms that Commissioner Williams instituted. Twice over, they would orchestrate 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.¹⁴⁷

Kohler was well equipped to handle the law work. After graduating from Columbia Law School in 1893, Kohler became an Assistant U.S. District Attorney, as they were then called, for the Southern District of New York. Shortly after beginning this 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 1898.¹⁴⁸ He then left government to become a partner in the firm of Lewinson, Kohler, and Schattman, where he began representing Chinese immigrants facing deportations from New York.¹⁴⁹ 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

¹⁴⁵ 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.

¹⁴⁶ Information for The National Encyclopedia of American Biography, Max J. Kohler, Box 1, Folder 5 (undated) (on file with the American Jewish Historical Society).

¹⁴⁷ See NAOMI W. COHEN, NOT FREE TO DESIST, *supra* note 74, at 27.

¹⁴⁸ *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.

¹⁴⁹ Statement of Max J. Kohler, Max J. Kohler, Box 1, Folder 5 (undated) (on file with the American Jewish Historical Society).

Francisco also took this route, working on retainer to the city's wealthy Chinese merchants.¹⁵⁰ By contrast, for the next three decades, Kohler would do his voluminous immigration work for free.¹⁵¹

Perhaps it was to expiate his guilty complicity (while exploiting his expertise) in the deportation of Chinese immigrants that led Kohler into pro bono immigration work. Some of Kohler's passion may have flowed from a recognition that subjecting Chinese merchants to vicious rituals of status degradation evoked the treatment of Jewish merchants in contemporary Russia and parts of Europe. He may have seen that the pogroms and the stirrings of mass immigration of Russian Jews in the 1880s and '90s might soon give occasion to use his painfully gained knowledge on the latter's behalf.¹⁵² But for the next three decades, Kohler represented Jews barely more often than other unwelcome racial others (Chinese, "Hindus," "Slavs" and "Arabs") facing deportation.¹⁵³ So perhaps being assigned as a young District Attorney to master the machinery of expulsion, while being heir to the family-forged faith in the liberal Constitution as the Reform Jews' "new Covenant" and America as the "new Zion of freedom and human rights," made defending the rights of racial others at America's gates seem an inescapable calling.

Max's father, Rabbi Kaufman Kohler, 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 people with a separate national destiny seeking to return to Zion, and no longer bound by Jewish law, hewing only to Judaism's universal precepts. "Why then," asked Rabbi Kohler in a widely circulated sermon at New York's Temple Emmanuel in 1888, would not Reform Jews "throw down" the "ragged mantle" of the eternal "wandering Jew" and "melt" 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."¹⁵⁴ 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."¹⁵⁵ Only then, could the "priest-people" fulfill their destiny—

¹⁵⁰ See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 70 (1995).

¹⁵¹ 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...").

¹⁵² See Max Kohler, *Our Chinese Exclusion Laws*, *supra* note ___, at 9 ("The system devised for the expulsion of the Moors from Spain and of the Jews from Russia in our day...are gentle and humane compared with the barbarities of our existing 'American' methods for the deportation of alleged Chinese persons...").

¹⁵³ See Max J. Kohler Box 14, Folder 7, "List of Cases" (on file with the American Jewish History Society).

¹⁵⁴ See Rabbi Kaufman Kohler, *Wandering Jew*, Box 1, Folder 4 (1888) (on file with the American Jewish Historical Society).

¹⁵⁵ KAUFFMAN KOHLER, *JEWISH THEOLOGY: SYSTEMATICALLY AND HISTORICALLY CONSIDERED* 346, 365 (1918).

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.”¹⁵⁶

From the late eighteenth century onward, 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 Kaufman Kohler and other leading late nineteenth-century American Reform rabbis, 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 the attorneys we are studying may be said to enact during the Progressive Era. Kaufman Kohler’s identification of Jews as a people apart with a mission of justice-seeking on behalf of “all humanity” would become a central element of Jewish American identity for generations. Here was a basis for renewing and defending Jewish particularity—standing with the outcast, raising the fallen, and resisting “absorption” into the gentile elite, but doing so as a member of a respected bourgeois profession, and in terms of Enlightened, “universal” values enshrined in the U.S. Constitution.¹⁵⁷

Mass immigration and heightened nativism spurred Max Kohler to put into practice his father’s reconstruction of Jewish apartness and its ethical meaning. We can speculate: Without this identification with racial outsiders, without taking on arduous law work on their behalf, what exactly did one’s Jewishness amount to for an earnest young corporate lawyer praying in English in an elegant Fifth Avenue cathedral? Like the “godly men of yore,” he could “consecrate” his life “to the practice of the law” to bring “human rights and freedom” forth from Zion.

Max Kohler became the first Jewish civil rights lawyer. In November 1901, a few years into his private practice and a few months before Congress would contemplate renewing the Chinese Exclusion Act, he published a passionate and learned article in the *New York Times* entitled, “Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?”¹⁵⁸ along with a more densely-argued treatment, “Un-American Character of Race Legislation,” in the scholarly press.¹⁵⁹

¹⁵⁶ *Id.*

¹⁵⁷ On the Lower East Side, a new generation of Russian Jewish socialists and nationalists, trade unionists and union attorneys made a similar kind of “modern,” justice-seeking sense of Jewishness through trade unionism and radical social and political activism. Brandeis, we’ll see, wedded the two and made them a key part of his own awakening to and vocabulary of Jewish American identity. See *infra* ____.

¹⁵⁸ See Kohler, *Our Chinese Exclusion Laws*, *supra* note ____.

¹⁵⁹ Max Kohler, *Un-American Character of Race Legislation*, 34 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 55 (1909).

Given his prior “duty of representing the Government in this class of cases . . . and since then [having] argued many cases under these laws on behalf of Chinese applicants,” Kohler took it upon himself to “expos[e] to the reading public” the harsh and summary deportation proceedings to which Congress had consigned would-be Chinese immigrants and native-born Chinese-Americans returning from abroad and alleged to be newcomers.¹⁶⁰ He described the scant fact-finding and stacked deck of evidentiary presumptions, the bar on judicial review and obstacles to administrative review, the “ignorant, biased, petty officials,” and the general “reign of terror” that this extra-constitutional deportation system had produced in the Chinese community.¹⁶¹ Such injustice, he concluded, was only possible because of dehumanizing racism and the political invisibility of Chinese-Americans.¹⁶²

Kohler argued that matters might be better if the Chinese were subject to the “general [immigration] legislation,” and not statutes aimed at the Chinese in particular.¹⁶³ Until we are rid of “the present ideas embedded in our statutes [that] Chinese are treated as people unlike all others, having no rights that our petty or high officials or other citizens need respect,” the Chinese would meet unremitting official hostility.¹⁶⁴ With its promise of “equal protection of the law,” the Constitution might seem to demand eliminating the racial classification of Chinese from immigration laws, but that promise applied only to the states, and in any case, the Court had indicated that judicially enforceable “constitutional limitations” had little force in the immigration arena. Congress, however, could and should apply “our fundamental principles” to its own legislative work.

Here, Kohler set up the “[c]onstitutional principle against class legislation” as the heart of equal protection, citing the leading Gilded Age constitutional treatise, Cooley’s classic (and classically liberal) *Constitutional Limitations*, for the proposition that “[p]roper classification and not race discrimination ought to underlie legislation.”¹⁶⁵ Within “certain limits,” at least, the Court had condemned “legislation based upon race discriminations.”¹⁶⁶ Kohler quoted lavishly from *Yick Wo*, in which the Court condemned city officials’ “race discrimination” against Chinese laundry owners in San Francisco.¹⁶⁷ *Yick Wo* proudly affirmed the Fourteenth Amendment’s embodiment of the Declaration of Independence’s

¹⁶⁰ Kohler, *Our Chinese Exclusion Laws*, *supra* note ___, at 14.

¹⁶¹ Kohler, *Un-American Character of Race Legislation*, *supra* note ___, at 63-64.

¹⁶² See Kohler, *Our Chinese Exclusion Laws*, *supra* note ___, at 14. No matter how longstanding their residence in the U.S., Asians were “ineligible of [naturalized] citizenship” and barred from the ballot.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Kohler, *Un-American Character of Race Legislation*, *supra* note ___, at 55.

¹⁶⁶ *Id.* at 56.

¹⁶⁷ *Id.*

“fundamental rights to life, liberty and pursuit of happiness, considered as individual possessions, secured by those maxims of constitutional law which are monuments showing the victorious progress of the [American] race in securing to men the blessings of civilization under the reign of just and equal laws.”¹⁶⁸ Kohler rightly saw in *Yick Wo* a generous expression of the freedom to pursue ordinary callings and of basic civil rights against arbitrary (because racially motivated) deprivation of that liberty extended, in the Court’s words, “equally [to citizens and to] the strangers and aliens who now invoke the jurisdiction of the court.”¹⁶⁹

The same precept animated federal statutes and treaties.¹⁷⁰ Kohler highlighted the Civil Rights Act of 1875 in which Congress broadly “outlawed race discrimination,” only to be struck down by the Court “as an encroachment upon state power.”¹⁷¹ Likewise, after enacting the Fourteenth Amendment, Congress struck “color distinctions from our naturalization laws.”¹⁷² In the same vein, Kohler quoted President Hayes’ veto message against the first Chinese Exclusion Law of 1882 as a violation of the Burlingame Treaty that Hayes had negotiated with China: “Up to this time,” Hayes had declared, “our uncovenanted hospitality to the immigrant, our fearless liberality of citizenship, and our equal and comprehensive justice to all inhabitants . . . ha[s] made all comers welcome.”¹⁷³

Instead of fearless liberality, however, the Court’s jurisprudence was marred, in Kohler’s view, by “a large number of statutory distinctions on race lines . . . sustained . . . on the theory that illegal ‘discriminations’ are not involved, if equal but separate and distinct facilities for different races are afforded.”¹⁷⁴ “It is difficult to escape the conclusion that [such laws and the decisions, like *Plessy v. Ferguson*, upholding them] are inconsistent with the spirit of American Government.”¹⁷⁵

C. *Lawyering for Racial Outsiders*

So like Oscar Straus, Max Kohler steeped himself in liberal legal learning; for the next two decades, he would continue publishing in scholarly outlets and journals of opinion, his articles replete with international-legal, historical, anthropological and philosophical references.¹⁷⁶ But with Kohler, the focus almost always was on gripping

¹⁶⁸ *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

¹⁶⁹ *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886)).

¹⁷⁰ See Kohler, *Un-American Character of Race Legislation*, *supra* note ___, at 56.

¹⁷¹ *Id.* at 61.

¹⁷² *Id.* at 56.

¹⁷³ *Id.* at 65.

¹⁷⁴ *Id.* at 62.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., MAX KOHLER, *IMMIGRATION AND ALIENS IN THE UNITED STATES* (1936)(collecting articles and essays); Max Kohler, *Some Aspects of the Immigration Problem*, *AMERICAN ECONOMIC REVIEW*, Mar. 1914, at

matters at hand, crafting the case against “racial classifications and distinctions” in the nation’s immigration laws. Over the next two decades, Kohler would become 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.

A Lower East Side attorney, “Charles Dushkind of 119 Nassau Street” first seems to have enlisted the young Kohler’s expertise, in filing federal habeas petitions, on behalf of two Jewish immigrants, Esra Rubin and Yankel Zisel, caught in the coils of Commissioner Williams’ harsh new administrative regime. A BSI hearing had determined that Rubin and Zisel were likely to become public charges, despite their testimony that relatives here would take care of them. Like hundreds of others, beginning in late 1902, the two had been put to the burden of affirmatively showing they would not become a burden on the public fisc, without benefit of an advocate or time in which to contact and bring forward the relatives who might vouch for them. The habeas petitions were successful; the federal court not only disapproved the BSI proceeding but overturned the BSI and found the two men entitled to land.¹⁷⁷

Also successful were Dushkind’s efforts to translate the uproar over Williams’ administration – and the outraged headlines and painstaking reporting in the Yiddish and German language press – into a direct plea to President Roosevelt. Dushkind led a “Committee on Immigration” formed by several of the new Jewish immigrants’ “Hebrew societies.” With Kohler’s quiet assistance, Dushkind crafted for the Committee a set of resolutions, which the Committee circulated for signatures to Jewish

93; Max Kohler, *Beginnings of New York Jewish History*, in PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY (2d ed. 1905), at 41.

¹⁷⁷ *Societies to Plead for Immigrants*, N.Y. TIMES, January 4, 1903 at 6. Papers of Max J. Kohler [Kohler Papers], Box 10, Folder 11... (on file with the American Jewish Historical Society).

organizations “across the country.”¹⁷⁸ The resolutions condemned the “new methods employed at Ellis Island” in much the same language Kohler had used the previous year to indict the harsh, summary treatment, scant fact-finding and stacked deck of presumptions meted out to Chinese newcomers.¹⁷⁹

Working with Wolf in Washington, Dushkind and Kohler apparently managed to bring the press coverage and the Committee resolutions against Williams’s regime to the White House’s attention.¹⁸⁰ The White House called on the Commissioner General of Immigration to arrange the first presidential visit to Ellis Island. The President invited his friend, the famous Progressive journalist and photographer of immigrant life, Jacob Riis to join him and other Progressive notables, along with Mrs. Roosevelt and “the young Kermit Roosevelt” to make the trip from Oyster Bay to Ellis Island on the Government Yacht Sylph. The yacht arrived “in a howling gale [and]...driving rain,” and the President, “dripping wet...dashed down the shaky gangplank, wrung the hand of [the Commissioner General]...[and] vigorously shook hands with Commissioner Williams.” Then, he “immediately announced the appointment of a special commission of inquiry to look into allegations of all sorts of irregularities in the administration of the station.”¹⁸¹

The appointment of “the Commission of Inquiry came like a thunderclap out of a clear sky to Commissioner William Williams and even to” the Commissioner General, neither of whom “had received the slightest intimation that the New York Station was not giving entire satisfaction to their superior.”¹⁸² All day, they remained “in the dark as to the nature and source of the charges,” which the *New York Times* discretely attributed to the editorials of “a number of New York German-American newspapers.”¹⁸³

Roosevelt’s announcement may have chagrined the Commissioner, but the President remained “enthusiastic” and “game.” Showing off his familiar (and, for patricians of his day, distinctive) relish for journeying across racial and class boundaries, Roosevelt and his entourage “toured the big establishment...teeming” with roughly 2,000 new immigrants “from almost every land and clime.”¹⁸⁴ Embracing and shaking hands with countless newcomers, Roosevelt engaged dozens in warm and intense conversation, with Riis and others translating the President’s “volleys of questions.” The

¹⁷⁸ *Id.*; Kohler Papers, Box 11, Folders 11, 12...

¹⁷⁹ *Id.*

¹⁸⁰ See *id.*; *President Starts Ellis Island Inquiry – Astonishes Officials by Naming a Special Commission*, N.Y. TIMES, September 17, 1903, at 1.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

group visited every department, from the main inspection hall to the detention wards to the Boards of Special Inquiry hearings rooms. There, the President pointedly remained for two hours, raising skeptical questions about “why the board should feel any doubt” about landing immigrants like “a Magyar...going to his son-in-law in Shamokin....who had sent him the ticket and \$12 in money.” Commissioner Williams, undaunted, explained to Roosevelt that (by Williams’s lights) “the law provides that unless the immigrant is beyond doubt entitled to land” he must be excluded; and “[a] man with only \$12 may without doubt become a public charge.”¹⁸⁵ But Arthur Von Briesen, the German-born patent attorney, friend of Roosevelt, and founder and president of the City’s Legal Aid Society “spoke up quickly. `Under the law, [said Von Briesen,] Jake Riis should have been sent back when he came over.’”¹⁸⁶

Von Briesen was Roosevelt’s choice to chair the investigatory commission. The commission heard from dozens of witnesses and swiftly produced a voluminous report and many recommendations. Instructed by Roosevelt to “confine itself to the humanitarian phase of the subject,” the Briesen Report did not severely criticize Williams’ regime and found no evidence of “race prejudice” in his administration.¹⁸⁷ But in addition to calling for better hospital accommodations and improvements in the sleeping quarters, it recommended “a more liberal interpretation” of some key statutory touchstones, including the “assisted immigration” and “contract labor” provisions, and urged that exclusion of advocates from BSI hearings cease.¹⁸⁸ The White House assured Von Briesen and his commission “that all their recommendations and suggestions would be carried out.”¹⁸⁹

Commissioner Williams misjudged the measure of support he enjoyed from the President. He made cosmetic policy changes but continued to demand that his inspectors hold the line, and continued to clash with Kohler, Schiff and the Hebrew Sheltering and Immigrant Aid Society as well as his own Deputy Commissioner, Joseph Murray, Roosevelt’s trusted lieutenant in New York’s Republican Party. In less than a year, the White House prodded Williams to resign.¹⁹⁰

¹⁸⁵ *Id.* The statutory burden-shifting provision (see supra note ___) did not specify an evidentiary standard; [WF- find the usual standard of proof for such cases]. Williams’s “beyond doubt” standard was one of the many innovations Kohler assailed. See infra ___.

¹⁸⁶ *Id.*

¹⁸⁷ Briesen Commission Investigation, supra note ___, at 491; *Immigration Reforms Will Be Approved*, N.Y. TIMES, December 4, 1903, at 1.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *Williams Regains Immigration Office – Forced Out by Roosevelt, Taft Puts Him Back to Continue His Former Policy*, N.Y. TIMES, MAY 19, 1909, at 2 (“[F]ollowing the Kishineff massacre, a flood of immigration from Russia set in and Washington was disposed to stretch the immigration laws...to give the persecuted Jews a refuge. Mr. Williams insisted on the letter of the law being applied...[Under pressure from President Roosevelt,] he resigned.”); VINCENT J. CANNATO, *AMERICAN PASSAGE: THIS HISTORY OF ELLIS ISLAND 162-164* (2009) (on

Though fired from the Roosevelt administration, Williams had gained a reputation in Republican circles as a fearless but fair-minded Progressive administrator. So when William Howard Taft won the White House, he asked Williams to resume the thankless task of running Ellis Island.¹⁹¹ As the recession of 1908 ended, the numbers of newcomers returned to roughly forty thousand a month, and the President looked forward to boasting of vigorous enforcement of the “liberal” but stringent restrictions Williams had pioneered.¹⁹² The percentage of would-be immigrants barred at Ellis Island in 1908 had been roughly 1%.¹⁹³ It doubled during the first several months of Williams’ second term, and by January 1911, the portion of immigrants excluded had increased four-fold.¹⁹⁴

Max Kohler probably appreciated the irony of the return to mass deportations under Williams. None other than Kohler’s good friend Oscar Straus had helped push through Congress in ’06-’07 statutory reforms that provided the Commissioner with new support for his harsh policies, expanding the reach of both the contract labor and assisted immigration provisions.¹⁹⁵ Of course, Straus had done so to help the President stave off bills in Congress that aimed to shut out far more immigrants, bills with “racial quotas” and provisions openly hostile to Jewish immigrants and other racial others.¹⁹⁶ In any case, Williams’s regime once again went too far. In response, Kohler filed a bundle of habeas corpus petitions, which landed in the chambers of the newly appointed federal district court judge, Learned Hand.¹⁹⁷

feud with Murray and Williams’s dismissal).

¹⁹¹ See *Williams Regains Immigration Office – Forced Out by Roosevelt, Taft Puts Him Back to Continue His Former Policy*, N.Y. TIMES, MAY 19, 1909, at 2.

¹⁹² See Comm’r. Gen. of Immigr. Ann. Rep., at 13 (1908). Taft’s new Secretary of Commerce and Labor Charles Nagel – like Straus, a German Reform Jew – preferred Williams’ strict front line enforcement, while reserving for himself wide discretion to apply more lenient standards when determining appeals.. For a close study the dynamics of the immigration machinery under Nagel, see Michael Churgin, *Immigration Internal Decisionmaking: A View From History* 78 TEX. L. REV. 1633. Kohler, for his part, was careful to separate his criticism of Williams’ “injustice” from his assessment of Secretary Nagel, who he deemed “disposed to be fair.” See, *Says We’re Unfair to Desirable Aliens*, N.Y. TIMES, April 23, 1911 at C3. The Immigration Question – with Particular Reference to the Jews of America, Addresses by Max J. Kohler, Honorable Charles Nagel and Jacob H. Schiff, delivered at The Twenty-Second Council of the Union of American Hebrew Congregations on January 18, 1911 (New York)

¹⁹³ VINCENT J. CANNATO, *AMERICAN PASSAGE* 221 (2009).

¹⁹⁴ MAX KOHLER, *Administration of Our Immigration Laws*, reprinted in *IMMIGRATION AND ALIENS IN THE UNITED STATES* 46, 47 (1936).

¹⁹⁵ See *supra* TAN ____.

¹⁹⁶ See *supra* pp. 61-62.

¹⁹⁷ Kohler already had appeared once before in Judge Hand’s courtroom on behalf of an alleged stowaway, who had been denied a BSI hearing on the ground that “the omission of his name from the ship’s manifest conclusively proved he was a stowaway.” Judge Hand adopted Kohler’s theory that relevant Supreme Court precedent demanded a hearing – and “an opportunity to prove his rights to enter the country...a hearing in good faith, however summary in form...[not] the semblance of a hearing.” Brief for the Petitioner In the Matter Of Hersch Skuratowski, (S.D.N.Y. 1909)(citing *In re D’Amato* (Hand, J., July 12, 1909), and quoting *Chin Yow v. U.S.*, 208 U.S.8 (), reprinted in 41 U.S. IMMIGR. COMM’N. REP., STATEMENTS AND RECOMMENDATIONS

Kohler argued that his clients, sixteen detainees at Ellis Island, were about to be deported based on readings of the immigration law that the statutes wouldn't support. Kohler's brief assailed as "unprecedented" and "*ultra vires*" the various grounds on which the Boards of Special Inquiry (BSI) had determined that these would-be immigrants were "likely to become public charges." The immigration inspectors comprising the Boards had rested their decisions to expel several of Kohler's clients on the ground that the relatives who vouched to support them while they sought work were brothers and brothers-in-law, uncles and cousins, not "legally bound to support" them. Others were excluded from landing in the U.S. because the trades they intended to pursue were "congested"; and others because they failed the Commissioner's new "twenty-five dollars rule." The Commissioner also had re-issued a circular barring counsel from the BSI hearings, relying on the statutory bar against "public attendance." But denying the detainees the right to counsel in a hearing in which "banishment" was at stake, Kohler argued, violated "our Constitution and our legal traditions."¹⁹⁸

After challenging his clients' imminent expulsion on statutory grounds, Kohler concluded the brief by raising a constitutional worry. The immigration inspectors, Kohler observed, labeled and referred to petitioners as "Russian Hebrews."¹⁹⁹ The record didn't show that this "racial identification" was the reason for the decisions to deport them, and Kohler didn't claim it was. He repeated the Reform Jews' "factual" objections to the notion that Jews were a "race" and their constitutional objections to government singling out any group on the basis of religion. By officially categorizing his clients as "Hebrews," the Immigration Bureau invited prejudice on the part of the "uneducated, underpaid [immigration] inspectors."²⁰⁰ Quoting the Harvard philosopher Josiah Royce, Kohler concluded: "Give men's apprehensions a name—and they dignify it."²⁰¹

Learned Hand began the consolidated habeas hearing by ruling against the government's jurisdictional objections. The statutory rule of administrative finality did not bar the court from hearing claims that the Ellis Island hearings were mere "semblances of hearings" nor claims that

SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION 160, 164-65 (1911).

¹⁹⁸ Brief for the Petitioner In the Matter Of Hersch Skuratowski, (S.D.N.Y. 1909), supra note ___. Kohler urged the court not only to order his clients released, but also to appoint a special master to hold hearings on the "Commissioner's whole method of operation." *Williams Accused of Terrorizing Men* N.Y.TIMES, July 16, 1909. Commissioner Williams's "far-reaching" circulars, orders and directions to the inspectors conducting Boards of Special Inquiry were themselves illegal, Kohler argued; and these "regulations which he has promulgated" were "impell[ing] inspectors to make unlawful decisions." Brief for the Petitioner In the Matter Of Hersch Skuratowski, supra note ___, at 168.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

the substantive grounds for detention and exclusion were unauthorized by statute and *ultra vires*. Judge Hand ordered a hearing on the merits, and he looked likely to rule for the petitioners on at least some of their arguments.²⁰² So, Commissioner Williams ordered a new BSI hearing for Kohler's clients in which they could introduce new evidence that they were not "likely to become a public charge." A few days later, the Russian emigres were released from Ellis Island detention and landed in Manhattan.²⁰³

Despite Kohler's victory, Williams vowed that "there will be no letting down of the bars" at Ellis Island,²⁰⁴ and he carried on with strong support from President Taft and Secretary of Commerce and Labor Charles Nagel.²⁰⁵ So Kohler, Schiff, and Sulzberger redoubled their campaign against "the Inquisition and Expulsions at Ellis Island," and so did their Lower East Side counterparts. The editor of the *Yiddish Morning Star* enlisted Kohler's help in drafting a five-page letter to President Taft, detailing his community's grievances against Williams' return engagement at Ellis Island. The President asked Nagel to investigate, and Nagel dispatched his Assistant Secretary Benjamin Cable to cooperate with Congressman Sabath and other lawmakers in conducting hearings at the port.²⁰⁶ At the heart of the controversy was the question of how much support and assistance could informal kinship networks and formal Jewish

²⁰² *Williams Accused of Terrorizing Men* N.Y. TIMES, July 16, 1909.

²⁰³ *Detained Russians Permitted to Land*, N.Y. TIMES, July 22, 1909 at 7.

²⁰⁴ *Id.* at 7.

²⁰⁵ *Sustains Williams in Barring Aliens*, N.Y. TIMES, July 27, 1909 at 6. Taft's new Secretary of Commerce and Labor Charles Nagel was, like Wolf, Straus, Kohler and Brandeis, an offspring of German-born Jews. A leading corporate lawyer in St. Louis, founder and leader of the U.S. CHAMBER of Commerce, and member of the Republican National Committee when Taft appointed him, Nagel's first wife had been Brandeis's beloved sister, Fannie. Like Brandeis until his "conversion" to Zionism, Nagel made no secret of being Jewish but kept his distance from Jewish organizations and Jewish life. His relations with Straus, Kohler and Schiff were testy and strained but also, as we'll see, sometimes tacitly collaborative (*infra* at ___). Always careful to separate their sharp denunciations of Commissioner Williams and Commissioner General Keefe from their assessments of Nagel, they often deemed Nagel "disposed to be fair" and sometimes praised him to the hilt. See, *Says We're Unfair to Desirable Aliens*, N.Y. TIMES, April 23, 1911 at C3; *The Immigration Question – with Particular Reference to the Jews of America*, Addresses by Max J. Kohler, Honorable Charles Nagel and Jacob H. Schiff, delivered at The Twenty-Second Council of the Union of American Hebrew Congregations on January 18, 1911 (New York)(Concluding Remarks by Schiff).

For his part, Nagel defended Commissioner Williams's strict front-line enforcement of the immigration laws and reserved for himself wide discretion to apply "lenient" and "liberal" standards when determining appeals. See *The Immigration Question*, *supra*. ___ (Address by Nagel). For a study of the dynamics of administrative review under Nagel, see Michael Churgin, *Immigration Internal Decisionmaking: A View From History* 78 TEXAS L. REV. 1633 (2000). As Churgin observes, Nagel was sharply critical of Kohler's demands that the Department return to an older system of published decisions and Executive Branch (Attorney General and Solicitor of the Treasury) opinions on immigration matters. Nagel objected that published decisions would constrain him from exercising a generous liberality in particular cases and also would bring the administration of appeals to a grinding halt, since decisions on the mass of appeals were rendered solely by the Secretary and his Assistant. No doubt, Nagel had a point. But he and Kohler were also talking past one another. Kohler seems to have had in mind published decisions on disputed questions of statutory interpretation and challenges to administrative rules like those that Commissioner Williams promulgated at Ellis Island.

²⁰⁶ Casefile 53139/7-A. June, July 1911, Records of the INS, Reel 11. Congressional Investigation of Application of Immigration Laws at Ellis Island, 1911

organizations lend to newcomers. Defending these expressions of solidarity forced Kohler and the other Reform Jewish leaders to confront, more pointedly than ever, the fierce individualism of the “liberal” reforms they had championed. The continuing campaign against Commissioner Williams’ regime also put pressure on the Reform Jewish establishment’s old commitment to legal and political invisibility. It pushed Kohler toward group-based claim-making in the public sphere, the press and the courts.

As part of his raft of stringent rules and standards, Williams began once more using the immigration law’s burden-shifting provision to hold administrative hearings for as many newcomers as possible whose way had been paid by others. Williams’ inspectorate used such payment as evidence that the newcomers were “likely to become public charges;” yet, Jewish attorneys and journalists pointed out that roughly 40 % of new immigrants in recent years had their way paid in this fashion. Williams acknowledged that the practice was widespread, but by enforcing the laws “rigorously” for the first time, he hoped to “send word to Russia” that the practice put newcomers at risk of deportation.²⁰⁷ Immigrants must come to Ellis Island “unassisted.”²⁰⁸

Similarly, Williams acknowledged that in the past friends’ and relatives’ assurances of support had sufficed to show that a newcomer was not “likely to become a public charge.” No longer, said Williams. Neither Jewish charities nor friends or distant relations were under a legal obligation of support, and as during Williams’s original reign at Ellis Island, only a legal obligation of support would remove the burden of proof from a cash-strapped immigrant and his family.²⁰⁹ The Commissioner was having none of the Jewish journalists’ objections that mass immigration simply wasn’t an individual enterprise but one that relied on chains of migration and mutual aid. He also was unmoved by Kohler’s insistence that the Jewish organizations could aid as many poor Jews as arrived until they found work. To Williams, “likely to become a *private* charge,” dependent on Jewish charity, was just as valid a ground for expulsion.²¹⁰ Congressman Sabath aside, the lawmakers and executive officials conducting the hearings, including Assistant Secretary Cable, sympathized with the Commissioner. Likewise, none of the federal officials, besides Sabath, seemed to think it *ultra vires* for inspectors to take account of economic conditions and reports of unemployment in a would-be immigrant’s trade or his planned destination.²¹¹ Finding little support from the administration, Kohler and

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See id.*

his allies returned to court.

There, they again found success. The U.S. Supreme Court sided with Kohler against Commissioner Williams' ingenious transformation of the "likely to become a public charge" provision into a crude tool for calibrating immigration to the condition of U.S. labor markets.²¹² Hundreds of would-be immigrants were being excluded on "public charge" grounds at Ellis Island because their trade in their destination city was "congested." Justice Holmes for a unanimous Court overturned the Commissioner's experiment in labor market management.²¹³ "It would be an amazing claim of power," exclaimed Holmes, "if commissioners decided not to admit aliens because the labor market of the United States was overstocked, and yet that would be more reasonable than refusal to admit because of reported conditions in one city."²¹⁴ The "public charge" provision, Holmes pointed out, tracking Kohler's brief, was found among a statutory list of grounds for exclusion like insanity and physical handicaps.²¹⁵ Plainly, Congress had envisioned that the basis for finding someone "likely to become a public charge" should be his own infirmities, not the immigration officials' assessment of economic conditions.²¹⁶ In the same case, Justice Holmes also handed Kohler a procedural victory, affirming that federal courts had jurisdiction to hear challenges to the legal bases of exclusions, despite the seemingly impregnable statutory rule of administrative finality.²¹⁷

In other cases, Kohler made headway with the constitutionally inflected interpretive claim that laws governing exclusion at the nation's gates should be construed according to a canon of liberality. Since "banishment" was a severe burden on individual liberty, Kohler argued that administrators and courts should read statutory grounds of exclusion narrowly, in favor of the liberty interest at stake. Commissioner Williams, along with Commissioner General Keefe, mocked the idea. The nation's interest in controlling its gateways, they insisted, warranted enforcement to the statute's hilt.²¹⁸ The judges on the Second Circuit, however, were committed to the classical outlook of free markets, free trade and free movement of (able-bodied European) persons. Noting the moxie, good health or craft skills of Kohler's admittedly poor clients, they proved hospitable to his canon of liberality.²¹⁹

²¹² *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915).

²¹³ *Id.* at 8, 10.

²¹⁴ *Id.* at 10.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Gegiow*, 239 U.S. at 9.

²¹⁸ Several NYT quotes.

²¹⁹ Cites, Quotes – in Forbath, *Borders of "Our America"* ms.

D. Special Pleading for Poor Jews? Clashes Over Group-Based Claims

Unlike Max Kohler, Simon Wolf's stock in trade was not legal craft but carefully-cultivated, sometimes painfully deferential personal relations with Presidents and high executive officials. For him, publishing editorials or articles or going to court to attack the Executive Branch's regulations and rulings amounted to perilous special pleading for poor Jews. If strict enforcement of the existing laws, with their emphasis on individual fitness, was the price to pay for the White House's firm stand against racial and religious bars, who were Kohler and Schiff to object? That was the bargain they had struck with Roosevelt.

From Washington, Wolf bitterly complained about Kohler's litigation and publicizing, along with Schiff's and the AJC's constant lobbying, all of it challenging the exclusion of Jews who were, Wolf insisted, just too hapless and poor. Wolf wrote to Kohler:

I enclose copy of letter received from Secretary Nagel in an immigration case. He is absolutely just in his criticisms in a general proposition, as well as specifically in this case. The American Jewish Committee is making itself very prominent and promiscuous at present, and flooding the country with alarming telegrams, as if Congress was going to shut down the gates at once.²²⁰

Kohler and Schiff recognized the value of Wolf's "keep[ing] on the right side" of high officials, but they refused to do so.²²¹ Defending Jewish immigrants against William's Ellis Island crackdown on kinship networks and Jewish organizations had drawn Kohler away from the old Reform values of liberal individualism and public invisibility. As Kohler, Schiff, Oscar Straus and others in the Reform Jewish establishment embarked on a grand project to bring and distribute poor Jewish newcomers across the U.S., they would be pushed further toward making claims on behalf of Jews not strictly as individuals but as a group and a people.

V. DISTRIBUTION, THE GALVESTON MOVEMENT, AND *THE MELTING POT*

A. *Distribution*

By the time Oscar Straus arrived in Washington to join Roosevelt's

²²⁰ Letter from Simon Wolf to Max J. Kohler (May 6, 1911) (on file with the American Jewish Historical Society).

²²¹ Letter from Jacob Schiff to Max J. Kohler (February , 1911), Kohler Papers, Folder __, Box __.

cabinet, he had a model of how public distribution of new immigrants should work. The model was the “great Jewish charitable undertaking,” of the Baron de Hirsch Fund, which parceled and transported thousands of Jewish immigrants each year from New York westward to cities like Cleveland, Kansas City, Louisville, Nashville and Texarkana, and over a thousand smaller towns.²²² The problem was not too many immigrants, but instead, their ill distribution. The undertaking went under the unvarnished name of the Industrial Removal Office (“IRO”), and on its board sat Straus, Kohler and the tireless financier and philanthropist Jacob Schiff.²²³ The IRO collaborated with the network of B’nai Brith chapters, which found and relayed employment opportunities and helped settle the Jews the IRO sent them.²²⁴ Straus, Kohler, and Schiff praised the character-forming virtues of “becoming American” in communities far from the Lower East Side and its vast “colony” of Russian Jews.²²⁵ In no time, they claimed, the new immigrants assisted by the IRO would form the “nuclei” for growing Jewish communities across the country.²²⁶

President Roosevelt and other leading Progressive voices took up distribution as the key to immigration reform. The *New Republic* trumpeted it, as did academic experts.²²⁷ Now in the Cabinet, Straus set out to accomplish “distribution” by creating within the Immigration Bureau a new “Division of Information” to serve as a public IRO writ large, gathering information on labor needs throughout the country and linking immigrant workers with willing employers.²²⁸ Straus’s idea sounded in a Progressive key: Use the machinery of government to relieve the labor markets of the “congested cities” by nudging and prodding individuals to find their highest and best use in the under-populated West.

The new division never flowered. In Straus and the President’s experiment trade unionists saw the building up of state power to attract more “cheap foreign labor” and supply state-sponsored immigrant

²²² See ROCKAWAY, *supra* note 154, at 11-28 (1998) (on establishment of the IRO).

²²³ See Churgin, *supra* note 17, at 950-951 (on Schiff’s involvement with the IRO).

²²⁴ *Id.* at 11.

²²⁵ ARTHUR A. GOREN, *NEW YORK JEWS AND THE QUEST FOR COMMUNITY: THE KEHILLAH EXPERIMENT, 1908-1922* (1979). Resolute urbanites themselves, they thought sending the “shtetl Jews” of Russia and Eastern Europe to the towns and countryside of America would improve their character and inure them to honest toil. The IRO kept careful employment and pay records of those it sent west, and noted with satisfaction that most swiftly became self-sufficient, assimilated into the local communities, and earned more than they would in NYC. See ROCKAWAY, *supra* note ____, at 33 (on IRO record-keeping). See also JACK GLAZIER, *DISPERSING THE GHETTO: THE RELOCATION OF JEWISH IMMIGRANTS ACROSS AMERICA* 161 (1999) (noting IRO emphasis on residential stability and self-sustaining employment)

²²⁶ David M. Bressler, *Immigration Distribution*, BULLETIN OF THE NATIONAL CONFERENCE OF JEWISH CHARITIES, Sept. 1914, at 32, (“Nearly 80,000 people have been distributed... into 1,500 cities and towns in the United States. These have attracted friends and relatives, thus forming nuclei . . .”).

²²⁷ TNR cites. See also Henry P. Fairchild, *Restriction on Immigration: Discussion*, 2 THE AMERICAN ECON. REV. 53,57 (1912).

²²⁸ *Uncle Sam A Job Getter*, N.Y. TIMES, Sept. 16, 1907, at 8.

strikebreakers.²²⁹ The distribution idea ran counter to the classical liberal ideal of the free-standing, self-directed and “unassisted” immigrant that animated the immigration laws. Providing immigrants with a “promise of employment before they leave” was precisely what the contract labor law prohibited! Labor leaders seized on this clash of ideals in lobbying against appropriations for Straus’s Division of Information.

Though the network of “government employment bureaus” never materialized, the federal commitment to distribution remained a central feature of Presidents Roosevelt, Taft and Wilson’s offerings to the anti-immigrant majority in Congress. Meanwhile, Straus, Kohler and Schiff were at work on another grand project to distribute Russian Jews. This one aimed to reach the emigrants before they even set out, and to nudge them toward a destination a thousand miles from New York.

B. *The Galveston Movement and The Melting Pot*

The port that Schiff and Straus agreed on was Galveston. Announcing the new undertaking to the press, Schiff told the *New York Times* that he and his fellow philanthropists aimed to divert some part of the vast flow of Russian Jews away from New York and direct them to the “great American hinterland in which there is not 10 per cent of the Jewish population. . . . We can render our country a great service by turning this immigration in the direction of Texas.”²³⁰

New Orleans had been Schiff’s first choice as the new port of entry. But his friend Straus had objected.²³¹ The Russian Jews would end up settling there and create a new Lower East Side.²³² Better to send them to a smaller city on the Gulf Coast: Galveston. So with Roosevelt’s blessing, Straus set up a new Immigration Station there.²³³ To head the new effort, Schiff enlisted Galveston’s well-regarded rabbi Henry Cohen.²³⁴ The first boats of Russian Jews arrived a year later, and Rabbi Cohen welcomed them before sending small groups out to the IRO’s network of B’nai B’riths and tiny Jewish communities organized in towns and cities along the Mississippi and west as far as California.²³⁵

Of course, the Galveston Movement also needed a leader on the Russian and European side to orchestrate a campaign to persuade emigrants of the

²²⁹ *The Discontent of Gompers*, N.Y. TIMES, Feb 12, 1909; *Labor Men Object to Federal Bureau*, N.Y. TIMES, Feb 12, 1909.

²³⁰ *Schiff Would Turn the Jewish Tide*, N.Y. TIMES, May 27, 1907 at 6.

²³¹ See Letter from Morris Waldman to David Bressler (Nov. 5, 1908), in BERNARD MARINBACH, GALVESTON: ELLIS ISLAND OF THE WEST 11-12 (1983) (reporting Straus’ rejection of New Orleans).

²³² *Id.* at 12.

²³³ See COHEN, A DUAL HERITAGE, *supra* note ____, at 157.

²³⁴ Henry Cohen Papers, Barker Texas History Center at the University of Texas at Austin.

²³⁵ Henry Cohen II, *Kindler of Souls: Rabbi Henry Cohen of Texas 59-60* (2007); See also MARINBACH, *supra* note ____, at 24.

non-obvious advantages of embarking for Galveston instead of New York, and then to aid and guide them on their way. Although Jacob Schiff was an ardent foe of Zionism,²³⁶ he hired a Zionist to lead the effort.²³⁷ Israel Zangwill was a London-born Jew and among the most widely read Jewish authors in turn-of-the-century England and the U.S.²³⁸ A brilliant orator and propagandist, Zangwill was the leader of the Jewish Territorial Organization (ITO), a branch of Zionism determined to find a homeland wherever possible—in Uganda, if not in Palestine.²³⁹ But as the search for a homeland floundered and the pogroms raged, Zangwill and his organization were willing to be co-opted by Schiff. Galveston was a second-best way to get the Russian Jews away from oppression, and a way for the JTO to gain experience in organizing mass emigration, in preparation for the moment when a homeland materialized.

Israel Zangwill saw no middle ground between thorough-going assimilation and thorough-going separation via a Jewish homeland, and he was drawn to both extremes.²⁴⁰ On one hand, Zangwill observed that “[a]ssimilation is evaporation.” President Roosevelt made no bones about it, Zangwill observed, invoking Roosevelt’s declaration that “the different peoples coming to our shores should not remain separate, but should fuse into one American race.”²⁴¹ Better, then, for American Jews to affirm this wholeheartedly, intermarrying and working like a Hebraic yeast upon American civilization, inspiring the emergence of what Zangwill called a “universal, natural religion”—a modern, secular faith—a “religion of humanity” that transcended the “old theological differences” between Christians and Jews.²⁴²

On the other hand, Zangwill argued that Jews “who cannot or will not remain in the Diaspora” must take the opposite course—establishing a homeland where Judaism and Jewish life, language and tradition could flourish. Yet Zangwill realized that Zionism was shot through with dilemmas. Palestine was not empty; most of its land was owned by Arabs, “who have no disposition to part with it, and they must be dealt with fairly.” “No country in the world has its original inhabitants. Application of such a principle would make all mankind homeless.” That was why Zangwill and the Territorialists insisted that the “goal is not to fulfill national ideology but to end Jewish suffering”—to find “land to be colonized” and create a

²³⁶ COHEN, JACOB SCHIFF, *supra* note ___, 175.

²³⁷ See MARINBACH, *supra* note ___, at 7-12.

²³⁸ *Id.* at 7.

²³⁹ *Id.*

²⁴⁰ “Not to rationally Judaize now is forever to denationalize it...The crucial moment in the long life of Israel has arrived... and the Jews stand at the parting of the way that no longer permits one foot on each.” Israel Zangwill, *The Return to Palestine*, 2:11 NEW LIBERAL REVIEW 627 (Dec. 1901).

²⁴¹ Israel Zangwill, *Lucien Wolf on “The Zionist Peril”* 17 JEWISH QUARTERLY REVIEW 397, 410 (1905).

²⁴² See ISRAEL ZANGWILL, DREAMERS OF THE GHETTO 112 (1898).

homeland wherever “climate, geography and social and political conditions” permitted.²⁴³

Zangwill himself was inclined to remain in the Diaspora. He wrote eloquently about the Jewish Enlightenment. Sounding the same chords as Kaufman Kohler, Zangwill could ask: “How can a God of justice and the world . . . be confined to Israel?”²⁴⁴ Yet, unlike Rabbi Kohler’s, Zangwill’s chronicles of this “enlightened” tradition end in paradox and fusion. The tradition’s pioneers were “Jewish apostates” like Spinoza, its “heroes” included Jesus, and its “philosophy” was a secularized “Hebraic” Christianity.²⁴⁵

Caught between the assimilationist and the particularist poles of Jewish identity, Zangwill embraced contradictions. Married to a gentile, he pilloried intermarriage. A Zionist champion of a Jewish homeland, but also an assimilationist. Indeed, he wrote the famous play, *The Melting Pot*, the same year he signed on to Jacob Schiff’s Galveston Movement.²⁴⁶ He described the play as a “dramatic brief” for the Movement.²⁴⁷

The play is a hymn to the new immigrants as new Americans—and to America as a crucible in which the races are fusing into a “new American race.”²⁴⁸ The play echoed Roosevelt, and Roosevelt echoed the play. The President wrote a rave review after seeing it on opening night at Washington’s Columbia Theater in October 1908, and Zangwill dedicated the play’s published version to him.²⁴⁹ *The Melting Pot*’s lesson is that the “true American” is not the old-stock WASP, but the newcomer—the American by choice and consent, not by descent and “blood”—who embraces America’s liberal ideals afresh. This “true American” is personified in the play by David Quixano, a Russian Jew orphaned by a pogrom who recently emigrated with an elderly uncle to New York. The play also involves the most radical kind of Jewish assimilation: intermarriage between Jew and gentile and the conflicts it provokes.

David, the Jewish orphan-turned-composer-genius falls in love with Vera Revendal, the daughter of an anti-Semitic baron from the very same city, Kishinev, where David’s parents had been killed during the infamous 1903 massacre which claimed hundreds of Jewish lives (and spurred Schiff,

²⁴³ ISRAEL ZANGWILL, *THE VOICE OF JERUSALEM* 275 (1921).

²⁴⁴ ISRAEL ZANGWILL, *CHOSEN PEOPLES: THE HEBRAIC IDEAL VERSUS THE TEUTONIC* 55-56 (1919).

²⁴⁵ See MERI-JANE ROCHELSON, *A JEW IN THE PUBLIC ARENA: THE CAREER OF ISRAEL ZANGWILL* 114-116 (2008).

²⁴⁶ ISRAEL ZANGWILL, *THE MELTING-POT* (1909).

²⁴⁷ *Id.* *Afterword*, pp.

²⁴⁸ See *id.* See also Letter from Theodore Roosevelt to S. Standwood Menken (Jan. 10, 1917) in *THE WRITINGS OF THEODORE ROOSEVELT*, at 382 (William H. Harbaugh, ed., 1967) (“Americanism means many things. . . To divide along the lines of section or caste or creed is un-American. . .”).

²⁴⁹ ZANGWILL, *THE MELTING-POT*, *supra* note ___, at v. (“To Theodore Roosevelt in respectful recognition of his strenuous struggle against the forces that threaten to shipwreck the Great Republic which carries mankind and its fortunes, this play is, by his kind permission, cordially dedicated.”).

Kohler and Straus to launch their new projects in aid of Russian immigrants). Vera has broken from her aristocratic family, become a radical, and fled her “reactionary” father and the Czar’s police to dwell in New York among the city’s liberal and cultivated elite, volunteering in a Lower East Side settlement house, where an immigrant orchestra is rehearsing David’s New World Symphony. The plot turns on the obstacles to David and Vera’s union and overcoming them. Vera’s father and stepmother show up from the old world and try to stop the affair; a native-born WASP millionaire makes advances to Vera; and David’s uncle warns him not to defy the call of blood.²⁵⁰

The WASP suitor, Quincy Davenport, mocks David’s ode to America: “Your America, forsooth, you Jew-immigrant!”²⁵¹ To which David replies in terms that evoke Oscar Straus’s “Jewish origins” thesis and its sub-text of Jewish belonging, turned into melodrama: “Yes--Jew-immigrant! But a Jew who knows that your Pilgrim Fathers came straight out of his Old Testament, and that our Jew-immigrants are a greater factor in the glory of this great commonwealth than...you, freak-fashionables, who are undoing the work of Washington and Lincoln, vulgarising your high heritage, and turning the last and noblest hope of humanity into a caricature.”²⁵²

The gulf separating David and Vera widens when David learns that Vera’s aristocratic father is the “Butcher of Kishineff,” the very baron who led the pogrom in which his parents and brother were slaughtered. Yet, with the help of his “New World Symphony” and the persistent vision of America as God’s melting pot, David overcomes this final obstacle. At the play’s end, after the first performance of the symphony, David and Vera are united on the rooftop of the settlement house. The idealistic composer realizes that he must live up to his own ideals and begs Vera: “[C]ling to me till all these ghosts [of Kishineff] are exorcised, cling to me till our love triumphs over death.”²⁵³

Thus, *The Melting Pot* elevates loving consent above loyalties to kin,

²⁵⁰ “[J]ust think! She was bred up to despise Jews – her father was a Russian Baron”... “No, you cannot marry her.”... “The Jew has been tried in a thousand fires and only tempered...Many countries have gathered us. Holland took us when we were driven from Spain—but we did not become Dutchmen. Turkey took us when Germany oppressed us, but we have not become Turks.”... “These countries were not in the making. They were old civilisations stamped with the seal of creed. In such countries the Jew may be right to stand out. But here in this new secular Republic we must look forward.” ... “We must look backwards, too.”... “[Hysterically] To what? To Kishineff?”

Id. at 100-106.

²⁵¹ *Id.* at 91.

²⁵² *Id.* at 91.

²⁵³ *Id.* at 197.

“race,” and religion. From David’s point of view, his love must overcome the severe wounds of the past and is thus proof that any parental legacy of “race” and descent can be redeemed by consenting youths. As with true love, so with true Americanness—it is founded on active consent, active embrace, not inherited or based on blood and racial descent.

In contrast to the Reform Jews’ account of becoming American, however, *The Melting Pot* tracked the President’s outlook: making a “new race” by forsaking the race/religion of the fathers. So, while the play drew a rave from Roosevelt, it prompted ambivalent responses from Schiff, Kohler, Straus and Wolf, who were dismayed by its celebration of intermarriage and the “Amalgamation of the Races.”²⁵⁴

The play expressed Zangwill’s stark view of the logic of assimilation and his anguished sense of what he called the modern Jew’s “strange polarities”: “the most tenacious preservation of his past and the swiftest surrender of it...entering with such passionate patriotism into almost every life on earth but his own...The fall of the ghetto has left him dazed in the sunlight of the wider world, his gabardine half off and half on.”²⁵⁵

As the Galveston Movement got underway, Schiff and Zangwill clashed constantly. Schiff would write Zangwill to send no one who won’t work on Shabbat; no one without a marketable trade; no more old rabbis, Hebrew teachers and no more *mohels*!²⁵⁶ And Zangwill resisted. The Galveston Project also met resistance in the Yiddish press. The *Jewish Daily Forward* ran horror stories of Jews sent by Schiff into semi-slavery along the Mississippi.²⁵⁷ And it editorialized, painting the West as a spiritual wasteland. The point was that the Russian Jew should instead settle where he wills, and not be bullied, cajoled and diverted away from his people.

About two thousand Jews passed through Galveston until the 1908 elections brought Taft to the White House and with him a new Commissioner General of Immigration.²⁵⁸ Taft largely continued Roosevelt’s immigration policies. But unlike Roosevelt and Straus, Taft and his high officials, including Nagel, were suspicious of the Reform Jewish elite’s efforts on behalf of poor Russian Jews. They had no fondness for the Galveston Movement. Nagel’s Assistant Secretary Cable and his Commissioner General Keefe both inclined to the view that the

²⁵⁴ See Letter from Roosevelt to Zangwill (Oct. 15, 1908) in THE LETTERS OF THEODORE ROOSEVELT (Elting E. Morrison, ed. 1951) (“I do not know when I have seen a play that stirred me as much.”). “Amalgamation of the Races” actually served as the *The Melting Pot*’s subtitle in the 1908 playbills. On Straus’s, Schiff’s and Kohler’s ambivalent responses, see KOHLER PAPERS, CITES; Goldstein ___-___.

²⁵⁵ Israel Zangwill, *The Jewish Race* 71 THE INDEPENDENT 288, 297 Aug. 10, 1911; Israel Zangwill, *The Position of Judaism*, 160 THE NORTH AMERICAN REVIEW 425, 425 (1895).

²⁵⁶ See MARINBACH, *supra* note ___, at 14.

²⁵⁷ JEWISH DAILY FORWARD, Sept. 16, 1907, at p. 4, quoted in MARINBACH, *supra* note ___, at ___.

²⁵⁸ MARINBACH, *supra* note ___, at 42.

Movement was a vast conspiracy to violate the bars on induced and assisted immigration.²⁵⁹ At Keefe's and Cable's prompting, Nagel assigned a new commissioner to the port at Galveston, and he began excluding hundreds of Jews.

Kohler came to the Movement's defense with a host of deft arguments, threading the various kinds of support and encouragement offered by the Jewish agencies on each side of the Atlantic through openings left in the statutory framework. Kohler himself had insisted that the far-flung system of aid must avoid paying the Russian Jews' steamship fares across the Atlantic. That plainly would have constituted "assisted immigration" under the 1907 law. But other kinds of costs were being covered, and the agencies under Zangwill's leadership were papering the shtetls and ghettos of Russia with advertisements extolling the opportunities to be found in the American hinterlands and promising help in settling and finding employment in America.²⁶⁰ These Kohler contended were too general to amount to promises or offers of employment under the statute and its judicial glosses. Then stepping back to argue from statutory purpose, he tried to demonstrate through legislative history and judicial and Executive glosses that the statutory bars were aimed against foreign schemes and schemers a world apart from this philanthropic enterprise: unscrupulous labor brokers and steamship companies, along with foreign governments and unfeeling foreign "charities" that simply wanted to unload their paupers in our congested cities.

The well-crafted memos left the Assistant Secretary underwhelmed. So, as the numbers of "deportations" from Galveston mounted, Kohler turned to a novel notion rooted in international law. Treaties and treatises recognized an international norm of asylum from persecution.²⁶¹ While immigration laws, at the time, had no asylum provisions, precedents were at hand for construing federal statutes to comport with such international norms and obligations.²⁶² So Kohler argued that the documented persecution of Russian Jews warranted liberality in construing the immigration laws in cases involving poor Jewish immigrants fleeing Russia.²⁶³

²⁵⁹ See MARINBACH, *supra* note , at 58-59.

²⁶⁰ Letter from Alfred Hampton, Inspector in Charge at Port of Galveston to Commissioner General of Immigration Daniel Keefe (May 6, 1910) (on file with National Archives)

²⁶¹ Max Kohler, *Immigration and the Right of Asylum for the Persecuted*, reprinted in IMMIGRATION AND ALIENS IN THE UNITED STATES 78, 88-95 (1936).

²⁶² See Memoranda in Galveston Folders in KOHLER PAPERS; and see generally Max Kohler, *The Alien and the Right of Asylum*, reprinted in IMMIGRATION AND ALIENS IN THE UNITED STATES 99 (1936).

²⁶³ *Id.* at 118-120. Kohler's new argument earned another stern reproach from Simon Wolf. This was a plea for "a special discrimination" in favor of "our people." And that was something "[w]e must avoid." Letter of Simon Wolf to Max J. Kohler (), KOHLER PAPERS, Box , Folder . But Kohler would have none of this rigid race-blindness. He could hew to the Reform Jewish creed that Jews were not a race or nation apart, and he could invoke the liberal Constitution to condemn immigration authorities classifying and perhaps ill-treating Jews as a race (as he did in cases at Ellis Island). Still, if the Czar made Russia's Jews racial outsiders and brought Cossacks and mob violence down on them, Kohler could demand a special liberality on their behalf, as a

Kohler's reasoning satisfied Congressman Bennet, the Galveston Movement's most ardent supporter in the House. He sought to intervene with Secretary Nagel on Schiff's and Kohler's behalf. But Cable, responding for Nagel, remained adamant: "The original purpose of this effort was to distribute immigrants away from New York City to avoid congestion . . . but its leaders have carried it beyond that to provide a refuge in this country for their race." It violated the laws against assisting and soliciting immigration.²⁶⁴

Schiff had had enough. Hadn't the Roosevelt administration encouraged him to invest a fortune in setting up the Jewish Immigrant Information Bureau in Galveston, paying its officials and social workers up and down the Mississippi, and putting his good name behind the proposition that the Movement was in harmony with the government's policies? Hadn't he generously supported President Taft in the '08 election? And hadn't President Taft himself, in the thick of the mid-term elections, made a much touted statement of support for private "efforts to divert the tide of immigration" to ports like Galveston?²⁶⁵ Assistant Secretary Cable finally bowed to Kohler's requests for a ruling on the part of the Attorney General on Kohler's various arguments for the Movement's legality, and a hearing was arranged before the Attorney General, Secretary Nagel and Assistant Secretary Cable. Representing the Jewish Immigrant Information Bureau were Schiff and Kohler, along with the director of IRO's New York office and his assistant.²⁶⁶

Kohler gave a thorough rendering of his arguments. Schiff concluded. Rising to his feet, he shook his finger at Nagel and exclaimed, "You act as if my organization and I were on trial. You, Mr. Secretary, and your department are on trial!"²⁶⁷ Then, Schiff made a plea on the Movement's behalf, recalling Roosevelt's and Straus's support and underscoring the Movement's efforts to remain within the law. He warned that if the government continued to treat the Jewish Immigrant Information Bureau as an outlaw, it would bear a heavy responsibility for shutting down the Galveston Movement.²⁶⁸ Secretary Nagel "made a show of being terribly offended."²⁶⁹ But having held himself apart from Assistant Secretary Cable's series of rulings against the Movement, he was in a position to accept with equanimity the Attorney General's determination that Max

persecuted people. If this meant drawing Jews' "racial identity" into some portion of official public discourse, that was only because oppression had made it a social fact. Letter of Max J. Kohler to Simon Wolf, *id.* See generally,

²⁶⁴ Letter from Benjamin S. Cable to William Bennet (July 14, 1910) KOHLER PAPERS, Galveston Folder.

²⁶⁵ *Taft Wants Ports to Get Aliens*, N.Y. TIMES, October 19, 1910, at 1.

²⁶⁶ MARINBACH, *supra* note , at 111.

²⁶⁷ MARINBACH, *supra* note ___ at 111.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Kohler had been right all along, and the work of the Jewish Immigrant Information Bureau at home and abroad fitted the letter and spirit of the immigration laws.²⁷⁰

Still, the damage had been done. Repeated deportations of “Galveston Jews” had demoralized the Movement abroad, and its transatlantic emigration network limped along for another couple years before unraveling. The fiercely individualistic immigration laws the Reform Jewish policy mavens had promoted brought down their own efforts to divert, distribute and Americanize the Russian Jews. No amount of fine lawyering could fully suppress the tensions between the classical liberal ideal animating those laws and the lawyers’ organized efforts at solidarity with the oppressed of their “race” and “creed.” Operating through the Taft administration, these put an end to the Galveston Project.²⁷¹

Zangwill was not sad to see it end. Schiff’s notions of Americanization galled him. Galveston and the American West were not a homeland. *The Melting Pot* was merciless—to Zangwill the polarities seemed irreconcilable: assimilation and Americanization on one hand; Jewish self-assertion and nationhood, homeland, and spiritual and cultural flowering on the other.

VI. LOUIS BRANDEIS, ZIONISM AS “TRUE AMERICANISM” AND THE IDEAS OF “GROUP RIGHTS” AND “GROUP EQUALITY”

A. Brandeis’s Conversion

Perhaps Zangwill could have reconciled the polarities if he had teamed up with a different Jewish lawyer. Maybe only a Jewish lawyer as serenely secure in the legal elite as Louis Brandeis could break so decisively from the old formulas. Wolf, Straus, Schiff and Kohler were anti-Zionists. Zionism proclaimed that Jewishness was everything they insisted it was not: a race, a nationality, an inherently public and political set of beliefs and commitments. A true American, they warned, could not be a Zionist.²⁷² Brandeis turned the warning on its head, declaring that “loyalty to America demands that each American Jew become a Zionist.”²⁷³ Zionism and Jewish nationalism were not bad for the Americanization of the new Jewish immigrants, but rather, the essence of it.

Brandeis had no use for the Reform Jewish establishment. As Wall Street’s most prominent Progressive critic, Brandeis saw Jacob Schiff as

²⁷⁰ *Id.* at 112.

²⁷¹ MARINBACH, *supra* note ___ at 59.

²⁷² *See supra* ___.

²⁷³ *See* Brandeis, True Americanism, *supra* note ___, at 3 .

just another plutocrat and parvenu. Unlike Schiff, though, Brandeis contributed precious little of his fortune or energies to Jewish causes until he was in his fifties.²⁷⁴ Before then, Brandeis belonged to no temple or synagogue or any other Jewish organizations, and he socialized little with Jews outside his family circle. He immersed himself in the social and cultural world of the Boston Brahmins.²⁷⁵ Unlike Wolf, Straus or Kohler, his law partners were WASPs, not Jews, and he summered, socialized and found his closest companions among liberal gentiles. Until roughly 1910, a part of him fancied he *was* a Brahmin.²⁷⁶ His few lectures to Jewish audiences prior to that time were laced with stern talk about loyalty and condemnations of “hyphenated Americanism.”²⁷⁷ Looking back, Brandeis observed, he was “very ignorant in things Jewish.”²⁷⁸

But Brandeis’s relations with Boston WASPdom, even with some of his closest Brahmin associates, grew strained as his public attacks on the investment banking and business communities hit home. He was deeply shaken by the anti-Semitic counter-attacks from much of the Boston business elite, and from the ABA leadership when President Wilson mooted his name for a cabinet post and, a few years later, for the Supreme Court.²⁷⁹

As this estrangement was beginning, Brandeis happened to be brought in to mediate the great 1910 garment workers strike in New York.²⁸⁰ The Russian Jewish trade unionists and attorneys he encountered inspired him with their intellectual and moral passions and personal warmth. Their radical brand of Jewishness, combining strains of socialism, Yiddishkeit and Jewish nationalism, and his own cooler, more rationalistic brand of Progressive democracy seemed made for each other: a pair of wildly different but complementary temperaments.

Alienated by the efforts of wealthy Reform Jews to remake Jewishness into a private faith and a discrete private sphere of elite Jewish clubs, associations and sociability, Brandeis was magnetized by the Lower East Side and the Yiddish-speaking labor leaders and attorneys, rank-and-file workers and employers he encountered there. This immigrant Jewish world defied the Reform Jews’ careful separation of public and private spheres, not only in its insistence on the political nature of Jewish commitments and

²⁷⁴ See UROFSKY, *supra* note __, at 407-408.

²⁷⁵ *Id.* at 54, 366.

²⁷⁶ See ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 6 (1988).

²⁷⁷ See Louis D. Brandeis, *What Loyalty Demands*, Address Delivered Before the New Century Club on the Occasion of the 250th Anniversary of the Settlement of the Jews in the United States (Nov. 28, 1905), (“In a country whose constitution prohibits discrimination on account of race or creed, there is no place for what President Roosevelt has called hyphenated Americans.”).

²⁷⁸ Louis D. Brandeis, *The Jewish People Should Be Preserved*, Remarks at Brandeis’s Acceptance of the Office of Chairman of the Provisional Executive Committee for General Zionist Affairs (Aug. 30, 1914), in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 3, 3 (1942).

²⁷⁹ See UROFSKY, *supra* note __, at 405-407.

²⁸⁰ See *id.* at 243-47.

aspirations, but in the texture of its everyday life. The Lower East Side was a place of Jewish cultural invention, radical politics and labor agitation in theaters, meeting halls, newspapers, and cafes. Street life throbbed with constant strikes and demonstrations, outdoor markets, crowds and vocal and exuberant public conduct. Jews doing in public what ought to be done in private, from laundry to vociferous argument around the exchange of goods or ideas! Improbably, Brandeis felt, if not at home²⁸¹, then at least powerfully drawn toward the world of Jewish nationalism. If the Brahmins would not have him, he would throw their prejudices back in their faces, embracing the Jews they most despised.

Back in Boston, Brandeis sought out the company of Zionists. He plunged into Zionist literature. He found a 1913 presentation by Zionist “agronomists” cultivating new strains of “wild wheat” in the rocky soil of Palestine “the most thrilling talk I have ever heard,” and wrote his wife that it was partly responsible for “inspiring” his “becoming quite an assistant Zionist”.²⁸² Horace Kallen, the rebellious young Harvard philosopher and Boston’s leading Zionist thinker, courted Brandeis; and Brandeis took to Kallen’s passionate Zionism as well as his groundbreaking ideas about “cultural pluralism” and the positive democratic value of “racial” and national group identities.²⁸³

Like Brandeis, Kallen had encountered first-hand WASPs’ hardening racial lines against even highly assimilated Jews. Fired from Princeton for teaching what he called his “Jewish heresies,” Kallen saw his “dream America” upended, and began to see assimilation as a dangerous hoax.²⁸⁴ The “100% Americanism” idea “connoted a ‘fusion of races,’ a transmutation by ‘the miracle of assimilation’ of Jews, Slavs, Poles, Hindus . . . into beings similar in . . . tradition, outlook, and spirit to the descendants of . . . the Anglo-Saxon stock.” Yet, the WASP establishment was beginning to doubt and mock the melting pot ideal and to clamor about Anglo-Saxon “race pride” and “respect for ancestors.”²⁸⁵ If WASPs were turning more and more to racialized notions of national identity, then perhaps hitherto assimilation-minded Jews should too. Stung by establishment Anti-Semitism, Kallen, like Brandeis, was drawn to the world of the Russian Jewish immigrants, their Zionism, their various non-Zionist visions of diasporic nationalism and “racial” solidarity, and their dream of a “Jewish National Renaissance” in the U.S.²⁸⁶

²⁸¹ See ROBERT BURT, TWO JEWISH JUSTICES (1988)(arguing Brandeis was an inveterate outsider, not at home in Zionism any more than in the other milieus in which he moved.)

²⁸² LOUIS D. BRANDEIS & DAVID W. LEVY, THE FAMILY LETTERS OF LOUIS D. BRANDEIS 205-06 (2002)

²⁸³ For the classic manifesto of Kallen’s cultural pluralism, see Horace M. Kallen, *Democracy versus The Melting Pot: A Study of American Nationality*, THE NATION, Feb. 25, 1915.

²⁸⁴ HORACE M. KALLEN, INDIVIDUALISM: AN AMERICAN WAY OF LIFE 11 (1933).

²⁸⁵ Kallen, *Democracy versus the Melting Pot*, supra note __, at __.

²⁸⁶ Horace M. Kallen, *Judaism at Bay* __ ().

Confronting the racial determinism of high-brow WASP eugenicists like Princeton's Edward Ross and popularizers like Madison Grant,²⁸⁷ Kallen threw down the gauntlet by seeming to adopt their outlook. "Self-hood," he wrote in a famous essay for the *Nation*, "is ancestrally determined...Men may change their clothes, their politics, their wives, their philosophies..[but] they cannot change their grandfathers."²⁸⁸ The Anti-Semites were right in that, Kallen contended. Indeed, "Grant and Co." were also right to reject the Declaration of Independence's "glittering generalities" about equality and the "eighteenth century" notion of "natural man." Man was not an "abstract individual."²⁸⁹ Rather the "essential reservoirs of individuality" lay in the "races or nationalities" from which men sprang and whose "cultures" nourished them. Like "Grant and Co.," Kallen doubted that "the miracle of assimilation" or the machinery of Americanization would turn the new immigrants into "beings" whose "tradition, outlook and spirit" would mirror the WASP ideal that a Grant or Ross prized. The question was what was to be done. Grant and Ross urged shutting the doors on these irremediably different and inferior races. Kallen urged instead revaluing and prizing their differences.

Kallen was fighting a two-front war. Not only most of the WASP but also most of the Jewish establishment, certainly most of the Reform Jewish elite, regarded the cultural worlds of new immigrant communities, and the Lower East Side, in particular, with suspicion and scorn. Yiddishkeit, Jewish nationalism, Zionism and socialism, along with rival religious orthodoxies – and the various institutions that sustained and wove all of them into the community's everyday life, forming a semi-separate Jewish public world – were nothing that the Reform elite thought worth saving. They wanted the Russian and East European Jews to assimilate into mainstream "American institutions," while a pared-down Judaism would become their private faith.

Kallen was merciless toward the Reform Jews – "amateur Gentiles," he called them – and what he saw as their fatal efforts to sever Judaism from a thick web of Jewish life, institutions and public culture. Kallen (and following him, we'll find, Brandeis) repeatedly invoked the Zionists' warnings that assimilation meant the "suicide" of the Jewish people. Again, Kallen adopted – and put to his own metaphorical uses - the naturalistic and organicist brand of social thought, on the naturalness of racial and national groups and their inherited traits and cultures, employed by eugenics-minded

²⁸⁷ See *supra* note ____.

²⁸⁸ See Kallen, *The Melting Pot*, *supra* note ____.

²⁸⁹ *Id.*; see also Kallen, *Zionism and Liberalism*, reprinted in HORACE KALLEN, *JUDAISM AT BAY* 114 (1932)

Progressive Era sociologists like Princeton's Edward Ross.²⁹⁰ Thus, he warned the Reform Jewish readers of the *American Hebrew*: Doctrines and beliefs, even citizenship, you can embrace and shed.

But you cannot cease to be a Jew without ceasing to be. The Jewish group is the natural group to which you belong...[I]t is the root of your nature and character...it is your "heredity"..<[and] *breed*...This group mind is the culture of your group....[And] [c]ultures...possess a nature as organic as the physical form of life...you cannot separate any social institution [like the Reform Synagogue] from the natural community-complex of which it is a part...and in so far as the [Reform] rabbis have detached Judaism from the total complex of *Jewish* life, they have condemned it to death.²⁹¹

Unless Reform Jews built up associations with the "community-complex" and "*Jewish* life" of the new immigrants and their many-sided culture and unabashed national projects like Zionism and all the brands of diasporic nationalism, like the Bund, which immigrant activists and intellectuals brought with them and fashioned anew, the Jewish spirit would die out among Reform Jewry. For centuries, the Jewish spirit had managed to endure under conditions of oppression and ghetto-ization – but also group

²⁹⁰ See EDWARD A. ROSS, *SOCIAL PSYCHOLOGY* (1908); *THE OLD WORLD IN THE NEW: THE SIGNIFICANCE OF PAST AND PRESENT IMMIGRATION TO THE AMERICAN PEOPLE* (1914). Of course, these ideas about the natural, primordial character of national or racial "inheritances" and "cultures" were also afoot in Zionism; for it drew upon nineteenth-century European nationalist thinking that rested on similar organicist notions of group identity. See SHLOMO AVINERI, *THE MAKING OF MODERN ZIONISM* (1991). Today's conception of the socially constructed and not "naturally" "inherited" character of cultural identities emerged as the overthrow of Lamarckian ideas about heredity pushed social thinkers in opposite directions: either toward more modern, hard-wired Mendellian variants of eugenics (of which Grant was an early spokesman); or toward more thorough-going social and historical accounts. The idea of ethnicity as a socially constructed identity - wherein a nation's or people's "inheritance" is understood as a social and cultural project and a contingent, collective undertaking, *only metaphorically and imaginatively tied to ancestry and heredity* – is an idea first fashioned by, among others, this generation of Jewish nationalist thinkers within the loose Lamarckian framework within which figures like Kallen and Brandeis still discussed "race" and "nation." Thus, one can read Kallen's naturalistic rhetoric, as more or less self-consciously metaphorical. Kallen begins in the 'teens to describe Jews as an "ethnic group," and always is at pains to underscore that the transmission of Jewish culture unfolds in social institutions that Jews must sustain through collective choices and social action. If a race's or a nation's culture is "natural," it is not because it is genetically transmitted but because it is rooted in deep "associations deriving from a real or credited predominant inheritance, an intimate sameness of background, tradition, custom and aspiration." Kallen, *Zionism and Liberalism*, *supra* note ___ at 114. On Kallen's – and Brandeis's – equivocations about whether African-Americans fitted this emerging social-constructionist or cultural conception of the "national" or "ethnic group" or were somehow more deeply, biologically "different" in their supposed "racial traits," see *infra* note ___.

²⁹¹ Kallen, *Jewish Quarrels and Jewish Unity* (1916), reprinted in HORACE KALLEN, *JUDAISM AT BAY* 83 (1932)

autonomy and self-rule; under such conditions, Jews “lived an organic social life and expressed [that life] in a culture which has been continually efficacious in the wider world.” But with emancipation came assimilation and the “attempt to thin [Jewishness] down to a mere sectarian Judaism...Reformed Judaism appears to have cut itself off from the sources of its own life. These sources are the Jewish nationality. There is no intrinsic quarrel...between reformed Judaism and Zionism. Jewish religion...depends on nationality for life.”²⁹²

But whether or not Jewish nationalism was really vital to Judaism or Jewishness, what warrant was there for saying it was compatible with full membership in the national community that was the U.S.A.? Having granted Grant’s premise about the “natural” depth and durability of the group identities that marched under the banners of “race,” “people” and “nation,” and having grabbed that racial banner for Jews: how square this with Americanism?

Along with a handful of other Progressive social thinkers - Gentile (like the great African-American thinker and activist, W.E.B. DuBois) and Jewish, Kallen mounted a bold revaluation of group difference in American life. Like DuBois, Kallen found in the philosophical pluralism of his Harvard mentor William James an intellectual framework for defending a multifarious, hyphenated American nation. Kallen seized on the “foggy” but “democratic metaphysics” of James’s *A Pluralistic Universe*—with its allegory of “each-forms” resisting incorporation in “all-forms” and the “federal republic” as its key trope for the “pluralistic universe”—and translated James’s ideas about value pluralism and irreducibly contending visions of the good into an eloquent defense of what Kallen dubbed “cultural pluralism.”²⁹³ On the eve of World War I, Kallen declared that the U.S. was at a crossroads. The country had to choose between a monistic “Kultur” based on “unison, singing the old British theme of ‘America’—the America of the New England School” and a pluralistic culture that embraced “harmony, in which that [British] theme shall be dominant, perhaps, among others, but one among many.”²⁹⁴ Kallen’s America was “a cooperative of cultural diversities . . . a federation or commonwealth of national cultures.”²⁹⁵ It remained for Brandeis to put the cultural theory to work in constitutional discourse, and legal and political battle.

²⁹² Kallen, *Zionism and Liberalism* (1916) reprinted in HORACE KALLEN, *JUDAISM AT BAY* 114 (1932).

²⁹³ Horace M. Kallen, *Culture and Democracy in the United States* (1924). On Kallen and DuBois as students of James, see CARRIE TIRADO BRAMEN, *THE USES OF VARIETY: MODERN AMERICANISM AND THE QUEST FOR NATIONAL DISTINCTIVENESS* 67-111 (2000).

²⁹⁴ Kallen, *Democracy versus The Melting Pot*, *supra* note ____.

²⁹⁵ *Id.*

In 1915, as war broke out across Europe, it was Kallen who persuaded Brandeis to allow himself to be drafted into leading American Zionism.²⁹⁶ Brandeis became the Supreme Court's first Jewish Justice a year later, but he remained the leader of American Zionism until 1921. In that time, he transformed the movement's organization, heft and identity.²⁹⁷ Brandeis brought together a leadership cadre of Reform German-Jewish corporate attorneys and jurists, who incorporated the Zionist Organization of America and reorganized the Zionist federation from a tiny new immigrant fraternity and debating society into a vast corporate "business-like" operation, with the administrative capacity to manage the millions of dollars they raised for relief in Europe and the Jewish settlements in Palestine.²⁹⁸ Combining Brandeis's access to the White House and State Department with their joint and several legal and administrative talents, they made the new Zionist Organization a central vehicle of American Jewry's aid to Jews in war-torn Europe²⁹⁹ and an established feature of American Jewish life.

More so than with the dozens of other movements for which Brandeis had served as advocate and counselor, Zionism echoed in "[his] soul" and gave the profoundly reticent Brandeis a new sense of belonging.³⁰⁰ In Jewish and broader public spheres, Justice Brandeis began weaving Jewish nationalism and cultural pluralism together with the Progressive Constitution to create a new constitutionally shaped account of Jews' terms of belonging to America. 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.³⁰¹ The 1918 "Pittsburgh Platform," as it came to be known, reflected Brandeis's brand of progressive democracy. It 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 people" of utilities, natural resources, and land and the application of the "cooperative principle... in all agricultural, industrial, commercial, and financial undertakings."³⁰² Thus, the national homeland was to be

²⁹⁶ See UROFSKY, *supra* note ____, at 399-409. For a discussion on the origins of American Zionism, see generally MELVIN I. UROFSKY, *AMERICAN ZIONISM: FROM HERZL TO THE HOLOCAUST* (1995); Ben Halpern, *The Americanization of Zionism, 1880-1930*, in *AMERICAN ZIONISM: MISSION AND POLITICS* (Jeffrey S. Gurock ed., 1998).

²⁹⁷ See *id.* at 463.

²⁹⁸ See UROFSKY, *supra* note ____, at 416-23.

²⁹⁹ *Id.* at 422-423.

³⁰⁰ *Id.* at 411.

³⁰¹ UROFSKY *supra* note 106 at 518-27. See also JONATHAN SCHNEER, *THE BALFOUR DECLARATION* 340-341 (2010).

³⁰² See *id.*, at 527.

governed by a “Jewish spirit” that was “essentially modern”—and in complete harmony with Brandeis’s Jeffersonian brand of advanced American Progressivism.

Meanwhile the air was thick with war preparations, anti-immigrant hysteria, coercive government-sponsored Americanization campaigns and repression of “foreign” immigrant organizations.³⁰³ This climate of repression along with his role as Zionism’s chief defender prompted Brandeis to embark on a constitutional crusade, translating Kallen’s ideas about cultural pluralism into a new constitutional theory.

B. Zionism, Group Rights and the Infirmities of Liberalism

The gist of the theory was that free and equal individuals only developed in the context of free and equal groups; and such groups, in turn, needed “group rights” and “group equality.” Neither Jews nor members of the U.S.’s other “minority races and nationalities” could flourish in America without such constitutional precepts.³⁰⁴ 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. “We recognize that with each child the aim of education should be to develop his own individuality, not to make him an imitator, not to assimilate him to others. Shall we fail to recognize this truth when applied to whole peoples?”³⁰⁵

Under this constitutional dispensation, the modern Jew could be both an American patriot and yet free to “assert his Jewish nationality.” “Multiple loyalties” and affiliations such as these were the seedbed of richer

³⁰³ The War Department and other federal agencies mobilized “patriotic” civic associations like the National Americanization Committee to carry out “100% Americanism” campaigns in public schools and workplaces and to police and suppress “deviant” and “foreign” immigrant associations. State and local governments also shut down “hyphenated” civic groups and religious schools, and barred foreign language instruction in public and private schools, and even its use in worship. See, e.g. Jonathan Zimmerman, *Ethnics Against Ethnicity: European Immigrants and Foreign-Language Instruction, 1890-1940*, 88 J. OF AM. HIST. 1383, 1400. Brandeis’s assertions of group rights were aimed against these practices. See Brandeis, True Americanism, *supra* note __, at 13-14. At the same time, Brandeis’s constitutional group rights rhetoric also targeted much of the Reform Jewish elite’s social work and Americanization programs, which sought to suppress Yiddishkeit and impose unwanted and deeply authoritarian kinds of cultural tutelage on new immigrants.

³⁰⁴ See Brandeis *supra* note __, at __. (“This right of development on the part of the group is essential to the full enjoyment of rights by the individual. For the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part.”).

³⁰⁵ “And what people in the world,” Brandeis continued, “has shown greater individuality than the Jews? Has any a nobler past? Does any possess common ideas better worth expressing? Has any marked traits worthier of development?” Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 12, 22 (Zionist Organization of America ed., 1942).

individual identities and of moral depth, enlarged knowledge, and a greater taste and capacity for participation in the polity. Those affiliations demanded a constitutional order that protected political action and organization based on group difference and national aspirations, and a regime of social governance that allowed and fostered group educational, cultural and political associations.³⁰⁶ Such an order was essential, if the U.S. was to gain “the full benefit of [the Jews’] great inheritance.”³⁰⁷ President Wilson was dismayed by Justice Brandeis’s pluralist ideas. But a new generation of “hyphenated Americans” embraced them. Here was an ideal of democratic citizenship that cracked apart the melting pot and offered a vision of Americanization closer to the new immigrants’ own practices: invested in American patriotism but also in the history and (invented) “traditions” of Greece or Italy, in securing Irish “home rule” or a Jewish “homeland.”³⁰⁸

³⁰⁶ *Id.* at 29. State action aimed at repressing immigrants’ cultural associations, educational institutions, and group identities only reached the Supreme Court in 1920s cases like *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Meyer struck down a state statute outlawing the use of a foreign language as a medium of instruction as well as the teaching of foreign languages “in any private, denominational, parochial or public school.” The Meyer majority, famously, rested its decision on “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer*, 262 U.S. at 399. The Court emphasized the plaintiff-teacher’s right to teach and the parents’ right “to engage him so to instruct their children.” *Id.* at 400. As with other potential “group rights” cases, this one (like the later *Pierce* case (striking down a statute outlawing most private and parochial schools)) reached a pluralist result in an individual rights framework. See *Pierce*, 268 U.S. at 535.

Below, I show that during the 1914-19 war years, Brandeis thought, wrote and spoke about freedom of association as a group right, in the context of attacking these repressive measures against Jewish and other immigrant group associations, much as he did in regard to trade union freedom of association. I sketch the transnational legal and political context in which this thinking and group rights talk took shape. See *infra* ___-___. It is noteworthy that in the ‘20s, when the cases reached the Court, Justice Brandeis did not seize on them to write concurrences expressing either his pluralist ideals or his notions of constitutional group rights and group equality. Given group rights’ lack of any doctrinal traction, Brandeis may have been content to champion his pluralist precepts in public political discourse and debate. He almost surely hoped that over time, pluralist precepts might become background public norms against which individual rights doctrines were to be interpreted and associational freedoms protected. It is hard to imagine, though, that Brandeis did not ponder that the statutes struck down in *Meyer* and *Pierce* violated the minority rights provisions on language and educational autonomy that were among the group rights that Brandeis, working through Mack and Frankfurter, had just succeeded in pressing Wilson to push the Great Powers to include in the minority rights and new nations treaties at the Paris Peace Conference of 1919. See *infra*. at ___-__.

³⁰⁷ Brandeis, “The Jewish Problem,” *supra* note ___ at 29.

³⁰⁸ We have seen the evasions of class inequality inscribed in Kohler’s and Straus’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.” “True Americanism,” *supra* note ___ at . 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

No more than Straus or Kohler, however, was Brandeis above claims of Jewish exceptionalism. New Jewish immigrants were *already* proto-Americans, equipped for the rigors of American citizenship, in virtue of the special kinship between the “Jewish spirit” and the “American spirit.” For Brandeis, as for the Reform Jewish attorneys, the “Jewish spirit” ran through justice-seeking, universal ethics and republican self-rule. Like them, he fastened on to the notion that that the historical roots of the U.S. Constitution and American democracy lay in Hebrew soil, although he gave the notion a distinct Progressive twist. Speaking to a conference of Reform rabbis in 1915 on “The Jewish Problem: How to Solve It,” Brandeis boasted “[t]he Jews gave to the world its . . . reverence for law and the highest conceptions of morality Our [Jewish] teaching of brotherhood and righteousness, has, under the name of democracy and social justice, become the twentieth century striving of America and western Europe. Our [Jewish] conception of law is embodied in the American constitution which proclaims this to be a ‘government of laws and not of men.’”³⁰⁹

Unlike the other Jewish lawyers we’ve met, however, Brandeis came not to praise classical liberal constitutionalism, but to bury it. When it came to the “Jewish Problem,” Brandeis told the Reform rabbis, “Liberalism” was a “failure.” It did far too little “to eliminate the anti-Jewish prejudice.”³¹⁰ Liberalism promised Jews equality but supplied no ground on which to build group dignity and self-respect. While acknowledging that the “concrete gains through liberalism were indeed large,” Brandeis pointed out that “the anti-Jewish prejudice was not extinguished even in those countries of Europe in which the triumph of civil liberty and democracy extended fully to Jews the [individual] ‘rights of man.’”³¹¹ The problem with classical liberalism was that it gave Jews and members of other minority groups 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.”³¹² Classical liberalism counseled assimilation as the solution

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. [Discuss Kohler and Boas in contrast to Brandeis and Kallen.]

³⁰⁹ Brandeis, The Jewish Problem, *supra* note ___ at 23. Brandeis probably gleaned this vision of the Constitution’s Hebraic origins not from Straus but from Kallen, who had studied the Puritans and their “Hebraism” at Harvard. Like Straus, Kallen too boasted that “Hebraism” formed “the spiritual background of the American commonwealth.” Kallen, Culture and Democracy, *supra* note ___ at ___; Horace M. Kallen, What I Believe and Why – Maybe 181 (1971). See also BRAMEN, *supra* note ___, at 80, 86-87

³¹⁰ Brandeis, The Jewish Problem, *supra* note ___ at 17.³¹¹ *Id.* at 15 - 16.

³¹¹ *Id.* at 15 - 16.

³¹² *Id.*

to Anti-Semitism but, Justice Brandeis lectured the rabbis, the solution lay elsewhere, in the “Assertion of Jewish Nationality.” Here, Brandeis was following Kallen and Zionism’s founders in their romance with nationalism. Assimilation, on this account, was not only a kind of “noble suicide.”³¹³ Assimilation also was the source of modern Anti-Semitism, for it produced among gentiles the fear that Jews, emancipated from the exclusions and disabilities of the old order, were “sail[ing] under false colors and conceal[ing] their true identity.”³¹⁴

Zionism, by contrast, held out the promise of gentiles’ respect and recognition; it 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. . . . The Zionists and the orthodox Jewish nationalists have long ago won the respect and admiration of the world.”³¹⁵ The project of establishing a Jewish homeland, where “Jewish life can be fully protected . . . and the Jewish spirit reach its full and natural development,”³¹⁶ was inspiring Jews everywhere, including Brandeis’s new immigrant comrades on the Lower East Side and in the Zionist federation, to “glory in the power and pertinacity of the race.”³¹⁷

C. Group Rights Abroad and at Home

If his critique of the melting pot and his vision of a pluralist Constitution borrowed from Kallen, Brandeis’s vocabulary of “group equality” and “group rights” derived from international law. Indeed, the nascent international law of “group rights” loomed large in the first great public battle between Brandeis and the Reform Jewish attorneys who led the AJC. The outbreak of World War I and the prospect of post-war treaty-making stirred hope of transforming the legal status of Jews and other oppressed “nationalities” and “minorities” in the crumbling Hapsburg, Ottoman and Russian empires. It also sparked a clash between Justice Brandeis and the Reform elite over the rights that the U.S. ought to champion on behalf of Jews in post-War Russia, Eastern Europe and Palestine. This conflict over what individual and what, if any, group rights Jews should enjoy in the post-war international legal order became a dramatic public contest over the meaning and politics of Jewishness in America.

War brought massacres and mass expulsion of Jews at the hands of the Czar’s army, And as it had a decade earlier, violence in Russia stirred American Jewry to respond. But no longer were Wolf, Straus, Kohler,

³¹³ *Id.* at 29.

³¹⁴ *Id.* at 23.

³¹⁵ *Id.*

³¹⁶ *Id.* at 25.

³¹⁷ *Id.* at 31.

Schiff, and the other leaders of the AJC the sole national figures claiming to speak for American Jews on the fate of their brothers and sisters abroad. At the helm of the Zionist Federation, Justice Brandeis went to war against the AJC, whose “anti-nationalist” and “anti-Zionist” outlook he assailed.³¹⁸ Law and democratic constitutionalism provided the weapons. Would these “self-appointed autocrats” and “benevolent tyrants,” these “plutocrats” of the AJC with their “private, secret diplomacy,” continue to presume to speak for the “Jewish masses?” Brandeis demanded to know. Or would the Jewish people in America—“American Israel”—“repossess themselves of the spirit of self-determination”?³¹⁹ How tragic if Jews, “first among the world’s peoples in democratic vision and popular autonomy,” should now “succumb to a self-appointed body of men who substitute their own judgments . . . for the convictions and determinations of the whole people.”³²⁰

Wielding the language (and legal technology) of democratic constitutionalism, Brandeis, Rabbi Wise, and Judge Mack, and several of the other attorney leaders of the Zionist Federation, now launched a vast new project: creating an “American Jewish Congress” to challenge the American Jewish Committee in its role as de facto representative of American Jews in the councils of state and committee rooms of Congress.

By framing the project as one of democratic reform—public deliberation and accountability, “elected representatives,” and “popular self-rule”—Brandeis wedded what was most controversial and “foreign” in his outlook, Zionism and Jewish nationalism, to what was most American. From the AJC’s perspective, the very idea of a Jewish “Congress” representing an “American Israel” on the public, political stage was anathema. But Brandeis’s democratic-constitutional platform and rhetoric put them on the defensive.

New immigrant Jewish neighborhoods brimmed with resentment against the “Hofjuden,” or upper class Reform elite. Whether the question was Palestine, Jewish nationalism, Yiddishkeit, socialism, labor relations or the direction of the life of the Lower East Side, the “Jewish masses” seemed far more inclined toward the new national leadership of Justice Brandeis and Rabbi Wise than to standing by the AJC. As Brandeis’s cadre of attorneys crafted the new federation’s elaborate associational framework and electoral machinery, their balloting drew in practically the entire array of Jewish organizational life,³²¹ with the exception of the AJC and a few other elite

³¹⁸ “Opening Speech by Justice Louis D. Brandeis,” REPORT OF PROCEEDINGS, PRELIMINARY CONFERENCE OF THE AMERICAN JEWISH CONGRESS, MARCH 27 AND 28, 1916 6 (1916).

³¹⁹ *Id.* at 7.

³²⁰ *Id.* at 8-9.

³²¹ This included orthodox rabbinate and congregations, Jewish nationalist, communist, socialist and anarchist labor federations, charitable organizations and benevolent societies of all stripes.

Reform associations that refused to take part. Brandeis and the other American Jewish Congress organizers engaged in protracted negotiations with the AJC over the terms on which it might agree to participate.³²² The AJC, however, would accept only a dominant position. Brandeis refused; and when the Preliminary Conference of the American Jewish Congress convened in Philadelphia in March of 1916, the AJC was conspicuously absent.³²³

But the stakes were too high for the attorneys atop the AJC to abstain. Here was a massively publicized constituent assembly of American Jewry called to create a “permanent national organ,” and it threatened to undo the AJC’s own *raison d’être*, by providing “the ways and means” for American Jews to “serve the oppressed” and “secure for our people equal rights in all the lands of the world.”³²⁴ The Conference would consider the particular matters of immigration, the future of Palestine, and the rights of Jews in the “belligerent lands” at the War’s end. So, the Reform elite relied on proxies like the Hebrew Sheltering and Immigrant Aid Society, and a few key figures like Max Kohler and Louis Marshall attended as delegates from other New York organizations.

Most contentious was the question of just what rights the Congress aimed to “secure for our people” in the “belligerent lands.” Louis Marshall, Kohler’s friend and the future AJC president, reported, at first, fighting “tooth and nail” to extirpate the idea of “national rights,” and he failed. Kohler took a more conciliatory approach. Kohler was versed in contemporary developments in international law. He corresponded with Jewish lawyers abroad who had begun to envision a new architecture of national and international safeguards for minority groups and nationalities. More immediately, Kohler understood that the question of “group” and “national rights” for “our brethren abroad” had become bound up with the question of who “we” (American Jews) are. The very premise of the Congress movement was that “we” are a people and a nation. Not only Zionists, but virtually the whole wide spectrum of new immigrant opinion—religious or secular, traditional or modern, radical or conservative—was nationalist of one hue or another. And in the transnational political culture of Jewish nationalism, nationality and minority rights were the constitutional essentials denied to the Jews of Russia, Poland, Romania and the rest of the oppressive old world.

It was in Eastern Europe and Russia that “national” and “group” rights were first conceived and championed among Jews. There, alongside Zionists, were other anti- or non-Zionist, diasporic nationalists imagining

³²² JONATHAN FRANKEL, *PROPHECY AND POLITICS: SOCIALISM, NATIONALISM, AND THE RUSSIAN JEWS, 1862-1917* __-__ ().

³²³ *Id.*

³²⁴ Report of Proceedings, *supra* note __ at 3.

and demanding various forms of cultural and political autonomy and self-rule on behalf of Jews in the Diaspora. These movements and thinkers were caught up in the various revolutionary and gradualist reform movements springing up, getting crushed and springing up again in the Austro-Hungarian and Russian empires in the decades before World War I. 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. But Jewish nationalist thinkers took inspiration from and honed the ideas of those heterodox legal thinkers and reformers who hoped instead to see Austria-Hungary and Russia reconstituted as commonwealths of multiple nationalities, whose constitutions would vouchsafe “the most complete equality of rights for all languages and nations.” In this milieu, it seemed essential to demand Jewish “nationality” rights. Most Russian and Polish Jews spoke mainly or only Yiddish; one could not imagine carrying on a Jewish cultural and political life in a new Polish or Russian state that suppressed Yiddish.

The present seemed a moment of national liberation for subjugated nations; “national rights” were in the air – not only cultural and language rights, but also visions of constitutions providing for politically autonomous, self-governing minority communities with group representatives in the legislatures of the new nation states. “For if all the nationalities in Russia,” declared a Jewish nationalist manifesto during the 1905 revolution, “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.” By contrast, when Western Europe’s Jews were emancipated a century or more earlier, assimilation was the price of freedom and equality. Not so today, the Jewish nationalists argued; and without state-recognized and, some insisted, state-supported autonomous Jewish educational, cultural and political institutions, individual rights to freedom of expression and association would be mere fictions. That, the nationalists claimed, was the lesson of the liberal constitutional provisions recently enacted in Austria-Hungary; and that surely would be the case in any future Russia unless every nationality including the Jews enjoyed “the status of a juridical unit” with “state organs” expressing the “united will” of each group.

Leaders and spokesmen of these movements, in turn, often fled or came as emissaries and speakers to New York, published in the city’s Yiddish press, and by the mid-1900s, a broad swath of organizations and local leaders, journalists and intellectuals in the Lower East Side and other new immigrant Jewish communities around the country were wedded to this forgotten constitutional vision of diasporic Jewish nationalism. Demanding not only civil and political but also “national rights” for “our brethren” in

war-torn Eastern Europe and Russia signified solidarity with their “yearnings and struggles.” Small wonder that so many of the delegates at the Conference seemed adamant about including national rights in the Congress’s resolutions. In the end, not even Marshall was disposed to dispute them or to insist they clashed too deeply with his own liberal ideals. Kohler and Marshall helped Rabbi Wise hammer out a chaste, general formula committing the Congress to support “[r]eligious, civil, political and national rights in the countries where the Jews do not now enjoy such rights.”³²⁵ And when Marshall put it forward as a resolution, the Conference roared its approval, appreciating (in Wise’s words) that the resolution, including national rights, came from a “quarter [of German Reform Jews] that has not been sympathetic” to the idea.³²⁶

³²⁵ *Id.* at 544.

³²⁶ See FRANKEL, *supra* note ____, at 545.

Brandeis, Wise, Mack and Brandeis’s lieutenant Felix Frankfurter continued negotiations with the AJC about the “Jewish rights” that American Jewry should press the Wilson administration to champion in post-War treaty-making. By 1917, the AJC president Louis Marshall bowed to the inevitable. Thanks to the American Jewish Congress movement, Brandeis and Wise had gained the mantle of the duly elected leaders of American Jewry and spokesmen of the Jewish “masses.” What was more, Brandeis and Wise seemed to enjoy President Wilson’s confidence more so than Marshall, Straus and the AJC. The American Jewish Congress, Wilson insisted, would send a delegation to the 1919 Paris Peace Conference with the President’s blessing; but the AJC should be well represented. And the two groups should have a common program of “Jewish rights.” The delegates the two groups agreed on included Marshall and Straus for the AJC and Wise, Mack and Frankfurter among the nationalists and Zionists for the Congress. Brandeis would make a brief appearance.

Rather than give up influence over the shape of “Jewish rights” by seeming out of touch with the “masses,” Marshall, Kohler and Straus took up the cause of group and national rights with some real devotion, even as they hoped to temper and moderate it. This switch in time would end up giving them, along with Judge Mack, an influence over the drafting of the Minority Treaties provisions in Paris unmatched by any other minorities’ representatives at the treaty-making.

Group rights had no more ardent classical liberal foe in the U.S. than Louis Marshall; ironically, he would become their most important and effective advocate in the international arena at Paris. With Brandeis busy on the bench, Marshall’s force of personality and stature as longstanding head of the AJC enabled him to grab the chairmanship of the committee that in 1918 crafted a “Jewish Bill of Rights” – for the American Jewish Congress to endorse, and for its delegation to champion at the Peace Conference; the aim was to make safeguarding these rights a condition of the Great Powers’ recognition of the new or redrawn nation states (like Poland and Romania) that would emerge from Paris. Styled a “Jewish Bill of Rights,” it was in fact a bill of minority rights that made no mention of Jews in particular. In addition to “equal civil, political, religious and national rights” and anti-discrimination norms regarding “race, nationality, or religion,” the Bill brimmed with group rights, although less stringent than some nationalists had hoped. Along with a bar on any laws “restricting the use of any language,” it included the right [of national and religious bodies] to the “autonomous management of [their] own communal institutions...religious, educational, charitable or otherwise,” and, strikingly, a requirement that “[t]he principle of minority representation [in government] shall be provided for by law.” *Report of the Proceedings of the American Jewish Congress, Phila. 1918*, 61-63. Shorn of minority representation, and bolstered by the requirement of a fair share of state resources for minority educational and cultural institutions, the Bill presaged the rights that finally emerged in the Minority Treaties.

A few factors lent the team of American Jewish attorneys their sway. First, the Reform Jewish leaders of England and France – Marshall’s and Straus’s counterparts – also came to the Peace Conference; but in contrast to the Americans, they stood firmly against the idea of group and national rights for Jews or other minorities. They set themselves at odds with the delegations of Yiddish-speaking, nationalist-minded Jews pouring into Paris from cities and regions all over what had been the old Hapsburg, Russian and Ottoman empires, where the great majority of the world’s Jews continued to dwell. By contrast, Marshall and Judge Mack threw themselves into the affairs of the “Comite des Delegations Juives aupres de la Conference de la Paix,” which brought together Jewish leaders from Russia, Poland, Romania, Ukraine, Galicia, Lithuania, Transylvania, Bukovina, Palestine, Greece, as well as the U.S. and Canada. NATHAN FEINBERG, *LA QUESTION DES MINORITES A LA CONFERENCE DE LA PAIX*, Paris 1929, 14.

The Comite claimed to speak “in the name of nine million Jews,” and it chose Marshall and Mack to speak

Immersed in Zionism and the diasporic nationalism of the Jewish Congress Movement, it is no surprise that Justice Brandeis turned to the nascent international law language of group rights to express his new vision of a pluralist Constitution.³²⁷ The language circulated among the immigrant

on its behalf to the Great Powers. The two Jewish American attorneys gained a great access of moral authority. NATHAN FEINBERG, *LA QUESTION DES MINORITES A LA CONFERENCE DE LA PAIX*, Paris 1929, 14. See also OSCAR I. JANOVSKY, *THE JEWS AND MINORITY RIGHTS (1898-1919)* (1935). But the Jewish nationalists probably made no mistake in electing American leadership. Mack was a Zionist and roughly of the same mind as the Russian and European Zionists and nationalists on questions of group and national rights; and Marshall and Straus would remain staunchly loyal to the compromise they had struck and the group rights they had promised to champion at the American Jewish Congress. Marshall bluntly told the Comite's first gathering that only the American delegates were in a position to influence U.S. policy, and the U.S. was the most powerful of the Great Powers; moreover, only the American delegation could blunt the influence of the English and French Jewish delegations, who opposed the Comite's whole program of group and nationality rights. *Id.*

The American delegates also were alone among the Western Jewish leaders at Paris in enjoying some significant influence with their own country's chief representatives. Lloyd George and Clemenceau paid scant attention to their nations' Reform Jewish elites' representatives in Paris. For that matter, alone among all the various delegations and representatives of oppressed peoples from across the globe who had come to Paris in hopes of making some mark on the new international order, with its riveting Wilsonian promises of justice and national self-determination, the American Jewish Congress delegates at least had the ear of a Great Power. Wilson had met with Brandeis and Wise several times in the months prior to the Conference and publicly promised he would support their demands for minority rights. Wilson had instructed Colonel House and others to confer with the leaders of the Jewish delegation as the Conference set about addressing the Minorities Question; and House, in turn, assigned his principal attorney-advisor, David Miller to work closely with the Jewish lawyers as Miller worked on the critical Committee on New States and the Protection of Minorities.

Marshall and Mack gave Miller a crash course on Jewish "cultural autonomy" and on the idea that Jews constituted a "nationality," entitled to control their own "religious, educational, and social institutions." Miller, in turn, pushed the ideas before his Committee. He refused to bring forward the notion of "minority representation" in the governments of the new states, predicting this would meet derision for resurrecting the Jews' vexed old status as a "state within the state." (However, Miller did try, unsuccessfully, to sell the Great Powers on Marshall's strenuous arguments that not only state parties but minority groups' own associations ought to have standing to raise minority rights claims before the international tribunal under construction.) Still, thanks to Miller's work and Wilson's backing, significant portions of the "Jewish Bill of Rights" found their way into the minority rights provisions of the treaties made in Paris and Versailles. See KOHLER PAPERS, *Paris Conference & Rights of Minorities Correspondence*, Box 17, Folder 8, [1919 Letters and Memos from Oscar Straus].

Marshall, Straus, and Kohler had been forced, grudgingly, to make a deal in Philadelphia with Brandeis and his Zionist cohort of lawyers, jurists and attention-grabbing rabbis. To deprive that crowd of unconstrained hegemony over American Jewry and to keep them from making unrestrained nationalist or Zionist demands at the Paris peace talks, they hammered out a common program of national and group as well as individual rights, and gained a prominent place in the delegation to Paris. At first, like Schiff, like the Reform Jewish leaders of England and France, Marshall and the others were persuaded that their own formula of "equal [individual] rights" and "assimilation" was not only good for Reform Jews, but good for all Jews everywhere. Pragmatic self-regard combined with some genuine openness to learning from the nationalists' and Zionists' "foreign" legal and political ideas and experience to bring Kohler and Marshall to a more sophisticated and sympathetic understanding of the place of group and national rights in the Eastern European context. Whatever their forebodings about the imagined rebirth of official "juridical unit[s]" enclosing East European Jewry and "state organs" expressing their "united will," the American Jewish attorneys were willing to believe that even the bare hope of keeping the state from shutting down Jewish associations seemed to demand the expression of associational freedom in the vocabulary of group and national rights.

The few fine-grained accounts of the crafting of the minority rights provisions of the Paris treaties seem to concur on a critical, shaping role for Marshall and Mack, without whom the provisions likely would have been "anodyne repetitions" of the minority rights guarantees in the Berlin Treaty of 1878. And Marshall (with Kohler's long-distance research assistance) did most of the crafting. The Jewish civil rights lawyers became the key spokesmen and draftsmen of minority rights on the international stage. They managed once again to cast themselves in the proud and problematic role of championing the uplift and rights of others.

³²⁷ See, e.g., Louis D. Brandeis, "Group Liberty: Address delivered before the Collegiate Zionist Society of Columbia University," May 2, 1915; "The Common Cause of the Jewish People," Address delivered by Justice Brandeis, before a mass meeting in Carnegie Hall called by the Jewish Congress Organization Committee of

Jewish nationalist intellectuals and activists who had inspired him and whom he, in turn, hoped to inspire. What that language signified for their conceptions of “Jewish rights” abroad in an imagined post-War, post-revolution Russia and Eastern Europe was fairly clear: (a) freedom of association, the right to construct, foster and govern the group’s educational, philanthropic, social and cultural associations, and to carry on their activities in their national languages, unmolested by government – what we would call a zone of negative liberty, but one that was conceived in “group rights” terms; (b) a right on the part of the group’s members and (supposedly duly chosen) leadership to have autonomous government-honored control over the group’s networks of educational and cultural institutions; (c) a fair share of whatever state resources were given over to minority nationalities’ autonomous educational institutions; (d) some form of proportional group representation in various organs of national and subnational government. And as we have noted, Brandeis and his lieutenant, Judge Julian Mack and his arch-rivals, Louis Marshall, Max Kohler and Oscar Straus would jointly champion this whole array of meanings in the treaty-making in Paris in 1919.

But what did the language of “group rights” signify in the U.S. context? What did “group rights” mean in the creative higher-law-making that runs through Brandeis’s speeches and essays for the American Jewish Congress and the new Jewish organizations and Jewish public sphere and public discourse he was helping to create? For Brandeis’s thinking about cultural pluralism in the U.S., “group rights” probably never seriously meant (b)-(d), as much as these notions appealed to many of the émigré thinkers and activists as features of their imagined pluralist America. For Brandeis, “group rights” and “group liberty” and “equality” in the U.S. seem to have meant something like (a): a zone of negative liberty conceived as a group right, much as Brandeis frequently wrote (in judicial opinions and elsewhere) and spoke of trade union freedom in group right and group liberty terms. As we have noted, local and state governments in these years were enacting statutes and taking informal action to suppress new immigrant political, educational and cultural activities and organizations. At the same time, there was, as yet, no constitutional doctrinal basis on which to think, instead: freedom of association is an entailment of the first amendment, but one that inheres simply in individuals. Put that together with Brandeis’s broader thinking about the nature of groups as legal entities in the labor context and elsewhere in

which he was chairman. January 16, 1916, in *BRANDEIS ON ZIONISM: A Collection of Addresses and Statements* by Louis D. Brandeis (1942, reprinted 1976).

economic and social life in legal-intellectual conversations animated by ideas like Harold Laski's, and it seems likely that Brandeis found it sensible to think here too about such negative liberty as a group liberty – one which also demanded the kinds of legal supports and carapaces that Louis Jaffe set out in “Lawmaking by Private Groups,” the year after he clerked for Brandeis.

Brandeis's “group rights” talk also did another kind of work in the U.S. context. It signified a posture of public political group self-assertion – it was part and parcel of Brandeis's call for “American Israel” to become a proper politically constituted group with its own “duly elected” democratically chosen group spokesmen and leaders, “authorized” to speak and act for “American Israel” to “other governments.” At the same time, it was a way of saying that working-class new immigrant Jews and their own organic leaders had every right to form associations dedicated to speaking out on the questions of the day (both Palestine and the fate of Jews in Russia and Eastern Europe), as well as on matters closer to home (labor strife, city politics, promoting Yiddishkeit, etc.). In this regard, the rubric was not aimed against government repression; rather, it was a demand for recognition and respect aimed against the outlook and actions of the “Hofjuden” Reform Jewish elite, who thought that the new immigrants and their associations ought to be prevented from raising an embarrassing political ruckus and thwarted in their efforts to foster a Yiddish-speaking culture and public sphere. Bear in mind that these years saw many overlapping and hard-fought battles in which Brandeis's lawyer-lieutenants were pitted against the Reform Jewish elite in regard to what kinds of organizations with what authority structures and leaders would govern and control the Jewish public sphere of New York and its central organizations.

So, while the claim that “group rights and group equality” were safeguarded by the U.S. Constitution was the purest legal fiction, as Brandeis declared it to Jewish audiences, it became a cultural fact. “Asserting Jewish Nationality” became a matter of “group equality” under “our Constitution,” and it made one a “truer American.” What Jewish nationhood and Jewish nationalism meant would continue to vary and change, taking many forms Brandeis might have lamented (nationalism has always been most morally attractive before it has a state at its command). But the first Jewish Supreme Court Justice brought this thicker, modern, hyphenated conception of American Jewishness—the Jewish-American or “American Israel”—into the American mainstream for the first time. It was a conception of Americanization much closer to what the new immigrant

“Jewish masses” fashioned for themselves in their everyday lives than the assimilationist one on offer from Brandeis’s foes in the Reform Jewish establishment. That is why, with his profoundly successful assimilation into American life and institutions alongside his bold assertion of Jews’ public “individuality” and Jewish nationalism, Rabbi Wise called Brandeis the “first American Jew.”³²⁸

CONCLUSION

In the midst of the nation’s largest mass immigration, the two million “poor Russian [and Polish] Jews” who arrived between 1890 and World War I were singled out as especially vexing and “un-American” racial others.³²⁹ The newcomers occasioned a crisis for the small and settled community of mostly Reform Jews whose parents and grandparents had arrived half a century earlier from Germany and Central Europe. The crisis was practical: How to keep the gates open for these racial others who were fellow Jews, while safeguarding one’s own welcome? But also theoretical and existential: What forms of Jewish particularity fitted with full membership in the national community? What grammar of self-understanding and group identity could Jews claim without cutting themselves out of the promise of American life and bringing down on themselves some American variant of European Anti-Semitism?

This article has made the case that during the Progressive Era key members of the first generation of nationally prominent Jewish attorneys crafted a normative vocabulary of Jewish membership in the American nation out of the materials of constitutional law. Law, lawyering, and constitutionalism played important, protean parts in the shaping of Jewish American identities.

Of course, the ways that late nineteenth and early twentieth century Jews wedded Jewishness and American-ness were complex and various. I have left most of them unexplored. Most Jews were not lawyers, and most Jewish lawyers were not as powerful as these four. Partly because they were powerful, however—as litigators, advocates, and jurists; authors and publicists; policy makers and high state officials; founders, leaders and spokesmen of the most important national Jewish organizations—they managed to fashion durable terms of Jewish and other immigrant others’ entry and belonging to America. They became gatekeepers of the nation state and defenders of those whom the gatekeepers excluded. They also fought over the kinds of collective public presence and group claims Jews

³²⁸ _____ [Stephen Wise, pseudonym], *Great American Jews* ()

³²⁹ A Congressional Committee on Immigration dubbed the “great mass” of them “the usual ghetto types...filthy, un-American and often dangerous in their habits.” [Goldstein at 109]

ought to assert in the national polity. In the thick of this practical legal and political work, these attorneys drew on law's cultural and symbolic resources in imagining (and clashing over) the meaning of Jewishness in the U.S. Weaving together disparate strands of Reform Judaism, Zionism, and classical liberal and Progressive constitutionalism, they helped invent key terms and sentiments of Jewish belonging for decades to come.

As we have seen, the attorneys fashioned two rival and overlapping vocabularies of belonging. Slowly, the openly "hyphenated" and public Jewish-American group identity gained ground over the Reform Jews' rigorously assimilationist outlook. Elements of the two vocabularies also combined in new ways. Thus, the hyphenated Jewish-American ideology associated with 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 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 depend[ed] on pursuing the rights of America's oppressed minorities."³³⁰ Zionism melded with devotion to the Constitution, "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 lawyers, activists and supporters from the Lower East Side and other Russian Jewish communities.

In retrospect, it is clear that what the Progressive constitutionally shaped understanding of American Jewishness had in common with the classical liberal account was more significant than what divided them. But a century ago, they clashed. For Reform Jews, the liberal Constitution—in its individualism, its promise of legal and civic equality, equal opportunity and freedom of conscience, trade and callings, its condemnation of "class legislation" in general and racial classifications in particular—filled out the precepts of their constitutional patriotism, and resonated with their social aspirations and their class-bound experience of American life. The anti-classification principle and its attendant individualism would have a long life among the Reform Jewish establishment, animating Reform Jewish organizations' attacks on Jim Crow and framing the AJC's opposition to affirmative action decades later.

³³⁰ Quote is in NYU book.

While Wolf, Straus, and Kohler declared that Jews were not a race or nation, Louis Brandeis blithely affirmed the contrary. He turned the ideological table around against the Reform establishment, arguing that Jewish nationalism made a Jew a truer American. His voice and authority as a Supreme Court Justice at the helm of the Zionist federation and the American Jewish Congress combined with his defense of group equality, group rights, and “multiple loyalties” to put the new immigrants’ thicker, more public, political and controversial “hyphenated” kind of American Jewishness on the road to respectability. A deeply assimilated American Jew, Brandeis offered a critique of assimilation and a new pluralist constitutional vocabulary of Jewish belonging that drew on the ideas, aspirations and lived experiences of Jewish newcomers from Russia and Eastern Europe.

Even so, Brandeis’s defense of “group rights” never ripened into a program of legal 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 lawyers had come to believe that Jewish institutions and associational life in the U.S. could and should rest on the sparser legal bases of individual rights, much as Brandeis’s “liberal” foes in the AJC had insisted all along.

Meanwhile, Brandeis, the Zionist federation and the American Jewish Congress would continue to press the U.S. to exert influence on the international stage on behalf of a Jewish homeland. It became ever clearer, however, that the national homeland was a place for unfortunate brethren abroad, while American Israel remained in America. Brandeis’s critics in the European Zionist movement complained that his was a “long-distance nationalism.” But that missed the emancipatory thrust of the Zionist project on the American scene. American Zionism was a form of diasporic nationalism, a plebian “national assertion” of public Jewishness, bound up with what Brandeis provocatively called the new immigrant Jew’s “right to his own peculiarities, which he should no longer have to hide.”³³¹ 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

³³¹ LB, Zionism Letters.

elite.

No less than the new immigrants, the Reform Jews were determined to have it both ways. They too were determined to remain a people apart, not to be “absorbed” or “amalgamated” into the “new American race” that Roosevelt touted. Intermarriage was no part of the “assimilation” they championed. But they kept their “race” talk private, outside politics in a separate, largely private sphere of elite Jewish associations and sociability. Their grammar of belonging might have sounded like this, if one of them were to have brought its basic structure of ideas and feelings to the surface: We, Reform Jews, have stripped away the old, anachronistic features of Judaism as a communal form of self-government, abandoning what Reform rabbis like Kaufman Kohler call a “ghetto religion.” Our “Zion” is “America.” Our “law and Covenant” are the Constitution. We are not only claimants of the constitutional promise of equal rights and liberty; we are its champions and arbiters. For us, the heart of the Fourteenth Amendment is these promises: no racial classifications and every individual on his own merits. We are not racial others, and we won’t allow government to classify or cast out our co-religionists as racial others. We’ll take this same battle up for all people whom government classifies and spurns as racial others. We were “strangers in the land”; we are destined to hold the nation to its deepest liberal commitments. And if we are going to talk about blood and race (and Reform Jews never actually ceased doing so), remember this. Our Jewish ancestors bequeathed to your Puritan forebears and Founding Fathers their first and holiest examples of the rule of law, equal justice, and republican self-rule.

That, at least, is how I imagine a Wolf, Straus or Kohler might have imagined key elements of his Jewish Americanness. Like Brandeis’s contributions, and often fused with them, they would have a long and interesting life. Lost in time, though, was the moment when Jewish longings and aspirations gave rise to a forgotten trans-national constitutional imaginary – one whose recollection might have enabled Jewish liberals in the turbulent ‘sixties to see something of themselves in the racial others whose nationalist ideas and group rights claims they found so dismaying and indefensible.