

TO: LAPA SEMINAR COLLEAGUES

FROM: WILLY FORBATH

RE: "The Jewish Constitutional Moment"

Here is my paper. It's long, but being narrative, it's a swift read. If you don't have time to read all of it, read the Introduction and pp. 60-78.

The paper is a lightly edited, and still barely footnoted, expansion of a pair of lectures. It is a first effort to sketch the main themes and arguments and the whole narrative arc of my book-in-progress. It also begins folding to into the narrative my archival work on the papers and Yiddish journalism of a Russian Jewish revolutionary émigré economist and attorney named Isaac Hourwich.

I am keen to get your views about the narrative structure, the arguments, and the style. It's all fair game and I am enormously grateful for your taking time to read this.

THE JEWISH CONSTITUTIONAL MOMENT

Jews, Law and Identity Politics in the Early Twentieth Century¹

William E. Forbath

Nation states have constitutional moments. Nations or peoples without states – sometimes calling themselves national, sometimes ethnic or racial minorities – have comparable moments. These are moments of constitutive politics, when the most basic questions of group identity and group interests are up for grabs, and when ordinary people are deeply involved in debates about what constitutes and binds them together as a distinct “people” or “nation,” what forms of governance ought to prevail among them, who is authorized to represent them, and what rights they must demand and enjoy.² This essay is about a forgotten Jewish constitutional moment a century ago, in 1915-19. It explores a titanic clash among American Jews, or more precisely, Jews in the United States, fighting over what rights to champion on behalf of Jews at home and abroad – and, more deeply, what it would mean to be both American and Jewish over the next century. It is a story about the adventures of rival ideas about individual and group rights and a

¹ Please do not cite, quote or circulate beyond this LAPA seminar.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

² I am using “constitutional moment” in this purely descriptive sense. Bruce Ackerman famously coined the phrase and put it to work in constitutional theory. See BRUCE ACKERMAN, *WE THE PEOPLE*, vols. 1-3: FOUNDATIONS (1991); TRANSFORMATIONS (1998); and *THE CIVIL RIGHTS REVOLUTION* (2014); see also Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1812 (2007). For Ackerman, the idea of a constitutional moment does legal and normative as well as descriptive work. For him, it encapsulates a process of fundamental constitutional change whose legitimacy does not rest on the rules laid down in Article V but instead on an elaborate and evolving pattern of “higher lawmaking” norms, a common law of higher lawmaking that, Ackerman argues, has governed constitutional transformations outside Article V. For a critical but appreciative assessment of the first two volumes of *WE, THE PEOPLE*, see William Forbath, *Constitutional Change and the Politics of History*, YALE L.J. 1917 (1999). See also William Forbath, *Caste, Class and Equal Citizenship*, Mich. L. Rev. 1, ___-___ (1999).

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

study of how law and lawyer-leaders shaped the terms of Jewish belonging and apartness in twentieth-century America.

In the annals of legal and constitutional scholarship, we know much about minority groups' struggles for full membership and first-class citizenship rights in the American community. These are contests to expand the borders of belonging.³ But ethno-racial minorities have also quested for *apartness* in American life.⁴ They have assailed exclusion and discrimination; but, like the Jews in this story, they also have strived to remain peoples apart, loyal to other real or, as historians often say, "invented" and "imagined" nations and homelands.⁵ Yet, we have little legal history of the nationalist and "separatist" side of either immigrant or African-American experience.⁶ We know little about the role of law, lawyers and legal imagination in the forging

³ See BARBARA WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (Michael Grossberg & Christopher L. Tomlins eds., 2010). Thanks to Welke and many others, we know a great deal about the legal construction of these groups' otherness and subordination, and lawyers' part in efforts to resist and dismantle these constructions in the quest for equal citizenship. On the legal construction of African-American otherness and subordination, see THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (Thomas A. Green & Hendrik Hartog eds., 1996); DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK* (2004); ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000). On the legal construction of other racialized others, see KUNAL M. PARKER, *MAKING FOREIGNERS, 1600-2000* (2015); WELKE, *supra* note 3, at 63-94; MAE M. NGAI, *IMPOSSIBLE SUBJECTS* (William Chafe et al. ser. eds., 2004). On lawyers' part in movements to resist and dismantle the legal subordination of African Americans, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); LEA VANDERVELDE, *MRS. DRED SCOTT 231 -324* (2009); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 65, 89, 337-38 (2004); KLARMAN, *UNFINISHED BUSINESS* 88-90 (2007); BARBARA WELKE, *RECASTING AMERICAN LIBERTY* at 295, 300-301, 307-309, 358-68 (Christopher Tomlins ed., 2001); ; MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987); *see also* TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994); TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT* (2011); KENNETH W. MACK, *REPRESENTING THE RACE* (2012). The main studies of legal attacks on the racialization and subordination of Mexican-Americans include NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* (1997); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM* 148, 161 (2002); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997). For an insightful comparison of African-American and Mexican-American legal campaigns, see NEIL FOLEY, *QUEST FOR EQUALITY: THE FAILED PROMISE OF BLACK-BROWN SOLIDARITY* (2010). On lawyering against the racialization, exclusion and subordination of Asian immigrants, see LUCY E. SALYER, *LAW HARSH AS TIGERS* (Thomas A. Green & Hendrik Hartog eds., 1995); MAE M. NGAI, *THE LUCKY ONES* (expanded ed., 2010). For a brilliant study of the racialization, gendering and subordination of African-, Asian- and Mexican-American women workers, see EVELYN NAKANO GLENN, *UNEQUAL FREEDOM* (2002). For Jewish lawyering against "race discrimination" against Jews, see William E. Forbath, *Jews, Law and Identity Politics* (Mar. 31, 2014) (unpublished manuscript), (https://law.utexas.edu/conferences/constitutional/papers/forbath_jews_law_identity_politics.pdf); *see also* STUART SVONKIN, *JEWS AGAINST PREJUDICE* (1997).

⁴ See NIKHIL PAL SINGH, *BLACK IS A COUNTRY* (2004); RONALD TAKAKI, *A DIFFERENT MIRROR* (2008); WERNER SOLLORS, *BEYOND ETHNICITY* (1986); *THE INVENTION OF ETHNICITY* (Werner Sollors ed., 1989); MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* (2008). For a classic sociological account, see NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT* (2d ed. 1970). For an essential study of this dual quest for belonging and apartness in the context of a religious minority, see SARAH BARRINGER GORDON, *THE MORMON QUESTION* (Thomas A. Green & Hendrik Hartog eds., 2002).

⁵ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 2006); ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* (2d ed. 1992) ("Nations do not make states or nationalisms but the other way round."); ROGERS M. SMITH, *STORIES OF PEOPLEHOOD* (2003); MATTHEW FRYE JACOBSON, *SPECIAL SORROWS* (2002); *THE INVENTION OF TRADITION* at 12-14, 278-280, 302-303 (Eric Hobsbawm & Terence Ranger eds., 1983); ANTHONY D. SMITH, *THE ETHNIC REVIVAL* at 67-70, 157 (1981).

⁶ Happily, on the other hand, we have many social and cultural histories about the "invention" *in America* of national or trans-national identities apart from the American one – of becoming African, Asian, Lithuanian, or Italian in America. *See, e.g.*, JAMES SIDBURY, *BECOMING AFRICAN IN AMERICA* (2007); SINGH, *supra* note 4; ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* (1995); JACOBSON, *SPECIAL SORROWS*, *supra* note 5; *THE INVENTION OF ETHNICITY* *supra* note 4; DONNA R. GABACCIA, *FROM SICILY TO ELIZABETH*

of “hyphenated” ethnic and racial identities, and almost nothing about how law and lawyering have figured in the intra-group conflicts and choices that are inescapable when people pursue both belonging and apartness.

The battle at the heart of this essay was a contest over a “Jewish Bill of Rights” – a document produced by the American Jewish Congress, a self-styled “constituent assembly” of American Jewry. The “Bill” would embody a democratic mandate to a group of attorneys dispatched with President Wilson’s official sanction to advocate on behalf of American Jewry’s vision of Jewish rights at the post-War peace conference. In the battle over what rights to include in the “Bill,” outfits led by pluralist-minded, Zionist and diasporic nationalist Jewish lawyers clashed with organizations led by classical liberal- and assimilation-minded Reform Jewish attorneys over what rights Jews should enjoy in the post-war states to be crafted out of the crumbling empires. But the upstart pluralists pushed the contest onto the more contentious plane of just what kinds of rights Jews should enjoy in America as well as abroad.

Fundamental issues were at stake. Should Jewishness be reinvented as a “private faith,” as Reform Jews insisted? Or should Jews constitute themselves anew as a distinct “nation” and a separate “race,” as the nationalists contended? Could they create a Jewish public sphere and Jewish political organizations, without raising the lethal specter of a Jewish “state within the state”? What self-understandings could Jews claim, what structures of feeling could they inhabit, what narratives of belonging and apartness could they tell themselves without cutting themselves out of the promise of American life?

STREET, 1880-1930 (Charles Stephenson & Elizabeth Pleck series eds., 1984).

The backdrop of this battle was the mass emigration of almost two million Jews from Russia and the peripheries of Europe to the United States during the decades bracketing the turn of the last century (1890-1910). The new immigrants settled in New York's Lower East Side and in "Jewish ghettos" in a few other big cities, and disrupted the small world of an older, well-settled Jewish elite of lawyers, merchants and bankers, most of them Reform Jews, whose parents or grandparents had come from Germany and Central Europe in the mid-nineteenth century.

With their vast numbers, their thicker, "foreign" kind of Jewishness, and all the ancient hatreds clinging to them as the old world's most despised ethno-racial and religious outcasts, the newcomers became the paradigmatic "unassimilable" new immigrants in the eyes of growing numbers of native-born Americans during this era of mass immigration. It seemed only a matter of time before the nation's gates would clang shut. The deeply committed Reform Jewish lawyer-leaders were determined to keep the nation's gates open, but also to remain the unchallenged representatives of American Jewry and to shape the "Americanization" of the "poor Russian Jews" in their own image. The newcomers, however, had their own ideas about being Jewish and becoming American, and their own lawyer-leaders.

It is becoming something of a commonplace that lawyers played an outsized role in creating modern Jewish American identities.⁷ But I think this project has some new things to say. As a study in the cultural history of ideas, it examines how ideas about rights are invented and how

⁷ See Jerold Auerbach, *RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION* (1990); and the important recent work of Jim Loeffler. For my own larger work-in-progress in this vein, see William Forbath, *Jews, Law and Identity Politics*, http://www.utexas.edu/law/faculty/wforbath/papers/forbath_jews_law_and_identity_politics.pdf Auerbach's brilliant and quirky book was the first to explore this terrain. Auerbach was not concerned with the actual work of Jewish attorneys or the forms and structures of legal and constitutional thought. But Auerbach first lit on the centrality of law and lawyers to creating Jewish American identities. His account has much to say about religious and historical authenticity and about traditional forms of Jewish law and life against which the embrace (and, I'll suggest, sacralization) of secular law and lawyer-leadership is judged hollow. Examining, without lament, a Jewishness shaped by the ruptures and changes of modernity, I remain deeply in Auerbach's debt.

they change in the dialectics of legal, intellectual and political battle. This study also toggles between the planes of ideas and action, exploring how lawyer-leaders have shaped popular and elite social movements and their group politics, strategies and identities. Immersed in the intensely practical work of creating Jewish organizations, mobilizing the wealth of Jewish bankers and merchants for philanthropy and the solidarity of Jewish workers for labor struggles, and representing Jews and other ethno-racial others in courts, administrative and legislative arenas and public debates at a time of mounting crises, lawyer-leaders parlayed their professional authority into broader political and cultural authority. They served as powerbrokers and strategists, wordsmiths and public intellectuals, as well as authority figures and ethno-cultural folk heroes in a time and place when other authority figures and markers of authenticity had faded. As such figures and heroes, we will study how they advocated and performed their rival accounts of being American, but also a people apart, and how they fought for communal, state and international recognition for what each of them contended were the constitutional essentials of Jewishness in the modern world.

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

This essay (and the larger project it previews) are an experiment in doing legal history in a transnational, diasporic frame.⁸ One of the things it uncovers is the remarkable circulation of ideas about national, group and collective rights that émigré and exiled Jewish-nationalist lawyers and revolutionaries brought back and forth across the Atlantic from struggles abroad in Europe and Russia – where the fate of Jews and other minorities hung in the balance, in contests and campaigns whose impact on American legal and social thought has gone largely unexamined.⁹ We will begin to explore the work that Russian and Eastern and Central European ideas about “group rights,” “minority rights” and “federations of nationalities” did on the American scene, where they opened up new imaginative possibilities and took on new meanings, in Jewish politics, and, more broadly, in American legal and social thought, in the invention of American legal and cultural pluralism, and in battles over the grammar by which the U.S. would conjugate and govern difference over the coming century.

The richness of this particular chapter in the adventures of ideas about rights is also partly a function of the wide-open contest over the future of constitutional liberalism in the first decades of the new century. The official, early twentieth-century Court-sanctioned account - what we now call “laissez-faire” or classical legal liberalism – seemed brittle and besieged. Progressive legal thinkers and reformers, including the famous and forgotten Jewish Progressives who will

⁸ For some important recent efforts at transnational legal histories of U.S. experience, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 63 (David Trubek & Alvaro Santos eds., 2006); REBECCA J. SCOTT & JEAN M HÉBRARD, *FREEDOM PAPERS* (2012); Alejandro de la Fuente & Ariela Gross, *Concluding Thoughts: Boundary Crossings: Slavery and Freedom, Legality and Illegality, Past and Present*, 35 *LAW & HIST. REV.* 119, 130 (2017). For criticism of the national framing of U.S. legal history, see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS* 1-12, 157-208, 279-284 (2007).

⁹ Such leading commentators on twentieth-century pluralism and multi-culturalism as Werner Sollors and David Hollinger have underscored the lack of “resources for group claims” in U.S. law and constitutionalism. We’ll see how this transnational, diasporic constitutionalism provided a language of group and national rights with which thinkers like Louis Brandeis and Horace Kallen first thought and expressed American cultural pluralism. Historians have traced cultural pluralism’s intellectual origins to Kallen’s studies with William James at Harvard, and to the intellectual milieu of the *Menorah Journal*, which was produced there. That is a bit like claiming that Madison’s constitutional thought sprang from his studies at Princeton (or, to be more precise, the College of New Jersey). James’ theory of value pluralism figured in the background; but it didn’t supply Kallen’s keywords and conceptual scaffolding. It was in the transnational arena of Jewish politics, we’ll see, in the clash of rival movements and organizations and their rival views of what rights Jews ought to demand and defend - and thanks to the fresh blast of unfamiliar diasporic constitutional ideas learned from émigré comrades - that Kallen’s and Brandeis’s cultural pluralism first took shape and found its critical vocabulary.

figure in this story, were imagining what might come next, after the well-nigh inevitable overthrow of constitutional laissez-faire. It was hardly a foregone conclusion, circa 1915-19, that when laissez-faire was toppled, modern constitutional law in the U.S. would take shape around a new array of *individual* rights. Quite the contrary: Most advanced Progressives believed that group rights were sure to be part of the new constitutional firmament.

When the dust settled, however, there were no constitutional group rights in the U.S. firmament. There were some individual rights doing certain kinds of functionally similar work, safeguarding liberties that can only be exercised in concert with others. But in the politico-constitutional milieu of the Cold War, even these were thinned out and pressed into an older legal liberal mold. So, this history will acquaint with us with an alternate, more deeply pluralist constitutionalism than the one we got.

Over and against this forgotten pluralist constitutionalism was the older, competing vocabulary of strictly individual rights rooted in classical liberal legal thought. It underwrote a reinvention of Jewishness as a “private faith”; the public-facing aspect of Jewishness, on this account, was subsumed in simply being a citizen – 100% American. The main new argument on offer here is that these Reform Jews also fashioned a distinctive public-facing way of enacting their particular, Jewish identities. They invented – and sacralized – the secular calling and enduring folk hero and authority figure of the “Jewish civil rights lawyer,” whose most important, and sometimes sole, public enactment of Jewish particularity was the defense of constitutional liberalism itself, and the rights of racial others.

This essay, like the larger project, is about four key lawyer-leaders. Two led the Reform Jewish elite and its premier organization, the American Jewish Committee (AJC): the well-

remembered Louis Marshall and his forgotten lieutenant, Max Kohler, whose extensive papers have gone unstudied. Two led the chiefly new-immigrant ranks drawn to the Zionism and diasporic nationalism of the American Jewish Congress movement: the fabled Louis Brandeis and the no less forgotten revolutionary/lawyer-leader Isaac Hourwich, whose legal and scholarly papers I am the first to explore, and whose vast, neglected Yiddish journalism I have studied with the help of a professional Yiddishist. This essay will focus chiefly Hourwich; it is my first effort to fold some of the work on his journalism into the narrative and explore its meaning.

Jewish Emancipation and the Enlightenment Bargain

Let us start with the older rival: the Reform Jewish elite's classical liberal vision of Jewishness, which harked back to the 18th century. Reform Judaism was a child of the Enlightenment, fashioned to outfit Jews for equal citizenship in an Enlightened liberal state.¹⁰ Enlightenment liberalism's answer to the "Jewish Problem" was that Jews were to be welcome as members of the new liberal polity as long as they ceased to be publicly Jewish and abandoned their corporate existence as a self-governing community—subordinate and vulnerable but also legally and socially insulated and apart.¹¹ "We must refuse everything to the Jews as a nation," a liberal Parisian nobleman famously declared in 1789, "and accord everything to the Jews as individuals."¹²

This was a bargain many middle- and upper-class Jews welcomed. The Enlightenment

¹⁰ MICHAEL A. MEYER, *RESPONSE TO MODERNITY: A HISTORY OF THE REFORM MOVEMENT IN JUDAISM* __ (1988).

¹¹ DANIEL SCHWARTZ, *THE FIRST MODERN JEW: SPINOZA AND THE HISTORY OF AN IMAGE* (2012).

¹² 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).

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

Re-forming Judaism into a “religion” was arduous. “Religion,” in this (liberal, Protestant) sense, was a voluntarily chosen private faith. Judaism was none of these things. It was public, not private; compulsory, not voluntary; and a system of laws and practices, not chiefly a matter of belief or faith.¹³ What was more: Judaism named a people and a nation, no less than a “religion.” So, Reform Jews had to reinvent both Judaism and themselves. No longer a people apart, they were - or hoped to become – American, French or Prussian citizens, of the Jewish faith. They cut away traditional Jewish law and ritual, rejected “rabbinical legalism” and centered their Judaism on the “universal” moral teachings of the prophets. The aim was not solely to fit the liberal mold; it also was to reanimate Judaism among “modern,” “enlightened” Jews, who found much Jewish tradition stifling and hollow. So, Reform Jews cast off Jewish garb and dietary laws, ceased worshipping in Hebrew, and built Reform synagogues that resembled neighboring churches.

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

¹³ Leora Batnitzky, *How Judaism Became a Religion* (2011)

dream of legal and civic equality and equal rights for a subordinate and outcast group.

Equal rights seemed on the horizon in 1848, as revolutions swept across Germany and Central Europe, and Reform Jews were prominent among the revolutions' financiers, leaders and foot soldiers. The defeat of these republican revolutions and the repression and reactionary measures that followed brought tens of thousands of republican "'48ers" to the U.S. from Germany and Central Europe. Jewish '48ers bulked large, carrying their militant liberal republicanism with them.

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

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

The Jewish Wedding with Classical Liberal Constitutionalism

Reconstruction Era constitutionalism flowed into Reform Jews' public discourse and self-understandings. In the 1870s and '80s, well-heeled Reform Jews began sending their scholarly sons like Louis Brandeis and Louis Marshall to the nation's elite law schools. There, the young scholars embraced the task of mastering constitutional jurisprudence, taught by leading lights of late 19th century classical liberal legal thought.

At Columbia, Marshall studied common law under Theodore Dwight, and imbibed Reconstruction Era constitutionalism from the famous Prussian émigré, treatise writer and counselor to Lincoln, Francis Leiber.¹⁴ There he also encountered Thomas Cooley's famous 1868 *Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union*, the founding text of laissez-faire constitutionalism. Marshall made his own Cooley's master precept that the Fourteenth Amendment condemned all "class legislation," whether aimed at favoring or redistributing wealth and bargaining power among economic actors, or at classifying and burdening individuals on the basis of race, color, nationality, or creed: a precept that Marshall would put to work over the next four decades on behalf of business clients and, with equal zeal, poor Russian Jews, Southern blacks, and other racial others.¹⁵

¹⁴ See M.M. SILVER, *LOUIS MARSHALL AND THE RISE OF JEWISH ETHNICITY IN AMERICA: A BIOGRAPHY* (2013).

¹⁵ *Id.* This enthusiastic embrace of both the anti-redistributional and anti-racial-classification dimensions of classical liberal constitutionalism was hardly typical among Gilded Age jurists. But it characterized Cooley's own jurisprudence as a state supreme court judge and occasionally prevailed on the federal bench. On Cooley's fusion of the two dimensions, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 818 (1985); Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 91 (1999). For an example from the federal bench, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which figures briefly in our story, *infra* at ___. On Marshall's remarkably successful deployment of both dimensions, see *infra* __-__; and Silver, *supra* note . For his part, the other famous Louis, Brandeis mastered classical liberal legal and constitutional discourse as a star student at Harvard, and used it brilliantly as a young attorney. See, e.g., Samuel D. Warren; Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890-1891). By the time he enters our story, however, he will have become one of classic legal liberalism's most prominent and biting critics, and will fashion his rival account of the terms of Jewish belonging and apartness out of different constitutional and international legal materials. But that lay decades in the future, during the 1910s and World War I. See *infra* __-__.

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

What prompted this momentous bit of self-invention? The standard account runs along instrumental lines. For "highly assimilated" Reform Jews like Kohler and Marshall, so David Levering Lewis's classic essay on the subject goes, fighting Jim Crow laws was a "displaced" way to address the threat that Jews too might be legally cast as racial others in the nativist climate of the day. It seemed reckless even to raise the prospect of anti-Jewish laws in the United States. So, they used Jim Crow statutes as a kind of "stalking horse." If the latter were unconstitutional, then "*a fortiori*" so would be laws discriminating against Jews.¹⁶ There is much to this. But there is a deeper story of how and why interpreting and making claims on the U.S. Constitution on behalf of racial others became a Jewish calling.

First of all, the instrumental account overlooks a critical fact. Most of the racial outcasts

¹⁶ David Levering Lewis, *Parallels and Divergences: Assimilationist Strategies of Afro-American and Jewish Elites from 1910 to the Early 1930s*, 3 JOURNAL OF AMERICAN HISTORY 71, 543-564 (Dec., 1984).

that Kohler and Marshall defended were not blacks, but Jews being turned away at Ellis Island—not proxy racial others, but Jewish ones, claiming precisely that these Russian Jews were being subject to “race discrimination” and “race prejudice” by the Immigration Bureau and nativist lawmakers and pundits. But this revision only begins to unfold the deep and thorny problem for which rights lawyering was a solution. How could a well-heeled, proudly assimilated Reform Jew affirm and act upon—rather than shun—his kinship with the despised racial others, the “unassimilable,” “poor Russian Jews” at the nation’s gates? And how do so without fatally wounding the claim that Jewishness was no ethno-racial marker at all, but simply one’s religious “faith”?

Rabbi Kohler helped outline the answer. His canonical Platform of Reform Judaism declared that Judaism had safeguarded monotheism through thick and thin. For millennia, that had been the “mission” of “the Jewish people.” They were “priests of the one God,” and as such, they lived a “national life” apart, governed by the “Mosaic and rabbinic laws.”¹⁷ They had no choice. Living under Jewish law was essential preparation for “the realization of Israel’s great Messianic hope”: the “restoration of the Jewish state,” and with it the full flowering of mankind’s exemplary, “priestly” nation.¹⁸

But that was then; and this was now. Now, the old Messianic hope has morphed into a new and “modern” one. Jews no longer need to maintain their legal apartness. In the Enlightened West, gentiles have gotten the message. The “moral and philosophical progress” of the day had relocated “Israel’s great Messianic hope.” America and the Western world were the new venue “for the establishment of the kingdom of truth, justice, and peace among all men.”¹⁹ Thus, for

¹⁷ “The Pittsburgh Platform,” The Pittsburgh Conference (1885) (quoted in Berenbaum, *Pittsburgh Platform*, *supra* note).

¹⁸ *Id.*

¹⁹ *Id.*

American Reform Jewry, the Enlightenment bargain was sealed. We Jews, Kohler's Platform proclaimed, "consider ourselves no longer a nation, but a religious community, and therefore expect neither a return to Palestine...nor the restoration of any of the laws concerning the Jewish state."²⁰

More broadly still, Reform rabbis began to declare, Jewish law no longer binds us, except in its moral precepts.²¹ Henceforth, Kohler and his fellow Reform rabbis and Reform Jewry's lawyer-leaders would say, "Our Zion is America."²² For Jews in America, diaspora was destiny. Not Jewish but American law rules over us; we are Americans of the Jewish faith. As another 1880s Reform convention put it in a letter to President Cleveland, the "pillars" of Jews' belonging to America were "equal rights" and "assimilation." Indeed, more than one enthusiastic Reform rabbi sermonized about the Constitution supplanting the Torah.²³

Fighting the Tsar of Ellis Island

During the decade after the rabbis hammered out their American platform, however, mass immigration began to burgeon. By 1900, "poor Russian Jews" were arriving at close to one hundred thousand each year, and mostly staying in New York or heading to one of a few other new urban "ghettoes." Lawmakers and the popular and highbrow press were beginning to depict the Jewish newcomers as America's "new race problem," the "race problem of the North."²⁴ Recall, this was still the "open doors" era as far as European immigration was concerned. Individual "infirmities" were grounds for exclusion. The laws excluded "idiots,"

²⁰ *Id.*

²¹ See BATNITZKY, *supra* note ; COHEN, *supra* note ; MEYER, *supra* note .

²² See, e.g., Kaufmann Kohler, American Judaism (Jan. 18, 1911), in HEBREW UNION COLLEGE AND OTHER ADDRESSES at 206 (1916); AUERBACH, *supra* note .

²³ See KOHLER PAPERS, Paris Conference & Rights of Minorities Correspondence, Box 17, Folder 8, [1919 Letters and Memos from Oscar Straus]; AUERBACH, *supra* note , at 22.

²⁴ GOLDSTEIN, THE PRICE OF WHITENESS at 47.

“insane persons,” “felons,” and “anarchists,” along with “paupers,” indentured workers, and persons “likely to become a public charge.”²⁵ The great liberal virtue of these laws on European immigration, boasted President Theodore Roosevelt, was that they determined exclusion by the “individual qualit[ies] of the individual man,” and not his “race . . . nation . . . [or] creed” - not “whether he is Catholic or Protestant, Jew or Gentile...”²⁶

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

The numbers arriving at Ellis Island rose further, assisted by Reform Jewish philanthropy.²⁷ Jews were becoming a sizeable portion – upward of 25% - of the city’s population, and this

²⁵ Immigration Act, ch. 551, §1, 26 Stat.1084 (1891). The bar on indentured workers reached so-called “imported” or “contract labor,” workers who came “under contract” and had their passage paid for by American employers or foreign labor brokers; these were seen as undercutting the U.S. labor market. Such indentured workers were often depicted as dependent “serfs.” If they lacked the grit and independence to make their own way to America, then they lacked the qualities that a liberal nation as well as a free labor market demanded. On classical legal liberalism’s views of free labor, see William Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985).

The worry about impoverished, “pauperized” immigrants was also stirred by stories – real and imagined – that Southern and Eastern European, Russian and Austro-Hungarian governments and charities, including particularly Jewish charities, were promoting and paying for emigration to be rid of their own paupers and misfits. See, e.g., Memorandum by John Gruenberg, Immigration Inspector at Ellis Island (1901), INS PAPERS, Reel 6, pp. 90-103. And this, in turn, prompted a measure addressing “assisted immigration.” Immigrants whose passage was paid or who were “assisted by others to come” were put to the burden of “show[ing] affirmatively” in an administrative hearing that they did not belong to “one of the foregoing excluded classes” (particularly persons “likely to become a public charge”). 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.* This measure and its interpretation would soon figure in Max Kohler’s lawyering on Ellis Island and in the federal courts. See infra ___ - ___.

²⁶ See Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905). 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, as inherently “servile” and dependent. 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.” *Id.*

²⁷ Reports of the Kishinev Pogrom of ‘03 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 Reform Jewish philanthropist and chief of Kuhn, Loeb and Company, the second largest investment banking house on Wall Street. As the leading financier among New York’s German-Jewish elite, Schiff was the United States’ nearest counterpart to Europe’s Baron de Hirsch and the Rothschild family. See COHEN, JACOB SCHIFF, *supra* ___ at 47. In Kishinev’s wake, Schiff, Marshall and other leaders of New York’s Reform Jewish elite set about expanding the network of agencies to assist Russian Jews, including deeply impoverished ones, with emigration.²⁷ See ROBERT A. ROCKAWAY, WORDS OF

provoked an intensification of racialized fear and loathing on the part of many patrician New Yorkers. The Commissioner of Ellis Island – a blue blood reformer, friend and appointee of President Roosevelt named William Williams – decided to push back. He tightened up the enforcement of various provisions like the bar on persons likely to become public charges, excluded attorneys and other advocates from the hearing rooms on Ellis Island, and began deporting hundreds of would-be Jewish emigrants weekly. Clashes erupted, and protest meetings were called. The Yiddish papers proclaimed: “Pity Is Unknown at Ellis Island; Severe Discipline”; “Russian Conditions Prevail; Only the Lash Is Wanting.” “Yesterday 250 Persons Detained in the Inquisition Bastille”; “Deported Number Thousands.” “The masses are rising against the tyranny on Ellis Island. The people of the East Side are planning to make a demonstration against the barbarous new interpretations of the immigration laws...[A] movement is now on foot...asking for the removal of Commissioner Williams” and demanding that the U.S. government formally protest against the pogroms and use its muscle to press the Tsar’s regime to halt them.²⁸

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

By the early 1900s, the new immigrants on the Lower East Side had built an impressive landscape of organizations – not only the Yiddish press; but hundreds of *landsmanschaftn* and a number of big and powerful socialist trade unions. Also afoot were some tiny new Zionist and

THE UPROOTED 27-28 (1998). See also COHEN, NOT FREE TO DESIST, *supra* note __, at 57.

²⁸ 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.

Jewish Nationalist outfits. They seized on the Kishinev crisis and the mass deportations at Ellis Island to call for a new national organization – a *Jewish Congress*, they dubbed it - to speak with one voice for all “American Israel” and bring the “Jewish people’s” demands to the White House. On the Upper West Side, the leadership of the Reform Jewish elite was thoroughly alarmed. Of course, it was essential to respond to the massacres in Russia and the deportations on Ellis Island. But the reckless crowd of radicals on the Lower East Side could not be allowed to speak for American Jewry.

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

Remember, late 19th century liberal constitutionalism prized formal legal equality and condemned “class legislation,” including laws that classified and burdened individuals on the basis of race, color, nationality, or creed. This harmonized perfectly with the Reform elite’s yearning to preserve what Jim Loeffler nicely calls Jews’ “legal invisibility” in America. The

flip side of this outlook was that Jews in America must maintain *a public-political invisibility*. Individual Jewish citizens should take a lively interest in American politics; but they must shun a Jewish group presence in politics or public life.

No wonder, Louis Marshall responded in high dudgeon to the Zionists' and Jewish nationalists' calls for a Jewish Congress. Wrote Marshall to his friend and soon-to-be fellow AJC founder, Cyrus Adler, "national organization is in the air and we should take the initiative and avoid mischief."²⁹ Adler concurred: "Shall we wait until the Russians push us aside and speak for all American Jewry, or shall we lead the movement and give it a sane and conservative tone?" At an emergency gathering of Upper West Side and Lower East Side notables, Marshall declared that any national organization must be "some kind of religious body"; it can't smack of Jewish "sovereignty" or Jewish "nationality" or "race." Those ideas were "inconsistent with the American conception of government" and threatened to give rise to "a Jewish question here" in America. Marshall read out language that would find its way into the new organization's charter: the AJC would set its face against "infringement of the civil and religious rights of Jews" and vowed to "alleviate the consequences of persecution."³⁰

Marshall was relieved when the clamor for a Jewish Congress subsided. And the AJC, under his leadership, positioned itself as the ideal outfit to engage in "quiet diplomacy," speaking behind the scenes in the corridors of power for American Jews and their oppressed "co-religionists" abroad. At the same time, Marshall, more firmly than most other patrician Reform Jewish leaders, already grasped that the future belonged to the new immigrants: their numbers

²⁹ "What I am trying to avoid more than anything else is, the creation of a political organization, one which will be looked upon as indicative of a purpose on the part of the Jews to recognize that they have interests different from those of other American citizens... We can, however, all unite for the purpose of aiding all Jews who are persecuted, or who are suffering from discrimination in any part of the world on account of their religious beliefs; and we can at the same time, unite for the purpose of ameliorating the condition of our brethren in faith, who are suffering from the effects of such persecution and discrimination..."

³⁰ THIRTY-FIFTH ANNUAL REPORT OF THE UNION OF AMERICAN HEBREW CONGREGATIONS at 6258 (1909)

and cultural and political energy made that certain. The uptown Reform elite's continued power, and even relevance, depended on coming to grips with the leaders and organizations of the Lower East Side and somehow incorporating them into its own projects and outlook.³¹

For the next quarter century, the uptown elite would entrust Marshall with the delicate task of formulating the terms of Reform Jews' major public political engagements as Jews, in ways that upheld the self-contradictory, but existentially necessary, fiction that these were not political engagements, but something else, intercessions as private citizens. Louis Marshall would set about finding the most cautious but effective ways of coming to grips with the Lower East Side and its dramatically different outlooks.³²

One Lower East Side Zionist called the Uptown Reform Jews, like Marshall, Kohler and Adler "faith Jews" and himself and his comrades "race Jews." Not surprising when poor Russian Jews were seen and saw themselves as racial outsiders, and, like many African American intellectuals and activists in this same era, were determined to make something positive out of that racial identity, even as they demanded that it not be used to exclude them from equal membership in the larger national community.

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

Not everything that Marshall and Kohler did in the pre-World War I era was quiet diplomacy and behind the scenes. Their classical liberal outlook had a militant aspect when it came to keeping the law free of racial classifications and assailing those in place, not only

³¹ M.M. SILVER, LOUIS MARSHALL AND THE RISE OF JEWISH ETHNICITY IN AMERICA: A BIOGRAPHY (2013).

³² Id.

regarding Jews but all racialized outcasts. Immigration law and its administration were where Jews' treasured legal invisibility was most threatened in this era, and Marshall and Kohler responded vigorously to every threat. They lobbied tirelessly in Congress to quell efforts to enact racial classifications and racial barriers against Jewish immigration. Enlisted by Lower East Side editors and attorneys, Kohler led the legal challenges to Commissioner Williams' new regulations in the hearing rooms at Ellis Island, and brought habeas suits in federal district court challenging them. Kohler assailed the whole constellation of Williams' substantive and procedural reforms, orchestrating a many-sided campaign of quiet diplomacy and loud protests, sophisticated lawyering, and intense lobbying to halt the "deportations" and turn back Williams' new regime as a species of "administrative lawlessness," "race prejudice" and persecution. This marked the beginning of two decades of litigation challenging efforts like Williams' to discourage mass emigration of Jews and other racial others from the Tsar's empire and work de facto racial barriers into the immigration law's administrative fabric.

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

bench. The young Learned Hand and the venerable Justice Holmes wrote opinions echoing Kohler's briefs and arguments, invoking "our constitutional heritage."

Kohler's militant and sophisticated advocacy in courts and the press collided with some of his AJC colleagues' rigid insistence on safeguarding Jews' legal invisibility and never conceding Jews were a race or a people. Kohler seized the nettle. He invoked the liberal Constitution's anti-classification principle, likening Jews to blacks and Asians – and disparaging *Plessy* and the Chinese Exclusion laws, as he condemned the immigration authorities classifying and ill-treating Jews as a race, and defended the Reform Jewish elite's organized efforts on their behalf. If the Czar's laws made Russia's Jews racial outsiders and brought state violence down on them, Kohler would demand special liberality on their behalf, as Jews. Drawing Jews' "racial identity" into public and legal discourse was inescapable, Kohler would point out, because Anti-Semitism here and abroad made it a social fact.

When the editors of *der Tog* and *Forverts* enlisted him in the '05 battle against Commissioner Williams, Max Kohner was already well equipped to handle the work. Max's first job after graduating from Columbia had been as an Assistant U.S. District Attorney, as they were then called, for the Southern District of New York. Soon after he began, 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 1898.³³ Max then left government to become a partner of Marshall's, and began representing Chinese immigrants facing deportations from New York.³⁴ Switching from prosecution to defense work was as common then as it is now. A number of

³³ *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.

³⁴ Statement of Max J. Kohler, Max J. Kohler, Box 1, Folder 5 (undated) (on file with the American Jewish Historical Society).

former Assistant U.S. District Attorneys who had prosecuted the Chinese Exclusion Law in San Francisco also took this route, working on retainer to the city's wealthy Chinese merchants.³⁵ By contrast, for the next three decades, Kohler would do his voluminous immigration work on behalf of Chinese, Jewish, "Arab" and "Slav" immigrants for free.³⁶

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

On the Bima at Temple Emmanuel on Fifth Avenue, while Max was still in law school, Rabbi Kohler gave a sermon on "The Wandering Jew"³⁷ that seemed to predict and prefigure his son's calling—and also answer a question that the Rabbi's own Platform of Reform Judaism had left hanging. Reform Jews were no longer a nation or people with a separate national destiny involving a return to Zion, and no longer bound by Jewish law, hewing only to Judaism's universal precepts. "Why then," asked Rabbi Kohler, would not Reform Jews "throw down" the "ragged mantle" of the eternal "wandering Jew" and "melt" and be "absorbed" into the larger gentile community? Why not convert? Why not intermarry? Why stay stubbornly apart? His answer was the "arduous" and "priestly" work of justice-seeking, which Jews had to do "for all humanity."³⁸ This, according to Rabbi Kohler, was the "mission mapped out by our great seers

³⁵ See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 70 (1995).

³⁶ 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...").

³⁷ See Rabbi Kaufman Kohler, *The Wandering Jew*, Address before Temple Beth-El (April 1, 1888) (American Jewish Historical Society, Box 1, Folder 4).

³⁸ See Rabbi Kaufman Kohler, *Wandering Jew*, Box 1, Folder 4 (1888) (on file with the American Jewish Historical Society).

of yore”—“the godly men . . . who consecrated their lives to the practice of the law.”³⁹ Only then, could the “priest-people” fulfill their destiny—scattered amongst the nations in order to “bring the Law forth from Zion,” not the old rabbinic law, but the moral law of the Constitution, “human rights” and “freedom.”⁴⁰

The “practice of law” was an oddly modern way to describe the work of pre-modern rabbis in rabbinic courts. But this was a distinctly modern, secular, and American re-interpretation of Jews’ “mission.” Reform Judaism was built around a new conception of Jews’ role in history: keeping Judaism’s rigorous monotheism and “universal ethics” alive among the nations of the world. But in the hands of Kaufman Kohler, this idea subtly changed register, into a more secular language of justice-seeking—from a calling to keep alive the religious sources of modern liberal ideals to a calling to pursue those ideals themselves. In this, one can sense a double movement: a secularization of religious commitments and a sacralization of a secular calling, a modernist mingling of religious and secular modes of thought and feeling, which Max Kohler was set to enact.

Here was a basis for renewing Jewish particularity—resisting “absorption” into the dominant community, affirming one’s ineradicable membership in a people apart and one’s solidarity with the despised others – but doing so as a member of a respected bourgeois profession and in terms of Enlightened, “universal” values enshrined in the U.S. Constitution. We can speculate: Without this, what exactly did one’s Jewishness amount to for an earnest and conscience-stricken, young lawyer praying in English in an elegant Fifth Avenue cathedral? Like his father’s modernized “Godly men of yore,” Max could “consecrate” himself “to the practice of the law” to bring “human rights and freedom” forth from Zion.

³⁹ KAUFFMAN KOHLER, *JEWISH THEOLOGY: SYSTEMATICALLY AND HISTORICALLY CONSIDERED* 346, 365 (1918).

⁴⁰ *Id.*

Representing racial outsiders before the nation's courts, Kohler, Marshall and other high-powered Jewish lawyers showed that Jews belonged in the temple of America's civic religion. Linking American Jewishness to defending the rights of racial others, they made expounding the Constitution's *universal* promises a way of affirming Jewish American *particularity*: as a justice-seeking people apart. Civil rights lawyering would prove a long-lived way for American Jews—and not only patrician Reform Jewish liberals, but new immigrant Russian and East European Jewish leftists too—to rise in the social order, becoming an insider, while remaining in some morally and imaginatively significant ways an outsider, publicly enacting one's solidarity with the outcast and the fallen, the stranger. For many, defending constitutional liberalism on behalf of outsiders would become the most meaningful and sometimes the sole public enactment of Jewish identity.

Diasporic Legal Imaginaries – Rehearsing the Jewish Constitutional Moment

The greatest challenge to this liberal Jewish civic religion, or even political theology, was the rise of Zionism and Jewish nationalism, which made their own claims on Jewish loyalties and offered their own visions of outfitting Jews for modernity and their own prescriptions for Jewish responses to anti-Semitism. For this reason, among others, the new immigrants “masses” on the Lower East Side did not make it easy for the uptown, patrician Reform Jews to represent them and advocate on their behalf – or preside over their Americanization.

By the early 1900s, we noted, the newcomers had built an impressive landscape of organizations, including some tiny Zionist and Jewish Nationalist outfits, which were a big thorn in Louis Marshall's side. In response to the pogroms in Russia and the tightening of

administrative barriers against the entry of “poor Hebrews” at Ellis Island, we saw how the nationalists started to call for a Jewish Congress. Small as they were, in comparison to the great socialist unions, the nationalist outfits had some sophisticated lawyer-leaders and even a constitutional vision and vocabulary of their own, one that envisioned group rights of communal autonomy and self-determination—in Palestine, of course, but also in the Diaspora, in Russia, and even in the United States.

When Louis Marshall and his fellow AJC founders fretted about getting “push[ed] aside” by “the Russians [claiming to] speak for all American Jewry,” it was Isaac Hourwich and his comrades who were doing the pushing. Their tiny organizations – like the New York branches of Poele Zion and the Algemeyner Yidisher Arbeter Bund [the Bund] – would remain tiny for another decade. Then, they suddenly became major players on the Jewish scene; their push became a shove, and their outlandish ideas about Jewish rights had to be addressed by the bourgeois liberal establishment and the big socialist unions, alike.

The catalyst would be the rage and anguish on the Lower East Side brought on by the war-time massacres and mass expulsions of Jews at the hands of the tsar’s armies. Beginning in 1914, pogroms that dwarfed Kishinev were being reported - slaughter and expulsions on scale not seen for centuries. What kind of political campaign would American Jews undertake against these catastrophes? Relief work was not enough. War-time pogroms dramatized that the bare right to life was insecure and would remain so, and the prospect of post-war treaty-making stirred hopes of transforming the legal status of Jews in the tsarist as well as the Hapsburg and Ottoman empires. What actions would American Jewry take against the tsar, to strike back, to demand rights? “How to save what could be saved now and gain what could be gained when war

ended,”⁴¹ and peace treaties, new maps, new states, new constitutions were drawn up? The yearning for action among the Jewish masses in New York and elsewhere, with friends and family in harm’s way, found no response from the established leadership and big organizations of either the uptown Reform Jewish elite or the downtown new immigrant working-class.

To be sure, Jewish diplomacy by Western “Hofjuden” on behalf of “Ostjuden” in Eastern Europe and Russia had an established tradition. Louis Marshall and the AJC could look back at their own successful efforts to prod the Congress and White House to terminate the nation’s trade treaty with Russia in 1911 in protest against official Anti-Semitism. Already in 1914, Max Kohler began assembling documents drawn from the Napoleonic Wars and from the Congress of Berlin. Marshall and Kohler were mindful, then, of the possibilities of post-war treaty-making. But it did not even occur to them to mobilize the Jewish masses.

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

⁴¹ Jonathan Frankel, “The Jewish Socialists and the American Jewish Congress Movement,” YIVO Annual XVI (1976), .

This was more than an instrumental calculation; the inhibitions against assertive Jewish politics ran deep. Few socialists questioned Marx's basic tenets: Jewishness as a social and cultural identity was irremediably narrow and tribal, steeped either in the benighted social ethics and customs of crumbling pre-industrial trades and callings, or, even worse, in the kind of capitalist selfishness that "Jewishness" signified in most of Western thought, including Marx's own. Jews, said Marx, had "eagerly contributed" to the triumph of their "worldly cult," "Haggling," and their "worldly God," "Money." "Jewishness" was not unique to Jews but pervasive in capitalist society, and "Jewishness" would vanish with the overthrow of capitalism.

As for Jewish "rights," they remained what Marx dubbed them in *On the Jewish Question*: better than nothing, in the sense that Jewish emancipation promised to put Jews on an equal plane with others in the alienated realm of spiritual affairs and the "formal" sphere of political equality; but worse than nothing, a snare and illusion, when it came to real human emancipation. Unlike socialism, liberalism left space for religious and other particularistic identities, in their proper, "private" place, in civil society. But orthodox socialism rested on rejecting and overcoming just this distinction. What place was there for Jewishness in this equation?

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

As arduous as it was to remake Jewishness into a “private faith” and mix it with classical liberal constitutionalism into a distinctive Jewish American identity, even more daunting was the gulf between Jewishness and Marxian socialism, to say nothing of the gulf between Marxian socialism and liberal constitutionalism. Yet, both had to be bridged to construct a Jewish/socialist/constitutional outlook and put it to work on the American scene. By 1915, Hourwich and his comrades had fashioned just such an outlook, which would take flight and gain a mass public following.

The Making of a Transnational Radical Constitutionalist

Understanding how that happened requires a closer look at Hourwich’s formation as a transnational lawyer-leader and at the construction of his constitutional imaginary, his legal-intellectual toolkit, and his social and political authority on the Lower East Side. That story begins in Minsk, where Hourwich grew up in Minsk in a free-thinking middle-class Jewish family. His parents did not send him to traditional yeshiva but to the city’s one modern Gymnasium. Despite harsh Jewish quotas, he got a spot at the empire’s leading university in St. Petersburg, where he was studying math and economics when a run-in with the Tsar’s secret police took him away.

In 1881 the interior ministry arrested the nineteen-year-old Hourwich and sentenced him by administrative process to five years exile and hard labor in Siberia. Hourwich had been an active member of the outlawed Social Revolutionary Party (champion of a joint peasant-worker revolution), since he was seventeen. The charges against the young revolutionary were menacing “social order and public tranquility” and “composing or circulating written...matter...question[ing] the integrity of the prerogatives of the Sovereign Power...or

audaciously...disapprov[ing] the form of government...established by the laws of the state.”

The evidence showed that Hourwich had organized study groups of students, workers and artisans, to read translations of John Stuart Mill and Karl Marx; and that he also had authored an essay entitled “What is Constitutionalism?” for the Social Revolutionaries’ underground publication *Land and Liberty*.⁴²

“Going to the people” was the Social Revolutionaries’ watchword for young intellectual-activists like Hourwich, and running study groups like this – to educate revolutionary cadres in political economy and prepare them to organize among the laboring classes - was the order of the day. But why “What is Constitutionalism?”? By the 1880s, as Hourwich would later recall, the autocratic Tsarist regime had brought upon itself not only “guerilla war” on the part of anarchists bent on political assassinations, along with dogged underground organizing among urban workers by socialist revolutionaries like the young Hourwich, but also the stirrings of a milder “bourgeois reform” movement of middle-class professionals demanding “political freedom” and “constitutional government.” The demand for constitutional government, however, “was against the orthodox doctrine of `socialism’ as it was then understood by the `pure Socialists, ’” like the teenage Hourwich.

We have no copy of the incriminating essay, which was confiscated before it reached the underground press, but according to Hourwich’s recollections, it proclaimed that demanding a political revolution without social and economic revolution was “mere political rainbow-chasing.” “It led to hobnobbing with the bourgeoisie; it turned the minds of the revolutionary youth [away] from Socialist propaganda among the common people...Had not the experience of

⁴² I. A. Hourwich, *Leaves from the Autobiography of a Russian Student, A Personal Narrative Which Casts Much light on the Present Troubles in St. Petersburg*, Frank Leslie’s Popular Monthly 281, 283 (July, 1901). George Kennan, *How Russia Loses Good Citizens*, *The Outlook*, 714, 715 __ ().

America, that Mecca of all [exiled and émigré] political radicals, demonstrated the futility of republican institutions without economic equality?...Sow the seeds of social revolution – never mind that the work be slow - a political revolution will follow as a result! – such was the credo of the ‘pure Socialist.’ Why, of course, I was opposed to the agitation for constitutional government!”⁴³

Hourwich remained a life-long socialist; in the U.S., he would translate large portions of Marx’s *Das Kapital* into Yiddish⁴⁴; would help found the New York chapter of Eugene Debs’s American Socialist Party as well as many other more short-lived socialist organizations; and would edit and write – in Russian, German, English and Yiddish - for dozens of socialist journals, popular and high-brow, revolutionary and reform-minded. But much as his teenage self might have prophesized, almost as soon as Hourwich arrived in America, he came to think better of constitutionalism, rights talk and republican institutions.

Meanwhile, his Siberian exile ended and, barred by the interior ministry from completing his degrees at St. Petersburg, Hourwich discovered that a venerable law school in the ancient town of Yaroslav required no official certificate of “political trustworthiness” of its Jewish applicants. So, the tireless scholar enrolled there, completed his legal studies, and was admitted to the bar. Returning to Minsk to practice law, in the late 1880s Hourwich resumed his radical activism. This time, he began organizing a pioneering network of Jewish “workers’ circles” to teach Marx to the politically engaged cadre of the city’s Jewish working class.⁴⁵

⁴³ Hourwich, *Leaves from the Autobiography*, supra note ___, at 2.

⁴⁴ Isaac Hourwich, *Oysgevehlte shriften* [Selected Writings], vols 2,3 (Dr. Isaac A. Hourwich Publication Committee, New York, 1916).

CITE TO SECTIONS OF DAS KAPITAL IN HIS SELECTED WRITINGS.

⁴⁵ Bear in mind, the Jewish working class dwelled not in Russia’s big cities, but in the towns of the Pale, where the great majority of Jews were compelled to live, along the empire’s western borders. Even in the larger towns or small cities, like Minsk, where Jews were more than half the population, they were barred from many trades, and mostly scraped by as peddlers and petty artisans. As the empire expanded and its

The Russified young revolutionary, Hourwich was equipped to teach Marxism to gentile Russian workers in St. Petersburg, but not to the Yiddish-speaking workers of Minsk, where the interior ministry's ban constrained him to practice law, inside the Pale - and where he set out to build the movement's first Jewish workers' circles. The solution seems obvious: learn Yiddish and translate Marx and Mill for the Jewish workers to read. But when it came to Jews, the Social Revolutionary Party line was fiercely assimilationist. Yiddish and Jewishness had to be stripped away. Jewishness was not only a backward, tribal identity (as well as an irremediably capitalistic one!), as Marx had said; but, since the Russian "people" were wildly anti-Semitic, Jewishness also was an intolerable obstacle to revolutionary solidarity. The task for Russified Jews like Hourwich was to grind Russian into their Yiddish-speaking recruits, remake them to be one with the Russian "people," and then, educate them in political economy *in Russian*.⁴⁶

population of poor and "backward" Jews grew, the Tsars and high imperial officials experimented with various strategies of ethnic cleansing, alternating encouragement of periodic slaughters or pogroms, and the laying on of new tax burdens and new occupational restrictions.

Poor as they were, most of the young men and a substantial portion of young women living in the Pale were taught Hebrew. But Hebrew was their ancient, religious tongue. Of modern languages, most of Russia's Jews knew little, if any, Russian; the Jewish masses spoke and read Yiddish, a language the Jewish elites spurned. Yiddish was a poor people's "jargon"; using the Hebrew alphabet, it mixed scraps of Hebrew with scraps of Russian, Slavic, German and other dialects. It was too meager and crude for any serious writing or "modern," "higher thinking." For the ordinary, poor Jew, though, this separate everyday language, the product of centuries of isolation and the result of Jews being the majority population and predominant community in the Pale, embodied a rich national-cultural heritage, difficult to imagine giving up. Having a language of one's own and living where it was the language of everyday life was one of many things that made the situation of the great mass of Russian and East European Jewry a different one from that of the Jews of Western Europe or the United States.

As the condition of the Jewish masses deteriorated over the course of the nineteenth century, the circumstances of Jewish elites improved, and their numbers grew. A handful belonged to the privileged elite of old banking and mercantile wealth, with ties to the imperial state. As elsewhere, members of this old elite served as the Jews' traditional interceders with the Tsar. They were the *Hofjuden* or *Shtadlodim*. By the end of the 19th century, a much larger and growing number of Jews belonged to the empire's new middle classes of university-educated professionals. Hourwich's parents were members of this modern, middle-class "Russified" minority, which constituted a new "third element" in Russian Jewish life. Like the old Jewish financial and mercantile elite, the new bourgeois professionals learned and spoke Russian and often also French and German; their offspring rarely heard Yiddish. Having accumulated some cultural capital, they sent their most gifted sons and daughters, like Hourwich, to universities outside the Pale; and they managed to rise as capitalists, academics, engineers, lawyers, doctors and reformist and revolutionary intellectuals, much like their counterparts in Western Europe and the U.S.

⁴⁶ See Isaac Hourwich, "Nationalism and Internationalism," Talk at Convention of Jewish National Workers, Buffalo, NY (July 11, 1915) ("Thirty years ago a socialist propaganda began among us in Minsk. We used Russian language. We organized study groups to teach Jewish workers to read and speak Russian; and then began to teach them socialism in Russian."), in Isaac Hourwich, *Selected Writings*, vol II (1921)(in Yiddish)

We have no evidence that Hourwich, at the time, questioned this. One thing Jewish revolutionaries like Hourwich had in common with their Enlightened liberal parents in the 1880s was the shared conviction that Jewish emancipation in Russia would follow a “Western” path of assimilation. Full membership in the larger society demanded erasing Jews’ social particularity and apartness in favor of a larger, “universal” identity: subsuming the Jew in the citizen for the liberal, and the Jew in the worker for the revolutionary. Liberal and socialist alike identified the remnants of a separate Jewish communal life with Jewish backwardness and oppression. Indeed, socialist orthodoxy demanded a more thoroughgoing assimilation, holding as it did that religion was the “opiate of the masses,” including the Jewish masses; and nationalisms too were opiates and diversions – and dangerous, divisive ones, for nationalism forged bonds between class enemies and fueled hatreds between the working classes of rival nations. If the Jewish liberal could embrace a modern, Enlightened Judaism, the Jewish socialist had to find her ethical compass entirely elsewhere, by casting her lot with the exploited working classes of *all* nations, the international proletariat, the prisoners of starvation, the wretched of the earth.

This orthodoxy was about to unravel. Hourwich, however, would not be there over the next critical decade of the 1890s, at least not in person. His revolutionary activities in Minsk had put the Tsar’s secret police back on his tail. This time, he eluded them and in 1890, he landed in New York. But even as he plunged into myriad radical currents and activities in the U.S., Hourwich would remain immersed in developments in Russia, actively contributing to the far-flung international networks and debates of Jewish nationalism and Marxist internationalism. Intellectually, imaginatively and politically, he lived in both worlds, a one-man transmitter of ideas across these transnational networks. Looking back, he would write that the American Jewish Congress movement of the 1910s had its origins in the Russian Jewish politics of the

1890s.⁴⁷ So, before we follow Hourwich to New York, we should take a look at the new ideas and organizations his Russian comrades forged in that decade.

During the 1890s, Jewish unions began to sprout up in the cities of the Pale. Composed chiefly of artisans in trades like tailoring, carpentry and weaving, these were skilled workers undergoing a slow, grinding version of the proletarianization that made radicals out of artisans throughout the industrializing world of the 19th century. Like hard-hit artisans everywhere, they were hungry for organization and taught themselves the art of waging a strike. A recently arrived worker from Vilna or Minsk, where strikes had taken hold, would bring to Bialystock the rudiments of holding a meeting, hammering out demands, and swearing an oath of solidarity (on the Torah). Soon it became possible to speak of a Jewish strike movement, although the early strikes rarely resulted in durable organizations; a seasoned trade unionist would say they were “spontaneous” and “undisciplined.”

At first, the young Jewish revolutionaries from the universities had little enough to offer. Their *métier* was not trade unionism but socialist education. It was designed to bring enlightenment, not to organize the work force. Even so, the circulation of socialist ideas helped imbue the strike movement with a special militancy, a vivid account of why the artisans’ circumstances were deteriorating, and a vision of a better day. The unions grew stronger, and by the mid-‘90s, an extraordinary proportion of the Jewish artisans of Vilna and Minsk were organized in radical unions. Yiddish was the language of union organizing, and the emergence of a “Jewish proletariat” led more and more student revolutionaries to spurn the socialist parties’ edicts in favor of the practical conclusion that if, like the young Hourwich in the 1880s, they didn’t know Yiddish, they ought to learn it. Familiarity bred affection, not only for the language but for the

⁴⁷ “The American Jewish Congress,” handwritten ms., n.d., Hourwich Papers, YIVO, Folder 59 (no box number)(in English).

culture which, willy-nilly, mingled socialist ideas with Jewish tropes, customs and “feelings.” Yeshiva students proved especially adept at tying socialism to Torah and Talmud.⁴⁸

At the same time, the emergence of a “Jewish proletariat” led artisan and middle-class revolutionaries alike to a greater immersion in Marxism, and with it, a greater emphasis on the class struggle at the workplace; the idea was that intensifying strikes and economic conflict would sooner or later draw the working class into revolutionary conflict with the Tsarist state. So, when the trade unionists of Vilna, the “cradle of the [Russian] Jewish labor movement,” convened a secret gathering of Jewish unionists from throughout Poland and Russia in 1897 to form the General Jewish Labor Bund, the aim was to found an underground Jewish social democratic (i.e., Marxist) party, uniting the Jewish proletariat and addressing the workers’ social and economic needs and interests *in their own language*.

As for Zionism and Jewish nationalism, however, the new organization was hostile, its official relationship to Yiddish an instrumental one. Even though nationalism and “national rights” (for Poles, Lithuanians, and other non-Russian groups inside the empire) were in the air in the late 1890s, the Bund’s founders kept their distance. “National rights” were no part of the party’s platform for its first few years. The Bund’s only “special [Jewish] demand” on the state was for civil equality, an end to Jews’ distinct legal disabilities: Jewish emancipation, in other words, still in its classic liberal mold. Likewise, the Bund’s founding convention treated the use of Yiddish as indispensable but *temporary*. Ultimately, the founders hoped, the Jewish proletariat would learn Russian and meld with the whole of the Russian proletariat: much as the Jewish socialists in New York created a vibrant Yiddish-language press and labor movement, all the while treating Yiddish as a transitional medium, like a temporary foreign tongue in an English-

⁴⁸ On the revolutionary yeshiva students, see Eliyahu Stern, *Jewish Materialism* (2018).

as-a-second-language classroom, as they urged new immigrants to master English and join forces with the “American working class.”

As we’ve glimpsed, this principled socialist hostility toward Jewish nationalism would prove more enduring in New York. In Vilna and Minsk, it swiftly eroded. From the start, there were nationalist voices in the Bund. As soon as the organization launched its own underground journal, the *Yiddisher Arbeiter*, some contributors expressed the nationalist sentiments percolating among middle-class teachers and provincial intellectuals as well as working-class activists by the late ‘90s; they cast the Bund as the proletarian liberator of the Jewish nation. The most full-throated and fully theorized expressions of this outlook in the new journal came not from a card-carrying Bundist, but in contributions by a childhood friend and Social Revolutionary comrade of Hourwich’s, Chaim Zhitlowsky.

Sometimes in Minsk, sometimes out of harm’s way in Switzerland, Zhitlowsky used his prosperous and sympathetic bourgeois father’s support to campaign against the Social Revolutionaries’ obnoxious Party line. For a bourgeois Jew, Zhitlowsky’s father had an unusual affection for Yiddish, which he imparted to his radical son, who rebelled against the Party’s efforts to force Jews to abandon their own language. In addition to Yiddish, Zhitlowsky had a doctorate in philosophy and a gift for theory. His outrage led to a critical insight. The supposed cosmopolitanism and internationalism of the socialist leaders who decreed that Jews sacrifice their language were nothing but a veiled form of Russian chauvinism, just as all such assimilationist demands were not truly universalist, but a masked particularism.⁴⁹ Yiddish, not Russian, was the language of Jewish socialism, and Zhitlowsky built up a theory of modern

⁴⁹ Chaim Zhitlowsky, “Socialism and the Jewish Question” (1899); “The national question and socialism” (1899).

socialist Jewish national identity resting on *Yiddishkeit*. Linguistic renaissance, after all, was the currency of modern nationalist movements like the Irish. Why not Yiddish?

In 1898, Zhitlowsky wrote for the *Yiddisher Arbeiter* one of his first treatments of *yidische kultur*. The main burden of the essay, “Zionism or Socialism,” was to show up Zionism as a pipedream, unable to meet the crying needs of the Jewish masses. As for the Zionists’ dream of reviving Hebrew as a modern, spoken language, that too was fantasy. Not Hebrew but Yiddish was Russian Jewry’s “national language.” Zhitlowsky evoked a brave new world of Yiddish poetry and drama, Yiddish belles lettres and Yiddish universities. He concluded his article with an ode and a vision: Yiddish is “to us as dear and holy as German is to the Germans, Russian to the Russians, and Hebrew to the old-fashioned Jews.”

Probably, few Bundists thought Yiddish holy. Still they agreed with Zhitlowsky: the only sane way to draw Jews into revolutionary struggle was as a “national unit,” speaking their own language. How else would the Jewish masses participate in public life, save via the only language they knew? How would they gain self-esteem as equal citizens, being dinned at by Russianizers? The assimilationists yearned for “amalgamation with the Greater Russian nationality,” but what was worth struggling for, as Zhitlowsky put it, was “a free and equal union with all the peoples” inhabiting Russia. Zhitlowsky seemed to have a compelling point: “If all the nationalities in Russia, anticipating a constitution, demand autonomy, we must stand aloof...[S]o long as we are a nation we must demand national rights...we must be privileged equally with all nations.”

Zhitlowsky’s writing and speeches helped soften Bundists’ opposition to Jewish nationalism and warm them to his emergent constitutional vision. As the Bund itself officially resolved in 1901, Russia must topple the Tsars and be reconstituted into a socialist “federation of

nationalities with full national autonomy for each, regardless of the territory it occupies... The concept of ‘nationality,’” the Bund now declared, “should also apply to the Jewish people.” Other Jewish socialists were arriving at similar insights and so were some liberal Jewish reformers. Soon, improbably, these ideas would enter the mainstream of Jewish life and gain mass followings, first in Russia, and then, later, in the U.S. Hourwich would team up with Zhitlowsky in both arenas and supply the lawyer-leadership to make it so. But first, we must pick up Hourwich where we left him in 1890, lighting out to America, “that Mecca of all political radicals.”

Hourwich in America

Hourwich arrived with more cultural capital than most. Immigration was his scholarly ticket as well as his social identity. He had put his economics and statistics to work during his Siberian exile to produce a pioneering book on peasant immigration to that part of the empire⁵⁰; it caught the eye of Columbia University’s leading Russianist (and father of the famous diplomat) George Kennan, who sponsored Hourwich’s enrollment. By 1893, Hourwich had completed a dissertation on *The Economics of the Russian Village* about property and class formation in the Russian countryside, which won him a teaching post at the University of Chicago. But mid-1890s Chicago was a hub of immigrant and native-born labor radicalism. Its leading unions had taken up the socialist banner, and talk of a farmer-labor alliance and an America remade into a Cooperative Commonwealth inspired Professor Hourwich to join the People’s Party, which seemed the Social Revolutionary peasant-worker movement reborn above-ground in free

⁵⁰ Isaac Hourwich, *Peasant Immigration to Siberia* (1888)(in Russian).

American air. The University promptly fired the émigré “populist revolutionary,” and his academic career was cut short again.

Returning to New York, Hourwich resumed his second career, as a lawyer. At the same time, he turned his statistics to account, commuting to Washington, where he landed a job as a high-powered (though low-paid) number cruncher for the Bureau of Mines and later the Census Bureau, where he became a leading expert on immigration. He became the very model of Holmes’s modern lawyer, a “man of the law” who was also a “man of numbers.”⁵¹ With his law partner Meyer London, who became New York’s first socialist Congressman, Hourwich helped found the New York chapter of Eugene Debs’s new American Socialist Party,⁵² and began representing some of the burgeoning socialist garment workers’ unions, as they waged tumultuous general strikes, challenged and defied the courts’ anti-strike decrees, and, over the next decade, fashioned pioneering trade agreements.

For a few tumultuous years before World War I, Hourwich would serve as the much loved (and hated) lawyer-leader of the vast New York Local of the International Ladies Garment Workers Union (ILGWU). In that role, he helped fashion the country’s first great experiment in mutually recognized “group rights” and what would later be called “mature collective bargaining” between a powerful industrial union and an employers’ association. Hourwich worked in intimate conflict and testy cooperation with both Louis Marshall and, especially, Louis Brandeis

⁵¹ O.W. Holmes, “The Path of the Law”

⁵² The archives contain a draft of the New York Chapter’s founding Manifesto in Hourwich’s handwriting. Already in 1897, it reveals a mastery of Debsian labor republicanism and proto-Progressive municipal reform ideology. Hourwich melds his Marxism to traditional American republican political economy – formal legal equality is no safeguard against oppression; hirelings are dependent “wage slaves”; only “abolition of the wages system” and a recuperation of labor’s ownership of productive property will restore workingmen’s political independence and full standing as citizens – cast by Hourwich in both the Populist/Debsian language of “cooperative commonwealth” and the Marxian terms of workers’ ownership of “the means of production.” Hourwich also slyly folds into the Manifesto his Marxist “revisionism”: in America, social revolution can unfold without violent seizure of the state and capital. This will require enlisting middle class elements into the socialist camp. Only a cross-class urban coalition can overcome the corporate/party boss alliance and push through municipal ownership of public utilities. Only a super-majority can amend the Constitution to allow nationalization of major transportation and other monopoly industries!

in crafting the “Protocol of [Jewish labor-capital] Peace.” The experience brought Brandeis into close contact with New York’s working-class Jewish socialism and Zionism for the first time. It also provides a fine-grained study in both the radical-democratic and the bureaucratic-managerial dimensions of labor “group rights,” a study in which Hourwich and Brandeis play central roles.

As Hourwich would tell the Congressional Commission on Industrial Relations, “Brandeis is the [mainstream middle-class Progressive] People’s Lawyer. I am the [radical democratic socialist] lawyer of the oppressed.” Hourwich insisted on the most radical democratic interpretations and design choices for the collective agreement, its institutional machinery and group rights provisions; Brandeis’s approach was top-down and managerial-minded. Their clashes were epic and revealing, as the book-in-progress will show. Also, as we will see, Hourwich (as well as later Jewish nationalist/social democratic thinkers like Felix Frankfurter and Alexander Pekelis) would draw many supple analogies between labor group rights and ethno-racial group rights.

As a man of numbers, meanwhile, Hourwich used his post at the Census Bureau to cull and construct data on the American class structure. He produced articles for scholarly publications, as well as for socialist journals here and abroad, making the “revisionist” case that the proletariat would never constitute a majority in the U.S., and therefore, bringing socialism to America would require a farmer-labor/working-class/middle class alliance.

It was as a sophisticated statistician and expert on the economics of immigration and labor markets that Louis Marshall, Jacob Schiff and the AJC first engaged Hourwich. The occasion was Congress’s publication in 1911 of the massive forty-two volume Dillingham Commission Report on Immigration. The gist of the Dillingham Commission’s findings was that the new immigrant “races” – the “Polish and Russian Jews,” Southern Italians, Slavs, Greeks and other

racial others from the peripheries of Europe – were filling the nation’s jails, “congesting” its cities, and above all, swamping its labor markets and bringing down the wages and standards of living of native-born workers. The open door needed to be shut with harsh new immigration restrictions and “racial quotas.”

Schiff and Marshall hired Hourwich to produce a scholarly monograph rebutting these arguments – basing the counter-arguments not on sentiment, but facts and numbers from the Report itself. This he did, in bravura style. With a mastery of institutional economics and Progressive tropes, a blend of sophisticated statistics and Marxian insight and a small office full of number-crunchers paid by Schiff, Hourwich made an “economic case” for keeping the door open. The great bulk of new immigrant workers, Hourwich showed, occupied the lowest strata of the nation’s industrial labor markets, forming a low-wage labor supply for industrial expansion and creating a vast number of well-paid jobs higher up the ladder for the native-born working class. Even in the low-wage sectors, Hourwich argued, new immigrants were not crowding out internal migrants from the American countryside. Closing the door on new immigration would only drive American capital abroad.

Hourwich’s *Immigration and Labor: the Economic Aspects of European Immigration to the United States* (1912) became his one famous book, and the only work of his historians recognize today. But the reason Hourwich was greeted on the NY streets as “the professor” is because every year, beginning in 1897, he turned out dozens of vivid essays that contemporaries said were the “Jewish masses” – or at least the mass readership of the Yiddish papers – “main introductions” to American law and politics, history, government and political economy. 1897 was the year Abraham Cahan launched the *Forvert* and hired Hourwich as a principal contributor. Thrilled with this new mass mediated mode of going to the People, the polyglot

Hourwich learned Yiddish on the fly, writing at first in Western characters, which Cahan transposed.⁵³

By the 1900s, Hourwich was writing for several of the dailies - *Forvert*, *Freiheit*, *Arbeiter Simme*, *Die Wahrheit*. He had an uncanny knack of grabbing hold of the central insights, idioms and analytical tools of Progressive American jurisprudence, institutional economics, political science, sociology and muckraking journalism, while remaining, at the same time, immersed in the far-flung international networks and debates of Jewish nationalism and Marxist internationalism. He put Torah stories and Yiddish folk sayings, along with Yankee colloquialisms, to work to produce pungent, accessible articles about Tom Paine and James Madison, the Federalists and Anti-Federalists, the federal courts and the labor injunction, the trusts and anti-trust; about American cities' political machines, the dynamics of American party conventions and the machinations of party bosses, and about the latest word on electoral reforms like proportional representation, fusion tickets and direct democracy, along with the conflicts amongst IWW syndicalism, Debsian socialism, and AFL voluntarism. From Hourwich, the new immigrants also got Yiddish translations of Marx and reports on the newly founded Bund, Poale Zion and the intricate debates in the exiled and underground Russian press between Jewish socialist nationalism and orthodox socialist internationalism.

Lower East Side trade unionists would introduce Hourwich as “the smartest Jew in New York.”⁵⁴ Unlike the union leaders, however, or Abe Cahan, or any of the other leading lights of the Lower East Side socialist world, Hourwich was drawn to the offbeat, new currents of

⁵³ Melech Epstein, *Profiles of Eleven*, at

⁵⁴ Hyman Berman, “Era of the Protocol: A Chapter in the History of the International Ladies' Garment Workers' Union, 1910–1916” (Ph.D. diss., Columbia University, 1956), .

socialist Jewish nationalism circulating around the edges of international socialism during the late '90s and early 1900s. Teased for his “thinly disguised nostalgia for Russia,”⁵⁵ Hourwich remained steeped in Russian Jewish socialist politics, reading, inter alia, the obscure *Yiddisher Arbeiter*, and following the thinking of his friend Zhitlowsky and the evolution of the Bund. Thousands of miles from Minsk, his thinking evolved in tandem with it.

By 1903-04, Hourwich was dispatching bundles of Yiddish socialist and anarchist papers to Russia, where the Yiddish press was outlawed and underground publications scanty. Hourwich's mailings were not merely propaganda but prized prefigurations of what a flourishing radical Jewish public sphere might be like. In exchange, Zhitlowsky and the Bund provided Hourwich with an intellectual passageway for a union of international socialism and Jewish nationalism, when socialist orthodoxy remained unchallenged in New York.

So much more invested in Russian politics, Hourwich saw continuities between New York experience and the circumstances that brought forth Jewish nationalism in Russia, where most of his New York comrades saw only the obvious, stark differences: pogroms, disenfranchisement, legal ghetto-ization and other special legal disabilities, no education in Russian, just for starters. True, the Yiddish socialist press and Yiddish-speaking unions, clubs and associations they had fashioned in New York were great achievements, but still, at bottom, simply way-stations to merging with the “American working class.” Hourwich was coming to see them as something more – a “national movement.”

Consider the first stirrings of Jewish socialism in the Pale, he later told a union convention in a talk on Jewish nationalism in Buffalo, New York. Hourwich had been there. When “we began socialist agitation..., [w]e used the Russian language,” even in Minsk. But then, with the Bund

⁵⁵ Melech Epstein, *Profiles of Eleven* 256 (1965).

there “began a true mass movement [and] it went over to Yiddish.” The “same has happened here in the United States.” Hourwich had been here too. When we led New York’s “first general strikes” of cloak makers and garment workers in the early 1890s, we had “[n]o time to learn to speak Yiddish.” Soon though, “socialists and anarchists realized the need to establish the *Arbeiter Zeitung* and *Frei Arbeiter Stimme* as means for propaganda.” But thanks to the freer “cultural milieu in the United States,” they were proving more than that, “open[ning] up for the Jewish masses the possibility to benefit from human culture...a press, literature, theater, clubs, unions and parties in Yiddish.” We “do-ers were not ourselves clear that we were creating a national movement. ‘In the beginning was the act’; consciousness came later – just as the up and coming bourgeois in Moliere spoke prose not knowing it was so.”⁵⁶ As surely as in Minsk, Yiddish remained the new immigrant working class’s entry into a larger world of culture and politics. As long as the U.S. continued to let “poor Russian Jews” pour into the Lower East Side, and did not welcome them “to marry shikshas in Rockaway,” it would remain so - “for a few generations, at least.”

What exactly did Hourwich mean by a “national movement” in the making on the Lower East Side? His thoughts were just forming. In a cultural register, a “national movement” meant something like what black, Italian, and Polish nationalisms were coming to mean for other ethno-racial others, amid mounting anti-black and anti-immigrant racism and nativism. A “national movement” implied a politics of recognition, of group differences as sources of pride, not shame. A proud, assertive Jewish politics also might assail brewing anti-Semitic nativism more effectively than the discrete uptown elite’s intercessions. A “national” politics could put clout

⁵⁶ “Nationalism and Internationalism,” supra note __.

behind the elite's quiet pleas that America act against the Tsar's open toleration of a new wave of pogroms, devastating Jewish communities in the Pale, beginning with Kishinev in 1903.

Quite apart from all this, there was Hourwich's restless intellectual engagement with all things Russian and radical, his sense of self as part of an international conversation, writing for all manner of publications – scholarly and political – in the U.S. and abroad, making his own interventions, while serving as the Yiddish public's chief interpreter of the latest developments. Thus, along with Zhitlowsky and the Jewish nationalist thinkers in the Bund, Hourwich was on the look-out for tools and materials for building out the framework of this emergent new diasporic Jewish nationalism. Developments in the Hapsburg Empire of Austria Hungary grabbed their attention.

The late 1890s and early 1900s were a moment of heightening nationalist agitation. The vision of new independent nation states arising out of the hoped-for overthrow of empire animated most of this nationalism. This was a seedbed of Russian Zionists' dream of a Jewish homeland and nation state in Palestine. But Hourwich and Zhitlowsky took inspiration from more heterodox Austrian legal thinkers, who hoped to see Austria-Hungary reconstituted not as a welter of independent nation states but as a big, federated commonwealth of multiple nationalities, whose constitution would vouchsafe “the most complete equality of rights for all languages and nations.”

The Hapsburg Empire was hardly a liberal democracy, but it had a parliament and, compared to Russia, a relatively free political life and an abundance of nationalist-minded parties and politicians amongst its subordinated ethnic groups. It also had a robust, above-ground Social Democratic [Marxist socialist] Party [the SDP], whose leaders worried that the constant fiery appeals of nationalist politicians and the ethnic strife they stoked up were diverting the empire's

workers from the class struggle and their destiny as a united proletariat. So, in 1897 the Austrian SDP reorganized itself as a federation of national groupings. The party cast its new federated structure as the model for constitutional transformation of the empire itself, calling for a constitutional federation of nationalities, with self-governing geographic regions – constituted as semi-autonomous national units for the Czechs, the Slovaks, and so on.

This was a sharp departure from socialist orthodoxy, a far more serious reckoning with the National Question than any socialist party had ever undertaken. The SDP leadership believed it had put the National Question to rest. But the constitutional blueprint brought forth protests from members of ethnic groups destined to become national minorities in the geographic regions that larger or more concentrated national groups fancied they would govern.⁵⁷ With the nationality problem still up for grabs, the SDP's legal theorists went to work, focusing on the novel notion of scrapping the idea of a geographic federation of nationalities in favor of a non-territorial-based federation.

Karl Renner was an Austrian Marxist and jurist, and a founder of sociological jurisprudence on the continent; he would go on to become a leading Social Democratic politician. In "State and Nation" (1899), Renner offered a first jurisprudential take on the kind of arrangements Zhitlowsky and his Bundist comrades had begun to envision for the constitution of a post-revolutionary Russia. Addressing many of the same dilemmas (and in Marxian terms, to boot), Renner's work provided some conceptual tools and legal analogies.

By Renner's lights, nationalist feelings were, at bottom, expressions of class antagonisms and frustrations, but feelings too deep-seated and too entangled with language and other cultural

⁵⁷ South Slavs, for example, began to press for decoupling national autonomy from territory. "We have to make it clear that equality of rights is possible only if the nation is defined not as the population living in one territory but as the sum total of all individuals claiming a particular nationality."

differences to be ignored. Aiming to break up the Hapsburg Empire into separate nation states, nationalist movements rested on the “territorial principle,” and that principle could “only produce struggle and oppression” of the “minority by the majority.” Why, for example, did the “Young Czechs” want to break off “their” homeland? “Because [doing so] guarantees them domination of the minorities” there. The territorial principle’s “essence” was “domination” and “not equal rights.” The solution was to recognize nations as non-territorial legal entities within a multi-national state – and at the same time to restrict these non-territorial nation’s jurisdictions to their proper domains of language and culture. “The nations,” wrote Renner, “should be constituted not as territorial entities but as personal associations, not as states but as peoples...equipped with rights and responsibilities, [so] that in every part of the empire every member of a nation enjoys...the protection of his nation and bears its burdens and obligations.”

The analogy was to religious denominations. We take it for granted that in one geographic place, “two and often three denominations are represented, each of which forms...a corporation under public law and a religious community. Each has its own board, its own property, its own institutions for instruction and charity, each conducts state business as a self-administrative entity in its assigned sphere of activity.”⁵⁸ Just as the denomination was “a personal association of those sharing the same belief,” so the nation, in this imagined legal dispensation, would constitute “a personal association of those sharing a way of thinking and speaking”: “Each nationality occupied with internal consolidation...concerned about the promotion of its own education system, its national literature and its national art; each master of its members, master

⁵⁸ With regard to individual’s liberty to depart from a religious denomination, so it should be with respect to nations, in Renner’s account. The individual must enjoy the freedom to choose and declare a national affiliation. Just what criteria – beyond the willingness to speak that nation’s language and send children to its schools - were allowable for “national” officials to admit or exclude would-be members, Renner did not address, but other pluralists would. And just what should become of “others” who either preferred to belong to no nation in particular, or felt ties to more than one, was another question left dangling, or answered with the observation that they would willy-nilly find themselves speaking the dominant language and sending their offspring to the dominant schools in a given community.

of its own resources. Who could doubt that national existence, rather than exhausting itself in the struggle with other nations, would necessarily look inward and deepen?”⁵⁹

Renner supplied the Russian Jewish socialist nationalists with some useful tools. What were Jews, after all, but the non-territorial nation *par excellence*? They made modifications on the Austrian’s work. Zhitlowsky imagined a more ample jurisdiction for national self-rule – welfare and immigration, as well as education, language and culture. Hourwich, ever more attuned to the coercive pitfalls of (even a supposedly ethical, pacific) nationalism, began to worry about the rights of the individual to opt out of (or opt into) his or her national-cultural order.

But their most important modification was including Jews in the category of national minorities at all! Renner passed over the Jewish Question in silence. His Jewish comrade and fellow Marxian jurist in the Austrian SDP, Otto Bauer did not. Jews, Bauer acknowledged, were indeed a national community; but their archaic, anomalous economic roles destined them for extinction. Meanwhile, they were merely an irritant to the “Aryan” working class.

⁵⁹ The apt analogy and pacific vision notwithstanding, Renner reckoned that many legal thinkers would find the idea of extending such group rights to nations unsettling. To them, Renner, as a sociological jurisprude, pointed out that groups were everywhere growing in significance, over against individuals, as the main units of modern social and economic life; new group rights were being fashioned in commercial law, in labor and industrial codes, and so on. “And yet, as far as the legal system is concerned, the most important groups for our state system, the nationalities, still constitute transcendental natural entities that do not fit into the civil garments of state legislation.”

Repeating the same point in more theoretical terms, Renner turned to the organicist, evolutionary tropes prevailing among advanced legal and social thinkers (on both sides of the Atlantic). A sociologically informed, “progressive” jurisprudence, must discern and support the natural logic of social evolution. “If it is a law of organic development that a particular organ is produced from the general organism for each separate function, then the people as a constitutional unit, as a totality of material and social interests, and the nations as cultural and spiritual communities, also require separate organs for their separate functions.” These “separate organs,” in turn, required legal recognition and legal rights tailored to their distinct functions within the broader constitutional framework of a multi-national society of equal citizens.

When we come to Louis Brandeis’s ready embrace of the language of group rights for Jews and other “national minorities,” it will be useful to reflect that, while he got the inspiration and vocabulary from Jewish nationalists, his thinking also ran along a path like Renner’s. Progressive jurisprudence was a transatlantic enterprise. Like Renner, Brandeis was keenly aware – indeed, he contributed to the development – of new kinds of group rights in various areas of private law, including labor. And like Renner and the mainstream of “modern,” reform-minded jurists on both sides of the Atlantic, Brandeis believed that one hallmark of modern legal thought was attending to “the social” and making instrumental use of private and public law in its governance. One axiom of this broadly anti-formalist, anti-classical-liberal, “social”-minded school of legal thought, in turn, was that groups were natural and practically indispensable elements of social life, and law must recognize and regulate them as rights-bearers. So, when each jurist confronted the Nationality Problem, it seemed common sense that governing cultural difference in a progressive spirit might demand group rights, just like governing labor-capital relations and other realms.

The idea that groups were natural entities, which law should recognize – overcoming the hostility of classical legal liberalism toward intermediate forms of corporate authority and association between state and individual – animated much of the writings of two of the era’s great legal historians whose work Brandeis admired: Frederick Maitland who traced the history of corporations and other “group forms” through centuries of English law; and Otto Von Gierke who did the same with German law. Brandeis might well have seen a similar spirit animating the Russian Jewish socialists like Hourwich and Zhitlowsky, and even more so, the non-socialist, liberal Russian Diasporic Jewish nationalist Simon Dubnow’s brilliantly detailed histories of the medieval and early modern Kahal and other corporate forms of Jewish life, which Dubnow hoped to see rebuilt in a modern style.

Renner's silence and Bauer's shibboleths came as no surprise. You picked up your concepts where you found them and put them to new uses. Events in Russia, however, suddenly demanded more concrete, even urgent, constitutional imagining. In 1905, a democratic revolution broke out in the Tsar's empire. Tragically, in little more than a year, it would be put down. However, the Russian Revolution of 1905 provided a dress rehearsal for the constitutional ideas and politics the transnational diasporic network of Jewish nationalism brought to their American campaign a decade later.

The Russian Revolution of 1905 – A Dress Rehearsal for the Jewish Constitutional Moment in America

Like many revolutions before and since, this one was brought on by costly military defeat. Russia's autocracy tottered in the midst of disastrous defeat at the hands of Japan. A liberal Minister of the Interior appealed for "mutual trust" between government and people. He relaxed rigid press censorship, encouraged petitions for reform, and tolerated meetings of banned political associations. This brought out liberal and socialist reformers and revolutionaries, calling for national assemblies and general strikes. The Tsar and military stepped in, to stem reform. Troops fired on a procession of striking workers carrying a petition to the Tsar; and this "Bloody Sunday" in January, '05, aroused a wave of militant action from peasant, working-class, and middle-class associations alike. Organized as federations across Russia – radical unions of doctors, lawyers, and engineers along with the All-Russian Peasants Union and the St. Petersburg Council of Workmen's Delegates, and hosts of socialist and liberal ethnic associations, including the illegal, but impressively large, Jewish socialist Bund - all participated in the general strike of October 1905, compelling the Tsar to proclaim a new era of

civic freedom, the calling of a national parliament, the Duma, and preparations for constitution-making.

Over the previous decade, liberal professional, as well as radical agrarian and proletarian associations of many ethnic and ideological stripes, had been debating – in staid and tolerated liberal publications and assemblies and underground “samizdat” and clandestine meetings – the terms of a new constitution to usher Russia into some kind of (liberal or social democratic) modernity. Now, issues like central versus provincial power, forms of minority representation and self-rule, and individual versus group or nationality rights all took on sudden immediacy.

For the first time in Russian history, ordinary Jews were thrust on to the public, political stage and had to consider just what rights Jews wanted in a new democratic Russia, which seemed, briefly, to be in the making. Bundists and other socialists and nationalists, and nationalist socialists, like Zhitlowsky came out of exile and above ground. Isaac Hourwich rushed back from New York to Russia. Both men would end up running for the Duma.

The most striking thing about Russia’s short-lived revolutionary moment as far as Jewish politics were concerned was how overwhelmingly ordinary Russian Jews were drawn *not* to the programmatic outlooks on offer from the bourgeois Jewish liberals or the orthodox socialists but to the heterodox constitutional ideas of socialist Zionists and Diasporic nationalists, whose platforms demanded not only Jewish emancipation, the inherited formula of civil and political equality, but also new-model “national” or group rights, proportionate representation in provincial and national assemblies, and various forms of autonomous social and cultural group self-governance. While their “ultimate goal” was a Jewish homeland, the socialist Zionists (Poele Zion) had the most ambitious constitutional blueprint. Zhitlowsky had shifted allegiances to this outfit, and had a hand in the blueprint, which called for Jews and “all national minorities”

to enjoy extensive language rights; proportional representation in all legislative bodies; and also legislative bodies and taxing authority of their own, along with a proportionate share of the broader Russian fisc for their respective educational, health and welfare, emigration agencies, and religious institutions. As for who belonged to the “nation,” Poete Zion opted for an opt-out system. Each Jew who did not report that she wished to withdraw would be deemed a member. The middle-class, liberal Diasporic nationalists, like Dubnow and his followers had a similarly far-ranging plan, while the Bund and Hourwich, for his part, had a more modest program. They were staunchly in favor of “national rights” but cast them simply as language rights and full educational and cultural autonomy.

Most revealing was the trajectory of the most Russified, bourgeois liberal Jewish actors, like the prominent attorney, Maksim Vinaver, known, disparagingly, in the New York Yiddish press as the “Russian Louis Marshall.” Vinaver and his network were associated with the Kadet or Constitutional Democratic Party, comprised of gentile and Jewish liberals alike, advocating for a constitutional monarchy like Great Britain’s, and Jewish emancipation along classical liberal lines. Vinaver was dismayed by the upwelling of Jewish parties like Poete Zion and the Bund; they threatened to stamp Jews as “aliens among Russia’s peoples.”

Vinaver watched as Zhitlowsky and Dubnow and their attention-grabbing new parties began to agitate for constitutional provisions that secured Jewish “national autonomy” via supposedly modern and democratic forms of the “medieval” institutions of Jewish corporate self-rule. Vinaver denounced them for conjuring with “a new type of Ghetto in the form of a compulsory national union, which has not as yet been tried anywhere, which has been reared only in theory...and that [aims to]...direct the entire spiritual and cultural life of the nation.”

Zhitlowsky, Dubnow and even Hourwich returned the favor by denouncing Vinaver and his liberal ilk as rank “assimilationists.”

The timing was on the nationalists’ side. The Duma elections and the intensive preparations for constitution-making came on the heels of Kishinev and other gruesome pogroms in 1903-’04. Among millions of ordinary Jews, these generated outrage at Russian Jewry’s traditional interceders with the imperial government for doing so little. The violence and the passivity also pushed hosts of hitherto assimilationist-minded radical Jewish intellectuals into rethinking their anti-nationalist outlooks. Wrote Jabotinsky, “the slaughter of Kishinev played an enormous role in our social consciousness...[it] turned our attention to Jewish cowardice” and to the question whether the old formula of civil equality was “enough.”

So, just as the constitutional moment came for Jews to participate in general Russian politics, nationalism and the ethos of communal self-assertion were gaining ground. Maksim Vinaver and other prominent Jewish liberals hoped to head off the new nationalist parties and bring matters under control by organizing a new Verein or Union for Achieving Full Rights for the Jewish People in Russia. The idea was to create an umbrella organization for all the Jewish liberal and socialist parties and groupings to hammer out a common platform of Jewish demands. As the Verein’s meetings unfolded, all agreed on the removal of special restrictions, taxes and disabilities and equal civil and political rights. Vinaver repeatedly pointed out that securing civil and political liberty would enable Jews “individually or in voluntary union to work out that type of national cultural institutions which will accord with their needs”; they would have the freedom to found their own schools and so on. All by dint of the classical liberal program of individual rights. It was Louis Marshall’s and the AJC’s outlook in a nutshell.

But the ferment in favor of national rights was so great that even the “Russian Louis Marshall” found himself compelled to include national rights in the common platform. By election time, the platform called for: “civil, political and national rights for the Jewish people in Russia” and “the freedom of national-cultural self-determination in all its manifestations” – “a comprehensive Kehilla-autonomy, freedom of language and of school education.” Even this express affirmation of group autonomy was not nearly enough for Poete Zion or Dubnow’s party, which continued to call for a national Jewish constituent assembly, permanent Jewish national assemblies, and proportionate Jewish representation in the Duma – all despite the outbreak of more pogroms in ’05-’07⁶⁰ and Vinaver’s anxious declarations about the “crying need for absolute unity to secure equal rights and guard against future violence.” Still, the nationalists pressed the issue, demanding “complete Jewish national autonomy.”

“Letters from Yitzak Isaac”

Isaac Hourwich arrived on the scene in 1906. He went everywhere and, ever the participant-observer and chronicler, he sent “Letters from Yitzak Isaac” to *Die Wahrheit* from St. Petersburg, Minsk, Vilna and elsewhere. First stop was St. Petersburg. From there he sent “Scenes and Pictures around the Duma in St. Petersburg.”⁶¹ The “Letter” begins in the thick of things, as Hourwich joins a mass parade to the imperial building where the Duma is meeting. “The human sea goes down a street as broad as Seventh Avenue in New York.”

Peasants in traditional mujik shirts shout “Hoorah!” Deputies greet the crowd. First in the parade line are some of the Social Democratic deputies. Young people raise them on their shoulders. A SD deputy gathers a crowd of several thousand people around him. Police come running. “Don’t give the government any reason to break out against you,”

⁶⁰ The Tsar lent encouragement to the pogroms. The “yids” were responsible for this whole revolutionary upheaval...insert riff from notes. Explain “Black hundreds”?

⁶¹ “Scenes and Pictures around the Duma in St Petersburg” *Die Wahrheit* – (The Truth) NY – 1906

he tells the people. “The time has not come yet. Let the Duma do its work. When the Cossacks come to close us down that will be the time for struggle..., then the Duma will turn to the nation with a call to support it!”

At this, “the crowd turns down a side street,” where a mounted “Cossack” brandishing a whip is about to attack a woman by Hourwich’s side. Hourwich steps in front of her, but, fortunately, the “Cossacks get the command to draw back.” Then, in jagged, proto-Yiddish-modernist style, Hourwich’s narrative turns abruptly inward to distant memory. It is 1880; Hourwich is a student-revolutionary marching the same streets. Again, a “Cossack” attacks a woman comrade, and the young Hourwich shields her. This time, he is clubbed down by the mounted police; “only my heavy coat prevented ribs from being broken.” That 1880 march had been to a government building where a fellow student was on trial. En route, before the attack, the narrator recalls, metal-workers “on the sidewalk laughed at us ‘rebels,’ and shouted, ‘Why don’t you take out your revolvers?’” But “this year,” Yitzak Isaac returns to 1906, “the [metalworking] trade selected a Social Democrat as a representative at the election for the workers’ electors. The world,” he concludes, “indeed goes forward.”

From Minsk, Hourwich sent a series of “Letters,” offering shrewd assessments of the dilemmas of constituting a Jewish voting public for the first time, and of coalition-building – again, for the first time – across myriad, cross-cutting social and ideological divides. If Jews don’t unite around the same candidates their numbers in the Duma will be diminished; if they do, then socialists may end up having to support bourgeois liberals,⁶² anti-Zionists may have to vote for Zionists. Even on the left, there are problems. Will the Marxist-minded Bundists hold their

⁶² “Naturally, were it not for the Jewish Question, it would be natural that the Jewish capitalists should connect themselves with that party to which the Christian bourgeoisie belongs. Such a situation will be natural when the political situation in Russia becomes natural...The problem is, however, that the despotism of the Russian government oppresses not only the poor Jew but the bourgeois. Only the few privileged Jewish ‘millionaires’ suffer little for the troubles of the Jewish nation.” “The Achievers – Their Ideas and Tactics,” *Die Wahrheit – (The Truth)* NY – 1906

noses and support an agrarian-minded Social Revolutionary? Will a Social Revolutionary support a Bundist, in the name of maximizing the radical Jewish delegation in the Duma? ⁶³

Of course, these intricate dilemmas elude a great many ““ordinary people’ ...not engaged with the issues.” ““Why,”” they ask, ““ do we need programs? All that we need is to select a Jew of standing [to advocate] in the Duma ‘for Jewish interests.’” At one level, Hourwich concedes, they have a point. “All the Jews know they have one enemy, the Russian government. For everybody, there is one program: to create a modern government and a democratic order...every Jew understands now that Jews in Russia cannot have any freedom without rebuilding on democratic foundations.”⁶⁴

Now, with the Tsar’s new reforms, a “city-wide Jewish election committee” has been authorized - “so much [at least] was won through the revolution, although still one must have a [meeting] permit from the Governor.” This presents the dramatically new problem of constructing an election system. And for the left, there is the added problem that the bourgeois organizations enjoy an edge, having been above-ground for some time. Small wonder, the first election committee meeting “consisted almost entirely of bourgeoisie.” Half are “general Zionists”; the other half members of the Verein [Union] to Achieve Full Equality for the Jews. The latter is Vinaver’s organization; known as “‘the Achievers,’ [in Minsk, according to Hourwich] they are all petty bourgeois.” Together, these two groups dominate the selection of delegates to the city’s nominating convention.

⁶³ “Zhitlowsky’s Candidacy for the Duma” Die Wahrheit – (The Truth) NY – 1906

⁶⁴ “Yitzak Isaac’s Letter from Russia – Special for the Wahrheit,” Die Wahrheit – (The Truth) NY – 1906

The left raises a ruckus, and a second meeting is held. “Twenty more delegates are chosen...Still, the socialists objected...Better to engage voters street-by-street, and organize the Jewish election committee in democratic manner just as one organizes the primaries in America.” Hourwich has a dimmer view of American election machinery and its democratic bona fides than his Minsk comrades. Not for the last time, as we shall see, he is passionate about America’s “full-fledged political freedom...to assemble where one wishes...and when one wants,” but plumps down for intermediate associations choosing a community’s political representatives.

The Bund gets ten delegates; but they are outraged, when, at the end of the day, their “opportunistic” American comrade accepts a nomination from the bourgeois liberal party. Hourwich, for his part, takes satisfaction that the Minsk platform ends up a “mix of the Kadets’ [liberal] program, some social reforms, and the Zionists’ dream of Jewish national autonomy in Russia [which both Hourwich and the Bund support].”⁶⁵ Hourwich is, after all, a Marxist “revisionist” who does not expect the social revolution to arrive on a “strictly proletarian” platter.

“I actually hate to write about myself,” Hourwich insists with some false modesty in a “Letter” dated 12 December 1906, but “[r]egarding my candidacy...I must relate to you the truth...Yesterday, I received a letter from Minsk that at the [final] gathering of Jewish voters, I recived the greatest number of votes.” Still, in the end, his nomination was annulled by the city’s Polish elite. Why so? Because they “won’t permit a Jewish candidate so long as he won’t agree with their land program” – to wit, “that the peasants should not receive any land” in the work of

⁶⁵ Id.

the new Duma.⁶⁶ And what is the truth value of that tale? Hourwich is far too unreliable a narrator for us to know; and nothing in the YIVO or other archives I have visited tells us more.

What we know is that the Tsar and his counselors rolled back the open-ended prospects of constitution-making with a conservative new Constitution; and the repression that followed sent Hourwich back to New York, and with him, Zhitlowsky and hundreds of other Bundist, socialist Zionist, and Jewish “autonomist” activists, intellectuals and advocates into American exile. In ’07-’08, they brought their diasporic nationalism and its newly filled-out constitutional imaginary to the Lower East Side, where they encountered the still fiercely anti-nationalist outlook of New York’s great Jewish labor organizations and Jewish socialist party and press.

So, with Hourwich as a kind of native guide and legal craftsman, the newcomers founded small American branches of the Bund and Poele Zion, along with tiny new outfits like the Jewish Socialist Agitation Bureau. With the Agitation Bureau doing the booking, Hourwich and Zhitlowsky, heroes of the short-lived Russian Revolution, went on the lecture circuit, bringing the constitutional outlook of Diasporic socialist nationalism to audiences at Cooper Union and Carnegie Hall, and immigrant Jewish communities around the country, creating a stir among adventuresome young radicals with their visions of a “Jewish national program” and their accounts of a deeply pluralist as well as socialist America waiting to be born: a “United Peoples of America,” America as a “federation of nationalities.” These pre-War years were when Zhitlowsky and Hourwich first became charismatic models of how one could be both a “good socialist” and a “good Jew.” (“Men who spoke flawless Russian, speaking instead Yiddish, with a rich lexicon mixing Hebrew words and phrases, Russian and German scholarly terms, original aphorisms and hometown [Yiddish] expressions...confounding the association between

⁶⁶ “Yitzak Isaac’s Letter, St. Petersburg, 12 December 1906,” Die Wahrheit.

cultivation and assimilation...men of high learning and yet Jewish nationalists championing the lowly zhargon.”⁶⁷) “*Vos mer mentsh, alts mer yid un vos mer yid, alts mer mentsh.*”

For mainstream socialists, Zhitlowsky’s “national program” remained an irritation and an enigma. “What yiddishkeit do they want?...Yiddish newspapers? We have them. Yiddish lecturers? We have them...My dear, what do you actually want?” What was this “Jewish national program”? It smacked of “separatism” and seemed a “Russian Jewish remedy for Russian Jewish wounds” that didn’t exist here.⁶⁸

In these years, Hourwich worked out his answer. He departed from Zhitlowsky’s emphasis on Yiddish culture and began instead with material interests and aspirations, and the need for a working-class Jewish movement that addressed them. It was folly for socialists to argue that Anti-Semitism in America was a “bourgeois worry.” The issue, he would say and write, was not whether one could join the Union League Club or be admitted to a Saratoga resort – these were the much publicized indignities that galled a Louis Marshall or a Louis Brandeis. The issue was the proliferation of “No Jews need apply” in the want ads. The issue was jobs and opportunities and the inhibitions that prevented the unions and the A.J.C. alike from staging boycott campaigns and pickets outside such employers, or demanding laws against such rank discrimination. Even in respect of language rights, America, beyond New York, was not as free as the socialists imagined. Hourwich would point out that Cleveland’s public schools, for example, welcomed afternoon classes in foreign languages, but Yiddishkeit was refused. And soon, he sensed, astutely enough, a rising nativist tide might push against any kind of “foreign” educational and cultural institutions.

⁶⁷ Tony Michels, *A Fire in their Hearts: Yiddish Socialists in New York*, at 139.

⁶⁸ *Id.* at 169.

A “national movement,” on this account, was not exactly “separatism” so much as a communal assertion of the “right to be different.” Not outright refusal of “assimilation,”⁶⁹ so much as a communal insistence on the freedom to shape the terms of one’s belonging to America. As with Jewishness and socialism, so with Jewishness and Americanism, one needed a program of both/and. “Russian Jewish wounds” were not the same as American ones, but not so different that the idea of a “national program” and various kinds of “group rights” were unimportant. Still, these ideas remained fairly marginal fare on the Jewish scene.

*The Constitutional Moment Arrives*⁷⁰

Then, however, came the outbreak of World War I and the rapes and massacres of thousands and mass expulsions of hundreds of thousands of Jews, at the hands of the Tsar’s army, on a scale not seen for centuries. And in the U.S. in 1915, as in Russia a decade earlier, the rage and anguish that the violence generated among ordinary Jews thrust these tiny organizations and their outlandish outlook into sudden prominence. Into the vacuum left by the political silence and quietism of the American Jewish Committee and the great socialist unions stepped Hourwich, Zhitlowsky and the tiny bands of Bundists and socialist nationalists. They gave voice to the hunger of the new immigrant masses for action on behalf of Jews abroad, in harm’s way. Ironically, the very aversion to united political action on the part of mainstream Jewish leadership enabled the unorthodox radicals to seize the occasion and raise the ideological stakes and imaginative horizons of how American Jews might respond.

Hourwich, Zhitlowsky and their socialist nationalist bands dusted off the Jewish Congress

⁶⁹ During this period Hourwich offered many wry and thoughtful historical-interpretive and self-reflective lectures and articles about Jewish “nationalism” alongside Jewish “assimilation” and Jewish “cosmopolitanism”; how and why Jews became not only contributors to but “prosleytizers” of dominant cultures; how and why such involvements need not crowd out an enlightened kind of “Jewish nationalism”; and how even a cosmopolitan, broadly cultured Jewish soul like himself felt acutely his outsidership in America. Outsidership lent one critical perspective; but could be unbearably painful, without the repose, esteem and belonging one found in communal identity.

⁷⁰ This section and my whole account of the Congress movement is much indebted to Jonathan Frankel, “The Jewish Socialists and the American Jewish Congress Movement,” YIVO Annual XVI (1976),

banner they had raised in the wake of Kishinev. Back then, Zhitlowsky and the other Bundists and Poete Zion revolutionary exiles had barely arrived. Now, they had had almost a decade to spread their heterodox ideas. Now, Hourwich, “the professor,” had ample intellectual and imaginative resources, along with the local knowledge and insight, and locally earned authority and gravitas, to present the constitutional outlook and demands of Russian Diasporic nationalism in a way that spoke to the experience and feelings of the immigrant working-class Jewish communities of America. Most important, now, there was a much vaster yearning for action and much more angry frustration with established leaders and organizations among the new immigrant masses.

Once again calling themselves the Jewish Congress movement, this time the radical upstarts of the Jewish Congress Organizing Committee (JCOC) launched an unprecedented frontal attack on the “old world despotism” of the “*Shtadlanim*” [Yiddish for traditional interceders with the Tsar, used here for]: the old German Reform Jewish elite of wealthy bankers and lawyers and, more specifically, Marshall’s American Jewish Committee, claiming to speak on American Jewry’s behalf – via “quiet diplomacy” and high-level contacts – to the U.S. Presidents and Congress on matters of Jewish interest. Over against this “old-world” arrangement, the radicals called for constituting American Jewry on a new basis, as a “democratic nation and people,” an “American Israel,” with newly *chosen* leaders, a “permanent Jewish Congress,” authorized to speak for all American Jews. (That was Hourwich’s and the JCOC’s phrase. Poete Zion put it in even more hair-raising terms: the Jewish Congress was to be a “standing, representative and sovereign body of American Jewry”!)

Here in “the great American republic,” Hourwich proclaimed early in the Jewish Congress agitation, “[w]e can no longer submit to a self-appointed body of men, our benevolent despots.”

Not only was the Congress idea the American way; it also promised to give American Jews more clout than the AJC's old-world ways of "secret diplomacy." Freely chosen representatives of American Jewry, Hourwich explained, would "speak to the politicians with the one word they understand: power...That a Congress can indeed achieve, [for it will] represent the Jewish masses, two million strong...not a gathering of ten of the wisest." Around this Congress, we must "create what we lack: a Jewish public and a Jewish public opinion...then you may be certain that the Congress and Senate and politicians...will heed what such a movement has to say."⁷¹

From some, Hourwich noted, one hears the old refrain: "We have our interceders, the shtadlonim...[T]he AJC does good work for Jews, why do you not want to depend on it?" Hourwich's response was this. The problem with the AJC was not simply "the undemocratic character" of their "pretensions" or the fact that "they do not trust the People." It was that they "want to play the diplomatic game with an empty hand." Hourwich, you'll recall, was steeped in American politics and muckraking journalism, political science and census data. Mimicking the hard-boiled muckraker, he would repeatedly say that "for today's practical American politicians, Jewish citizens must show they 'mean business'...When meetings shall be held of thousands of Jewish associations over the whole land, and delegates selected for city and state conventions, building up to a general Jewish Congress, then politicians will listen."⁷²

Hourwich tallied up the most recent counts of naturalized Russian Jews on the Lower East Side, noting that "[s]ince that time a lot of greenhorns have become citizens" – and "I am not counting the native-born children of Russian Jewish immigrants who are already also voters": in all, at least, one hundred thousand votes. "It has happened in American politics that ten thousand

⁷¹ "Der Yiddisher Kongres," articles in *Der Tog*, reprinted in *Selected Works*, vol. II, 158-214.

⁷² *Id.*

votes determined the presidency.” So, once a Jewish Congress and the kind of public opinion- and democratic will-formation Hourwich vividly evoked were in place, it would follow that “both major parties must be friendly to the Jews...lest the other party have a monopoly of [our] friendship.” True, “in other cities, the Jewish vote is not so great, but even a few thousand votes in a Congressional district are not allowed to wander off unattended on the streets. In American politics, the interests of various candidates are so bound up that for one candidate the whole party must very often demonstrate friendliness.”⁷³

Hourwich and the JCOC radicals made plain what they thought the substance of the imagined Congress’s agenda should be. It should demand that the U.S. government champion for Jews in post-war Russia and Eastern Europe a panoply of rights, a “Jewish Bill of Rights,” brimming with individual but also group rights and national rights, “minority rights,” the rights around which the Russian “masses” themselves had rallied in 1905-07. Some movement spokesmen tacitly, others openly, demanded some of the same group rights for Jews in America. Either way, the radicals forced into the unavoidable conversation about what was to be done for Russian Jews a deeper and more contentious debate about the nature of Jewish politics and the meaning of Jewishness in America. Part of the genius of Congress Movement leaders like Hourwich was to wed what was most “foreign” about their ideas – “group rights,” “nationality rights,” a “national program” – to what was most “American”: an elected Congress as embodiment of American principles of democracy, a constituent assembly to hammer out a “Jewish Bill of Rights.”

The renewal and sudden prominence of the Jewish Congress movement spelled trouble for Louis Marshall and the AJC. Nationalist agitation was bad for the Jews at any time; but with the

⁷³ Id.

U.S. maintaining a precarious neutrality, and the Tsar an obvious ally against Germany, it was disastrous. Early in 1915, Marshall and his brother-in-law, Judah Magnes (a fellow AJC board member, renowned Rabbi at Temple Emmanuel, but also one of the Reform elite's rare Zionist sympathizers and a brilliant intermediary between the Reform Jews and the new immigrants) called an emergency meeting of leaders of the JCOC, the socialist unions, and the AJC.

Marshall's and Magnes's hope was to co-opt the movement for a Jewish Congress, change its name to a movement for a Jewish *Conference*, limit its scope to the rights of vulnerable Jews in the belligerent lands abroad, and bring the whole enterprise under AJC leadership. As for what rights American Jewry should be championing for their co-religionists in the old empires, that was clear: individual civil and political rights, legal equality, freedom of religion, just as Jews enjoyed in the U.S.

The gathering was a public one, and widely reported in the general press as well as the Yiddish papers. Marshall gave the opening address. Whatever Judah Magnes had hoped for from his brother-in-law, Marshall was not conciliatory. He went on the offensive, beginning with the duty of Americans as citizens of a neutral power in a world at war, and the peril of any Jewish actions that seemed to side with Germany against Russia. The "policy" of American Jewry had to be one of "watchful waiting" as far as any interventions in the peace treaties and state-making that might unfold when the war was over. The idea of convening a so-called "Jewish Congress" to hammer out demands now, let alone ones in the key of Jewish "nationhood" and "sovereignty" was nothing more than an "ebullition of passion, an expression of emotion," inspired by the "theories of propagandists and dreams of a visionary." What was more, "the peace conference that will follow the present war will have absolutely nothing to do with the Jewish Question." And besides, international treaties and the conferences that crafted

them were matters of state and undertaken by state delegations. For all these reasons, Marshall concluded, the whole question of how American Jewry acted now and at war's end had to be recast.

By all accounts, Marshall's speech was a stunning performance, and only one representative of the Congress movement had the wit and wherewithal to respond full-bore. "It is time," Hourwich began, "to set aside the Jews' traditional policy of weakness in matters of grave concern to them... We have nothing to lose. What are we afraid of? Will one more rabbi be hung or a few more women violated? Why have we not a right to cry and weep against outrages perpetrated against our brothers and sisters? It is a question of maintaining the dignity and rights of the Jewish race." Other peoples already were coming forward with ideas and demands for the peace- and state-making that will follow the present war. Why not the Jews? Why not "American Israel"?

The emergency meeting and private negotiating sessions as well as public gatherings that followed all came to an impasse. Hourwich reported on the large public meetings with a comic eye for the classic "American" style machinations of the AJC leadership and union leaders who managed to control the agenda. "'Vote first, discuss afterwards'... That is the mechanical American idea of 'efficiency' – one comes with plans already made... One is afraid to allow for free discussion... In a monarchical land such as the United States where Herzog [Duke] Charlie Murphy and Groz-Herzog [Arch-Duke] Bose Penrose, and so forth, are the rulers and their devoted subjects are happy to vote when they are told. However, we Russian Jews come from a land with a republican spirit, and when somebody wants to lord it over us, we rebel."

Hourwich and the JCOC enjoyed too much support on the streets to be safely ignored. But Marshall and the chiefs of the big unions were used to such provocation. For most of 1915, their

view was that the Congress Movement was a flash in the pan; the thing to do was to bide one's time and let it fade away. They had seen the Movement once before, a decade earlier, when figures like Zhitlowsky first arrived – and the Kishinev pogrom had aroused the Lower East Side. The Congress Movement might well have faded away, for sheer lack of organizational heft and strategic resources. That calculation was up-ended, however, by the fortuity of Louis Brandeis's "conversion" to Zionism and his sudden ascent to leadership of American and world Zionism, shortly after the war in Europe began.

Enter Brandeis

The story of Brandeis's "conversion" to Zionism and his assumption of war-time leadership is a familiar one.⁷⁴ But Brandeis swiftly grasped that Palestine was not a cause likely to arouse the majority of ordinary Jews into action; what resonated – on the Lower East Side as it had in Russia itself – was not so much a homeland or state in Palestine, but the dream of Diasporic nationalists: safety and better lives, individually and collectively, via modern communal institutions and a panoply of individual and group rights for the oppressed Jewish millions *where they actually were*, in Russia and Eastern Europe themselves. So, encouraged by Horace Kallen, Brandeis welded his Zionism to Diasporic nationalism, and along with becoming chief of the Zionist federation, Brandeis took over the Congress Movement's helm, as well. He made his

⁷⁴ Zionism gave the profoundly reticent Brandeis a new sense of belonging. It helped that the Jewish homeland of Brandeis's imagination was bathed in Progressive light: a scene of small-scale, cooperative agriculture and enterprise, imbued with science, cooperative ownership of land and industry, and participatory democracy. After Justice Brandeis had helped craft and bring President Wilson on board the Balfour Declaration in 1917, he drew up a plan for the reconstruction of Palestine. The 1918 "Pittsburgh Platform," as it came to be known, called for "political and civil equality irrespective of race, sex, or faith," a comprehensive "system of free public instruction," "ownership and control by the whole [Jewish] people" of utilities, natural resources, and land, and the application of the "cooperative principle... in all agricultural, industrial, commercial, and financial undertakings." Thus, the national homeland was to be governed by a "Jewish spirit" that was "essentially modern"—and in harmony with Brandeis's Jeffersonian brand of advanced American Progressivism. It was revealing of Brandeis's continuing deep identification with the WASP establishment that he constantly described the Jews of Palestine as the "true Pilgrims" of the 20th century; like the "Puritan" founders of New England, Zionists were "pioneers" in the Arab "wilderness." The Arabs were the "Indians." We will return to the moral and constitutional infirmities of the Pittsburg Platform and this Puritan pioneer vision of Jews and Arabs in Palestine at the end of my talk.

own the Congress Movement's outlandish vocabulary and vision of "Jewish rights" (as well as their canny arguments about the superiority of the democratic American versus the despotic old-world model of Jewish political authority).

Brandeis made the Congress Movement's foes his own, as well. He had never had any use for New York's Reform Jewish elite and had long been inclined to see a Jacob Schiff or Louis Marshall as just another plutocrat and parvenu. Brandeis welcomed a battle against the AJC for the hearts and minds of the new Jewish millions in America. Brandeis brought to the Jewish Congress Movement a great access of money and social and cultural capital, a cadre of Progressive jurists like Felix Frankfurter, and his own towering reputation as the greatest of all Jewish-lawyers as Jewish-folk-heroes. He was known across America as the "People's Attorney," and at the very moment he emerged as the leader of Zionism and the Congress Movement, he also became the nation's first Jewish Supreme Court Justice - by far the most prominent Jew in America. Brandeis had no intention of forsaking his newfound role in Jewish politics merely because he had become a Supreme Court Justice!

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

Grabbing hold of the outlandish constitutional vocabulary of his new Russian comrades, Justice Brandeis hammered out his own answers to all these questions. Zionism, Louis

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

The gist of the new constitutional theory that Justice Brandeis began preaching to American Jewry and the nation at large was that free and equal individuals only develop in the context of free and equal groups; and such groups, in turn, need “group rights” and “group equality.” Without such constitutional precepts, neither Jews nor members of America’s other “minority races and nationalities” could flourish. Happily, the true genius of the American Constitution was that it constituted us as a community of free and equal individuals constituted, in turn, by free and equal groups, nations and peoples. Group rights and group equality promised to underwrite and safeguard ways of governing human difference that extended classical liberalism’s regard for freewheeling “individuality” to the plane of groups and peoples.⁷⁵

Under this constitutional dispensation, the modern Jew could be both an American patriot

⁷⁵ This same year, 1915, Horace Kallen wrote his seminal “Democracy and the Melting Pot” for the *Nation*. Widely seen as the foundational text of cultural pluralism, Kallen’s essay nowhere uses that phrase nor even the word, pluralism. Having enlisted Brandeis in the Zionist cause, Kallen also introduced his famous friend to the writings of Simon Dubnow and the ideas of an émigré group of liberal and socialist Diasporic Russian Jewish nationalists with whom Kallen had joined in a “reading circle.” From his readings and discussions with this “secret” group, and their passionate critiques of conventional nationalism (including Herzlian Zionism) and the nation state, Kallen seems to have garnered inspiration and keywords for his famous essay: Not “ethnicity” or “cultural pluralism,” but the émigrés’ discourse of “national rights,” a “federation of nationalities” and a “commonwealth of nations” supplied Kallen’s toolkit for reimagining a democratic America. Depicting the essay as one about cultural pluralism glosses over its genesis in that international conversation, as though Kallen were offering a distinctly American solution to the problem of difference.

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

and yet free to “assert his Jewish nationality.” This demanded a constitutional order that protected political action and organization based on group difference and national aspirations, and a regime of social governance that both protected and supported group educational and cultural associations. Such an order was essential, if the U.S. was to gain “the full benefit of [the Jews’] great inheritance.” The notion that the official U.S. constitutional order embraced any of these things was the purest legal fiction, but when Justice Brandeis declared it to packed meetings across the country, it became a cultural fact.⁷⁶

Speaking of the Jews’ “great inheritance,” we should pause to underline a rather striking difference between Brandeis, on the one hand, and Hourwich and the Bundists, on the other. Simply put, Brandeis was much like Louis Marshall and the AJC in this: they were Jewish racial exceptionalists. For Isaac Hourwich, Jews were a nation, like any other nation, no better but also no worse. Hourwich fondly told the histories of both Jewish nationalism and Jewish internationalism, separateness and assimilation, but he also mocked the romance of nationalism. He paraphrased Descartes (and anticipated Memmi, Sartre and Fanon): “Are we Jews a race and a nation? The answer is: ‘They beat us. Therefore, we are.’” In other words, we Jews have no choice but to acknowledge our “racial identity” and to embrace it with pride. For, unless we do so, we will be crushed. By contrast, for Brandeis, as for most of the Zionists he knew best, as for Reform Jews like Louis Marshall, Jews were not just another nation or people; they were an exceptional people. Why, they were *always already proto-Americans*, in the old-fashioned, racialized WASP sense! Just as the American WASP elite claimed that American liberty

⁷⁶ Historians have traced cultural pluralism’s intellectual origins to Kallen’s studies with William James at Harvard, and to the intellectual milieu of the *Menorah Journal*, which was produced at Harvard. That is a bit like claiming that Madison’s constitutional thought sprang from his studies at Princeton (or, to be more precise, the College of New Jersey). James’ theory of value pluralism was important background, to be sure; but it didn’t supply Kallen’s keywords and conceptual scaffolding. It was in the arena of real constitutional politics, in the clash of rival Jewish movements, organizations and their rival views of what rights Jews ought to demand and defend in the U.S. and abroad on behalf of oppressed Jews in the old world: in these battles - and thanks to the fresh blast of unfamiliar diasporic constitutional ideas learned from émigré comrades - that cultural pluralism first took shape and found its critical vocabulary.

sprang from their Teutonic and Anglo-Saxon ancestors, so Marshall and Brandeis boasted that the historical roots of the U.S. Constitution and American democracy lay in Hebrew “soil.”

Unlike Marshall, however, Louis Brandeis came not to praise classical liberal constitutionalism, but to bury it. When it came to the “Jewish Problem,” Justice Brandeis lectured his Congress Movement audiences, “Liberalism” was a “failure.” It did far too little “to eliminate the anti-Jewish prejudice.” Liberalism promised Jews equality but supplied no ground on which to build group dignity and self-respect. The problem with classical liberalism was that it gave Jews and other minorities individual rights and individual equality before the law, but it could not “protect as individuals those constituting a minority,” without “realiz[ing] that protection cannot be complete unless *group equality* also is recognized.” Liberalism counseled assimilation as the solution to Anti-Semitism; but, Brandeis proclaimed, the solution lay elsewhere, in the “Assertion of Jewish Nationality.” Zionism enabled Jews “to shake off the false shame which has led men who ought to be proud of their Jewish race to assume so many alien disguises. . . .”

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

Isaac Hourwich was the consensus choice to be architect of the Jewish Congress’s electoral

machinery, and he chaired the JCOC/AJC/labor committee that crafted the voting system. As often before, Hourwich performed many leading roles. He agitated and lectured on behalf of the JCOC and its “national program.” However, as the election committee’s chair and resident “expert” on the institutional design and technical logic of voting systems, Hourwich rose above the fray, acting as technocrat and what Brandeis would call “counsel for the situation.” He wrote many lengthy memos to his colleagues explaining and illustrating the differences between winners-take-all and proportionate representation (or, as he sometimes called it “minority representation”) schemes. Hourwich, the legal expert and technocrat, was at pains to ensure that all sides – the AJC, the unions, the Zionists and Diasporic nationalists – understood the stakes - especially how “well-organized groups” could take advantage of simple winners-take-all schemes with many names and parties on the contemplated ballots.

For the first several months of the election committee’s work, Hourwich shared the view of the AJC and union leaders that the only sensible way to orchestrate a nation-wide election was to delegate the choice of representatives to already existing Jewish organizations. But as Hourwich wryly reported in the Yiddish press, pressure for a one-Jew (or “Jewess”)/one vote “democratic election” overwhelmed the executive committee’s initial scheme – and the pressure for a “truly democratic election” emerged from the “greenhorns,” the newest immigrants, filled with the greatest enthusiasm for “American democracy.” After months of feverish work on Hourwich’s and his committee’s part, some 347,000 Jews across the country took part. And when the ballots were counted, the balance tilted toward the nationalists.

Brandeis and the nationalists, it was widely reported in the general press and the Yiddish dailies, were seizing the mantle of “representative” leaders of the Jewish “masses.” Holding on to power compelled Marshall and the AJC to find common ground with the émigré Russian

Jewish nationalists' ideas and program. President Wilson himself, you'll recall, had directed the AJC and the American Jewish Congress to join forces and send a single delegation to the Paris Peace talks. Over a period of months, Marshall and Kohler fought and negotiated with Hourwich and other Congress Movement leaders, hammering out a Jewish Congress agenda and drafting a Jewish Bill of Rights, which they and their clashing constituencies could live with. It was a Bill brimming with group rights and national rights.

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

Brandeis and the Congress movement had by no means routed Louis Marshall and the AJC. But they had permanently broken the hegemonic grip the AJC's account of American Jewishness had hitherto enjoyed on Jewish politics and forced them to cede a significant portion of power and to change some basic precepts. The nationalists' newer, thicker, more public, political and controversial account of Jewishness as an ethno-racial, “hyphenated” American identity with “multiple loyalties” – and of America as a pluralist nation of many peoples - had gained legitimacy and substantial sway, and would go on to transform the Jewish institutional and ideological landscape.

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

Meanwhile, “group rights” did not go gently into the constitutional night. Well into the 1940s, the American Jewish Congress lobbied and litigated on behalf of a “group rights” conception of the rights of minorities, and continued to win signal victories. Thus, in the face of

mounting American Anti-Semitism in the late '30s and early '40s, the Congress movement organized boycotts against Anti-Semitic employers and publishers, invoking minority group rights of protest and agitation, which prevailed against anti-boycott decrees. Likewise, the movement's lawyer-leaders pushed group libel laws – what today we'd call anti-“hate speech” laws – through some seventeen state legislatures. Today, it is settled doctrine and constitutional common sense that such laws are unconstitutional. But in *Beauharnais v. Illinois*, Felix Frankfurter, Brandeis's Zionist and Congress movement lieutenant, and his successor in the “Jewish seat” on the Court, wrote a majority opinion upholding criminal sanctions against group libel, on grounds that re-encapsulated the turn-of-the-century, transnational jurisprudential construction of group rights we just explored:

...Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs. Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members. It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism...for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

Lessons

Let me draw a few lessons from this forgotten story. The first is this. Group rights did a great deal of important work in this constitutional moment. Today, the Jewish-American establishment and the American legal establishment scorn “group rights.” They associate the idea with left-wing academics playing at identity politics of an irresponsible and noxious sort.

After all, the establishments will tell you, the U.S. has achieved a working system of cultural pluralism, with a reasonable balance of cultural group autonomy and individual liberty, without enshrining group rights.

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

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

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

only collectively, through participation in some corporate body.

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

All of this was perfectly clear to legal Progressives like Brandeis and Frankfurter. Legal Progressives a century ago were obsessed with group rights; and for years before his encounter with Zionism and the Congress movement, Brandeis had used the phrase frequently regarding the (unrecognized) rights of organized labor and trade associations. In the cultural arena, it was not hard for an Hourwich to envision government denying radical journals and organizations the use of the mails, shutting down their offices and meeting halls, forbidding the use of public buildings for teaching Yiddish, forbidding the teaching of Yiddish entirely. All of this Hourwich predicted during this constitutional moment; and, of course, all of it happened before the moment ended. All of these endangered activities, in turn, involved the exercise of “group rights” by a Brandeis’s or Hourwich’s legal lights. These were “group rights” marking off zones of “negative liberty.” But the idea had other, “positive” dimensions, as well – it fairly overflowed with constitutional meaning – in their imagined pluralist America.

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

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

Jewish American thinkers today are far more prominent as critics than architects of group-based and multi-culturalist strands of contemporary legal and political thought. We tend to forget how much the Jewish radicalism of a century ago had in common with the black radicalism of that day – think DuBois and his visionary mix of equal citizenship, black “separatism” and transnational black solidarity. Instead, since the 1960s, Jewish liberals have heard “group rights” and remembered anti-Jewish “quotas.” We have heard “black nationalism” and forgotten when Jewish nationalism meant not only Zionism but demands for group autonomy, separate cultural institutions and proportionate group representation in the Diaspora. We forget when “group rights” and “nationality rights” signified solidarity with oppressed Jews demanding just such rights in Eastern Europe and Russia, and how, in that moment in the U.S., “group rights,” “group liberty” and “group equality” signified a posture of Jewish cultural and public-political group self-assertion, a demand for group respect and recognition. We don’t recall when the emergence of separate, Yiddish-speaking public spheres brimming with restive

unions and revolutionary Marxist, socialist and nationalist politics in the cities' crowded Jewish "ghettoes" seemed as menacing to the city fathers, Jewish and Gentile, as black nationalism in the crowded black "ghettoes" seemed a couple generations later.

Nor do we recall how, in the 1900s, high-brow journals like *Menorah* and popular dailies like *Forverts* saw Jewish legal and social thinkers working through the competing claims of integration and separatism, liberalism and pluralism, individual and group rights, universalism and particularism, belonging and apartness – some insisting on the overriding wisdom of one pole or the other, but many refusing to choose, mediating the tensions between them, and, like DuBois, imagining and demanding both.

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