TO: Constitutional Faith & Redemption Conferees
FROM: Willy Forbath
RE: Jews, Law and Identity Politics in the Progressive Era

Forgive me for saddling you with such a long manuscript. Pages 1-14 will give you the gist of my argument and at least some the barebones of the narrative. Then, you can decide which, if any, of the four sketches you want to read.

Since it is mostly narrative, the piece reads swiftly.

I am looking forward to being with you and crave your comments, criticisms and suggestions. This is still very much a work-in-progress!

Jews, Law and Identity Politics in the Progressive Era[1]

Willy Forbath

PREFACE

Interpreting and expounding the U.S. Constitution is a Jewish calling. The nomination of Dean Elena Kagan to a seat on the U.S. Supreme Court occasioned public comment about the number of Jews on the high court. One third of the Justices belong to a group that numbers roughly 2% of the U.S. population. By most estimates, Jews number about 40% of the faculties of the nation's elite law schools. If one turns to the field of constitutional law, and to the authors of leading constitutional law casebooks and canonical scholarly works on constitutional law and constitutional theory, the proportion of Jews seems still larger. Likewise, one finds a great many Jews among the nation's leading constitutional advocates, particularly in the realm of civil rights and liberties. Bound up with this involvement with constitutional law on the part of elite Jewish lawyers has been an intimate identification with the U.S. Constitution on the part of a broad swathe of American Jews over the past century. At least for the generations of Jews born between roughly 1870 and 1960, you didn't have to be a lawyer to feel that "defending the rights of others" was an important part of Jewishness.

[1] ROUGH DRAFT: Not for circulation, citation or quotation without author's permission.

How and why all this came to be so is a complex and delicate question. This essay examines a critical, early chapter in the unwritten history of American Jews' intimate identification with the U.S. Constitution. A century ago, the essay argues, during the Progressive Era, the first generation of nationally prominent Jewish lawyers crafted a normative vocabulary of Jewish membership in the American nation out of the materials of constitutional law. They fashioned a vision of American Jewishness that was bound up with the Constitution as they interpreted and invented it: its ancient "Hebraic" roots, its individualism, and its promises of racial justice, equal opportunity, and the "right to be different." At the heart of the legal establishment, yet defending the outsider, they felt they were bringing to earth the preaching of contemporary rabbis that the Constitution was American Jews' "new Covenant," and that justice-seeking was the essence of Jewish particularity and the rationale for Jewish apartness in liberal society, as they wove together disparate strands of Reform Judaism, Zionism, and classical liberal and Progressive constitutionalism. Insofar as Jews have come to be at home in the precincts of constitutional law and made the liberal Constitution an important part of Jewish American identity, this essay reveals some of the distant horizons of these developments.

Jewish liberalism is fading; liberal Zionism is almost dead. Whether this century-old invented tradition of Jewish constitutional faith – with its particular modes of insider/outsiderness and belonging and apartness, its moral energy and solidarities (and its compromises and evasions) – will endure in the twenty-first century seems an open question. In my remarks next weekend at the Constitutional Faith and Redemption Conference, I'll distill this paper and then offer some reflections about what traces of this

tradition may be found, perhaps slyly and wisely reinvented, in the works of Balkin and Levinson.

INTRODUCTION

The decades bracketing the turn of the last century (1890s-1910s) brought the mass immigration of Jews from Russia and the peripheries of Europe. About two million mostly poor Russian and Eastern European Jews came to the USA in these decades; they made New York the city with the largest Jewish population in the world, and they disrupted the small world of the older Reform Jewish elite of successful lawyers, merchants and bankers whose parents or grandparents had come from Germany and Central Europe in the mid-nineteenth century. The vastness of this mass emigration combined with the newcomers' poverty, their unsettling, thick and "foreign" kinds of Jewishness, and the mounting hostility that greeted them from much of native-born, gentile America, to produce a crisis for the old Reform community. Leading voices in Congress and in popular and high culture questioned Jews' "racial fitness" for American citizenship. Jews, they said, were destined to remain foreigners, impoverished radicals or wealthy money-lenders, loyal to their own kind, unwilling and unable to join the national community.

The tiny German-Jewish establishment responded to the newcomers with mixed feelings and motives—solidarity and compassion, aversion and fear, recognition and estrangement, wanting to help and to control, to stop the "flood" of "poor Russian Jews" and to keep the gates open for them. Driven into national politics for the first time, the Reform elite prodded the White House and State Department to intervene against the

Anti-Semitic edicts and organized violence in Russia and elsewhere, which helped spur the Jewish "Exodus" and lent it moral urgency. The same elite spent tens of millions of dollars and devoted enormous energy creating networks of social agencies to aid and "Americanize" the newcomers. These efforts were led by a handful of prominent Jews of German background, almost all of them Reform Jews, and all but a few, attorneys. In addition to creating these organizations and agencies and leading these campaigns, some of the attorneys began practicing immigration law or became immigration policy experts. Even those who did not become experts or practitioners had to address the nation's "Immigration Problem," along with what gentiles had begun to call the "Jewish Problem" and America's "new race problem."

The encounter between the older American Reform Jewry and the Jewish newcomers in the U.S. and the solidarities, anxieties and conflicts it produced stirred questions of Jewish American identity. What is it to be an American? What is it to be a Jew? What commitments and loyalties define each, and do they clash? How does one embrace being an American while keeping one's separate identity as a Jew? What forms of Jewish particularity fit in with full membership in the national community? Must Jewishness be recast as a private religious faith and nothing more – publicly invisible, with no distinctive social identity and no group claims on the law or polity; or could Jews remain a "people apart," a distinct "nation" and even a separate "race," while participating fully and equally in American society? What grammar of self-understanding and group identity could Jews claim without cutting themselves out of the promise of American life

and bringing down on themselves some American variant of Jew hatred and Anti-Semitism?

These questions fueled the politics of Jewish-American identity in the Progressive Era. The essay's first thesis is that lawyers, law and legal culture played important, protean parts in the ways Jewish leadership answered these questions. Litigation, policy-making, private organization- and public state-building, inside-government work and political advocacy around both the "Immigration Problem" and the "Jewish Problem": these were sites of practice but also occasions for fashioning new and durable accounts of the terms of Jewish entry and belonging.[2]

Why should law and elite lawyers have been especially important in the making of Jewish American identities and terms of belonging? Law was a practical and a symbolic toolkit. Law was the language of state power, and the state was in the business of labeling and identifying newcomers and determining who was welcome and citizenship-worthy and who was not. Law also was a technology for exercising state power, for constructing and operating the machinery of exclusion at the nation's borders. Several of these elite Jewish lawyers set about successfully trying to shape these legal categories

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[2] Jerold Auerbach first explored this terrain in a brilliant and quirky book: *Rabbis and Lawyers* (1990). But Auerbach is not a lawyer, and he didn't follow the tale into the archives or the actual law work Jewish lawyers did. He also wasn't interested in the immigration question. Nor was he concerned with the forms and structures of legal and constitutional thought. However, Auerbach lit on the centrality of law and lawyers to creating Jewish American identities twenty years ago. His account has much to say about religious and historical authenticity, about traditional forms of Jewish law and Jewish life against which the embrace of American law and lawyer-leadership is judged hollow. I'm not equipped or disposed to interpret the material I've found in that fashion. Examining, without lament, a Jewishness shaped by the ruptures and changes of modernity, Americanization and reform, I remain deeply in Auerbach's debt.

and administrative machinery.[3] This same handful of attorneys were also architects and leaders of the key national associations and institutions of Reform Jewish life and of American Zionism.

Constantly speaking and writing, and being written and talked about , in both the general and the Jewish press and public spheres, they imbued their practical advocacy and policymaking, litigation contests and organizational campaigns – in the hearing

[3] The second thesis of the full version of work-in-progress –which I won't develop very much in this workshop paper – is this. There is an important, but forgotten chapter in the history of U.S. immigration law. The arrival of the new Jewish immigrants occurred in the context of the greatest mass immigration in U.S. history. From the 1890s to the 1910s, almost a million new immigrants arrived each year, amid increasingly bitter contests about whether these huddled masses of Southern and Eastern Europe and Russia—Italians, Greeks, Poles, Slavs and Hungarians, along with Jews - were fit to become Americans at all, and about how to sift out the "unfit." The "new immigrants" belonged to "races" different, as difference was then understood, from the "race" of "old stock" white Americans of Western European descent; and for most "old stock" lawmakers, judges, reformers and voters the new immigrants were too different, too inferior, and too many to be absorbed into the American community.

Thus, these Jewish attorneys confronted a polity that was determined to impose new immigration restrictions. Keeping the gates wide open to new immigrants was not in the cards. Just possibly, however, given the various important constituencies favoring generous immigration policies, one might prevent the gates from being closed very much. One might prevent Congress from enacting against the "new immigration" from Southern and Eastern Europe laws resembling the kind of "race"-based bars that closed the gates on Chinese immigrants in the 1880s.

Of course, in the aftermath of World War I, during the tribal 'twenties, Congress enacted and the White House supported just such "racial" bars, which practically halted immigration from Southern and Eastern Europe and Russia. Historians have reconstructed and interpreted the Progressive Era (1890s-1910s) with an eye to the precedent of race-based Chinese Exclusion in the 1880s and in search of harbingers of the race- and nationality-based quota system of the 1920s. From the 1880s through the 1910s, the narrative goes, every important new immigration regulation and restriction rested on a politics of racial exclusion, closing in on the "inferior races" from Southern and Eastern Europe. But this overlooks a constellation of statutory and administrative developments, state-building experiments, and public/private initiatives, building up a different immigration regime. This emergent regime rested immigration restrictions and regulations on labor market criteria of various kinds. It emphasized that economic considerations and not "race, nationality or creed" should govern immigration policy. It was Presidents Roosevelt's, Taft's and Wilson's "liberal" alternative to the "racial" regime promoted by populist and patrician racists and nativists.

The Jewish attorneys to whom I'm about to introduce you were among its principal architects and champions and its greatest critics. As we'll see, they sold it to the pre-war Presidents, who needed to satisfy the pro-immigrant interests by vetoing racial bars, and who needed to appease the anti-immigration crowd by offering alternative measures that would still keep out some significant number of poor new arrivals. Then, however, the attorneys discovered that the liberal rules and standards they'd championed were barring thousands of Jewish "paupers" and "misfits" at the nation's gates. The fiercely individualistic, stoutly bourgeois liberal impulses that encouraged them to champion these reforms clashed with the solidary and communal group impulses that led them to try to pry the gates back open. Swept away by the 1920s quotas system, the successes and the conundrums, coercions and cruelties that attended this emergent liberal labor market based immigration regime in the Progressive Era echo today.

rooms of Ellis Island and the halls of Congress, in the Yiddish press and the New York Times - with large cultural significance, drawing on law's symbolic resources to shape the public meaning of Jewishness in America. Here, the distinct place of law in American national identity was crucial. Nation states were under construction in Western Europe as well as in the U.S. in the 19th century. In Europe, national belonging was fashioned, above all, around ideas of common descent and shared origins. Nationalism took shape as a counter to the thinner notions of civic membership produced by Enlightenment liberalism. In the U.S., however, the felt attachments of identity and ideology that were coming to be called nationalism remained grounded in the liberal republican precepts that animated the Revolution, and these felt attachments became bound up with the very legal texts on which the state rested. In the U.S., the nation - "We, the People" – was felt to be constituted and defined by law. Over the course of the 19th century, the U.S. Constitution became the text of a "civil religion." To make one's way into the legal elite, then, was to gain not only a prestigious career but also access to the very language of national belonging and, perchance, opportunities to interpret and even shape its meaning.

For most of the 19th century, the law- and constitution-based language of American nationalism had a distinctly liberal tenor as far as European immigration was concerned: Every European newcomer, in becoming an American citizen was said to re-enact the Founders' freely given consent to the laws and Constitution of the new republic and become a member of "We, the People." No matter what our ancestors, our shared loyalty to this ongoing experiment in self-rule binds us together as a nation. This was the narrative around which the Jewish playwright Israel Zangwill constructed his famous

play, *The Melting Pot.* The true American is not the "old stock" American by descent but the newcomer: the American by active consent, replenishing the nation's liberal ideals and contributing to the ever-new "race" of an immigrant nation.

But the U.S. was not all that exceptional. As in Europe, liberal conceptions of political community were opposed by – and entangled with - ideas about race and common ancestry. Thus, alongside the liberal, consent-based notion of national belonging there flourished a rival descent-based account of American nationalism. It held that the thin gloss of consent-based constitutional patriotism was not enough to make foreigners into Americans. Only some groups of would-be Americans – Northern European, Anglo-Saxon or Teutonic and Protestant – had the right stuff to make them into new members of the national community. For African Americans, Asians, Mexicans and Native Americans, this racialized, blood and descent-based American nationalism was the dominant one throughout the 19th and early 20th centuries, against which the liberal, inclusive promises of the 14th Amendment strained. (Blacks were "America's Jews" was an observation common among both Black and Jewish writers and journalists in the Progressive Era.[4])

What clinched the centrality of law and lawyers for Jewish American identities was the clash between these rival conceptions of American nationhood, as it broke out on the

[4] Yet to be researched and written but an essential part of this short book-in-the-making is the sketch of Louis Marshall, a prominent German Reform Jewish attorney who was among the early Board members of and Supreme Court advocates for the NAACP. The sketches in this essay explore the encounter between leading Reform Jewish attorneys and the world and ideas of Russian Jewish immigrants. The sketch of Marshall and the early NAACP will provide an entry into their encounters (and exchanges, collaborations and conflicts) with African American leaders and attorneys. There I aim to explore some of the commonalities and contrasts between the two groups' legal and cultural work in this era – interpreting/inventing constitutional and religious traditions and narratives of belonging, claim-making and insider- and outsider-ness. Likewise, lacking in this iteration are the figures of Morris Hillquit and Fiorello LaGuardia. The former, a Russian Jewish socialist attorney and labor leader; the latter an Italian-American attorney and politician, they too will enable me to explore exchanges, contrasts and commonalities between overlapping worlds in Progressive Era New York.

plane of European immigration at the end of the 19th century, with the mass immigration from Russia and the peripheries of Europe. Whether the new foreign "races" and the "Hebrews," in particular, were fit to be Americans, why and on what terms – was the terrain on which the lawyers built Jewish American identities, in significant measure from the materials of law and constitutionalism.

These elite Jewish attorneys came up with not one but two rival and overlapping accounts of American Jewishness. The first seized on classical liberal legal and constitutional materials; the second on rival Progressive ideas.[5] The first was a deeply assimilationist account of American Jewishness that grew out of the outlook and experience of the Reform Jews. Reform Judaism was a child of the Enlightenment. The classical liberal constitutionalism the Reform Jewish attorneys gleaned from law professors and fellow legal mandarins filled the Constitution with precepts that mirrored the classical liberal ideals at the heart of Reform Judaism's dream of an Enlightened liberal state; the precepts also captured the attorneys' own social aspirations: full civic and legal equality; freedom of trade and conscience; equality of opportunity and careers open to talent; a legal order free of racial and religious classifications.

Reform Jews of their fathers' and grandfathers' generations had embraced and helped lead the campaigns for Jewish Emancipation in Europe, struggling to repeal the hated "Jews Statutes," the legal bars and disabilities excluding Jews from the polity, social life and most trades and professions. In the U.S., one found no Jews Statutes; and Reform

[5] By classical liberal legal thought—or simply classical legal thought—we mean the late nineteenth-century outlook that was intensely individualistic and prized formal legal equality, and condemned what was called "class legislation": laws, inter alia, that classified and burdened individuals on the basis of race, color, nationality, or creed. By progressive legal thought, we mean the counter-tradition, which decried the formalism and individualism of the first outlook. Its watchword was "social justice" as well as "legal justice"—insisting that formal equal treatment of individuals was not sufficient. The law must take account of groups and group interests, and their particularities and asymmetries of power.

Jews cherished their legal invisibility. Keeping that secure seemed to demand a broader public invisibility. They created forms of associational life that did not broach politics or a Jewish group presence in public life. Their account of American Jewishness yoked "equal rights" and "assimilation" as the pillars of Jewish belonging.

The second was a pluralist account, which defended American Jews' "right to be different" and to assert multiple public loyalties – loyal to the U.S. but also to a Jewish "nation," "people" and "race." Inspired by the actions and outlooks of the new Jewish immigrants, this second, more controversial, "hyphenated" kind of American Jewish identity came somewhat later, in the 1910s. It was invented by renegade Progressives to express and defend the new immigrants' cultural and political nationalism and "foreign" forms of associational life and everyday conduct – in a word, their public Jewishness. This account incorporated Progressives' insistence on the centrality of groups in American life, along with their critique of classical liberal individualism and formal, legal equality. Over against the dominant ideal of "100% Americanism" ("America does not consist of groups. A man who thinks of himself as belonging to a particular national group in America has not yet become an American" - Woodrow Wilson, 1915), these Progressive Jewish legal and social thinkers invented "cultural pluralism," a liberal defense of group differences, "group rights" and "group equality." Zionism, Jewish nationalism, and "Hyphenated Americanism," more generally, the pluralists declared, were all "True Americanism." This too became part and parcel of American Jewishness.

I have built the body of this essay around sketches of four prominent Jewish attorneys to catch something of the lived experiences and structures of feeling that imbued the cultural work that law and lawyers did. The four parts also trace successive moments in

the Progressive Era's battles over the shape of immigration law and policy and the terms on which newcomers would gain entry at the gates and membership in the nation. Simon Wolf was the eldest of these attorneys and he was the leading representative of the German-Jewish Reform elite in a critical but forgotten round of administrative and legislative battles over how the nation would categorize and count the new immigrants. Would it tally them by "race"? And if so, would the Russian and East European Jewish arrivals be counted as belonging to the "Hebrew race"?

Oscar Straus was the most scholarly. Straus's writings lent a pioneering intellectual and "historical" gloss to the (then new) sentiment that American Jews and Reform Judaism have a deep, organic link to the liberal Constitution. Straus was also the first Jewish cabinet member, serving as Teddy Roosevelt's Secretary of Commerce and Labor, and standing atop the machinery of exclusion – the Immigration Bureau – at a critical moment in the drama. Straus's leadership of the Immigration Bureau and his role as Roosevelt's counselor on immigration matters enabled him to pioneer key elements of what I've called a forgotten liberal constellation of immigration policies and institutions.

Max Kohler was the nation's first Jewish civil rights lawyer, defending hundreds of Jews and other racial outsiders - Chinese, Mexicans, Slavs, Poles, Croats - threatened with expulsion at the hands of the immigration bureau. His father and grandfather were the leading Reform rabbis of the second half of the nineteenth century and the early twentieth century. His father, Kaufman Kohler authored the 1885 Platform of Reform Judaism that proclaimed: *We are no longer nation…no longer expect to return to Palestine; no longer abide by Jewish law…* The "core" of Judaism lay in the precepts of "justice and universal morality" it bequeathed to the "Pilgrim fathers" and the "framers of

the Constitution." Father and grandfather made the American Constitution a sacred text and "new covenant" in Reform Judaism. Max helped make "defending the rights of others" a way of affirming American Jews' belonging, even as it affirmed Jews' distinctive ethno-cultural identity, as a "priestly," justice-seeking people.

Wolf, Kohler and Straus belonged to the broad Progressive camp. But when it came to fashioning an idiom and understanding of American Jewishness, they all worked with classical liberal legal materials. By contrast, Louis Brandeis's contribution to Jewish American identity was forged out of the Progressive counter-tradition. Probably no prominent Jewish American of his generation tried harder to fit into the upper-class WASP world of Boston Brahmins than Brandeis. Estrangement from that world, friendship with young Jewish nationalists at Harvard, and immersion in the world of the Jewish labor movement and Jewish nationalism on New York's Lower East Side brought a kind of conversion, and led Brandeis to affirm what the other three lawyers denied: the compatibility of Jewish nationalism and "True Americanism." His argument ran through the Constitution. When it came to the nation's "minorities," equal protection of the laws demanded "group equality"; freedom of expression, association and conscience demanded "group rights." Both were essential to a democratic Constitution, per Brandeis, and both seemed essential for the "Jewish Renaissance" he came to champion.

Brandeis became leader and spokesman of American Zionism in 1915. He became the Supreme Court's first Jewish Justice a year later. And in the next five years, he transformed the Zionist movement's organization, heft and identity. Brandeis brought on board a leadership cadre of Reform German-Jewish corporate attorneys and jurists.[6] Together, they turned the Zionist federation from a tiny new immigrant fraternity and

[6] *Id*. at 413-418.

debating society into a vast, corporate "business-like" operation, with double-entry accounting, rigorous fiscal controls, and an administrative capacity to manage the millions of dollars they raised for Russian and East European Jewry and the Jewish settlements in Palestine. By making the Zionist organization the central vehicle of American Jewry's aid to Jews in war-torn Europe, Brandeis made it an established feature of American Jewish life. At the same time, in the public culture, Brandeis wedded the new immigrants' Jewish nationalism to the Progressive Constitution. He cast Jewish nationhood as the kind of group identity that a pluralist and Progressive Constitution recognized and protected as an essential of democratic citizenship. The most assimilated of the Jewish lawyers we're going to encounter, Justice Brandeis used his position of cultural authority to put this thicker, more controversial, "hyphenated" kind of American Jewish identity on the road to respectability.

THREE REFORM JEWISH ATTORNEYS

Reform Judaism was a child of the European and American Enlightenments, fashioned to outfit Jews for equal citizenship in an Enlightened liberal state. The unspoken premise of Enlightenment liberalism's response to the "Jewish Problem" was that Jews were to be welcomed as members of the liberal polity so long as they ceased to be recognizably, publicly Jewish and abandoned their corporate existence as a self-governing community, subordinate and vulnerable but also legally and socially apart and insulated from the gentile world. "Everything to the Jew as an individual," declared Napoleon, "nothing to the Jews as a nation."

This was a bargain many Jews welcomed. The Enlightenment held out a brave new world of liberal learning and letters, a civic life in common with gentiles, political liberty, material opportunity and "careers open to talent." These Jews made the Enlightenment their own. Some abandoned Judaism in favor of the kind of Deism and "natural religion" favored by a Benjamin Franklin or Thomas Jefferson. The pioneers of Reform Judaism refused to abandon the faith. Instead, they reinvented it, hopefully embracing a new, liberal meld of private faith and public patriotism - a private sphere where a reformed Judaism could endure; and a public one of citizenship and civic equality, where one might aspire to find full membership and acceptance as a Prussian, Englishman, or American.

Re-forming Judaism into an Enlightened faith meant cutting away traditional Jewish law and ritual, rejecting "rabbinical legalism" and centering their Judaism on the "universal" moral teachings of the prophets. Reform Judaism aimed to fit the liberal (and Protestant) Enlightenment mold. But equally, it aimed to reanimate the faith among "enlightened" Jews, who were straying from the fold and who found traditional Jewish law and ritual stifling and hollow. Declaring that Jews were no longer a nation or a corporate community but instead an association of private believers, they hoped to disarm the ages-old view of Jews as eternal foreigners, loyal to their own laws and authorities, and their own blood. But, equally, they felt themselves patriotic Americans, Frenchmen and Prussians. They cast off Jewish garb and dietary laws, ceased worshipping in Hebrew, and built Reform synagogues that resembled neighboring churches and, by the late nineteenth century, neighboring cathedrals.

Just as Enlightenment ideas imbued the trans-Atlantic struggle for slave emancipation that began in the late 18th and early 19th century, so the dream of legal and civic equality and equal rights lay at the heart of contests for what Jews and Gentiles alike called "Jewish emancipation." Thus, the struggle for Jewish emancipation was a struggle for repeal of what Germans called the "Jews Statutes": all the legal bars and disabilities excluding Jews from the polity, social life and most trades and professions. In the German states, as elsewhere, it was a protracted and halting process and still incomplete; rights were granted and then revoked. In the wake of the defeated republican revolutions of 1848 and the reactionary measures that followed in the 1850s, Reform Jews came to the United States. They bulked large among the tens of thousands of republican "'48ers" who emigrated from Germany and Central Europe in that moment. Fleeing dispossession and imprisonment, these Reform Jews arrived with recent memories of struggle and repression, along with longer memories of recurrent group trauma, exclusion and violence. For them, the journey across the ocean brought Jewish emancipation. In the United States, there were no Jews statutes; legal and civic equality were facts on the ground. The United States seemed the utopian dream of an Enlightened liberal state. The small Reform Jewish community assimilated easily into the worlds of fellow German immigrants and the commercial life of the northern and southern cities, where they settled, as merchants, peddlers and shopkeepers; their male offspring carried on in commerce, or became lawyers and bankers.

As the second generation came of age in the U.S., slave emancipation brought forth a transformed Constitution. And Civil War and Reconstruction instigated the creation of a modern nation state and an intensified nationalism centered on the reconstructed

Constitution, inscribed with equal rights for all persons born or naturalized in the United States of America. That Constitution, as the leaders of the victorious Union expounded it -- in its individualism, its promise of legal and civic equality; equal opportunity and freedom of conscience, trade and callings; its condemnation of "class legislation" in general and racial classifications in particular -- harmonized with the Reform Jewish outlook and social aspirations.

Thus leading American Reform rabbi of the 1880s, Kaufman Kohler authored the famous 1885 Platform of Reform Judaism that proclaimed: *We are no longer nation…no longer expect to return to Palestine; no longer abide by Jewish law…* In "free America," Rabbi Kohler declared, a Jew must choose between "loyalty to all the laws and customs of his national past [and]…unreserved acceptance of all the mandates of his newly acquired citizenship." The "core" of Judaism lay in the precepts of "justice and universal morality" it bequeathed to the "Pilgrim fathers" and the "framers of the Constitution." America seemed the Enlightenment's liberal state come to earth. The Constitution was the American Jew's "new Covenant."

SIMON WOLF AND THE RACIAL CLASSIFICATION OF JEWS

The most senior of these four attorneys was Simon Wolf, a Washington attorney and lay leader of the Reform union of American Hebrew congregations. Less sophisticated and commanding as a lawyer and more deferential toward gentiles than the others, Wolf was the German-Jewish Reform elite's unofficial, full-time representative in the corridors of Executive power for almost two decades at the end of the 19th century.[7] So, it was

[7] *See* PANITZ, *supra* note 15, at 17.

Simon Wolf who responded when in 1898, the Immigration Bureau decided it was time to begin counting the newcomers from southern and Eastern Europe according to their race. [8]

To nativists and pro-new-immigrant advocates alike, it was a given that the new immigrants belonged to "races" – they were not *white ethnics*. [9] That term did not exist. [10] Instead, they were members of the Greek, Slavic, or Hebrew "race." [11] "Race" was a notion that defied the line we draw today between biology and culture. "Race" ran through one's blood, and yet it covered moral, intellectual and emotional qualities.[12] It covered qualities like meekness, impulsiveness, and independence, and human capacities like rationality and intelligence.[13] So, "race" seemed salient for sorting out which of these new immigrant groups were fit for self-government and American citizenship.

Between the 1880s and 1910s, ideas about "race" were in flux. The brand of scientific racism we associate with the rise of eugenics was an avant-garde perspective, gradually making headway among academic and patrician advocates of immigration restriction. It won "a diverse following of animal breeders and academics, social workers, psychiatrists and patrician reformers and philanthropists."[14] Eugenics gained favor among some academic and patrician advocates of immigration restriction during the Progressive

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[8] *See* SIMON WOLF, THE PRESIDENTS I HAVE KNOWN FROM 1860-1918, at 238.

[9] *See* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS 14 (2005) (noting that "race" was "a term that ecclesiastically described the alleged divisions of humanity").

[10] *See id.* at 18 (noting that the term "white ethnic" did not come into use until about 1970).

[11] *Id.* at 14.

[12] Richard Weiss, *Racism in the Era of Industrialization*, *in* THE GREAT FEAR: RACE IN THE MIND OF AMERICA 134-35 (Gary Nash & Richard Weiss eds., 1970) (explaining that race was "not simply a biological concept" but also thought to determine peoples' cultural attributes).

[13] *See id.* On popular forms of this understanding of "race" with respect to the new immigrants, see generally DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (2005). On high-brow and academic understandings of race, see generally GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION (1982); GEORGE W. STOCKING, JR., AMERICAN SOCIAL SCIENTISTS AND RACE THEORY, 1890-1915, at 602-17 (Ph.D. dissertation, Univ. of Penn., 1960); George W. Stocking, Jr., *The Turn-of-the-Century Concept of Race*, 1 MODERNITY (1994); THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1997).

14 Michael Willrich, The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930, 16 LAW AND HISTORY REV. 63, 63 (1998).

Era. The eugenicists' general take on the new immigrants was this. The new immigrants belonged to inferior races. Their inferiority ran not only to physical or intellectual capacities but also moral and political ones. Different races had different capacities for democracy and self-rule. Thus, what we consider to be cultural traits, they considered racial ones. The eugenicists saw these traits as deeply hard-wired, as genetically inscribed. The new immigrant races were not only inferior, but immutably so. In light of their rediscovery of Mendellian genetics, the eugenicists held that any upward "evolution" that one could expect in the new immigrants' genetic material was a matter of hundreds of generations. In the meantime, intermarriage between "old stock" Anglo-Saxon, "Teutonic" or "Aryan" Americans and new immigrants with their "inferior racial stock" threatened a "reversion to the lower type" and, therefore, Anglo-Saxon "race suicide": "The cross between a white man and an Indian is an Indian; the cross between a white man and a negro is a negro;…the cross between any of the three European races and a Jew is a Jew." This was the "new science of race" popularized in books like Madison Grant's best-selling *The Passing of the Great Race; or the Racial Basis of European History* (1916).[15] But only in the 1920s did the eugenicists' "modern" and hard-edged racial theories come to dominate the immigration debate.[16]

During the Progressive Era, the dominant way of thinking about race was neither the "modern" but today discredited eugenicists' view, nor the "modern" liberal view that would succeed it by mid-century, wherein the biological component of "race" captures skin,

[15] See, e.g., WILLIAM H. TUCKER, *The Racial Basis of European History* 18 (1916).

[16] *See* John Higham, Strangers in the Land: Patterns of American Nativism 1860-1925, at 150-52 (2002).

hair, bones, and other bodily features, but no socially or morally salient qualities at all.[17] Instead, the Progressive Era's prevailing uses of "race" had their (loose) scientific moorings in Lamarckian thought.[18] "Races" denoted groups with socially salient differences of character, morality, habits of mind and intelligence that were *both* hereditary and changeable.[19] These traits were passed along through "blood lines," but they were not hard-wired. They were heritable; yet they changed through the direct interaction of individuals and their social and physical environments.[20] Some thought change took many generations; for these thinkers, the "backward traits" of the Southern and Eastern Europeans and Russians were practically immutable. For them, "modern" eugenics held out a bold new scientific validation of what they already "knew," and many converted to it.[21] But at least an equal number of influential participants in the Progressive Era debates thought the new immigrants' "inherited racial traits" swiftly "wore off" and gave way to new "American" traits – in one or two generations, depending on the extent of new immigrants' immersion in the American "environment."[22]

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

[18] *See* George W. Stocking Jr., *Turning-of-the-Century Concept of Race*, 1 MODERNISM/MODERNITY 4-16 (1994).

[19] *Id*. at 10. ("Lamarckianism made it extremely difficult to distinguish between physical and cultural heredity. What was cultural at any point in time could become physical; what was physical migh well have been cultural. Thus a widespread theory of the origins of instinct assumed that habits might become organized as instincts through the inheiritance of acquired characteristics. Culturally conditioned behavior patterns would thus tend to become part of the genetic makeup of subsequent generations in the form of inherent tendencies or proclivities.").

[20] *Id.*

[21] *See* HATTAM, *supra* note 4, at 21-39.

[22] In either case, as one might guess from experience with cultural accounts of difference today, it was hardly equivalent to welcoming the newcomers and their socially constructed "racial" baggage. Take John R. Commons, the dean of Progressive labor economics, pioneer of institutional economics, and founder of the "Commons School" at University of Wisconsin. Commons distinguished sharply between the nature and durability of racial difference among the different white or "European races," and those separating the latter from Africans and Asians. These "fundamental divisions of mankind…are established in the very blood and physical constitution…[and] may yield only to the slow processes of the centuries." *See* JOHN R.

Many others, including most of the era's Commissioners of Immigration, were uncertain about just what "racial traits" the different new immigrant "races" brought with them and just how changeable or hard-wired the traits were.[23] It seemed crucial to find out how many of these different "races" were arriving and making their way by the hundreds of thousands to U.S. cities and industrial heartlands. Then state- and university-based producers of social knowledge could track down what traits and capacities they were revealing or acquiring, and how they were fitting in.

If the "peoples" or "races" to which the new immigrants belonged simply matched their country of birth then identifying, counting, and tracking them would have posed no special problems. But most of the new immigrants came from multi-national empires like Russia and Austro-Hungary.[24] Thus, collecting data about place of birth, as the Bureau already did, was "useless." Russia, the Commissioner at Ellis Island pointed out in a 1898 Report to the Commissioner General in D.C., had "over a score" of

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COMMONS, RACES AND IMMIGRANTS IN AMERICA 7 (1907) (Augustus M. Kelley eds. 1967). By contrast, the racial differences between the Southern European immigrant and old-stock white American were ones that vanish within a generation or two. *Id.* The "physical, mental, and moral capacities" of the Southern European newcomers were not much different from the old stock. *Id.* Living amid American streets and communities, learning to speak a common language with old-stock Americans, belonging to an American "labor union" or going to an American public school, were sufficient to transform and "Americanize" the newcomers' inner dispositions and "working ideals." *Id.* at 216. But this changeability was not decisive for Commons. It remained the case that "the peasants of Catholic Europe, who constitute the bulk of our immigration of the past thirty years, have become almost a distinct race, drained of those superior qualities which are the foundation of democratic institutions." *Id.* at 11-12. No matter that those "superior qualities" of "intelligence, manliness and cooperation" are within reach of the peasant "race's" offspring, after a childhood spent in American communities. *Id.* at 7. What mattered for Commons was the constant flow of newcomers reared in a peasant culture and inured to peasants' "standards of living," endless toil, and submission to authority. For them even the "sweat shop, low wages, and the slums" are a marked improvement. *Id.* at 117. Soon enough, to be sure, they aspire for more and better, but unrestricted immigration meant they were constantly replaced by peasant-newcomers still "willing to do the hard and disagreeable work at the bottom," under the same conditions and with the same low sense of life's necessities. *Id.* at 119, 151-52.

[23] *See* 1906 COMM'R. GEN. OF IMMIGR. ANN. REP., at 60 ("Do not the statistics of recent years on this subject point unmistakably to the conclusion that we, as a race, are endeavoring to assimilate a large mass of almost if not quite unassimilable material?"). *See also* MATTHEW PRATT GUTERL, THE COLOR OF RACE IN AMERICA: 1900-1940, at 17-27 (2001).

[24] *See* 1906 Comm'r. Gen. of Immigr. Ann. Rep., at 6.

different "races or peoples" within its borders; the Austro-Hungarian monarchy "at least fifteen." The "Hebrews…flocking to this country" from both those empires were a case in point. These Jewish immigrants "[had] changed conditions completely in certain trades here…but statistically we have no record of their arrival."[25] The "Immigration Bureau fails to give a clew to the size of this movement" of "Jews from Russia"; instead, "they are lumped up with the Poles, people of a distinct race and of different capacities and who have gone into entirely different fields of industry."[26]

With a go-ahead from the Commissioner General, the Commissioner at Ellis Island consulted with anthropologists and other racial scientists at the Museum of Natural History and pieced together a list of the world's "races or peoples." He added this list along with several new questions to the forms filled out by his front-line Inspectors and printed up instructions about how to categorize the new arrivals. You asked and noted down each person's mother tongue, country, and religion, and then you did your best to infer which of the forty-one "races or peoples" he or she belonged to.[27]

Although nationalism was burgeoning in Southern and Eastern Europe, most of the new immigrants from these regions were rural peasants and laborers who may have thought of themselves more as natives of a village or region than as members of a nation, race or people. In this, the new Jewish immigrants, with their fervent sense of people-hood and varieties of Jewish nationalism, may have been the exception.

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

[26] Victor Safford, Letter to T.V. Powderly, from Barge Office, New York, June 8, 1898, Box 143, Immigration Subject Correspondence, RG 85, National Archives, Washington, D.C.

[27] For an account of the piecing together of the list of "Races or Peoples," and the new forms and instructions for front-line inspectors, see the testimony of Dr. M. Victor Safford, Surgeon, United States Immigration Service, Port of New York, to the U.S. Industrial Commission of 1899. 15 U.S. INDUS. COMM'N. REP. at lxvi (1901).

For the other newcomers to the U.S., becoming immigrants in America created stronger European national and racial identities than they'd had at home. [28] At home, most of the other new immigrants were the subjects of an empire; spoke particular languages; were adherents of one or another religion, and saw a certain province or village as home.[29] But thanks to the Immigration Bureau's new requirement of determining their "race," their first encounter with American officialdom also began a process of naming a new identity of people- or nationhood, keyed, usually, to the language they spoke. Identity here was, literally, a matter of being counted as identical.

This lesson of belonging to a race or nation found reinforcement in U.S. cities - in immigrant politics, churches and civic associations, in the national identities imparted by immigrant church leaders, newspapers, trade unionists and party bosses. Migration itself sometimes stirred national identities. For in migration, chains of kin were indispensable: relaying news, job prospects and remittances along the lines of movement.[30] Along these same lines, people with ties to the same region, who spoke the same language, stood in as relatives, uniting the kin of home with adopted kin in an expanding web of obligation and affection. [31] These were the social processes in which new "national" identities were formed. Between the 1890s and the 1910s, many new immigrants submerged their provincialisms into a broader patriotism, their local dialects into a language. Thus, as

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[28] *See* MATTHEW FRYE JACOBSON, SPECIAL SORROWS: THE DIASPORIC IMAGINATION OF IRISH, POLISH, AND JEWISH IMMIGRANTS IN THE UNITED STATES 7 (2002) ("Nationalist idioms functioned to counter New World patterns of ethnic hierarchy, to salve immigrants' sense of having abandoned their compatriots to an unkind fate in the Old World, and to galvanize group members for a number of political or social aims—labor strikes, entrepreneurial cooperation, proto-feminist protest, or turning out the vote on behalf of the local machine.").

[29] *Id*.

[30] *See* ROBERT WIEBE, WHO WE ARE: A HISTORY OF POPULAR NATIONALISM 14 (2001); *See also, e.g.*, Donna R. Garbaccia, *Is Everywhere Nowhere? Nomads, Nations, and the Immigrant Paradigm of United States History*, JOURNAL OF AMERICAN HISTORY, Dec. 1999, at 2 ("[Italian immigrants] migrated through networks of kin and neighbors (*paesani*) from particular small towns; their strongest ties were to family and *paesani*...").

[31] *See* Robert Wiebe, Who We Are: A History of Popular Nationalism 14 (2001).

Nikolas Rose has put it, it is "not paradoxical that the first Lithuanian newspaper was published in the U.S., that the Erse revival began in Boston, or that the Czechoslovak nation was launched at a meeting in Pittsburg."[32] As much as the new immigrants became Americans, they also became Italians, Lithuanians, and Czechs; and as Italian-, Lithuanian-, and Czech-Americans, they defended their rights and the rights of their countrymen to come, contribute, and belong to America; and they supported nationalist movements to liberate oppressed countrymen at home.[33] Thus, most new immigrant groups' social and political leaders welcomed the new "racial classifications." They would provide evidence of the growing numbers of their "race" and hence dramatize their potential political clout.

By contrast, however, America's Reform Jewish elite found it no blessing that so many Jewish newcomers arrived with an already well-developed sense of Jewish nationhood.[34] Other immigrant groups might want to express their national longings in American public life and do so in the language of race and blood. [35] Not the Jews. Or rather, not these Jews. Not Simon Wolf, Oscar Straus or Max Kohler. Among Central and East European and Russian Jewry, Yiddish flowered during the second half of the nineteenth century as a vital "national language" from which a new literature, drama, and poetry emerged.[36] Likewise, various brands of spiritual and secular, often socialist,

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[32] Nikolas Rose, Powers of Freedom: Refraining Political Thought 224 (1999).

[33] *See id.* at 288-89.JI

[34] Israel Friedlander, *The Division Between German and Russian Jews (1912) in* THE JEW IN THE MODERN WORLD 486 (Paul Mendes-Flohr & Jehuda Reinharz eds.,1995); *see* NAOMI COHEN, THE AMERICANIZATION OF ZIONISM 1897-1948, at 39 (2003) ("By Americanizing its religious principles . . . Reform's leaders became the most vehement critics of Jewish nationalism in the United States.").

[35] *See, e.g.*, JACOBSON, *supra* note 38, at 15 (1995) (quoting Michael Davitt's sentiment that Irish-America was to be "the avenging wolfhound of Irish nationalism" and Agaton Giller's pronouncement the Poles in America "will see that the evil designs calculated to ruin Poland will be overturned . . . to her greater power and glory").

[36] *See* Bruce Mitchell, *Yiddish and the Hebrew Revival: A New Look at the Changing Role of Yiddish*, 90 MONATSHEFTE 189, 191 (1998) (discussing the flowering of Yiddish literature in late 19th-century Europe). For a discussion of the relationship of Yiddish to Jewish nationalism, see generally Joshua Shanes, *Yiddish and Jewish Diaspora Nationalism*, 90 MONATSHEFTE 178 (1998).

Zionism took shape, giving strident modern voice to the slumbering old religious ideals of Jewish nationhood and a Jewish homeland.[37] Yet, the Reform Jews in England, Western Europe and the U.S. wanted no part of this Jewish national revival. The estrangement ran deep. It went to the heart of what I've called the nineteenth-century Reform Jewish leadership's classical liberal conception of Jewish belonging in America.

On that view, becoming free and equal citizens of the republic meant forsaking a distinctive national life and a distinctive body of Jewish law and legal authorities. Only thus, Reform Rabbis and lay leaders like Simon Wolf insisted, did Judaism enjoy "perfect harmony with the law of the land."[38] Our whole "aim," said Rabbi David Philipson, leader of the Central Conference of American Rabbis and the first rabbi to deliver a blessing at the U.S. Senate, "is to see that [our Americanness and or Jewishness] shall never come in conflict."[39] By putting them into conflict, Philipson warned, the Russian newcomers posed "a great danger to Judaism in its relation to the republic."[40] The religious among the new Jewish immigrants Philipson dubbed "neo-Orthodox": practicing "meaningless, Oriental rites" and resurrecting "rabbinical legalism."[41] Even worse, many of the secular ones were "neo-nationalists," preaching Zionism and the separate destiny of their "race" and "blood" in a national homeland in Palestine.[42]

And religious or secular, they all spoke a language (Yiddish) that expressed "antagonism to American institutions."[43] If "American institutions" demanded unqualified embrace of English, Davidson was not wrong. On the Lower East Side,

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[37] *See* COHEN, *supra* note 44, at 3-14 (2003).
[38] Rabbi David Philipson, cite from Proceedings.
[39] *Id.*
[40] *Id*.
[41]
[42] *Id*.
[43] *Id.* at 83.

Russian Jewish intellectuals were winning a mass following with their calls for a full-blown national-cultural renaissance in Yiddish. Yiddish, they hoped, would forever serve as a primary medium of Jewish culture in the U.S.

Worst of all was Zionism, which scandalized Reform Jews by insisting Jewishness was everything they insisted it was not: a race, a nation, and a faith that was inherently public and political. By calling for the national and governmental aspects of Judaism to be renewed and modernized, Zionism threatened to re-awaken the issue of Jewish patriotism and loyalty that Reform Judaism had struggled to put to rest.

Zionism, the Central Conference of American Rabbis complained, stirred up the old hate-filled allegations that Jews "are foreigners in the countries in which they are at home."[44] Said Simon Wolf: "Speaking as an American, I cannot for a moment concede that one can be at the same time a true American and an honest adherent of the Zionist movement."[45] Zionism placed "a prior lien" on the citizenship of American Jews.[46]

Not every prominent Reform Jew encountered the world of the new immigrants in this way. For some, the new immigrants' exuberant *Yiddishkeit* and impassioned meld of socialist and Zionist ideals held out the promise of a more vibrant and "modern," but also more deeply Jewish kind of American Jew.[47] Thus, a handful of important Reform rabbis like Stephen Wise and Judah Magnes became leaders of American Zionism in the 1890s, embracing and hoping to harness the new immigrants' cultural and political energies and identifying with their Jewish nationalism.[48] Their writings would be a thorn in Simon

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[44] *Id.* at 84.
[45] *Id.* at 107.
[46] Id.
[47] *See generally* Hasia R. Diner, Lower East Side Memories: A Jewish Place in America (2002).
[48] *See* COHEN, *supra* note 44, at 55 ("In the case of two young charismatic rabbis in New York, Stephen Wise and Judah Magnes, involvement in Zionest affairs brought them closer to the newcomers from Eastern Europe.").

Wolf's side, as he sprang into action against the Immigration Bureau's new practice of inquiring into new immigrants' religion and classifying the Jewish newcomers as members of the "Hebrew race."[49]

Speaking for the Union of Reform Congregations and other associations of the German Reform Jewish elite, Wolf protested to the Commissioner General of Immigration.[50] Wolf expounded the precepts of Reform Judaism to the Commissioner: Judaism was not a race, and Jews were not a people or a nation. Judaism was a religion, and in the immigration inspectors' forms for questioning, categorizing and labeling new arrivals, "Jews alone" were being "singled out" for religious classification. Such a classification was "contrary to the spirit and genius of our institutions." Enumerating groups – or one group – by religion, the government was using its "administrative functions" in a way "never contemplated in the Constitution." [51] The Reform Jewish Congressman from Chicago Adolph Sabath raised the issue with the Commissioner of Ellis Island at an 1899 hearing of the U.S. Industrial Commission in New York. "Hebrew," Sabath complained, "is the only religion that is distinctively and particularly brought out in the [Immigration Bureau's] last annual report." The Commissioner was unapologetic. The Bureau was interested in "races," not religions. "In some cases the

[49] *See* Simon Wolf, Testimony Before the United States Industrial Commission 1910, at 234 *in* SELECTED ADDRESSES AND PAPERS OF SIMON WOLF (Union of American Hebrew Congregations eds., 1926) (declaring that "[p]eople come [to the United States] as Australians, Italians, Germans, Greeks and not as Catholics, Protestants, or Jews" and that "[t]he religious proclivities of the individual are no concern of the United States").

[50] *See id.,* at 215.

[51] *See id.*, at 239-40 (arguing to the Commissioner General that Judaism is a religion, not a race, and that a Jewish immigrant "does not land as a Jew, but comes as a native of the country in which he was born"). The Commissioner General at the time was Terrence V. Powderly, former leader of the Knights of Labor, who had gained his post by campaigning for McKinley in the '96 election. Powderly wrote Wolf about the inclusion of "Hebrews" among the new racial classifications, appealing to group pride and clout. "I believe that when our method of gathering statistics is understood, the Jews of this country will be the first to approve the measure" for it will "tend to show that they are a power in the United States…[M]any of my associates in the industrial movements were Jews, and I cannot recall a day when the Jew…did not stand for law and order." *Id.* at 259-63.

mother tongue might give us an idea of the races, but sometimes the tongue would not do that, and then we had to ask what their religion was…[A]sking the religion is simply a means to this end."[52] Wolf's and Sabath's protests, however, won them half a loaf. The forms filled out by front-line inspectors no longer included a question about religion. But the forms continued to list "Hebrew" as a race or people, inspectors continued to determine who was a "Hebrew," and "Hebrews" continued to be tallied.

The matter came to a head again a few years later in more bitter and protracted fashion as the work of the famous Dillingham Commission got underway in 1907.[53] The Commission adopted the Immigration Bureau's list of "races or peoples" and sent out scores of investigators and social scientists into the cities and industrial regions of the nation to gather information and compile statistics about where the different new immigrant races were settling, what trades they pursued, what work they did, and what impact they had upon labor markets and industries, unions and schools.[54] What portion was in prison or on poor relief? Did these racial newcomers assimilate? The Commission's massive surveys covered dozens of industries in all the nation's major cities and industrial regions, canvassing over ten million individuals, immigrant and

[52] 15 U.S. INDUS. COMM'N. REP. 92 (1901).

[53] The Dillingham Commission was the Progressive Era's central study of the new immigration, created as part of a deal that Roosevelt and his Secretary of Commerce and Labor, Oscar Straus struck with Speaker Joseph Cannon in exchange for eliminating the literacy test from Congress's agenda. *See infra. at __. See also* ROBERT F. ZEIDEL, IMMIGRANTS, PROGRESSIVES, AND EXCLUSION POLITICS: THE DILLINGHAM COMMISSION, 1900-1927, at 34 (2004).This research was published in a 42-volume report. *See* 1 U.S. IMMIGR. COMM'N. REP., ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION 17(1911) ("Since 1899 the Bureau of Immigration has classified arriving immigrants by races or peoples, as well as by country of last permanent residence, and this plan was followed by the Commission in collecting and compiling original data respecting the foreign-born element in the population of the United States.").

[54] *See* ZEIDEL, *supra* note 63, at 77-80 (2004) (surveying the Commission's plan to compile data on six broad areas of research regarding immigrants' assimilation and effect on established communities); John Lund, *Boundaries of Restriction: The Dillingham Commission*, 6 UNIVERSITY OF VERMONT HISTORY REVIEW, at 27 (Dec. 1994) (the Commission adopted a proposal that "would consolidate immigration statistics and simultaneously collect economic and sociological data on how and where immigrants lived and worked.").

native-born, classifying them according to nativity and "race" and correlating immigrants' "racial identities" to their industrial occupations, wage rates, children's years of education, union membership, and home ownership, as well as imprisonment, institutionalization, pauperism and dependency on charity, and so on. Completed in 1911, the surveys filled forty-two volumes and became the Progressive Era's central study of the new immigration.[55] They brought the Immigration Bureau's new racial classifications from the official head counts at the ports into the creation of social knowledge about the nation's cities and industrial heartlands.[56]

As the surveys got underway, the Commission lit upon the idea of extending these investigations to the *entire population*, via the U.S. Census.[57] The 1910 Census was coming up. Senator Dillingham, who headed the Immigration Commission brought to the Senate Census Committee the idea of introducing "race" into the list of categories to be canvassed by the census-takers.[58] Of course, there already was a race question on the

[55] U.S. IMMIGR. COMM'N. REP. (1911).

[56] Thus, for example, the Commission's city by city and industry by industry accounts of the new immigration's impact on wages, working conditions and working-class living standards contained table after table of dire "racial statistics" comparing figures for native-born and new immigrant workers and their families, with the latter designated by "race." ("The complaint is made in all sections of the Middle West that the recent immigrant, by his willingness to work in dangerous places and to increase the danger of accidents to himself and his fellow-workmen, by his acceptance without protest of extra work without compensation, by his evasion of and failure to adhere to the regulations of the labor organizations, and by consenting to the so-called company-store and the occupants of undesirable company houses, tends to bring about working conditions which are unsatisfactory to the native or old employee and to develop a standard of living with which the old employee cannot compete."). *See* 6 U.S. IMMIGR. COMM'N. REP., IMMIGRANTS IN INDUSTRIES, BITUMINOUS COAL MINING 666 (1911). Over the coming years, these would loom large in the American Federation of Labor's campaigns for immigration restriction and in the writings and speeches of Senator Lodge and the newly formed Immigration Restriction League in support of the literacy test and, later, the quota system. William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 70 (2009) (unpublished manuscript, on file with author) [

[57] Simon Wolf, The Presidents I Have Known from 1860-1918, 236-65 (1918).

[58] On the Senate floor, Senator Chester Long, chair of the Senate Committee on the Census, introduced "a committee amendment…to insert the word 'race'" into the list of items to be canvassed. 60 CONG. REC. S625 (daily ed. Jan 8, 1909). Strauss and Kohler's fellow member of the newly founded American Jewish Committee, Senator Simon Guggenheim, a Philadelphia-born German Reform Jew, who ran his family's mines in Colorado and represented the state in the U.S. Senate,

census forms. This was the "color" question – and it was designed to classify the population as White, Negro, American Indian, and Oriental.[59] But adding the Immigration Bureau's and Commission's list of forty-one races or peoples would teach volumes about the "other white races" who were arriving every day. The Senate swiftly adopted the change and the House seemed poised to do so.[60]

Simon Wolf and the leading organizations of the German-Jewish Reform elite responded in high dudgeon.[61] In 1906 the Reform elite had created what would remain its premier organization for decades to come, the American Jewish Committee (AJC).[62] Spurred by the hundreds of pogroms (organized and state-condoned massacres of Jews and destruction of Jewish property) sweeping across western Russia, a group of prominent New York Reform Jews had called a national meeting out of which the AJC was born. The object was to unify and lead American Jewish efforts to press the U.S. government to take action against Czarist policies, to help Russian Jews in harm's way and to manage the increasing Exodus from Russia, while ensuring, at the same time, that leadership of these efforts not fall into the hands of East European upstarts and rabble-rousers. Lawyers loomed largest, followed by extremely wealthy financiers and businessmen, and a number of nationally prominent Reform rabbis. Oscar Straus and the

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observed at a Senate Census Committee hearing a few months later that the impetus for tallying the new immigrants' "races" in the 1910 census came from Dillingham. *See also* WOLF, *supra* note 17, at 236-65 (1918).

[59] On the provenance and history of the "color" question, see Claudette Bennett, *Racial Categories Used in the Decennial Censuses, 1790 to the Present*, 17 No. 2 GOVERNMENT INFORMATION QUARTERLY (2000); U.S. Census Bureau, *U.S. Census Bureau, Measuring America: The Decennial Censuses from 1790-2000*, 34-36 (2002).

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

[61] *See id.* (describing how the German-origin, Reform-Jewish elite rose to challenge the addition of "race" to the 1910 census).

[62] *See* NAOMI W. COHEN, NOT FREE TO DESIST: THE AMERICAN JEWISH COMMITTEE 1906-1966, at 4-18 (The Jewish Publication Society of America,1972)

young Max Kohler were there, playing leading roles; the nation's highest ranking Jewish federal judge, Julian Mack also figured prominently,[63] and so did the corporate attorney and soon-to-be NAACP founder and advocate Louis Marshall. Reflecting its lawyer-leadership, the organization's constitution announced its purpose in rights talk, and reflecting its Reform Jewish vision, it made no mention of group or national rights but instead set its face against "infringement of the civil and religious rights of Jews" and vowed to "alleviate the consequences of persecution."[64] With Simon Wolf still an important spokesman, and the leading Wall Street financier and backer of President Taft, Jacob Schiff, working behind the scenes along with Senator Simon Guggenheim and Congressman Sabath, the AJC orchestrated the campaign against the new census category.

At the request of the leading Jewish lawmaker, Senator Guggenheim, hearings were scheduled. Representatives of other new immigrant groups also weighed in. But no other group engaged the issue of how the census would identify the newcomers from Southern and Eastern Europe and their offspring with anything like the same energy and intensity; no other group's leadership was so aroused against the Senate's decision to usher racial classifications of the new immigrants into the census.[65] If the measure was to

[63] On Judge Mack, see infra note 81.

[64] . An avowedly patrician organization, the AJC put aside talk of democratically constituting itself via representative elections from amongst the Jewish communities for which it aimed to speak. The AJC would pursue its purposes through quiet diplomacy and elite connections. The Yiddish press and East European (and East Side) Jewish leaders dubbed them *Hofjuden* or court Jews.

[65] Thus, the Immigration Commission Report contained several recommendations. 41 U.S. IMMIGR. COMM'N. REP., STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION (1911). Many of these concerned issues of classification. A few Italian-American organizations remonstrated against categorizing "Southern Italians" as a separate racial group. Cite. A number of Irish-American organizations

be defeated, it would be by dint of whatever persuasion and clout the Reform Jews could muster. No longer did it seem simply a matter of keeping religion out of government's categorizing of newcomers. By now the idea of counting Jews as a race had taken on sharpened significance. The racial sciences were turning harsher and more deterministic, and the 1900s had also seen the founding of the Immigration Restriction League (IRL) by a cohort of patrician nativists and eugenicists, like the viciously anti-Semitic Madison Grant and Prescott Hall..[66]

Wolf and the Reform Jewish leadership had seen enough of how Jews fared with the racial sciences of Europe.[67] Race science was the handmaiden of the "modern" theory of Jew hatred, an outlook that proudly dubbed itself Anti-Semitism. If the Russian Jews on the Lower East Side wanted to trumpet Zionism and Yiddishkeit in the idiom of "race," that was hard to stop. It was too late to prevent Senator Dillingham's Commission from adopting the Bureau's infernal List of Races. But racial classification of Jews in the official Census's classifications of the American population threatened much worse. You had only to look at the fate of the nation's legally classified racial others to see that.

In December, 1909 the Dillingham Commission held hearings addressing the proposed incorporation of the Immigration Bureau's racial classification scheme into the

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endorsed the notion of classifying Irish newcomers as belonging to the "Celtic" "racial group" and the "Irish people," just as the Commission had deemed them. *Id.* at 15- And more than a few Irish organizations echoed Terrence Powderly's view that being counted by "race" in this fashion would redound to the groups' advantage. By far the most numerous, longest and most high-brow statements were the work of Jewish organizations and individuals; and these were also the most internally divided, about whether Jews were indeed a "race" or "people," and about how the matter of racial difference was determined. *Id.* at 265-279.

[66] *See* HIGHAM, *supra* note 26, at 152.

[67] *See* HATTAM, *supra* note 4, at 35-39.

census.[68] Simon Wolf had the floor as the hearings commenced, and declared against the scheme's treatment of Jews as a "race" or "nation": Jews had "no nationality other than that to which he has sworn allegiance and to which he owes obedience." As an immigrant, "the Jew…should not be classified as belonging to a race, because he does not land as a Jew, but comes as a native of the country in which he was born." And "if the classification is religious, then I most solemnly protest, as it is contrary to the spirit and genius of our institutions."[69]

None of this impressed Henry Cabot Lodge, the Senate's brilliant patrician nativist and one of the three Senators on the Dillingham Commission. To classify the new immigrants solely on the basis of nationality or country of origin was useless, and

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[68] *See* ZEIDEL, *supra* note 63, at 96-100.

[69] *Hearing Before the Immigration Commission*, 61ST CONG. (1910), *reprinted in* 41 U.S. IMMIGR. COMM'N. REP., STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION 266 (1911). Not every Jew, Wolf acknowledged, rejected Jewish nationhood. However, the "reform element [of Jews] in the United States and throughout the world, that class which has not been living in Russia and Roumania under medieval conditions, is decidedly on the lines I have indicated; that is, that we are citizens of the country in which we reside, and we have been fighting in every possible way against the idea of founding a Jewish state." *Id.* If conditions in "Russia and Roumania" bred Jewish nationalism, they also embodied the oppressive experience of official racial classification as a vehicle of exclusion. Those governments "recognize the Jew racially and…confer no rights or privileges upon him as a citizen; in short, they do not recognize him. Therefore, the tabulating of the Jew [as a race apart in the U.S.], especially coming from those countries, is simply strengthening the hands of the people who have oppressed him in other countries." *Id.* Judge Julian Mack spoke along with Wolf for the Reform Jewish establishment against the racial classification system. A Progressive federal appeals court judge, with degrees from Harvard, Berlin and Leipzig, a founder with Jane Addams of Hull House and with Strauss and Kohler of the American Jewish Committee, Mack was rooted in the life and government of Chicago from his early experience as a municipal reformer and pioneering juvenile court judge. He drew on that experience - and tacitly alluded to the practice of racial segregation in American schools – in bringing down to earth what his cohort feared might loom if, via the proposed new census categories, the Dillingham Commission's scheme of classifying Jews as a race apart were drawn into general governmental practice. Especially distressing was the Commission's decision to classify according to the Immigration Bureau's racial categories not only foreign-born newcomers but also their U.S. born children and grandchildren:

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

Id. at 273.

the religion issue was a red herring.[70] For Lodge it seemed self-evident that Jews were a race, and he could not believe that Wolf sincerely thought otherwise. Lodge knew enough about Jewish life and letters to be familiar with some of the ways in which even assimilated Western European and American Jews thought about themselves in racial terms.

> *Senator Lodge*: Do you mean to deny – I want to understand your position – that the word "Jew" is a racial term?...How would you classify Benjamin Disraeli? Was he a Jew?
> *Mr. Wolf*: He was born a Jew.
> *Senator Lodge*: No, he was not born a Jew, for he was baptized in a Christian church.
> *Mr. Wolf*: He was born of Jewish parents, and subsequently at a certain age was baptized.
> *Senator Lodge*: He was baptized as a Christian. He then ceased to be a Jew?
> *Mr. Wolf*: Yes; religiously he ceased to be a Jew.

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[70] Thus, Senator Lodge stymied Wolf with the kinds of dilemmas that had led the Immigration Bureau to adopt the new category of "races and peoples." How could the census record only the newcomer's place of birth and the "nationality to which he owes allegiance" and still capture the salient group identities of the new immigrants whose impact was roiling the nation?

Senator Lodge: How are you going to define the nationalities?...Are you going to classify a Hungarian as an Austrian?

Mr. Wolf: The Hungarians, as far as their allegiance is concerned, under present conditions are undoubtedly Austrians. They are Hungarians, of course. Hungary is a separate and distinct Kingdom.

Senator Lodge: How would you classify those coming from the 17 Provinces of Austria – men of utterly different races, historically speaking? We classify the Croatians, the Bohemians, according to the race they represent in Austria. We classify them according to their race, not according to their allegiance or religion.

Mr. Wolf: I am aware of that.

Senator Lodge: The Irish are a perfect illustration of that. They are not classified according to their religion. They are British Subjects…But we classify them as Irish because they are Irish, and undoubtedly there is a great deal of mixed blood in Ireland – English, Scotch, and Welsh blood.

Mr. Wolf: That is altogether geographical, and so with respect to the 17 Austrian Provinces.

Senator Lodge: The Irish are not classified geographically. An Irishman is classified as an Irish immigrant wherever he may come from.

Mr. Wolf: You seem to forget – and you certainly are sufficiently versed in the history of all people and especially the people I represent to know – that when a Jew is spoken of a Jew in faith is meant.

Senator Lodge: Not at all.

Mr. Wolf: And the race has absolutely nothing to do with it.

Senator Lodge: There is where we start off with a vast difference. I deny that this classification is according to religion…It is purely a racial classification, and I used the illustrations I did to establish that.

Id. at 270.

> *Senator Lodge*: Ah! Religiously. He was very proud of the fact that he was a Jew and always spoke of himself in that way. Did the fact that he changed his religion alter his race?
> *Mr. Wolf*: It did not alter the fact that he was born a Jew; not at all; and I know the Jewish people throughout the world have claimed him, Heine, Borne, and others, who were born of their blood…but they ceased to be Jews from the standpoint of religion.[71]

Caught in the grip of contradiction, talking the language of blood and race, Simon Wolf stumbled. Then Lodge turned to other writings.[72] Many learned American Jews – Rabbis Stephen Wise and Judah Magnes among them - said that Jews were indeed a race and a nation. [DITTO!] Wolf changed tack, and turned to the Constitution. "So far as citizenship of the U.S. is concerned, we know only the great divisions of the human family – White, Black, American Indian and others. Otherwise, we will land ourselves in justifying discrimination against classes of citizens, which will result in a destruction of the American idea of the equality of all citizens."[73]

Lodge made no comment on the arresting constitutional distinction Wolf drew between the "great [color-coded racial] divisions of the human family" and the new racial divisions among whites that Lodge championed and Wolf opposed. One might imagine Wolf meeting Lodge half-way, agreeing that Jews were an historical "people," and offering Lodge something like the distinction we draw between "racial" and "ethnic" groups. Of course, the genealogy of this distinction is a vexed one, since both "ethnicity" and "race" are thought to run through kinship and "blood lines." Yet, the ways we use them emphasize the chosen and culturally constructed elements of "ethnicity," and the

[71] *Id.* at 267.
[72] *Id.*
[73]

unchosen and biologically given elements of the "race" idea. Even today, much turns on whether a particular minority is seen as a "race" or an "ethnic group."

But Wolf and Reform Jews of Wolf's generation did not want to offer U.S. lawmakers, administrative state officials, or race scientists some more historical, less biological, concept like "ethnicity" with which to categorize Jews as a group. They didn't want the state or the scientists to categorize Jews as a group at all. Judaism, they insisted, was a religion and nothing else. For Simon Wolf and the Reform Jewish elite he represented, Jews had no "national" identity, besides the country they owed allegiance to.[74] They had no "racial" identity that marked them off as "Hebrew" or "other"; and of course, according to the "great divisions of the human family," they were "White."[75] This did not suit Henry Cabot Lodge or the Immigration Bureau.

Nor did it suit the many American Jews, especially new immigrants, who dubbed themselves "race Jews" (as opposed to Wolf, Strauss, Kohler's and the Reform establishment who called themselves "faith Jews"). Wrote one rabbi in a Philadelphia Jewish paper, Senator Lodge was a "better Jew" than Wolf, for he refused to deny the existence of the Jewish race. Zionists, in particular, assailed Wolf's efforts before the Commission. If anything threatened to stir up anti-Jewish feelings, it was not the affirmation of racial identity, but the "shifting, unmanly and undignified pretense of representatives of a people, who against fact and history, and against their own private convictions, disown the racial and national birthright."[76] Nor did the establishment's stance suit the generation of Jewish American thinkers coming of age in the Progressive

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[74] *Hearing Before the Immigration Commission*, 61st Cong. (1910), *reprinted in* 41 U.S. Immigr. Comm'n. Rep., Statements and Recommendations Submitted by Societies and Organizations Interested in the Subject of Immigration 266-69 (1911).

[75] *Id.*

[7676] Bernard G. Richards, *Jews against the Jewish Race*, HEBREW STANDARD, Jan. 7, 1910.

Era. They would make their peace with (or join the ranks of) Jewish nationalism. It is only somewhat of a simplification to say that members of this next generation of thinkers invented the "ethnic group" idea, to acknowledge and safeguard rather than suppress group difference, while averting the "racial classification" of Jews. Soon, we'll catch a glimpse of this process when we encounter Louis Brandeis, his association with Horace Kallen, and his emergence as spokesman of American Zionism and champion of "group rights" and "group equality."

But what Wolf and other representatives of the Reform Jewish elite could not win through debate with the Senators from New England, they won through political clout.[77] Dillingham and Lodge's idea of incorporating the Immigration Bureau's and Dillingham Commission's list of races into the Census died in the Conference Committee.[78] Neither "Hebrew" nor "Slav" or "Southern Italian," nor any of the other new racial categories entered the nation's official Population.[79] All of them remained simply "White" in the official Census of Population. Uncounted in the Census as different "races," they were on their way to becoming "ethnicities."

OSCAR STRAUS FORGES A "LIBERAL IMMIGRATION POLICY"

From the 1890s until World War I, the new immigrants kept coming, and the immigration inspectors continued tallying them by "race" at the nation's gates. Roughly

[77] *See* Panitz, *supra* note 15, at 102-106.
[78] *See* 60 CONG. REC. S2181 (daily ed. Jan. 20, 1909); *see also* Perlmann, *supra* note 70, at 2-3.
[79] 1 Dep't. of Commerce, 1910 Population General Report and Analysis 125.

17 million arrived during these years.[80] Given the mounting hostility toward the waves of new immigrants, it's really a wonder that the gates remained open for as long as they did. The War temporarily halted immigration. Then, in1921-'24, during the tribal 'twenties, Congress enacted nationality and so-called "racial quotas" to shut the gates on the "new immigration" from Russia and Southern and Eastern Europe. Congress tried to shut them much sooner. Four times between 1891 and 1917, Congress enacted a stern literacy test intended to keep out the bulk of new immigrants, including, especially, the Jews.[81] And four times Presidents Cleveland, Taft and Wilson vetoed the measures.[82] During his White House tenure, Teddy Roosevelt kept the literacy test and other harsh exclusionary measures like "racial quotas" for Russians and Southern and Eastern Europeans from ever reaching a vote.[83] Even when a majority in Congress favored harsh immigration restrictions, neither party could afford to become a national vehicle for anti-immigrant politics. The pro- and anti-immigrant coalitions cut across party lines.[84] The anti-immigration coalition was an unholy marriage of progressive reformers, on one hand, and patrician and plebian nativists, on the other.[85] The latter loathed the new immigrants chiefly on racial grounds; the former wanted to stem the economic reserve army of poor newcomers pushing down labor standards.[86] Of course, the racists and labor market types overlapped. And both included lawmakers with rural constituencies whose native-

[80] *See* Claudia Goldin, *The Political Economy of Immigration Restriction in the United States*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 223, 223 (1994).
[81] Desmond King, Making Americans: Immigration, Race, and the Origin of Diverse Democracy 78-79 (2002).
[82] *Id*.
[83] *See* Robert F. Zeidel, Immigrants, Progressives, and Exclusion Politics: The Dillingham Commission, 1900-1927 34 (2004).
[84] Daniel J. Tichenor, Dividing Lines: The Politics of Immigration Control in America 8 (Ira Katznelson, Martin Shefter, Theda Skocpol, eds., 2002).
[85] *Id.* at 115-20.
[86] *Id*.

born sons and daughters were flooding into the same urban and industrial labor markets as the new immigrants: the largest internal migration in U.S. history collided with the largest immigration from abroad.[87] The pro-immigration coalition was an alliance of industrial employers who wanted the gates kept open for cheap labor and the new immigrants' own political organizations,[88] which could and did sway presidential elections in crucial cities and states.[89] However, if every president until World War I felt compelled to veto the harsh, racially coded restrictions, every president also needed something to offer the anti-immigration crowd.

The main solutions took shape under Teddy Roosevelt, and Roosevelt's counselor and representative in immigration policy-making was the German-Jewish lawyer named Oscar Straus, the nation's first Jewish cabinet member.[90] Straus was Roosevelt's Secretary of Commerce and Labor; hence, he stood atop the Immigration Bureau. Educated at Columbia Law School in the 1870s, son and grandson of leading German Jewish merchants and stalwarts of Reform Judaism in the old world and the new, Oscar Straus himself was a leading figure in New York's Reform Jewish establishment. Prior

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[87] *See* Claudia Goldin, *The Political Economy of Immigration Restriction in the United States*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 223, 239(1994) (arguing that anti-immigrant sentiment was largely driven not by nativism but rather by fear of the effects of immigration on jobs and wages, as many Americans "saw the future of their children . . . in the nation's cities and factories").

[88] *See* TICHENOR, *supra* note 97, at 48 (explaining that the failure of nineteenth-century nativists was due to both powerful voting blocs created by European settlers and Republican policymakers who viewed "large-scale European immigration as consistent with broader ambitions for economic development").

[89] *See id*. at 74 -75. (explaining the success of McKinley in the 1896 campaign despite the lack of nativist support; "With increased voter support from all ethnic groups except Irish Catholics, McKinley defeated his Democratic rival, William Jennings Bryan, by a comfortable margin, at least by late-nineteenth-century standards.")

[90] *Oscar S. Straus in Roosevelt's Cabinet*, N.Y.TIMES, Oct. 24, 1906. (Straus was the first Jewish person to hold the post of Secretary of the Department of Commerce and Labor. At the time, only five Jewish people had been elected to serve in the U.S. Senate.)

to joining the administration, Straus had led some of New York's and the nation's key Reform Jewish organizations devoted to Americanizing the new Jewish immigrants. Like Kohler, he was on the executive board of the American Jewish Committee; and like Kohler, he also founded and served on the board of the Baron de Hirsch fund, which underwrote and supervised transatlantic efforts to aid poor Jews fleeing pogroms and destitution in Russia and to "distribute" them into the U.S. hinterlands. In office, Straus helped pen Roosevelt's attacks on the race-laden immigration restrictions afoot in Congress, and he fashioned and championed the President's alternative "liberal" measures to diminish immigration's pressure on "the standard of wages of our own laboring men, whether these be of native or foreign birth," while shunning any restrictions that hinged on "whether [the would-be immigrant] is of one creed or another."[91] And Straus oversaw the implementation of these alternative policies.

But Straus was a man of letters as well as a high state official. He produced the first sustained, scholarly version of what became a central narrative of Jewish belonging, chronicling the "Hebrew origins" of the American Constitution. . Thus, Straus wedded intensely practical work on the law and policies governing Jews' entry to and membership in the national community withcultural work on law as a medium for imagining Jews' terms of belonging to America..

The Jewish "Origins" of the "Republican Form of Government" in America

Straus's family left Germany and settled in Georgia before the Civil War, bringing with them a long attachment to Reform Judaism and classical liberalism. Prominent

[91] Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905).

merchants and leaders of the Jewish community in Bavaria, Straus's forbearers hewed to Reform Judaism's meld of Enlightenment ideals and a pared-down "universalist" "ethical" core of Jewish belief, released from the yoke of rabbinic law.[92]

Straus's father Lazarus Straus was a merchant banker who put himself in harm's way for the cause of political liberalism by joining the 1848 Revolution against the authoritarian German provinces.[93] The Revolution's defeat set back Lazarus's finances and threatened him with imprisonment.[94] So, like thousands of other German '48ers, including Simon Wolf's family and Louis Brandeis's, he emigrated to the U.S. and settled in the South.[95] In Georgia, he began as a peddler and then, via old world connections in wholesale merchandizing, became a successful store owner and merchant.[96] The "only Jew" in Talbotton, Georgia, Lazarus conducted himself in the spirit of German Reform – assimilating with gusto, while remaining an Enlightened

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[92] NAOMI W. COHEN, A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS 3-4 (The Jewish Publication Society of America ed., 1st ed., 1969). Straus's grandfather, Jacob Lazard figured in one of the great set pieces of West European Jewish emancipation. Lazard was one in a long tradition of Jewish merchant bankers who built up supply networks across Europe to support Britain's and France's, the Hapsburgs', the Czars' and the Sultans' imperial armies. Jacob Lazard provided supplies for the horses of Napoleon's farflung armies. Napoleon included Lazard in the Assembly of Jewish Notables convened in 1806 to interrogate Jewish leaders about the terms on which the Jews proposed to live, if Napoleon confirmed their new and precarious standing as citizens of France and members of the French nation. "What precisely was the nature of rabbinical authority? Was it permissible for Jews to intermarry with Christians? Were Frenchmen brethren or strangers in Jewish eyes? Did a Jew born in France and treated as a citizen consider France to be his own country, one that he was bound to defend and whose laws he was bound to obey? Did Jewish law distinguish between usurious loans to Jews…and usurious loans to others…?" were some of the sometimes tricky and unsettling questions about which Napoleon and his imperial commissioners wanted answers. DAVID VITAL, A PEOPLE APART: A POLITICAL HISTORY OF THE JEWS IN EUROPE, 1789-1939 57 (1999). They were the kinds of questions the Jews of 19th century Europe encountered on the real or imagined road to emancipation and citizenship.

[93] *See* COHEN, *supra* note 96.

[94] *Id.*

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

[96] *See* NAOMI W. COHEN, A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS 4-5 (The Jewish Publication Society of America ed., 1st ed., 1969).

Jew.[97] He contributed to the upkeep of the town's churches, but offered local clergy lessons in Hebrew and lectured them on the wrongheadedness of claiming biblical sanction for slavery.[98] He imparted Hebrew and some Jewish learning to his offspring, while he sent them to the town's Methodist and Baptist Sunday schools.[99] There, he explained, they should imbibe universal ethical precepts and avoid sectarianism.[100] Supporters of the Confederacy, Lazarus and his older son, Isidor occupied a role similar to the one Jacob Lazard had filled for Napoleon:[101] procuring a handful of ships in England for Confederate blockade runners. From this came a modest access of wealth, and the family moved to New York at the war's end to launch a small crockery import business, whose success eventually enabled the firm of L. Straus & Sons to become owners of Macy's and other new "department stores."[102] Lazarus's two older sons, Isidor and Nathan went right into the family business, but the sensitive and scholarly Oscar was encouraged to continue his studies.

Straus enrolled in Columbia College, when being Jewish still marked one as half-outcast.[103] But only half: in Fall of '71, Straus entered Columbia Law School, studied common law under Theodore Dwight and imbibed Reconstruction Era constitutionalism from the famous Prussian émigré and great treatise writer, Francis Lieber, and left law

[97] *See id*., at 6.
[98] Id.
[99] *Id*.
[100] Id.
[101] *Id*. at 7-8.
[102] *Id.* at 8-9.
[103] Years later, he wrote a former professor, using the familiar biblical trope of outsiderness, as he recalled keenly felt social "slights" despite academic success: "I came to Columbia in 1867, almost a stranger to a strange land: I was under many disadvantages, comparatively poor, not as well dressed as most of my classmates, with no social standing and a Jew. For the latter offense I was even excluded from the literary society of the undergraduates. Often was the day I returned home with a heavy heart, because of some slight on the part of someone or other of my classmates." *Id.* at 10.

school equipped for and socialized into elite New York practice.[104] He joined a firm, Ward, Jones & Whitehead; then formed a new firm with Simon Sterne, a Reform Jew with a sizeable practice in banking and railroads and a reputation as a free trader, publicist and municipal reformer;[105] became friends with Joseph Choate, and immersed himself in the new lawyer-led elite reform movement that dubbed itself "liberalism" and became known as "Mugwumps": Republicans who spurned Grant for Cleveland, founded the Association of the Bar of the City of New York and countless other reform clubs and associations, assailed the spoils system and Tammany Hall, championed free trade, and in their writings, judicial decisions and legal practice, created classical legal liberalism and the constitutional outlook that found its *locus classicus* in Mugwump Thomas Cooley's *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*.[106] The classical liberal constitutionalism Straus gleaned from his law professors, fellow Mugwumps, legal mandarins and elite reformers in New York filled the Constitution with meanings and precepts that tracked the classical liberal ideals at the heart of Reform Jews' Enlightenment utopia: full civic and legal equality; no class legislation by race or creed; freedom of conscience, contract and trade; equality of opportunity and the equal right to pursue all trades and callings.

Given the family business and history, it was perhaps natural that Straus would gravitate to free trade and high-minded liberalism. But it was his ambitious scholarly bent that led him to identify so deeply with the liberal legal intelligentsia's historical-mindedness. . In his late twenties, Straus began building up a library rich in early

[104] *Id.* at 11.
[105] *Id.* at 12.
[106] *See id*. at 17-20. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (7th ed. 1903).

Americana and studying and lecturing on constitutional history and above all, on freedom of religion.[107] Then, in the early 1880s, he took time off to write an ambitious book.[108] One spur may have been the much-admired work on Anglo-American legal history by Henry Adams and his famous research seminar at Harvard in the late 1870s. That work centered on the "Teutonic" origins of "Anglo-Saxon Law" and the "Teutonic germ" of American law and liberty. With the "Teutonic germ" theory and arduous research, Adams and his illustrious students, including the young Henry Cabot Lodge, produced a racial account of the origins of American law that became the hallmark of intellectually serious American legal thought for a generation.[109] Straus's 1885 book, *The Origin of*

[107] NAOMI W. COHEN, A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS 14-15 (The Jewish Publication Society of America ed., 1st ed., 1969).

[108] *Id*. at 15.

[109] See David Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (2012). In the 1890s, Adams's gifted student and co-author, Henry Cabot Lodge (whom we met as the Senate's patrician nativist in his barbed exchanges with Simon Wolf) and other like-minded statesmen and public intellectuals began to put the "Teutonic germ" thesis to work in public debate, calling into doubt the fitness of Jews and other "alien races" for the rigors of republican self-rule and American citizenship. Already in the 1870s, though, Straus would have heard Dwight and others at Columbia expounding on the Anglo-Saxon character of American law and liberty. "A generation of English and American historians believed that English constitutional and legal institutions, the framework of liberty, went back to Teutonic rather than Roman Institutions. . . . Henry Adams . . . had said in 1876 that 'the student . . . who now attempts to trace, through two thousand years of vicissitudes and dangers, the slender thread of political and legal thought, no longer loses it from sight . . . but follows it safely and firmly back until it leads him out upon the wide plains of Northern Germany." Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 218-19 (1964) (quoting Adams, Essays in Anglo-Saxon Law 1 (1876)). By the 1890s, , Adams's own racial views would take a harsher and dourly Anti-Semitic turn. In New York's Reform Jewish elite, he saw a dismal sign of the times, with which he felt "more than ever at odds…I detest it, and…live only to see the end of it, with all its infernal Jewry. I want to put every money-lender to death, and to sink Lombard Street and Wall Street under the ocean…We are in the hands of the Jews. They can do what they please with our values…" To Charles Milnes Gaskell – July 31, 1896, in *Letters of Henry Adams, 1892-1918, Vol. 2,* 338 (W.C. Ford, ed. 1938) Likewise, as the mass migration of Russian and Eastern European Jews was swelling, Adams gave voice to patrician angst at the thought of "four-hundred-and-fifty thousand Jews now doing Kosher in New York." In his *Education of Henry Adams*, writing about himself in the third person, Adams connected the Jewish newcomers to a melancholy decline in native virtue and energy: "Not a Polish Jew fresh from Warsaw or Cracow – not a furtive Yacoob or Ysaac still reeking of the Ghetto, snarling a weird Yiddish to the officers of the customs – but had a keener instinct, an intense energy, and a freer hand than he – American of Americans, with Heaven only knows how many Puritans and Patriots behind him."

Republican Form of Government in the United States of America, was a "Jewish germ" theory.[110]

The book is about the deep roots of the U.S. Constitution in ancient Israel and the "Hebrew Commonwealth." This was a trope already common in Reform rabbis' weekly sermons in the 1880s. Thus, for example, Kaufman Kohler would tell his congregants that the "Founding Fathers took the heroes of ancient Israel as their models for the championship of liberty and democracy, framing their constitution on the principles underlying the Law of Sinai."[111] *We Jews share in the spiritual lineage of America's civil religion. Our traditions are its taproot. American liberty, equality, rule of law all flow out of the Hebrew Bible.* But Straus's book marked the trope's first elaborate, scholarly treatment.

"The Hebrew Commonwealth," claimed Straus, was the world's "First Federal Republic," and its influence was "paramount" in inspiring the U.S. Constitution.[112] Straus was conversant with what mid-nineteenth-century scholars in Germany and France had begun to call the "Hebraism" of seventeenth-century religious and political thought.[113] The term referred to the seventeenth-century revival of Hebrew learning among scholarly gentiles who began reading not only the Torah but rabbinic materials in

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[110] Oscar Straus, Origin of a Republican Form of Government 79-80 (2d ed. 1901).

[111] Kaufmann Kohler, "The Tocsin Call of Liberty and Democracy," *reprinted in* A LIVING FAITH 113-14 (Cincinnati: Hebrew Union College Press 1948). *See also* Abraham A. Neuman, "Relation of the Hebrew Scriptures to American Institutions" (Jewish Theological Seminary, 1939).

[112] Oscar Straus, Origin of a Republican Form of Government 79-80 (2d ed. 1901).

[113] *See id.* at xxxviii. (In the Introductory Essay, Emile de Laveleye cites an article written by "the eminent Frenchman" Anatole Leroy-Beaulieu: "The whole year 1789 contains the germ of Hebraism. The idea of right and social justice is an Israelitish idea. The advent of justice on this earth has been the dream of our people. To find the first source of man's rights, we must go back farther than the Reform or the Renaissance, farther back even than antiquity or the Gospel, as far back as the Bible, the Thora, and the prophets."). For a recent examination of Hebraism in the discourse of the American Revolution, see generally Nathan R. Perl-Rosenthal, *The "Divine Right of Republics": Hebraic Republicanism and the Debate over Kingless Government in Revolutionary America*, WM. & MARY L.Q., July 2009, at 535.

Hebrew. Political thinkers like Locke, Grotius, Selden, and Milton began interpreting the "Hebrew Bible" as a kind of "political constitution designed by God for the children of Israel," a "guide to the perfect republic."[114] Thus, Straus knew that the Puritans in Massachusetts Bay were not alone in studying the Old Testament in the original Hebrew; that Cotton Mather's custom of sporting a kippah as he studied Torah in colonial Boston was not as wacky in the Atlantic culture of his day as one might imagine.[115]

For his part, Straus focused chiefly on eighteenth-century New England, where the evidence of constitutional Hebraism was abundant. The colonists' break with England, their rejection of monarchy and mixed government, and their embrace of republicanism all demanded religious sanction. "Ministers preached politics as well as religion," Straus observed. "The pulpit was the most direct way of reaching the people."[116] From the pulpit, the colonists heard the Hebrew prophets' stern warnings against the perils of human monarchs and learned about God's preference that his chosen people choose "a free commonwealth and to have himself for their king."[117] Straus's book parses dozens of sermons, from the 1770s and 80s, including this election day sermon "delivered before the Honorable Congress of Massachusetts Bay" in 1775 by "Samuel Langdon, D.D., the President of Harvard College, who, afterwards, in 1788, was a member of the New Hampshire convention when the constitution came before that body for adoption":

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[114] *See generally* Eric Nelson, The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought (2010).

[115] Mark Krupnick, *The Rhetoric of Philosemitism*, *in* RHETORICAL INVENTION AND RELIGIOUS INQUIRY: NEW PERSPECTIVES 366, 379 (Walter Jost & Wendy Omsted eds., 2000) ("Put simply, the Calvinists who came to Massachusetts Bay admired and imitated the ancient Israelites"; for example, many seventeenth-century Biblical scholars, including Cotton Mather, wore yarmulkes.).

[116] Oscar Straus, Origin of a Republican Form of Government 77 (2nd ed. 1901).

[117] *Id*. at 119.

> The Jewish government, according to the original constitution which was divinely established, was a perfect republic. And let them who cry up the divine right of kings consider, that the form of government which had a proper claim to a divine establishment was so far from including the idea of a king, that it was a high crime for Israel to ask to be in this respect like other nations, and when they were thus gratified, it was rather as a just punishment for their folly. Every nation, when able and agreed, has a right to set up over itself any form of government which to it may appear most conducive to its common welfare. The civil polity of Israel is doubtless an excellent general model.[118]

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

> [T]he children of Israel, who had just emerged from centuries of bondage, not only recognized the guiding principles of civil and religious liberty that "all men are created equal," that God and the law are the only kings, but also established a free commonwealth, a pure democratic-republic under a written constitution, "a government of the people, by the people, and for the people."[119]

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

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[118] *Id*. at 120-21.
[119] *Id*. at 117.

Toward a New "Liberal Immigration Policy": Alternatives to Nativist Racism

Straus brought this deep identification with the liberal Constitution to bear on his work on immigration law and policy for Roosevelt. That "all men are created equal" and entitled to equal rights in an Enlightened liberal state was the utopian dream of Reform Judaism in Western Europe. We have noted the remarkable fit between the Enlightenment ideals of Reform Judaism and the classical liberal constitutional outlook of New York's legal elite in the 1870s and '80s.

Two decades later, however, by the time Straus was preparing to move to Washington and join the Roosevelt administration, the Reconstruction-bred racial liberalism of the leading lights of New York's legal elite had vanished. The old climate of liberality toward Jews remained among some stalwart WASP Progressives like the President, but most of the City's elite were thoroughly alarmed by the masses of poor Russian Jews flocking to the Lower East Side.[120] Thanks to them, Jews were fast approaching twenty-five percent of the city's population.[121] There were more poor, unassimilated Jews in the city than its Jewish elite could manage or its gentile elite would stomach.

Mass immigration of poor Jews and other racialized outsiders had brought forth a fierce wave of nativist politics in almost every region of the country: in the industrial regions and cities where the great bulk of new immigrants had settled; in the rural Midwest wherefarm families were sending sons and daughters to the industrial cities in

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[120] *See* OTIS L. GRAHAM, JR., UNGUARDED GATES: A HISTORY OF AMERICA'S IMMIGRATION CRISIS 29-43 (2004) (describing patrician New Yorker and racial scientist Madison Grant's best-selling treatise *The Passage of the Great Race,* which called for immigration restrictions from Southern and Eastern Europe to preserve "New York's 'old stock'").

[121] 1 U.S. Immigr. Comm'n. Rep., Abstracts Of Reports Of the Immigration Commission 247 (1911).

search of work; and in the South where nativist and Jim Crow racism were fused. In this climate, Senator Lodge and other patrician nativists like New York's Madison Grant had founded the elite think tank and lobbying organization, the Immigration Restriction League, which promoted eugenics research on the new immigrants' "racial stock" along with a legislative program of "immigration restrictions" that promised to save the nation's "old [racial] stock" from "decline."[122] Now, Straus would bring his constitutional creed to bear on the practical work of immigration reform. An immigration bill was already pending in Congress when Straus took up his cabinet post in June, 1906.[123] Sponsored in the Senate by Senator Dillingham of Massachusetts and drafted in part by Dillingham's fellow Senator from Massachusetts, Henry Cabot Lodge and Lodge's new Immigration Restriction League (IRL), the bill included both unvarnished "racial" quotas and the IRL's more popularly acceptable measure for stopping great numbers of "undesirable" new immigrant "races" at the gates: the literacy test. Over lunch in the White House, Straus made his case against the test.[124] Like outright quotas, it was bigoted and illiberal; it was aimed against the supposedly "inferiorraces" from Southern and Eastern Europe and Russia. If they were largely illiterate, it was only for lack of opportunity, not want of the stuff that made them fine Americans. "Distribution" was the liberal alternative; distribution plus stiffer enforcement of the existing laws.

If Lodge and the nativists in Congress wanted to close the gates on the new immigrants, that was chiefly because of the "congestion" of new immigrants in the nation's cities. The liberal solution was not exclusion; it was to divert or remove some

[122] *See* John Higham, Strangers in the Land: Patterns of American Nativism 1860-1925, at 150-52 (2002).
[123] Edward Prince Hutchinson, Legislative History of American Immigration Policy, 1798-1965, at 137-143 (1981).
[124] Naomi W. Cohen, A Dual Heritage: The Public Career of Oscar S. Straus 153 (1969).

portion of the new immigrants from their "foreign colonies" in New York and other big cities, with their ghettos and slums and contentious labor markets, and distribute them across the country, to the many places where their labor would be welcome, and they would much more readily assimilate.[125] Why, much of the nation's hinterlands and many western cities and towns were crying out for labor; much of the country's arable soil was going uncultivated! Thus, a Progressive policy would promote what Straus called – and Roosevelt began to extol as - "Distribution": establishing an ambitious, farflung federal agency, linking New York and other ports of entry to every town in the nation in order to assist the new immigrants in moving beyond the east coast cities into the interior, to the myriad places where their industry was sorely needed.

Roosevelt agreed with Straus's proposals. To Straus's ideas he added the quintessential Progressive notion of establishing an ambitious independent commission to examine the Immigration Problem, and he encouraged Straus to work with the autocratic Speaker of the House, Joe Cannon to kill the immigration bill's literacy provision and parlay these liberal alternatives into the new law.[126] They succeeded.

"Rigid Enforcement" of "Liberal Laws"- the "Individual Qualities of the Individual Man"

The liberal virtue of the existing laws restricting European immigration, in contrast to the measures championed by Senator Lodge and the nativists in Congress, was that they determined exclusion by the "individual qualit[ies] of the individual man," not his race or

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[126] See infra. TAN __ on provision for a new division of the Immigration Bureau to manage distribution of new immigrants. Roosevelt's idea for a major commission would become the Dillingham Commission. See supra ___.

creed.[127] Not only that, Straus explained, the existing laws picked out for exclusion individuals who lacked the qualities of material and moral independence that a liberal Constitution demanded and prized.[128] They excluded the person "likely to become a public charge," the infirm, the indentured and so-called "imported," "induced" or "assisted" immigrants. They could be given a broader reach, and they could be far more vigorously enforced. Said Roosevelt, in his '06 Annual Message to Congress, promoting Straus's reforms, "[M]ost of the undesirable class [of immigrants] does not come here of its own initiative. [They are] wheedled, cajoled, imported and assisted by [unscrupulous American employers, labor brokers] and the agents of the great transportation companies." They must be stopped; but the standard at the gates must be "the individual quality of the individual man." That was the "old American tradition." "Being a good American has nothing whatever to do with a man's birthplace." The measure must never be "whether he is of one creed or another, of one nation or another…whether he is Catholic or Protestant, Jew or Gentile…"[129]

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[127] *See* Theodore Roosevelt, Annual Message to Congress (Dec. 5, 1905).

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

[129] 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). For most lawmakers Chinese exclusion was a ready response to Western demands for a halt to what the region's politicians depicted, in starkly racial terms, as an alien invasion. The statute was also an easy way to placate organized labor; for the latter was calling for a halt to unfair competition from "coolie labor." *See id*. and ALEXANDER SAXTON, THE RISE AND FALL OF THE WHITE REPUBLIC (1990). 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 immigrant workers brought from Southern and Eastern Europe "under contract" by American firms in racialized fashion too. Some said they were innately "slavish." But for others the contract labor bar was a way to draw a non-racial line that excluded dependent and "unfree" labor and welcomed free standing Southern and Eastern European immigrants no matter their "race." See William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 14 (2009) (unpublished manuscript, on file with author).

The existing immigration laws excluded "idiots" or "insane persons," "felons" and "anarchists."[130] They also barred "paupers" and persons "likely to become a public charge" along with those would-be immigrants who were "imported" as "contract labor" and had their passage paid for by American employers and their agents and labor brokers in the impoverished countryside of Southern and Eastern Europe.[131] Likewise, existing laws barred immigrants whose coming was a result of "promise of employment through advertisements printed and published in any foreign country."[132] They too were deemed an artificially induced, unnatural flow of poor immigrants prompted by steamship companies' and American employers' proffers of wages that looked grand in the European peripheries but cut the bottom out of American labor markets.[133] Finally, existing laws also set up a presumption of excludability against "assisted immigrants," whose passage was paid or who were "assisted by others to come." Such "assisted immigrants" were put to the burden of showing they did not belong to "one of the foregoing excluded classes," on the theory that not only American employers and the foreign "padrones" with whom they dealt but also foreign governments and foreign charities were promoting and paying for emigration – the employers for cheap and

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[130] Immigration Act, ch. 551, §1, 26 Stat.1084 (1891).

[131] *Id*. Immigration officials, labor leaders and lawmakers saw these imported or contract laborers as pawns of unscrupulous European padrones or labor brokers. The padrones or brokers contracted with American employers and paid the fares of the poor and supposedly benighted immigrants, who were thus indentured and seemed no better than "white coolies" or serfs. Free American workers could not compete with them; and they probably lacked the "independence to live under our republican form of self-government." *See* William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 9-11 (2009) (unpublished manuscript, on file with author).

[132] Immigration Act, ch. 551, §3, 26 Stat.1084 (1891).

[133] William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 12 (2009) (unpublished manuscript, on file with author).

dependent laborers, the governments and charities to be rid of their own paupers and misfits.[134]

As Oscar Straus saw it, a constitutional standard unified the laws.. That standard was at the heart of cases like *Lochner* and classical legal liberalism's view of free labor. The true American worker was a free-standing actor selling his labor as he thought best. [135] The desirable immigrant fitted this standard. The proper test was whether he had the

[134] This burden-shifting provision against "assisted immigrants" flew in the face of actualities. Most contemporary observers concluded that massive numbers of immigrants, especially from Southern and Eastern Europe and Russia came to the U.S. with tickets purchased by family, kin or friends already in the U.S. *See, e.g.*, Memorandum by John Gruenberg, Immigration Inspector at Ellis Island, Reel 6, pp. 90 (detailing extensive use of tickets purchased in the U.S. by immigrants already here). ; BROUGHTON BRANDENBURG, IMPORTED AMERICANS: THE STORY OF THE EXPERIENCES OF A DISGUISED AMERICAN AND HIS WIFE STUDYING THE IMMIGRATION QUESTION 2-3 (1904); It would have been impossible for the immigration inspectorate at the main ports of entry to conduct what were called Special Boards of Inquiry (discussed *infra* at p. 65) to determine whether each of these "assisted immigrants" could "affirmatively and satisfactorily [show] on special inquiry" that he or she did not belong to one of the "excluded classes." Immigration Act of 1903, ch. 1012, § 2, (32 Stat.) 1213, 1214 (1907). What was more, the law was ambiguous about whether prepayment of passage on the part of family or friends brought immigrants within the coverage of the burden-shifting requirement. The clause requiring an affirmative showing on special inquiry was followed by the provision: "but this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes." *Id*. Read narrowly, the latter clause left the burden-shifting provision unaffected. (An immigrant whose way was paid for by family or friends could be made affirmatively to show he did not fall into an excluded class, and assuming s/he could show that was indeed the case – s/he was not a pauper, a criminal, insane, infirm, "under contract" and so on - nothing about the procedural burden hindered his family or friend from successfully sending for him.) In practice, the language generally seems to have been read as though it exempted from the "special inquiry" procedure immigrants whose way was paid by family or friends, as opposed to employers or foreign governments. But the narrow reading remained available, and as we shall see, it was used during a critical moment in the administrative history that concerns us.

[135] *See Straus Says that Taft is No Reactionary*, N.Y.TIMES, Apr. 29, 1909. (Straus extols the freestanding, unassisted immigrant's fit with American free labor tradition.). On Lochner and 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)**.** *See also Politics, State-Building, and the Courts, 1870-1920*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643 (2008). Of course, the precept of liberty of contract could be seen as safeguarding, not condemning, the new immigrant's decision to enter an agreement abroad to work for an American employer or to obligate himself to work off a debt to a "padrone" – all in order to reach the U.S.A. and its opportunities. Precisely this view occurred to federal judges who often construed the contract labor provisions of immigration law narrowly and strictly, in order to discourage officials from barring immigrants whom the judges regarded as having the moxie to make their way in the U.S., and whose circumstances did not seem those of helpless serfs or "coolies." *See, e.g*., United States v. Edgar, 45 F. 44 (Cir. Ct. E.D. Mo. 1891) (contract under the Act requires all the formality of any other contract, including consideration and mutual assent); United States v. River Spinning Co., 70 F. 978 (Cir. Ct. R.I. 1895) and United States v. McElroy, 115 F. 252 (Cir. Ct. D. N.J. 1902) (both cases denying government's claim of violation of the Act because description of the alleged contract was not particular enough). *See generally* William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity

grit to save up and get himself and his family and dependents to the U.S. by himself and the capacity to support them once they were here.[136] The valid reason to exclude a would-be immigrant and his family must be his failure to measure up to this sternly individualistic ideal.

Straus and the Immigration Bureau set out to give the existing laws more teeth and to enforce them more vigorously. They brought to Congress proposals (a) to bar not only persons who came "under contract"[137] but also those who came in response to more informal "offers or promises of employment" or "agreements oral, written or printed, express or implied"[138]; and (b) to turn assisted immigration from a burden-shifting category into a new excluded and deportable class encompassing would-be immigrants whose way was paid by "any corporation, association, society, municipality, or foreign government, either directly or indirectly"[139] Straus and the President championed these new measures, along with stricter enforcement of existing law, as ways to deter the most dependent and "artificially induced" forms of emigration and to signal that only

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in the Law and Politics of European Immigration, 1882-1924 at 25-27 (2009) (unpublished manuscript, on file with author). Other judges were more perspicuous regarding the law's purpose as a protectionist measure against cheap imported labor much as tariffs protected product markets against cheap foreign goods. In this light, the laws were the working-class equivalent of tariffs, and setting tariff policy was not the courts' work. *See* id.

[136] *See* Forbath, *supra* note 155 at 63.

[137] Which courts had read to require all the legal incidents of an enforceable contract. *See, e.g.,* United States v. Baltic Mills Co., 117 F. 959 (1903) (holding that the promise of probable employment of a specified type, place, and wage was prohibited). *See also* William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924 at 25-27 (2009) (unpublished manuscript, on file with author).

[138] Immigration Act, ch. 1134, §2, 34 Stat. 898 (1907). These new provisions were meant to capture the more informal promises and agreements that figured in the actual operations of padrones and labor brokers working for American employers. Of course, immigrants swiftly learned to deny that they came in response to any advertisements (already barred by the older laws) or any other specific offers or promises of employment. *See* BROUGHTON BRANDENBERG, IMPORTED AMERICANS: THE STORY OF THE EXPERIENCES OF A DISGUISED AMERICAN AND HIS WIFE STUDYING THE IMMIGRATION QUESTION 2-3 (1904) ; Memorandum by John Gruenberg, Immigration Inspector at Ellis Island Reel 6, pp. 90.

[139] *Id*. The burden-shifting requirement remained in place for immigrants whose way was paid by others; and the provision about not "prevent[ing] persons living in the United States from sending for a relative or friend" was omitted.

immigrants with a greater measure of resources and moxie would be welcome.[140] Soon enough, however, the individualistic features of these laws would collide with Straus's and his Reform Jewish cohort's own efforts at solidarity with their "race or creed." Aiding the emigration of Jews from Russia and Poland would bring them up against the limitations and dilemmas of embracing classical liberal constitutionalism as a vocabulary of belonging. Congress enacted the new measures in 1907.[141] The quotas and literacy test were struck ,[142] and in addition to the expanded bars on imported labor and assisted immigration, the 1907 immigration law reforms included authorization for an independent Commission on Immigration (which, it was understood, would be chaired by Senator Dillingham), as well as a provision for the establishment of a Division of Information within the Immigration Bureau in Straus's Department of Commerce and Labor, to gather and circulate comprehensive information about employment opportunities for new immigrants and to launch a network of labor exchanges to distribute them throughout the country.[143]

TROUBLES AT ELLIS ISLAND: MAX KOHLER JOINS THE FRAY

While Congress was still considering rival immigration bills, President Roosevelt and Secretary Straus took another step to dramatize their commitment to a "vigorous" but "liberal" immigration policy. As the new Commissioner of Immigration at Ellis Island,

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[140] *See* Theodore Roosevelt, "Annual Message to Congress" (Dec. 5, 1905). See also *Straus Says that Taft is No Reactionary*, N.Y.TIMES, Apr. 29, 1909. (Straus defends immigration policies which deter most dependent and exploitable classes of immigrants.))

[141] *See* Immigration Act, ch. 1134, §4, 34 Stat. 898 (1907).

[142] *See* E.P. Hutchinson, Legislative History of American Immigration Policy 1798-1965 136-143 (1981).

[143] E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 136-143 (1981) (describing the provisions of the final act); *See also* Immigration Act, ch. 1134, §39, 34 Stat. 898 (1907).

the President appointed a fellow patrician New Yorker and tough-minded Progressive reformer named William Williams.[144] A Wall Street attorney and member of several elite civic associations, Williams threw himself into the task of "cleaning up" Ellis Island, planting trees and greenery, renovating dining halls and waiting rooms, and rooting out both graft and "lax enforcement" of the immigration laws.[145] The attorney Commissioner sent out a raft of circulars to the front-line inspectors, demanding more "rigorous" application of the various statutory grounds for exclusion, stricter observance of the burden-shifting requirement for assisted immigrants, more exacting standards for "likely to become a public charge" determinations, and new rules for conducting Special Boards of Inquiry. The Commissioner's circulars crisply spelled out new statutory interpretations, evidentiary standards and procedural rules to implement his strict new regime. regime.[146] Longstanding rules and standards were swept aside: Henceforth, for example, every immigrant whose way was paid for by an American friend or relative would be deemed an "assisted immigrant" and would go before a Board of Special Inquiry hearing and be required affirmatively to show he did not fall within one of the excluded categories. At the hearing, a friend or relative's assurances of support while a newcomer sought work would no longer remove the taint of "likely to become a public charge," unless the assurances came from a relative legally obligated to support the newcomer. Moreover, the general rule of thumb as far as money in hand to tide one over for that time was raised to twenty-five dollars a person; otherwise, again, the new rules

[144] *William Williams Accepts*, N.Y. Times,, Apr. 2 1902. (William Williams replaces Commissioner Thomas Fitchie)

[145] *Ellis Island Improved,* N.Y.TIMES, July12, 1903. (Major changes made to Ellis Island under Commissioner Williams watch, including landscaping renovations, implementation of a roof garden, as well as barge services.) On Williams' campaign to root out graft by firing a number of corrupt Ellis Island officials, see N.Y. Public Library, Williams Papers files; INS files re Fitzpatrick & others.

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

deemed one "likely to become a public charge." Boards of Special Inquiry hearings were streamlined, while the numbers of hearings each day soared, and so did the numbers of detentions and deportations. [147] Williams had good reason to believe that his reforms followed the prodding of the President and his Secretary of Commerce and Labor for sterner application of existing law. Just as William Williams' stern new regime was getting underway at Ellis Island, violence in Russia brought new urgency to Jewish emigration. Reports of the Kishinev Pogrom of 1903 spurred Reform Jewish elites in New York City, London, Paris, and Berlin to ratchet up their efforts to aid Jewish emigration from Russia. The leading figure in New York was Jacob Schiff, a tireless German Jewish philanthropist and chief of the second largest invest banking house on Wall Street, Kuhn, Loeb and Company.[148] As the leading financier among New York's German-Jewish elite, Schiff was the U.S. counterpart to Europe's Baron de Hirsch and the Rothschild family.[149] In the wake of Kishinev, Schiff, Straus, Kohler and other leaders of the newly founded AJC set about expanding the network of agencies to assist Russian Jews, including deeply impoverished ones, to emigrate.[150] [151]

Between Kishniev and World War I ome 1.8million Jews would depart from Russia and elsewhere in Eastern Europe where pogroms, state violence and official intolerance

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[147] *Id*.

[148] *See* NAOMI W. COHEN, JACOB H. SCHIFF: A STUDY IN AMERICAN JEWISH LEADERSHIP xi (1999) ("[I]n times of crisis American Jews looked first to Jacob Schiff . . . the head of the powerful banking firm Kuhn, Loeb, & Company, for an appropriate response.").

[149] *See id.* at 47 ("Schiff's foreign contacts were primarily individuals like the Rothschilds of London . . . and Baron Maurice de Hirsch . . . .").

[150] *See* ROBERT A. ROCKAWAY, WORDS OF THE UPROOTED 27-28 (1998) (describing the emergence of the Galveston plan, spearheaded by Jacob Schiff, which sought to aid Jewish immigration from Russian by directing Russian Jewish emigrants to other parts of the country). See also NAOMI W. COHEN, NOT FREE TO DESIST 57 (Jewish Publication Society of America, 1st ed. 1972)

[151]

were mounting and economic circumstances worsening.[152] In Already by early 1906, over 140,000 of them had landed at Ellis Island.[153] As the numbers burgeoned, hundreds of Jewish emigrants were detained each week , caught in the screens of Commissioner Williams' improved administrative machinery. This returns us to Max Kohler. Son of Rabbi Kaufman Kohler, grandson of Rabbi David Einhorn, Max sat with Jacob Schiff on the board of New York's Baron de Hirsch Fund, and with Simon Wolf on the Executive Committee of the Union of American Hebrew Congregations.[154] If Wolf was the elder statesman of the old German-Jewish elite in Washington and Straus its first representative in the highest reaches of the Executive Branch, Max Kohler was among its premier litigators and did all the challenging law work in respect of immigration. Kohler would assail the whole constellation of substantive and procedural reforms that Commissioner Williams instituted. With Schiff and others, including Cyrus Sulzberger, German Reform Jewish owner and publisher of the New York Times and a fellow founder of the American Jewish Committee, Kohler led a many-sided campaign of quiet diplomacy and loud protests, sophisticated lawyering and intense lobbying to halt the deportations and turn back Williams' new regime as a species of "administrative lawlessness" and persecution.[155]

Kohler was well equipped to handle the law work. He had been immersed in immigration law for over a decade. In 1892, after graduating from Columbia, Kohler became an Assistant U.S. District Attorney, as they were then called, for the Southern

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[152] Samuel Joseph, Jewish Immigration to the United States: From 1880 to 1910, at 93 (1914).
[153] *Id*.
[154] Information for The National Encyclopedia of American Biography, Max J. Kohler, Box 1, Folder 5 (undated) (on file with the American Jewish Historical Society).
[155] *See* NAOMI W. COHEN, NOT FREE TO DESIST 27 (Jewish Publication Society of America, 1st ed. 1972).

District of New York, and there between 1894 and '98, he was given a special assignment to prosecute and deport Chinese merchants and laborers under the Chinese Exclusion Law.[156] Leaving government, Kohler became a partner in the firm of Lewinson, Kohler, and Schattman, and began representing Chinese facing deportations from New York.[157] Switching from prosecution to defense work was common then as now. A number of assistant U.S. district attorneys who had prosecuted the Chinese Exclusion Law in San Francisco took this route, and worked on retainer to the city's wealthy Chinese merchants.[158] But for the next three decades, Kohler would do his voluminous immigration law work for free.[159]

Perhaps it was to expiate his guilty complicity (while exploiting his expertise) in the deportation of hundreds of Chinese immigrants. Subjecting Chinese merchants to vicious rituals of status degradation also evoked the treatment of Jewish merchants in contemporary Russia and parts of Europe.[160] Some portion of Kohler's passion may have flowed from that recognition: one racially persecuted "market minority" seeing itself in the other. Perhaps, the pogroms and the stirrings of mass immigration of Russian Jews in the 1880s and '90s also led him to guess that he would soon be able to use his painfully gained knowledge on the latters' behalf. But for the next three decades, from

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[156] 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.

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

[158] *See* LUCY E. SALYER, LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 70 (1995) (noting that many U.S. Attorneys, after the end of their tenure, represented Chinese immigrants in San Francisco District Court).

[159] *See* Memorial to Max J. Kohler Box 1, Folder 12 (1934-1936) (on file with the American Jewish History Society) ("In fact during the last 25 years of his life he never accepted any remuneration for services in immigration cases…").

[160] *See* Max Kohler, *Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed,* N.Y. TIMES, Nov. 24, 1901, at 9 ("The system devised for the expulsion of the Moors from Spain and of the Jews from Russia in our day…are gentle and humane compared with the barbarities of our existing `American' methods for the deportation of alleged Chinese persons…").

the 1900s through the 1920s, Kohler represented Jews no more often than other unwelcome racial others – Chinese, "Hindus," "Slavs" and "Arabs" - facing deportation.[161] Maybe being assigned as a young District Attorney to master the machinery of expulsion, while being heir to the family-forged faith in the liberal Constitution as the Reform Jews' "new Covenant" and America as the "new Zion of freedom and human rights" made defending the rights of racial others at America's gates seem destiny.

Max's father, Rabbi Kaufman Kohler repeatedly explained and justified the Reform Jew's stubborn combination of assimilation and apartness in terms that might have predicted such a destiny. Reform Jews were no longer a people with a separate national destiny, no longer seeking to return to Zion, no longer bound by Jewish law, hewing only to Judaism's universal precepts "Why then," asked Rabbi Kohler in his inaugural sermon at New York's Temple Emmanuel in 1878, would not Reform Jews "throw down" the "ragged mantle" of the eternal "wandering Jew" and "melt" into the larger gentile community? Why not convert? Why not intermarry? Why stay stubbornly apart? His answer was the "arduous" and "priestly" work of justice-seeking, which Jews had to do "for all humanity."[162] This, according to the Reform Jewish narrative Kohler helped fashion, was the "mission mapped out by our great seers of yore" – "the godly men…who consecrated their lives to the practice of the law": "the Jewish people must guard against absorption by the multitude of nations

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

[162] *See* Rabbi Kaufman Kohler, Wandering Jew, Box 1, Folder 4 (1878) (on file with the American Jewish Historical Society).

as much as against isolation from them..."[163] Only thus, could the "priest-people" fulfill their destiny: scattered amongst the nations in order to bring the Law forth from Zion, "not as a geographical but as a spiritual center," not the old rabbinic law, but the moral law of "human rights" and "freedom."

Just what justice-seeking work the affluent members of Temple Emmanuel were about in 1878 is unclear. But mass immigration and heightened nativism spurred Max Kohler to bring closer to earth his father's bold reconstruction of Jewish apartness and its ethical meaning. We can speculate: Without this identification with racial outsiders, without taking on arduous law work on their behalf, what exactly did one's Jewishness amount to: a young corporate lawyer praying in English in an elegant Fifth Avenue cathedral?

Kaufman Kohler's identification of Diasporic Jews as a "chosen people" with a mission of justice-seeking on behalf of "all humanity" would become a central element of Reform Jewish American identity for generations: "rais[ing] the fallen," standing with the outcast, "tzedek, tzedek tirdof" ("justice, justice shalt thy seek"), "if not now, when?" Here was a basis for renewing and defending Jewish particularity, standing with the outcast, the "strangers," the fallen, resisting "absorption" into the smug gentile elite, but doing so as a member of a staunchly bourgeois profession, and in terms of Enlightened, "universal" values enshrined in the U.S. Constitution.[164]

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[163] See KK Theology file.

[164] On the Lower East Side, a new generation of Russian immigrant Jewish trade unionists and union attorneys made a similar kind of "modern" sense of their Jewish identities as a justice-seeking people for all humanity through a different Enlightened, universalist calling: not so much rights lawyering as trade unionism and radical social reform. Brandeis, we'll see, combined the two and made them a key part of his own awakening to and vocabulary of Jewish American identity. See infra __-__.

Max Kohler, in any case, son and grandson of the nation's leading Reform rabbis, became its first Jewish civil rights lawyer. In November, 1901, a few years into his private practice and a few months before Congress would contemplate renewing the Chinese Exclusion Act, Kohler published a pair of passionate and densely argued articles in the *New York Times*: "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?"[165] along with a more extensive treatment, "Un-American Character of Race Legislation," in the scholarly press.[166]

Having had "the duty of representing the Government in this class of cases…and since then [having] argued many cases under these laws on behalf of Chinese applicants," he set about "exposing to the reading public" the harsh and summary deportation proceedings to which Congress had consigned would-be Chinese immigrants and native-born Chinese-Americans returning from abroad (and alleged to be newcomers by hostile officials).[167] He described the scant fact-finding and stacked deck of evidentiary presumptions, the bar on judicial review and obstacles to administrative review, the "ignorant, biased, petty officials," and the general "reign of terror" that this extra-constitutional deportation system had produced in the Chinese community.[168] The law would not have taken the form that it did were it not for the Chinese-Americans' lack of political clout.[169] (No matter how longstanding their residence in the U.S., Asians were

[165] *See* Max Kohler, *Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed,* N.Y. TIMES, Nov. 24, 1901.

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

[167] Max Kohler, Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed, N.Y. TIMES, Nov. 24, 1901, at 14.

[168] Max Kohler, *Un-American Character of Race Legislation,* 34 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 55 63-64(1909).

[169] *See* Max Kohler, *Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed,* N.Y. TIMES, Nov. 24, 1901, at 14.

"ineligible of [naturalized] citizenship" and barred from the ballot). Above all, Kohler assailed the dehumanizing racism that seemed to explain these disabilities.[170]

If only the Chinese were subject to the "general legislation" and not statutes aimed at the Chinese in particular, matters might be better.[171] To be sure, the general immigration laws also provided for administrative finality. Still, at the time, Kohler believed that "though errors in administration doubtless occasionally bar out persons whom the courts would admit if the matter were open for consideration there, still paupers and contract laborers are dealt with" in ways that are generally fair.[172] But he drew back. The "principle of non-reviewability" simply can't fairly be "applied to Chinese exclusion" until we are rid of "the present ideas embedded in our statutes [that] Chinese are treated as people unlike all others, having no rights that our petty or high officials or other citizens need respect."[173]

Eliminating from the immigration laws the "racial classification" of the Chinese as a people apart, then, could be a vital step in changing the "atmosphere of oppression and prejudice and intolerance" among Government officials.[174] With its promise of "equal protection of the law," the Constitution might seem to demand this, but that promised applied only to the states, and, in any case, the Court had indicated that judicially enforceable "constitutional limitations" had little force in the immigration arena. Congress, however, could and should apply "our fundamental principles" to its own legislative work.

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[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *Id*.

Here, Kohler set up the "Constitutional principle against class legislation" as the heart of equal protection, citing the leading Gilded Age constitutional treatise, Cooley's classic (and classically liberal) *Constitutional Limitations,* for the proposition that " '[p]roper classification and not race discrimination ought to underlie legislation.' "[175] Within "certain limits," at least, the Court had condemned "legislation based upon race discriminations."[176] Kohler quoted lavishly from *Yick Wo*, in which the Court condemned city officials' "race discrimination" against Chinese laundry owners in San Francisco, proudly affirming the 14th Amendment's embodiment of the Declaration's "'fundamental rights to life, liberty and pursuit of happiness, considered as individual possessions, secured by those maxims of constitutional law which are monuments showing the victorious progress of the [American] race in securing to men the blessings of civilization under the reign of just and equal laws.'"[177] Kohler rightly saw in *Yick Wo* a generous expression of classical liberal notions of freedom to pursue ordinary callings ("considered as [an] individual possession") and of basic civil rights (here against arbitrary -because racially motivated - deprivation of that liberty) extended, in the Court's words, "'equally [to citizens and to] the strangers and aliens who now invoke the jurisdiction of the court.'"[178]

And so too with "federal statutes and treaties."[179] Thus, Kohler highlighted the Civil Rights Act of 1875 in which Congress broadly "outlawed race discrimination," only to be

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

[176] *Id.* at 56.

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

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

[179] *See* Max Kohler, *Un-American Character of Race Legislation,* 34 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 55 56 (1909).

struck down by the Court "as an encroachment upon state power."[180] Likewise, after enacting the 14th Amendment, Congress struck "color distinctions from our naturalization laws."[181] And as another instance of this same classical liberal outlook at the intersection of race and immigration in international relations, Kohler quoted President Hayes' veto message against the first Chinese Exclusion Law of 1882 as a violation of the Burlingame Treaty that Hayes had negotiated with China: "Up to this time," Hayes had declared, "our uncovenanted hospitality to the immigrant, our fearless liberality of citizenship, and our equal and comprehensive justice to all inhabitants . . . ha[s] made all comers welcome."[182]

Instead of fearless liberality, the problem with the Court's jurisprudence was that "a large number of statutory distinctions on race lines . . . have been sustained . . . on the theory that illegal 'discriminations' are not involved, if equal but separate and distinct facilities for different races are afforded."[183] Yet, "[i]t is difficult to escape the conclusion that [such laws and the decisions upholding them] are inconsistent with the spirit of American Government."[184]

So, Max Kohler, like Oscar Straus, steeped himself in liberal legal learning; for decades, he would continue publishing in scholarly outlets and journals of opinion, his articles replete with international-legal, historical, anthropological and philosophical references.[185] But with Kohler the focus almost always was on gripping matters at hand, crafting, again and again, the case against "racial classifications and distinctions" in the

[180] *Id.* at 61.
[181] *Id.* at 56.
[182] *Id.* at 65.
[183] *Id.* at 62.
[184] *Id*.
[185] *See, e.g.*, Max Kohler, *Some Aspects of the Immigration Problem*, AMERICAN ECONOMIC REVIEW, Mar. 1914, at 93; Max Kohler, *Beginnings of New York Jewish History*, *in* PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY (2d ed. 1905), at 41.

laws that defined and policed the nation's borders. Over the next two decades, Kohler would become the nation's leading litigator and scholarly expounder of the anti-classification principle and other liberal legal and constitutional precepts, in the service 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, however, these veins ran out quickly in the arena of immigration. But Kohler mined them for all they were worth and carved out space for judicial review of "non-reviewable" administrative determinations, appealing to the courts' skepticism about administrative finality. In this space, he usually managed to prevail on the merits, with subtle, constitutionally inflected statutory interpretations, sometimes served up with precepts from international law. His arguments resonated with the outlooks on the bench.

Kohler's first suit on behalf of Jews at Ellis Island arose from the encounter between Commissioner Williams' new administration and the burgeoning numbers of poor Jews arriving from Russia. Thousands were excluded because Ellis Island inspectors deemed them "assisted immigrants" or "likely to become a public [or private] charge," under Williams' new rules.[186] Clashes erupted, and protest meetings were called. The Yiddish papers proclaimed: "250 Persons Detained in the Inquisition Bastille Yesterday"; "Pity Is Unknown at Ellis Island; Severe Discipline"; "Russian Conditions Prevail; Only the Lash

[186] *See* Comm'r. Gen. of Immigr. Ann. Rep., at 53 (1903).

Is Wanting."[187] "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." "Deported and excluded people number thousands!"[188]

Max Kohler surely appreciated the irony: The "barbarous new interpretations" arose from the efforts of his good friend Oscar Straus to help the President stave off bills in Congress that aimed to shut out far more immigrants, bills openly hostile to Jewish immigrants and other racial others.[189] But Williams's regime went too far. Kohler filed a bundle of habeas corpus petitions, which landed in the hands of the newly appointed federal district court judge, Learned Hand. His clients, Kohler argued, forty-two detainees at Ellis Island, were about to be deported based on readings of the immigration law that the statutes wouldn't support. Kohler's brief assailed as "unprecedented" and "ultra vires" the various grounds on which the Boards of Special Inquiry had determined that these would-be immigrants were "likely to become public charges." The immigration inspectors comprising the Boards had rested their decisions to expel several of Kohler's clients on the ground that the relatives who vouched to support them while they sought work were brothers and brothers-in-law, uncles and cousins, not "legally bound to support" them. Others were excluded from landing in the U.S. because the trades they intended to pursue were "congested"; and others because they failed the Commissioner's new "twenty-five dollars rule." The Commissioner also had issued a

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[187] *See* Newspaper criticism, William Williams Papers, Box 2, Folders 7-9 (1902-1903) (on file with the New York Public Library).

[188] 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, Reel 8, pp. 856, 870-71.

[189] *See supra* pp. 61-62.

circular barring counsel from the BSI hearings, relying on an "inapposite" statutory bar against public attendance. But denying the detainees the right to counsel in a hearing in which "banishment" was at stake violated "our Constitution and our legal traditions."[190]

After challenging his clients' imminent expulsion on statutory grounds, Kohler concluded the brief by raising a constitutional worry. The immigration inspectors, Kohler observed, labeled and referred to petitioners as "Russian Hebrews."[191] The record didn't show that this "racial identification" was the reason for the decisions to deport them, and Kohler didn't claim it was He repeated the Reform Jews' "factual" objections to the notion that Jews were a "race" and their constitutional objections to government singling out any group on the basis of religion. By officially categorizing his clients as "Hebrews," the Immigration Bureau invited prejudice on the part of the "uneducated, underpaid [immigration] inspectors."[192] Quoting the Harvard philosopher Josiah Royce, Kohler concluded: "Give men's apprehensions a name – and they dignify it."[193]

Learned Hand began the consolidated habeas hearing by ruling against the government's jurisdictional objections. The statutory rule of administrative finality did not bar the court from hearing claims that the grounds for detention and exclusion were ultra vires. On the merits, Kohler urged the judge not only to order his clients released, but also to appoint a special master to hold hearings on the "Commissioner's whole method of operation," which was shot through with "intimidation" and "illegalities." Judge Hand questioned his authority to do the latter; but he ordered a hearing that would

[190] Brief for the Petitioner In the Matter Of Hersch Skuratowski, (S.D.N.Y. 1905)
[191] *Id*.
[192] *Id*.
[193] *Id*.

focus on the exclusion of counsel from the Ellis Island hearings and he looked likely to rule for the petitioners.[194] The next day Commissioner Williams released the detainees, and the Yiddish press applauded.[195] A few days later, the Wall Street banker and White House supporter, Jacob Schiff took matters into his own hands and scheduled a meeting in Washington to discuss Commissioner Williams with Straus.[196] Before the meeting took place, Straus and Roosevelt fired the new Commissioner at Ellis Island; the numbers of deportees plummeted; and the Yiddish press rejoiced.[197]

Williams, however, had gained a reputation in Republican circles as a fearless but fair-minded Progressive administrator. When William Howard Taft won the White House in 1908, he asked Williams to resume the thankless task of running Ellis Island. As the recession of 1908 ended, the numbers of newcomers were returning to roughly forty thousand a month, and the President looked forward to boasting of vigorous enforcement of the "liberal" but stringent restrictions Williams had pioneered.[198] The percentage of would-be immigrants barred at Ellis Island in 1908 had been roughly 1%.[199] It doubled during the first several months of Williams' second term; and by January 1911, the portion of excluded immigrants reached 10%.[200]

Kohler, Schiff, and Sulzberger resumed the battle against "the Inquisition and Expulsions at Ellis Island," and so did their East Side counterparts. The editor of the

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[194] Williams Accused of Terrorizing Men, N.Y.TIMES, July 16, 1906.
[195] *See* Newspaper criticism, William Williams Papers, Box 2, Folders 7-9 (1905-1906) (on file with the New York Public Library).
[196] *Id*.
[197] *Id.*

[198] *See* Comm'r. Gen. of Immigr. Ann. Rep., at 13 (1908).
[199] Vincent J. Cannoto, American Passage 221 (2009).
[200] MAX KOHLER, ADMINISTRATION OF OUR IMMIGRATION LAWS, *reprinted in* IMMIGRATION AND ALIENS IN THE UNITED STATES 46, 47 (1936).

Lower East Side's Yiddish Morning Star, enlisted Kohler's help in drafting a five-page letter to President Taft, detailing his community's grievances against Commissioner Williams' return engagement at Ellis Island. The President asked his Secretary of Commerce and Labor, Charles Nagel to investigate, and Nagel dispatched his Assistant Secretary Benjamin Cable to cooperate with Congressman Sabath and other lawmakers in conducting hearings at the port. The three days of hearings at Ellis Island were widely publicized. Witnesses (journalists, attorneys, immigrant aid workers, and immigration officials) were called and transcripts of recent administrative hearings on exclusions submitted, along with briefs by Kohler on points of statutory construction, while the immigrant and establishment press looked on.[201] The heart of the controversy was the support and assistance that informal kinship networks and formal Jewish organizations could lend to newcomers without putting them at risk of deportation. Defending these expressions of solidarity forced Kohler and the other Reform Jewish leaders to confront, more pointedly than ever, the fierce individualism of the "liberal" reforms they had championed. The continuing campaign against Commissioner Williams' regime put pressure on the Reform Jewish establishment's old commitment to legal and political invisibility. It pushed Kohler toward group-based claim-making in the public sphere, the press and the courts, while the elderly Simon Wolf railed against him.

Commissioner Williams had resurrected his raft of stringent rules and standards. He began once more to use the immigration law's burden-shifting provision to hold administrative hearings for as many newcomers as possible whose way had been paid by others. Williams' inspectorate also used such payment as evidence that the newcomers

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

were "likely to become public charges." Jewish attorneys and journalists pointed out that roughly forty percent of new immigrants in recent years had their way paid in this fashion. Williams acknowledged that the practice was widespread. By enforcing the laws "rigorously for the first time," he hoped to "send word to Russia" that the practice put newcomers at risk of deportation. Immigrants must come to Ellis Island "unassisted." Similarly, Williams acknowledged that in the past friends' and relatives' assurances of support had sufficed to show that a newcomer was not "likely to become a public charge." No longer, said Williams. Neither Jewish charities nor friends or distant relations were under a legal obligation of support; and only that would remove the burden of proof from a cash-strapped immigrant and his family. The Commissioner was having none of the Jewish journalists' objections that mass immigration simply wasn't an individual enterprise, that it relied on chains of migration and mutual aid ("people send others money for passage because they come from the same town…they always are paid back"). He also was unmoved by Max Kohler's insistence that the Baron de Hirsch Fund was good for aiding as many poor Jews as arrived, until they found work. To Williams, "likely to become a *private* charge," dependent on Jewish charity, was just as valid a ground for expulsion as likely to become a public one. And Congressman Sabath aside, the lawmakers and executive officials conducting the hearings sympathized with the Commissioner and sparred with Kohler and the Jewish journalists and attorneys from the Lower East Side on these and other matters. None of the federal officials, besides Sabath, seemed to think it *ultra vires* for inspectors to take account of economic conditions and reports of unemployment in the trade and city for which a would-be

immigrant was headed. Finding little support from the Administration, Kohler and his allies returned to court.

There, they again met with success. The Supreme Court sided with Kohler against Commissioner Williams' ingenious transformation of the "likely to become a public charge" provision into a crude tool for calibrating immigration to the condition of U.S. labor markets. Hundreds of would-be immigrants were being excluded on grounds that they would were "likely to become public charges" because their trade in the city they intended to pursue it was a "congested" one. Justice Holmes for a unanimous Court overturned the Commissioner's experiment in labor market management. "It would be an amazing argument," exclaimed Holmes, "for immigration officials to refuse admission to the United States because the labor market in the United States was over-burdened, and yet that would be more reasonable than refusal to admit because of reported conditions in one city." The "likely to become a public charge" provision, Holmes pointed out, tracking Kohler's brief, was found among a statutory list of grounds for exclusion like insanity and physical handicaps. Plainly, Congress had envisioned that the basis for finding someone "likely to become a public charge" should be his own infirmities, not the immigration officials' assessment of economic conditions. [202] In the same case, Justice Holmes also handed Kohler a crucial procedural victory, affirming that federal courts had jurisdiction to hear challenges to the legal bases of exclusions, despite the seemingly impregnable statutory rule of administrative finality. [203]

In other cases, Kohler made headway with the constitutionally inflected interpretive claim that laws governing exclusion at the nation's gates should be construed according

[202] Gegiow v. Uhl, 239 U.S. 3, 10 (1915).
[203] *Id*.

to a canon of liberality. Since "banishment" was a severe burden on individual liberty, administrators and courts should read statutory grounds of exclusion narrowly, in favor of the liberty interest at stake. Commissioner Williams, along with Taft's Secretary of Commerce and Labor, Charles Nagel, mocked the idea. The nation's interest in controlling its gateways, they insisted, warranted enforcement to the statute's hilt. The judges on the Second Circuit, however, were committed to the classical outlook of free markets, free trade and free movement of (able bodied European) persons. Noting the moxie, good health or craft skills of Kohler's admittedly poor clients, they proved hospitable to his canon of liberality.

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

From Washington, Wolf bitterly complained about Kohler's litigation and publicizing, along with Schiff's and the AJC's constant lobbying,challenging and condemning the exclusion of Jews who were, Wolf insisted, just too poor and hapless. "I enclose copy of letter received from Secretary Nagel in an immigration case," wrote Wolf. "He is absolutely just in his criticisms in a general proposition, as well as specifically in this case. The American Jewish Committee is making itself very prominent and promiscuous

at present, and flooding the country with alarming telegrams, as if Congress was going to shut down the gates at once…"[204] Kohler and Schiff recognized the value of Wolf's "keep[ing] on the right side" of high officials; but they refused to do so. [205]

Another line of argument also agitated Simon Wolf. Kohler sometimes folded international law into the case for applying a canon of liberality in the construction of immigration law. Treaties and treatises, Kohler pointed out, now recognized an international norm of asylum from persecution. [206] There were precedents for construing statutes to comport with such international norms and obligations.[207] So Kohler argued that the documented persecution of Russian Jews warranted a canon of liberality in construing "likely to become a public charge" and other statutory provisions in cases involving the admission or exclusion of poor Jewish immigrants fleeing Russia.[208] Simon Wolf remonstrated. This was a plea for "a special discrimination" in favor of "our people." And that was something "[w]e must avoid." Besides, Kohler and Schiff should know that many Russian Jews, including "thousands of paupers," were coming to the U.S. in search of material benefit as much as for freedom from pogroms and persecution. In any case, it would not do to condemn the Immigration Bureau's labeling "our clients" "Hebrews," while at the same time demanding special recognition of their circumstances as Jews. But Kohler would have none of this rigid race-blindness. He could hew to the Reform Jewish creed that Jews were not a race or nation apart, invoke

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

[205] *See* Charles Nagel, Address to the Council of the Union of American Hebrew Congregations: The Immigration Question, with Particular Reference to Jews of America (Jan. 18, 1911), *in* 1 CHARLES NAGEL: SPEECHES AND WRITINGS 1900-1928 at 153-156.

[206] Max Kohler, Immigration and the Right of Asylum for the Persecuted, *reprinted in* Immigration and Aliens in the United States 78, 88-95 (1936).

[207] *See generally* Max Kohler, The Alien and the Right of Asylum, *reprinted in* Immigration and Aliens in the United States 99 (1936).

[208] *Id*. at 118-120.

the liberal Constitution to condemn U.S. immigration authorities classifying and perhaps ill-treating Jews as a race; and still, if the Czar made Russia's Jews racial outsiders and brought Cossacks and mob violence down on them, Kohler could demand a special liberality on their behalf, as a persecuted people. If this meant drawing Jews' "racial identity" into some portion of official public discourse, that was only because oppression had made it a social fact.[209]

Wolf was hyper-cautious about group-based claims. But he was right that President Taft's Secretary of Commerce and Labor Nagel and his Commissioner General Cable were increasingly suspicious of the Reform Jewish elite's efforts on behalf of poor Russian Jews. They were beginning to see the new agencies that Straus, Kohler, Schiff and the Baron de Hirsch Fund had launched in response to the recent pogroms as seeking "to provide a refuge in this country for their race."[210] And the Secretary was right. Resurgent violence and persecution in Russia had brought the U.S. Reform Jewish community to a new level of solidarity and publicly visible organization and action on behalf of the "race."

Defending the work of this transatlantic network of agencies forced Reform Judaism's lawyer-leaders for the first time to level charges and make claims against the government of the United States on behalf of organized Jewry, something they had dreaded. Kohler himself had insisted that this far-flung system of aid and guidance must avoid paying steamship fares of Jews across the Atlantic. That plainly would have constituted "assisted immigration" under the 1906 law. But other kinds of costs were being covered both

[209] *See* Max Kohler, A Mis-Description of the Immigrant Jew, *reprinted in* Immigration and Aliens in the United States 232, 235 (1936).

[210] Letter from Benjamin S. Cable, Acting Secretary of the Department of Commerce and Labor to William Bennet (July 14, 1910) (on file with the National Archives).

abroad and here in the U.S.; and besides, the Jewish agencies were plastering the Jewish schtetls and ghettos of Russia with advertisements and sending out agents who were promising help in settling and finding employment in America and touting the opportunity to emigrate.[211] By the Reform Jewish elite's lights, all of this was philanthropy. By the Secretary's lights, all of this violated the letter and spirit of the immigration laws; and Schiff, Kohler and the AJC were engaged in special pleading for their race.[212] This clash would end up shutting down the latter's grand experiment in distributing Jewish newcomers across America.

DISTRIBUTION, THE GALVESTON PROJECT, AND *THE MELTING POT*

By the time Oscar Straus arrived in Washington to join Roosevelt's cabinet, he had a model of how public distribution of new immigrants should work. The model was the "great Jewish charitable undertaking," funded by the Baron de Hirsch Fund, which parceled and transported thousands of Jewish immigrants each year from New York to points west like Cleveland, Kansas City, Louisville, Nashville and Texarkana, over a thousand towns and cities in all.[213] The undertaking went under the unvarnished name of the Industrial Removal Office, and on its board sat Straus, Kohler and the tireless

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

[212] "[T]he records show and it seems to be an established fact that the Jewish Immigrants' Information Bureau advertise and distribute literature in Russia…It has induced and encouraged immigration to this country by those who would not otherwise have come, by offers and promises of employment and other representations" Letter from Acting Secretary of Commerce and Labor Benjamin S. Cable to William Bennet (July 14, 1910) (on file with the National Archives).

[213] *See* ROCKAWAY, *supra* note 170, at 11-28 (1998) (narrating the establishment of the Industrial Removal Office).

financier and philanthropist Jacob Schiff. The Industrial Removal Office [IRO] collaborated with small outposts of the Jewish fraternal organization B'nai Brith that took up the responsibility of finding and relaying employment opportunities and helping settle the Jews whom the IRO sent them.[214]

Straus, Kohler and Schiff had few doubts about the character-forming virtues of "becoming American" in communities out west, far from the Lower East Side and its vast "colony" of Russian Jews.[215] Resolute New Yorkers, they thought that sending the "shtetl Jews" of Russia and Eastern Europe to the towns and countryside of America would improve theirs character and inure them to honest toil.[216] In no time, they claimed, the new immigrants assisted by the Industrial Removal Office would form the "nuclei" for growing Jewish communities across the country.[217] As a national policy, Straus's vision of Distribution and his Immigration Bureau's new Division of Information promised to be the Industrial Removal Office writ large.

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[214] *Id.* at 11.

[215] Arthur A. Goren, New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922.

[216] *See* Statement of Jacob Borovik (undated) (on file with the American Jewish Historical Society) ("About five years ago the persecution to which we were subjected in Russia roused us to the necessity of taking active measures to protect ourselves. I had cherished the idea of becoming a farmer.. I have learned not to despise honest toil."). As trustees of the Baron de Hirsch fund and directors of the IRO, Straus and the others ensured that the IRO kept careful records of the employment histories and weekly pay of the Russian and Polish Jews it sent west, and they noted with satisfaction that most of the transplanted immigrants swiftly became self-sufficient, assimilated into the local communities, and earned more than they were able to make in NYC. *See* ROCKAWAY, *supra* note 170, at 33 (noting trustees directed IRO to keep records of "every aspect" of the removal work). *See also* JACK GLAZIER, DISPERSING THE GHETTO: THE RELOCATION OF JEWISH IMMIGRANTS ACROSS AMERICA 161 (1999) ("In Bressler's presentation to the Immigration Commission in November 1910, he reported that less than 15 percent of those distributed departed from their new communities and that less than 5 percent had returned to New York. . . . Residential stability and self-sustaining employment were important measures of success.").

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

Straus's vision, in turn, harmonized with the President's. Roosevelt saw many virtues in Distribution. Not only would sending immigrants to the nation's hinterlands remove them from over-crowded labor markets and prod them to assimilate, it might also aid in what Roosevelt called the "reclamation" of the nation's "abandoned" agricultural regions. In this light, distribution was a new species of "conservation," which warmed the President's heart and prompted his White House to sponsor joint conferences of agricultural and immigration reformers.[218]

Along with the President, leading Progressive voices took up distribution as the key to immigration reform. The New Republic trumpeted it.[219] And so did academic immigration experts.[220] For Straus's idea sounded in a Progressive key: Use the machinery of government to make the nation's labor markets more efficient and to nudge and prod individuals to find their highest and best use.

Like many other Progressive reforms, Distribution aimed to supplant "selfish," "private" actors who dominated a social or economic field with fair and efficient, public agencies, lodged in the nascent administrative state. In this case, the private actors were the hundreds of labor brokers, "padrones," and "immigrant bankers" whose storefronts lined lower Manhattan and other ports of entry, where they carried on the "trade of directing and distributing the tides" of newcomers.[221] But these private actors paid no

[218] *See Straus Confers With Labor Men*, N.Y.TIMES, Feb. 11, 1909, at 2.

[219] TNR cites.

[220] *See* Henry P. Fairchild, *Restriction on Immigration*, 2 THE AMERICAN ECONOMIC REVIEW 53, 57 (1912). *See also*

[221] As one close observer of the new immigration remarked, immigrant bankers had "privately bureauized [sic] the welfare of the Italian laborer in this country," collaborating with "money lenders" in Southern Italy, meeting him at Ellis Island, lending him "more money if he needs it," and "dispatch[ing] him to work in the Subway, steve on the docks, excavate for new buildings, delve in the mines, or whatever the work may be, fulfilling the agreement which the bank has made to deliver labor." BROUGHTON BRANDENBERG, IMPORTED AMERICANS – THE STORY OF THE EXPERIENCES OF A DISGUISED AMERICAN AND HIS WIFE STUDYING THE IMMIGRATION QUESTION 22 (1904).

heed to the actual qualities of the new immigrants or the actual labor needs of the regions to which they sent them. The private labor brokers were deceitful and harshly exploitive; often they served as strikebreakers.[222] Progressive immigration reformers were confident that the new scheme would transform newcomers' experience of being "bureauized [sic]" and sent away from New York.

When the Immigration Reform Act passed in summer '07,[223] Straus immediately appointed McKinley's former Commissioner General of Immigration, Simon Wolf's and Straus's friend, Terrence Powderly, the Irish-Catholic "labor man," as chief of the new Division of Information. The enthusiastic Powderly promptly dispatched hundreds of letters to employers, manufacturers' associations, local and state officials, as well as union leaders, to begin gathering information on "the conditions of trade and labor needs," wages paid, quarters provided, the demand for single men versus families, and "what nationalities were thought best qualified to do the work."[224] Under the headline "Uncle Sam A Job-Getter," the *New York Times* reported, "Secretary of Commerce Oscar

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[222]Powderly believed in a strong government role for the distribution of immigrant labor: "It seems to me that the Government should take a hand in this matter and provide means whereby these men may be transported from the place or places where they are obliged to live in idleness to points where they may secure employment." Statement during Labor Conference: Proceedings of the Conference with Representatives of Labor held in the Office of the Secretary of Commerce and Labor, February 10 and 11, 1909; *see also* Frances A. Kellor, *Justice for the Immigrant*, 52 THE ANNALS OF THE AMERICAN ACADEMY (Mar. 1914) 159, 160 ("[A]s a government, we do nothing to instruct [the immigrant] or inform him, either when he lands or goes into our industries, as to his responsibilities or duties or obligations. We are content to leave this to the padrone, the immigrant banker, the notary public, the saloon…").

[223] Immigration Act, ch. 1134, §2, 34 Stat. 897 (1907).

[224] *To Improve Immigrant Distribution*, N.Y. TIMES, July 12, 1907, at 3. By September of '07, Powderly presented Secretary Straus a report showing off the new Division's work:

> Already, the Division has information certifying that places can be provided for 256,400 men, women and children at wages ranging from at wages ranging from $3 per week to $3.50 per day. From individual employers…specific information has been received which will enable the division to place immediately 1,395 aliens at wages ranging from $1.25 to $3 per day. From Commissioners of Labor and State Boards of Agriculture have been received reports that 84,100 aliens can be employed at wages ranging from $18 a month to $3 per day.

Powderly Tells Labor Need, N.Y.TIMES, Sept. 17 1907, at 6.

S. Straus [envisions] the division of information newly established in his department…to be a much more far-reaching instrument than has been supposed…Mr. Straus's plans contemplate not merely the furnishing of immigrant workingmen information about where employment may be obtained, but the actual obtaining for them of a promise of employment before they leave one part of the country for another…`I hope the division [said the Secretary to The Times correspondent] will be a kind of clearing house, a Government employment bureau, so that the wage earner may obtain definite employment."[225]

As conferences, organizations, publications, and symposia proliferated, the Jewish model was often invoked. At a gathering of states' labor bureau chiefs and agricultural officials to forge closer institutional ties to the new federal effort, Max Kohler was not reticent:

> Chief among successful organized efforts at distribution is the Jewish Industrial Removal Office, originally organized by the Baron de Hirsch Fund, of which I am a trustee. This organization has removed about 60,000 Jews from the large congested cities during the past eleven years, and settled them in 1326 cities and towns, while this has led to many additional removals to these same new centers of attraction, by settlers acting at their own instance…It is largely upon this project that the new Information Division of our National Immigration Bureau was patterned...[226]

Thus, the Jewish philanthropists, the patrician President and the "labor man" turned bureaucrat, shared state-building ambitions as well as a liberal creed regarding the bases of immigration restriction. Keeping the categories of exclusion narrowly focused on individual (not group, race, or national) infirmities was not equivalent to keeping the government's role a slender one. A liberal, "open door" immigration policy was not

[225] *Uncle Sam A Job-Getter*, N.Y. TIMES, Sept. 16, 1907, at 8.
[226] Max J. Kohler, *Restriction on Immigration: Discussion*, 2 THE AMERICAN ECONOMIC REVIEW 63, 73 (1912).

necessarily an anti-statist one. To the contrary, if "distribution" became the alternative to exclusion, it could involve building up extensive new regulation, surveillance and control over the paths and destinies of the millions of newcomers – where they settled and how they fitted into the nation's industries and labor markets. Simply closing the nation's gates to the "races" of southern and eastern Europe, as Senator Lodge hoped to do, entailed no new regulatory apparatus; embracing "distribution" of the new immigrants meant putting migration patterns and labor markets under ongoing national supervision and intervention and thus required a hefty dose of new public authority and administrative capacity.[227]

The idea of using public channels to distribute unskilled immigrant labor across the U.S. was one whose details Straus devised in collaboration with Powderly.[228] Powderly first lit upon it on a visit to Europe (where public labor exchanges were widespread) while still leading the Knights of Labor in the 1880s and early '90s.[229] Not only the Knights but all the nation's trade unions at that time supported public labor exchanges to help immigrant workers get to where their labor was genuinely needed.[230] Ironically, though, by the late 1910s, the most important foes of "distribution" were Samuel Gompers and the national leadership of the American Federation of Labor (AFL),

[227] On Powderly's and the Immigration Bureau's administrative state-building ambitions, see COMM'R. GEN. OF IMMIGR. ANN. REP., at 24-27 (1915) (Powderly recommending that the Department of Labor establish a farm loan fund, and states and cities establish labor distribution zones for the purposes of employment and labor distribution). *See also* William Forbath, "The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 30-32 (unpublished manuscript, on file with author).

[228] *Id*.

[229] William Forbath, The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924 (2009) (unpublished manuscript, on file with author)

[230] *Id.*, *see also* A.T. Lane, Solidarity or Survival: American Labor and European Immigrants: 1830 -1924 (1987)

by far the country's largest labor organization.[231] In the intervening decades, the more inclusive and ambitious visions of the Gilded Age labor movement had been throttled; the AFL had narrowed its constituency to "old stock" craft workers, and with this, it narrowed its view of the proper uses of state power on labor's behalf.[232] No longer hoping to organize the unskilled, or to harness public authority for broad labor market reforms, Gompers's AFL now viewed government regulation of labor relations with utmost suspicion. In Straus and Powderly's Distribution scheme, they saw another unwanted aggrandizement of state power over the labor market.[233] "Middle-class bureaucrats" and statist experiments like this would produce nothing but government-sponsored immigrant strikebreakers and even more cheap foreign labor glutting the labor markets.[234] Ironically, too, the most valuable legal and rhetorical tools for opposing "distribution" were Powderly's own contribution to immigration reform in the 1880s, the original contract labor bar, along with the more recent bars against "imported labor" and "assisted" and "artificially induced immigration" that Straus and Speaker Cannon had pushed through Congress.[235] A government-run network of labor bureaus and exchanges comported with the Progressive "social liberalism" of Roosevelt. But it clashed with the

[231] *See The Discontent of Gompers*, N.Y.TIMES, Feb. 12, 1909.

[232] WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). *See also* JULIE GREENE, PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM (1998); William Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985).

[233] *See The Discontent of Gompers*, N.Y.TIMES, Feb. 12, 1909. To contrast Gomper's view with labor regulation abroad, see Catherine Collump, *Immigrants, Labor Markets, and The State, A Comparative Approach: France and the U.S., 1880-1930* 86 JOURNAL OF AMERICAN HISTORY 41, 48 (1999) (describing how In France there was already a highly centralized and regulated economic and social context of industrial work and population, and already in 1920's several French ministries involved in recruiting industrial and agricultural work force adapting flow of immigration workers to needs of industry.).

[234] *Id.*; *See also Labor Men Object to Federal Bureau*, N.Y.TIMES, Feb. 12, 1909.

[235] William Forbath, The Borders of 'Our America': 'Race,' Liberalism, and National Identity in the Law and Politics of European Immigration, 1882-1924, at 70 (2009) (unpublished manuscript, on file with author). On new bars against assisted immigration, see E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY:1798-1965 85-145(1981).

anti-statism of Gompers'AFL, and with the classical liberal image of the free-standing, self-directed "voluntary" and "unassisted" immigrant that animated the laws against paupers, contract or imported labor and "assisted immigration." Providing immigrants a "promise of employment before they leave" was precisely what the contract labor law prohibited! The AFL seized on this clash of ideals in lobbying against appropriations for Straus's Division of Information. So, the network of public labor bureaus for new immigrants never fully materialized; but the federal commitment to it remained a central plank of Presidents Roosevelt, Taft and Wilson's offerings to the anti-immigrant majority in Congress. Meanwhile, Straus, Kohler and Schiff were at work on another project to divert Russian Jews from New York. This one aimed to reach the emigrants before they even set out, and to nudge them toward a destination a thousand miles from New York, in Texas.

THE GALVESTON PROJECT AND *THE MELTING POT*The port that Schiff and Straus agreed on was Galveston. Announcing the new undertaking to the press, Schiff told the New York Times he had grabbed "time by the forelock." "[W]hile welcoming the Jew to this country," Schiff and his fellow philanthropists aimed to divert some part of the vast flow of Russian Jews away from New York and direct them to the "great American hinterland [west of the Mississippi] in which there is not 10 per cent of the Jewish population…We can render our country a great service by turning this immigration in the direction of Texas."[236]

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

New Orleans had been Schiff's first choice as the new port of entry. But his friend Straus had objected.[237] The Russian Jews would end up settling there and create a new Lower East Side.[238] Better to send them further west to a smaller city on the Gulf Coast: Galveston. As the high official in charge of the nation's Immigration Bureau, Straus, with Roosevelt's blessing, promptly set up a new Immigration Station at Galveston.[239] To head the neweffort in Galveston, Schiff enlisted the well-regarded, London-born rabbi Henry Cohen who had been the rabbi of Galveston for years.[240] The first boats of Russian Jews arrived a year later, and Rabbi Cohen welcomed them and sent them on their way in small groups to the network of B'nai B'riths and tiny Jewish communities that the New York Industrial Removal Office already had organized in towns and cities along the Mississippi and west as far as California.[241] Of course, the Galveston project also needed a leader to orchestrate the undertaking on the Russian and European side. Agents and publicists were needed to persuade emigrants of the non-obvious advantages of embarking for Galveston instead of New York, and then to aid and guide them on their way.

Although Jacob Schiff was an ardent foe of Zionism,[242] he hired a leading Zionist for the job.[243] Israel Zangwill was a London-born Jew and among the most widely read

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[237] *See* Letter from Morris Waldman to David Bressler (Nov. 5, 1908), *in* BERNARD MARINBACH, GALVESTON: ELLIS ISLAND OF THE WEST 11-12 (1983) (reporting that Straus and others had rejected the idea of New Orleans in favor of Galveston; it was less likely that the new immigrants would congregate and stay in the small city, instead of dispersing).

[238] *Id.* at 12.

[239] *See* NAOMI W. COHEN, A DUAL HERITAGE: THE PUBLIC CAREER OF OSCAR S. STRAUS 157 (The Jewish Publication Society of America ed., 1st ed., 1969).

[240] Henry Cohen Papers, Barker Texas History Center at the University of Texas at Austin.

[241] Henry Cohen II, Kindler of Souls: Rabbi Henry Cohen of Texas 59-60 (Don Carlson eds., 2007); *See also* Marinbach, *supra* note 270, at 24.

[242] NAOMI W. COHEN, JACOB H. SCHIFF: A STUDY OF AMERICAN JEWISH LEADERSHIP 175 (1999).

[243] *See* Bernard Marinbach, Galveston: Ellis Island of the West 7-12 (1983).

Jewish authors in turn-of-the-century England and the U.S.[244] Also a brilliant orator and propagandist, Zangwill was the leader of the Jewish Territorial Organization (JTO) – a branch of Zionism, determined to find a homeland wherever possible – in Uganda, if not in Palestine.[245] But as the search for a homeland floundered, and the pogroms raged, Zangwill and his organization were willing to be co-opted by Schiff. Galveston was a second-best way to get the Russian Jews away from oppression; and a way for the JTO to gain experience in organizing mass emigration, in preparation for the moment when a homeland materialized.

Israel Zangwill saw no middle ground between assimilation and separation; and he was drawn to both extremes – thorough-going assimilation and thorough-going separation via a Jewish homeland where Jews could resume a national existence and Jewish culture and tradition survive and prosper.[246] Granted equal rights and citizenship, Jews in the Diaspora (American Jews, above all), Zangwill declared, were bound to "fuse" into the dominant culture - to "die without knowing." [247] "Assimilation is evaporation." President Roosevelt made no bones about it, Zangwill observed.[248] Hadn't he declared "the different peoples coming to our shores should not remain separate, but should fuse

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[244] *Id.* at 7.

[245] *Id.*

[246] "Not to renationalize Judaism now is forever to denationalize it…The crucial moment in the long life of Israel has arrived… and the Jews stand at the parting of the way that no longer permits one foot on each. Either he must consent to be merely a member of an inter-national religious community welcoming the world to Abraham's bosom, or he must at last obey the trumpet call of Isaiah: "Go through, go through the gates; prepare ye the way of the people: cast up, cast up the highway, gather out the stones, light up a standard for the people." Israel Zangwill, *The Return to Palestine*, 2:11 NEW LIBERAL REVIEW 627 (Dec. 1901).

[247] JOSEPH H. UDELSON, DREAMER OF THE GHETTO: THE LIFE AND WORKS OF ISRAEL ZANGWILL 169-172 (1990) (Zangwill excoriates colonization schemes as conduits of assimilation. "Zangwill believed it most desirable for mankind to preserve [Eastern European Jewry] in a distinct national homeland somewhere so that a Judaic culture might once again flourish; his …opponents believed it best to resettle them in any tolerant nation that would welcome them and where they might have the opportunities already enjoyed by the Anglo-Jewry.").

[248] Israel Zangwill, *Lucien Wolf on "The Zionist Peril"* 17 JEWISH QUARTERLY REVIEW 397, 410 (1905).

into one"? Better, then, for American Jews to affirm this fusion wholeheartedly, intermarrying and working like a Hebraic yeast upon American civilization, inspiring the emergence of what Zangwill called a "universal, natural religion," a modern, secular faith, a "religion of humanity" that transcended the "old theological differences" between Christians and Jews.[249]

A Jewish homeland, however, was essential for Judaism and Jewish life, language and tradition to continue and flourish. Yet, Zionism was shot through with dilemmas. Palestine was not empty; most of its land was owned by Arabs, "who have no disposition to part with it, and they must be dealt with fairly." It was "Rabbinic opportunism" to claim otherwise. "No country in the world has its original inhabitants. Application of such a principle would make all mankind homeless." That was why Zangwill and the Territorialists insisted that the "goal is not to fulfill national ideology but to end Jewish suffering" - to find "land to be colonized" and create a homeland wherever "climate, geography and social and political conditions" allowed, for Jews "who cannot or will not remain" in the Diaspora.[250]

Zangwill himself was inclined to remain in the Diaspora. He wrote eloquently about the Jewish Enlightenment. Sounding the same chords as Kaufman Kohler, Zangwill could ask: "How can a God of justice and the world…be confined to Israel? Religion, not race, has always been the guiding principle in Jewish history." [251] Both the Old and the New Testament "reveal the aspirations of the old Jewish race for a righteous social order and the ultimate unification of mankind…Jewish literature preserves this aspiration as the Jewish mission…The Jewish masses, however, have transformed it into the narrow

[249] *See* Israel Zangwill, Dreamers of the Ghetto 112 (Jewish Publication Society of America 1898).
[250] Israel Zangwill, The Voice of Jerusalem 275 (1921).
[251] Israel Zangwill, Chosen Peoples: The Hebraic Ideal Versus the Teutonic 55-56 (1919).

concept of nationalism."[252] Yet, unlike Kohler, Zangwill's chronicles of this "enlightened" tradition end in paradox and fusion. The tradition's pioneers were "Jewish apostates" like Spinoza, its "heroes" included Jesus, its "philosophy" was a secularized "Hebraic" Christianity.[253]

Caught between the modernist, assimilationist and the anti-modernist, particularist poles of Jewish identity, Zangwill embraced contradictions. Married to a gentile, he pilloried intermarriage. A Zionist but also an assimilationist. A champion of a Jewish homeland and also of the Melting Pot. Indeed, he wrote the famous play, *The Melting Pot*, the same year he signed on to Jacob Schiff's Galveston Project.[254] He described the play as a "dramatic brief" for the Project.[255]

The play is a hymn to the new immigrants as new Americans – and to America as a crucible in which the races are fusing into a "new American race." [256] The play echoed Roosevelt, and Roosevelt echoed the play. Roosevelt wrote a rave review after seeing it on opening night at Columbia Theater in Washington in October '05, and Zangwill dedicated the play's published version to the President.[257] *The Melting Pot's* lesson is that the "true American" is not the old-stock WASP but the newcomer, not the American by descent and "blood," but the American by choice and consent, who embraces America's liberal ideals afresh - personified in the play by David Quixano, a Russian Jew, orphaned

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[252] Hani A. Faris, *Israel Zangwill's Challenge to Zionism,* 4 JOURNAL OF PALESTINE STUDIES 74, 87 (1975).

[253] *See* Meri-Jane Rochelson, A Jew in the Public Arena: The Career of Israel Zangwill 114-116 (2008).

[254] Israel Zangwill, The Melting-Pot (1909).

[255] Id. *Afterword*, pp.

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

[257] ISRAEL ZANGWILL, THE MELTING-POT, at v. ("To Theodore Roosevelt in respectful recognition of his strenuous struggle against the forces that threaten to shipwreck the Great Republic which carries mankind and its fortunes, this play is, by his kind permission, cordially dedicated.").

by a pogrom and recently emigrated with an elderly uncle to New York. The play also involves the most radical kind of Jewish assimilation: intermarriage between Jew and gentile and the conflicts it provokes.

David, the Jewish orphan-turned-composer-genius falls in love with Vera Revendal, the daughter of an anti-Semitic baron from the very same city, Kishinev, where David's parents had been killed during the infamous 1903 massacre which claimed hundreds of Jewish lives (and spurred Schiff, Kohler and Straus to launch their new projects in aid of Russian immigrants). Vera has broken from her aristocratic family, become a radical, and fled her "reactionary" father and the Czar's police to dwell in New York among the city's liberal and cultivated elite, volunteering in a Lower East Side settlement house, where an immigrant orchestra is rehearsing David's New World Symphony. The plot turns on the obstacles to David and Vera's union and overcoming them. Vera's father and stepmother show up from the old world and try to stop the affair; a native-born WASP millionaire makes advances to Vera; and David's uncle warns him not to defy the call of blood.[258]

The WASP suitor, Quincy Davenport, mocks David's ode to America: "*Your* America, forsooth, you Jew-immigrant!"[259] To which David replies in terms that evoke Oscar Straus's "Jewish origins" thesis and its sub-text of Jewish belonging, turned into

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

Id. at 100-106.

[259] *Id.* at 91.

melodrama: "Yes--Jew-immigrant! But a Jew who knows that your Pilgrim Fathers came straight out of his Old Testament, and that our Jew-immigrants are a greater factor in the glory of this great commonwealth than…you, freak-fashionables, who are undoing the work of Washington and Lincoln, vulgarising your high heritage, and turning the last and noblest hope of humanity into a caricature."[260]

The gulf separating David and Vera widens when David learns that Vera's aristocratic father is the "Butcher of Kishineff," the very baron who led the pogrom in which his parents and brother were slaughtered. Yet, with the help of his "New World Symphony" and the persistent vision of America as God's melting pot, David overcomes this final obstacle. At the play's end, after the first performance of the symphony, David and Vera are united on the rooftop of the settlement house. The idealistic composer realizes that he must live up to his own ideals and begs Vera: "[C]ling to me till all these ghosts [of Kishineff] are exorcised, cling to me till our love triumphs over death."[261]

Thus, *The Melting Pot* enshrines loving consent as the melting away and banishing of prejudices of racial descent. Fidelity to the beloved is elevated as loyalties to kin, "race," and religion are spurned. From David's point of view, his love must overcome the severe wounds of the past and is thus proof that any parental past, any legacy of "race" and descent, can be redeemed by consenting youths. As with true love, so with true Americanness. It is founded on active consent, active embrace - not inherited, not based on blood and racial descent.

Under the dispensation of Roosevelt's liberal nationalism, every new immigrant from every old world "race" was a welcome new citizen, a "true American," and a "[future]

[260] *Id.* at 91.
[261] *Id.* at 197.

mother of…our American citizenship for the next generation."[262] For Roosevelt, it was a matter ofwheter the immigrant had the grit and independence to come to our shores, forsake the racial ties of the old world, and freely consent to all our laws and customs. *The Melting Pot* is this liberal dispensation as love story between Jew and gentile. In contrast to the Reform Jews' account of becoming American, however, the play's version of becoming American tracked the President's outlook: making a "new race" by forsaking the race/religion of the fathers. So, while the play drew a rave from Roosevelt,, it prompted ambivalent responses from Schiff, Kohler, Straus and Wolf, who were dismayed by its celebration of intermarriage.[263]

The play expressed Zangwill's stark view of the logic of assimilation and his anguished sense of what he called the modern Jew's "strange polarities": "the most tenacious preservation of his past and the swiftest surrender of it…entering with such passionate patriotism into almost every life on earth but his own…The fall of the ghetto has left him dazed in the sunlight of the wider world, his gabardine half off and half on."[264]

As the Galveston Project got underway, Schiff and Zangwill clashed constantly. Schiff would write: *Send us no one who won't work on Shabbat. Send no one without a marketable trade. Send no more old rabbis and no more mohels!* [265] And Zangwill resisted. The Galveston project also met resistance in the Yiddish press. The *Jewish Daily Forward* ran outlandish horror stories of Jews sent by Schiff into semi-slavery

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[262] GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 52-53 (2001).
[263] *See* Letter from Roosevelt to Zangwill (Oct.15, 1908) *in* THE LETTERS OF THEODORE ROOSEVELT (Elting E. Morrison, ed. 1951) ("I do not know when I have seen a play that stirred me as much."); See
[264] Israel Zangwill, *The Jewish Race* 71 THE INDEPENDENT 288, 297 Aug. 10, 1911; Israel Zangwill, *The Position of Judaism*, 160 THE NORTH AMERICAN REVIEW 425, 425 (1895).
[265] *See* Bernard Marinbach, Galveston: Ellis Island of the West 14 (1983).

along the Mississippi.[266] And it editorialized: the West was a spiritual wasteland. The Russian Jew should settle where he wills, and not be bullied, cajoled and diverted away from his people.

About two thousand Jews passed through Galveston until the 1908 elections brought Taft to the White House and with him a new Commerce Secretary and Commissioner General.[267] Taft continued Roosevelt's immigration policies.[268] But unlike Roosevelt and Straus, Taft and his high officials had no fondness for the Galveston project; senior officials saw it as a vast violation of the bar on assisted immigration.[269] They assigned a new commissioner to Galveston who began excluding hundreds of Jews.[270]

In spite of Kohler's brilliant briefs, Taft's Commissioner General concluded: "The original purpose of this enterprise was to distribute immigrants away from New York City to avoid congestion...but its leaders have carried it beyond that to provide a refuge in this country for their race. It violates our laws against assisting and soliciting immigration."[271] The fiercely individualistic immigration laws the Reform Jewish policy mavens had helped promote cut down their organizational, public/private efforts to distribute and Americanize their fellow Jews.[272]

Zangwill was not sad to see it end. Schiff's notions of Americanization galled him. Galveston and the American West were not a homeland. The Melting Pot was merciless.

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[266] JEWISH DAILY FORWARD, Sept. 16, 1907, at p. 4.

[267] MARINBACH, *supra* note 270, at 42.

[268] *Think Taft Will Aid Immigration Plan*, N.Y.TIMES, Oct. 22, 1910, at 10 ("As a result of President Taft's visit to Ellis Island a few days ago and his pronouncement in favor of encouraging the diverting of immigration from New York to other ports…").

[269] *See* MARINBACH, *supra* note 270, at 58-59.

[270] *Id.* at 59.

[271] Letter from Benjamin S. Cable, Acting Secretary of the Department of Commerce and Labor to William Bennet (July 14, 1910) (on file with the National Archives).

[272] Or as a skeptical Jewish socialist might have observed, the bourgeois individualism that unthinkingly shaped their policy outlook subverted their high-handed efforts at solidarity.

To Zangwill the polarities seemed irreconcilable. Assimilation and Americanization on one hand; Jewish self-assertion and nationhood, homeland, and spiritual and cultural flowering on the other.

LOUIS BRANDEIS, ZIONISM AS "TRUE AMERICANISM" AND THE IDEA OF "GROUP RIGHTS" AND "GROUP EQUALITY"

But Zangwill may have been teamed up with the wrong Jewish lawyers. Maybe only a Jewish lawyer as serenely secure in the legal elite as Louis Brandeis could break so decisively with the old formulas. Zionism and Jewish nationalism were not bad for Americanization. They were the essence of it. Famously, Brandeis declared, an American Jew became a better and truer American by becoming a Zionist.[273] By contrast, we've seen, Wolf and Straus, Schiff and Kohler all loudly echoed Roosevelt's and Wilson's dark warnings that hyphenated Americans were not true Americans. Brandeis turned the warning on its head.

Brandeis had no use for the Reform Jewish establishment. To him, Jacob Schiff was just another plutocrat and a parvenu. Unlike Schiff, though, until the 1910s and until he was over fifty, Brandeis had contributed precious little of his own fortune and even less of his formidable energies to Jewish causes.[274] Brandeis belonged to no temple or synagogue nor any other Jewish organizations.[275] He socialized little with Jews outside his family circle.[276] He immersed himself in the social and cultural world of the Boston

[273] *See* Louis D. Brandeis, True Americanism, Oration at Faneuil Hall (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 3, 3 (Zionist Organization of America ed., 1942) ("Loyalty to America demands that each American Jew become a Zionist.").
[274] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 407-08 (2009).
[275] *Id.* at 366.
[276] *Id*.

Brahmins.[277] Unlike Wolf, Straus or Kohler, his law partners were WASPs not Jews; unlike them, he summered and socialized and found his closest companions among liberal gentiles. Until roughly 1910, a part of him fancied he *was* a Brahmin.[278] His few lectures to Jewish audiences prior to that time were laced with stern talk about loyalty and condemnations of "hyphenated Americanism."[279] Looking back, Brandeis observed, he was "very ignorant in things Jewish."[280]

But Brandeis's relations with much of Boston WASPdom, even with some of his closest Brahmin associates, grew increasingly strained as his public attacks on the investment banking and business communities hit home. He was deeply shaken by the anti-Semitic counter-attacks from much of the Boston business elite, and from the past and present presidents of the ABA, when President Wilson mooted his name for a cabinet post and, a few years later, for a Supreme Court nomination.[281]

As this estrangement was beginning, Brandeis happened to be brought in to mediate the great 1910 garment workers strike in New York.[282] The Russian Jewish trade unionists and attorneys he encountered inspired him with their intellectual and moral passions and personal warmth. Their radical brand of Jewishness, combining various strains of socialism, Yiddishkeit and Jewish nationalism, and his own cooler, more

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[277] *Id.* at 54.

[278] *See* ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 6 (1988) (noting that German Jewish families like Brandeis's saw themselves as part of gentile society).

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

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

[281] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 405-07 (2009).

[282] *See id*. at 243-47.

rationalistic brand of progressive democracy seemed made for each other: a pair of wildly different but complementary temperaments.

Alienated by the efforts of uptown Reform Jews like Schiff, Kohler and Straus (and their Boston counterparts) to remake Jewishness into a private faith and a discrete private sphere of Jewish clubs, associations and sociability, Brandeis was magnetized by the Lower East Side. There, Brandeis's new friends and acquaintances among Russian Jewish labor leaders and attorneys, rank-and-file Russian Jewish workers (and their Russian Jewish employer-adversaries) inhabited a Jewish world that defied the Reform Jews' careful separation of public and private spheres. Not only in its insistence on the public/political nature of Jewish commitments and aspirations, but in the texture of its everyday life, the Lower East Side's public sphere was one of Jewish cultural invention, radical politics and labor agitation in theaters, meeting halls, newspapers, cafes and street life throbbing with constant strikes and demonstrations, outdoor markets, crowds and vocal and exuberant public conduct. Jews doing in public what ought to be done in private, from laundry to vociferous argument around the exchange of goods or ideas! Improbably, Brandeis felt at home – and he identified that home with Jewish nationalism.

Soon, we will see, Brandeis would fashion a vocabulary of "group rights" to defend the Russian Jews' and other new immigrant groups' "right[s] of national self-assertion." He may have been prompted as much to defend this Lower East Side Jewish public sphere from the Reform Jewish elite's unwanted tutelage and condescension as from repressive state action. In any case, back in Boston, Brandeis sought out the company of Zionists. He plunged into Zionist literature. He "thrilled" to the talks given by Zionist

"agronomists," cultivating new strains of "wild wheat" in the rocky soil of Palestine, and he wrote his wife about the new access of "deep love" he felt on visiting there.[283]

In 1915, as war broke out across Europe, Brandeis allowed himself to be drafted into leading American Zionism.[284] He became the Supreme Court's first Jewish Justice a year later. And in the next five years, Justice Brandeis transformed the Zionist movement's organization, heft and identity. On the organizational side, Brandeis brought on board a leadership cadre of Reform German-Jewish corporate attorneys and jurists, who incorporated it and constituted themselves as board of directors of the Zionist Organization of America.[285] Under Brandeis's constant, sometimes hectoring, supervision, they reorganized the Zionist federation from a tiny new immigrant fraternity and debating society into a vast corporate "business-like" operation, with double-entry accounting, rigorous fiscal controls, and an administrative capacity to manage the millions of dollars they raised for Russian and East European Jewry and the Jewish settlements in Palestine.[286] Combining Brandeis's access to the White House and State Department with their joint and several legal and administrative talents, they made the new Zionist organization the central vehicle of American Jewry's aid to Jews in war-torn Europe.[287] By doing so, they made it an established feature of American Jewish life.

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[283] Louis D. Brandeis & David W. Levy, The Family Letters of Louis D. Brandeis 336-52 (2002)

[284] *See* MEL UROFSKY, LOUIS D. BRANDEIS: A LIFE 399-409 (2009). For a discussion on the origins of American Zionism, *see generally* MELVIN I. UROFSKY, AMERICAN ZIONISM: FROM HERZL TO THE HOLOCAUST (1995); Ben Halpern, *The Americanization of Zionism, 1880-1930*, *in* AMERICAN ZIONISM: MISSION AND POLITICS (Jeffrey S. Gurock ed., 1998).

[285] *See* Melvin I. Urofsky, Louis D. Brandeis: A Life 416-23 (2009)

[286] *Id*.

[287] *Id*. at 422-423.

More so than with the dozens of other movements for which he'd served as advocate and counselor, Zionism echoed in "[his] soul" and gave the profoundly reticent Brandeis a new sense of belonging. [288] Brandeis became American Zionism's leading spokesman as well as its institutional architect.[289] And inn Jewish and broader public spheres, Justice Brandeis began knitting the new immigrants' Jewish nationalism to the Progressive Constitution. Like Straus, he wedded intensely practical law work with cultural and symbolic work on law as a medium for imagining Jews' terms of belonging to America.

It helped that the Jewish homeland of Brandeis's imagination was bathed in Progressive light, a scene of small-scale, cooperative agriculture and enterprise, imbued with science, cooperative ownership of land and industry, and participatory democracy.[290] 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, which was adopted by American Zionist organizations.[291] The 1918 "Pittsburgh Platform," as it came to be called, rang out the changes on Brandeis's brand of progressive democracy:

> 1. We declare for political and civil equality irrespective of race, sex or faith for all inhabitants of the land.
>
> 2. To insure in the Jewish National Home in Palestine equality of opportunity we favor a policy which, with due regard to existing rights,

[288] *Id*. at 411.
[289] *See id*. at 463.
[290] It helped too that Brandeis seems never seriously to have entertained settling in Palestine himself, though he was urged to come lead the Jewish "colony" by Weizman and others. Brandeis modeled the idea that American Jews could and should support the Zionist enterprise as a refuge for Russian and Eastern European Jews not already settled in the U.S. and a site for Jewish cultural flowering.
[291] MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 518-27 (2009). *See also* JONATHAN SCHNEER, THE BALFOUR DECLARATION 340-341 (2010)

> shall tend to establish the ownership and control by the whole people of the land, of all natural resources and of all public utilities.
>
> 3. All land, owned or controlled by the whole people, should be leased on such conditions as will insure the fullest opportunity for development and continuity of possession.
>
> 4. The co-operative principle should be applied so far as feasible in the organization of all agricultural, industrial, commercial, and financial undertakings.
>
> 5. The system of free public instruction which is to be established should embrace all grades and departments of education.[292]

Thus, the national homeland was to be governed by a "Jewish spirit" that was "essentially modern" – and essentially liberal in respect of the civic and political status of its inhabitants and in harmony with Brandeis's Jeffersonian brand of advanced American Progressivism. Meanwhile, the experience of finding a kind of spiritual home in Jewish nationalism reshaped Brandeis's view of what he'd hitherto seen in staunchly conventional, assimilationist terms: the problem of "hyphenated Americanism" or new immigrants' "divided loyalties" should they remain wedded to national identities besides "American."[293] The experience also reshaped his understanding of the "Jewish Problem."

In respect of "hyphenated Americanism," Brandeis borrowed from his friend and fellow Boston Zionist, Horace Kallen's critique of the melting pot ideal and Kallen's ideas about "cultural pluralism" and the positive democratic value of "racial" or national

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[292] *See id*., at 527.

[293] *See* Louis D. Brandeis, What Loyalty Demands, Address Delivered Before the New Century Club on the Occasion of the 250th Anniversary of the Settlement of the Jews in the United States (Nov. 28, 1905).

group identities.[294] Kallen's America was "a cooperative of cultural diversities…a federation or commonwealth of national cultures."YetKallen was, in his fashion, as much a racial essentialist as were Lodge and the Teutonic crowd. Said Kallen, "whatever else he changes, [man] cannot change his grandfather";[295] and that, for him, made you who you are. Brandeis would introduce a more social, or what today we would call constructivist, perspective, which underscored "multiple," changeable "loyalties."[296] About the Jewish Question and the dilemmas of assimilation Brandeis borrowed from Zionist thinkers like Herzl and Hess. He added insights of his own, and he wove it all into a constitutional theory and vision.

The gist of that theory was that free and equal individuals only developed and flourished in the context of free and equal groups; such groups, in turn, needed "group rights" and "group equality." Neither Jews nor members of the U.S.'s other "minority races and nationalities" could flourish in America without such constitutional precepts.[297] Jewishness was not merely a private and individual faith; it was a public group identity, a nationality. And it was the right and duty of observant and non-observant Jews alike to "assert" their "Jewish nationality"![298] Only thus would Jews overcome the anomie and "demoralization" that, paradoxically, followed on the rise of liberalism and the tearing down of the ghetto walls. (This was Brandeis's drier rendering of Zangwill's "strange

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[294] Horace M. Kallen, *Democracy versus The Melting Pot: A Study of American Nationality*, THE NATION, Feb. 25, 1915.

[295] *See* Kallen, *supra* note 328. For a discussion of Kallen's racial essentialism, *see generally* WERNER SOLLORS: CONSENT AND DESCENT IN AMERICAN CULTURE (1987).

[296] *See* Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 28-29 (Zionist Organization of America ed., 1942) (arguing that because of the "essentially modern" and "essentially American" nature of the Jewish spirit, multiple loyalties are not inconsistent).

[297] *See* Brandeis *supra* note 331. ("This right of development on the part of the group is essential to the full enjoyment of rights by the individual. For the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part.").

[298] *See id*. (

polarities" of the emancipated Jew: "the most tenacious preservation of his past and the swiftest surrender of it…entering with such passionate patriotism into almost every life on earth but his own."[299] Also, "The fall of the ghetto has left him dazed in the sunlight of the wider world, his gabardine half off and half on."[300] 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. Under this dispensation, the modern Jew could be both an American patriot and a Jewish one. "Multiple loyalties" like these brought moral depth, enlarged knowledge, and a greater taste and capacity for participation in the polity.

Or so Justice Brandeis claimed, and a new generation of "hyphenated Americans" agreed. Here was a notion of democratic citizenship that cracked apart the melting pot and offered a vision of Americanization closer to the new immigrants' own social and cultural practices: invested in American patriotism but also in the history and (invented) "traditions" of Greece or Italy, in securing Irish "home rule" or a Jewish "homeland."[301] And a view of governing difference that sought to extend liberalism's regard for freewheeling "individuality" to the plane of groups, "nationalities" and "peoples."

Speaking to a conference of Reform rabbis in 1916 on "The Jewish Problem: How to Solve It," Brandeis began with the same theme as Kaufman and Max Kohler and Oscar Straus: the harmony of the Jewish spirit and the American spirit, the notion that the

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[299] Israel Zangwill, *The Jewish Race*, THE INDEPENDENT, Aug. 10, 1911, at 288-95.

[300] Israel Zangwill, *The Position of Judaism*, *in* THE NORTH AMERICAN REVIEW 425, 425 (Jared Sparks, Edward Everett, James Russell Lowell, Henry Cabot Lodge eds., 1895).

[301] By the 1910s, "patriotic" "national" organizations of such new immigrant groups as Lithuanian-, Greek-, Hungarian-, Italian-Americans had taken root. While war-time made some new immigrants' "multiple loyalties" more disturbing than ever for state authorities, Wilson's dream of a post-war Europe in which the Nationality Question and the destiny of "small nations" and "national minorities" would be put on new liberal democratic foundations encouraged Brandeis to call on Reform Jewish leaders to shed their timidity about Jewish nationalism and catch up.

historical roots of the U.S. Constitution and American democracy lie in Hebrew sources. "The Jews gave to the world its…reverence for law and the highest conceptions of morality…Our [Jewish] teaching of brotherhood and righteousness, has, under the name of democracy and social justice, become the twentieth century striving of America and western Europe. Our [Jewish] conception of law is embodied in the American constitution which proclaims this to be a 'government of laws and not of men.'"[302]

Thus, even as he stood apart from the Reform Jewish elite, Brandeis had absorbed Reform Judaism's core precept that the essence of Judaism was its "moral universalism," its ethical teachings, its "conception[s] of law" and "social justice."[303] Like Straus and Kohler, Brandeis made much of the fit between Jewish "tradition" and "spirit" (thus understood) and the wellsprings of the U.S. Constitution. But unlike the other Jewish lawyers we've met, Brandeis came not to praise classical liberal constitutionalism but to bury it. When it came to the "Jewish Problem," Brandeis told the rabbis, "Liberalism" was a failure. It did far too little " to eliminate the anti-Jewish prejudice."[304] Liberalism promised Jews equality but supplied no ground to build up group dignity and self-respect and to combat and overcome Anti-Semitism. In fact, it seemed to foster it. The "concrete gains through liberalism were indeed large."[305]

> Equality before the law was established throughout the western hemisphere…But the anti-Jewish prejudice was not extinguished even in

[302] Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 23 (Zionist Organization of America ed., 1942)

[303] *Id.* at 22 (Zionist Organization of America ed., 1942). Of course, this same Enlightened conception of Judaism's "universal" core also influenced other "modern" and secularized accounts of Jewish identity like the Zionists'; so, Brandeis encountered it from many quarters. On Brandeis's readings on Zionism, *see generally* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 243-47 (2009).

[304] Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 17 (Zionist Organization of America ed., 1942).

[305] *Id.* at 15.

> those countries of Europe in which the triumph of civil liberty and democracy extended fully to Jews 'the rights of man.' The anti-Semitic movement arose in Germany a year after the granting of universal suffrage. It broke out violently in France, and culminated in the Dreyfus case, a century after the French Revolution…And in the United States the Saratoga incident reminded us, long ago, that we too have a Jewish question.[306]

The problem with liberalism was that it gave Jews and members of other minority groups and races individual rights and individual equality before the law, but we cannot "protect as individuals those constituting a minority," until "we realize that protection cannot be complete unless group equality also is recognized."[307] "Group equality" and "group rights" implied a right to public political action and organization based on group difference and national aspirations, and a regime of social governance that allowed and fostered group difference and group educational, cultural and political associations.[308] "Group equality" and "group rights," on Brandeis's account, were precepts for governing difference that extended liberalism's regard for "individuality" to the plane of groups and

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[306] *Id.* at 16.

[307] *Id*.

[308] Remember it is 1916 and the air is thick with war preparations, coercive government-sponsored Americanization campaigns and repression of "foreign" immigrant organizations. The War Department and other federal agencies are mobilizing "patriotic" civic associations like the National Americanization Committee to carry out "100% Americanism" campaigns in the public schools and workplaces and to police and suppress "deviant" and "foreign" immigrant associations. State and local governments are carrying out anti-"foreigners" campaigns as well, outlawing foreign language instruction in public and private schools, and even use of foreign language in worship, shutting down immigrants' "hyphenated" civic associations and religious schools. *See, e.g.* Jonathan Zimmerman, *Ethnics Against Ethnicity: European Immigrants and Foreign-Language Instruction, 1890-1940*, 88 J. OF AM. HIST. 1383, 1400 (explaining that after World War I, many "parochial educators reduced or even eliminated foreign-language instruction in their own institutions"); Brandeis's assertions of group rights are aimed against these practices. *See* Louis D. Brandeis, True Americanism, Oration at Faneuil Hall (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 3, 13-14 (discussing the importance of group rights as a means of obtaining individual rights). At the same time, Brandeis's constitutional group rights rhetoric also seems aimed at some of the Reform Jewish elite's own social work and educational programs and institutions, which sought to suppress Yiddishkeit and impose unwanted and deeply authoritarian kinds of cultural tutelage on new immigrants. SEE BERKSON on Kehila. In other words, some of the main targets of Brandeis's group rights rhetoric seem to have been "private" institutions of social governance; others were local and state governments.

"peoples." ("We recognize that with each child the aim of education should be to develop his own individuality, not to make him an imitator, not to assimilate him to others. Shall we fail to recognize this truth when applied to whole peoples? And what people in the world has shown greater individuality than the Jews? Has any a nobler past? Does any possess common ideas better worth expressing? Has any marked traits worthier of development?").[309] Not "assimilation," in other words, not coerced Americanization on WASP terms, and not merely individual equality of opportunity and careers open to talent, but instead a constitutional order that prized group and national differences and fostered their free development was essential for the Jews and "the Jewish Renaissance," and also essential for the U.S., if the latter was to gain "the full benefit of [the Jews'] great inheritance."[310]

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[309] Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 22 (Zionist Organization of America ed., 1942).

[310] *Id.* at 29. State action aimed at repressing immigrants' cultural associations, educational institutions, and group identities only reached the Supreme Court in 1920s cases like Meyer v. Nebraska, 262 U.S. 390 (1923) or Pierce v. Society of Sisters, 268 U.S. 510 (1925). Meyer struck down a state statute outlawing the use of a foreign language as a medium of instruction as well as the teaching of foreign languages "in any private, denominational, parochial or public school." The Meyer majority, famously, rested its decision on "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. The Court emphasized the plaintiff-teacher's right to teach and the parents' right "to engage him so to instruct their children." *Id*. at 400. As with many potential "group rights" cases, this one (like the later *Pierce* case (striking down a statute outlawing most private and parochial schools)) and others during Brandeis's tenure, reached a pluralist result in an individual rights framework. *See Pierce*, 268 U.S. at 535. It is noteworthy that Justice Brandeis did not seize on these cases to write concurrences expressing his pluralist ideals or his notion of constitutional group rights and group equality. Given the vastly greater doctrinal traction of individual rights, he may have been content to see the language of pluralism and constitutional group equality and group rights emerge as a moral resource in public political debates. Or Brandeis may have thought that while group rights and group equality were essential as matters of social recognition and social governance, individual rights could suffice as legal safeguards for Jewish group life in the U.S. In contrast to Europe, Russia and Asia, Jews and Jewish institutions in the U.S. were not – and had never been- afflicted with legal suppression and group bans. This was the outlook of Wolf, Straus and Kohler as important advocates of constitutional group rights for Jews and other national minorities in Poland and the other new states of post-World-War-I Europe. Brandeis differed markedly from them in the pluralist precepts and

Posing the "Assertion of Jewish Nationality" as the solution to Anti-Semitism, Brandeis was following Zionism's founders in their romance with 19th-century nationalism. Assimilation, on this account, was not only a kind of "noble suicide."[311] Assimilation also was a source of modern Anti-Semitism; for it produced among gentiles the fear that Jews, emancipated from the exclusions and disabilities of the old order, were "sail[ing] under false colors and conceal[ing] their true identity." [312] Zionism, by contrast, held out the promise of gentiles' respect and recognition; it enabled Jews "to shake off the false shame which has led men who ought to be proud of their Jewish race to assume so many alien disguises…The Zionists and the orthodox Jewish nationalists have long ago won the respect and admiration of the world."[313] The project of establishing a Jewish homeland, where "Jewish life can be fully protected…and the Jewish spirit reach its full and natural development,"[314] was inspiring Jews everywhere, including those with no intention of lighting out for Palestine to "glory in the power and pertinacity of the race…to look the world frankly in the face and to enjoy the luxury of moral and intellectual honesty."[315]

Just as the Zionists' critique of assimilation appealed to Brandeis at this moment, in the context of wounds inflicted by the WASP world, so the romance of nationalism may have resonated for him, at this moment, as Wilson's confidant and advisor, in the context

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commitments he thought American Jews should assert in politics and public life, but less so, it seems, with respect to legal doctrine.

[311] Louis D. Brandeis, The Jewish Problem, How to Solve It, Address Before the Eastern Council of Reform Rabbis (July 4, 1914), *in* BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 29 (Zionist Organization of America ed., 1942).
[312] *Id.* at 23.
[313] Id.
[314] *Id.* at 25.
[315] *Id.* at 31.

of a "cruel war" that was "making clear the value of small nations."[316] In a world in which "every other people [besides Jews] …[was] striving for development by asserting its nationality,"[317] and in the context of a U.S. foreign policy that dreamt of the end of empires and a new international order committed to the protection of national minorities, it was timid and backward-looking for the Reform Jews to shun Jewish Nationalism. If his critique of the melting pot and his notions of pluralism derived from Kallen, his vocabulary of "group equality" and "group rights" derived from international law.[318]

The claim that the U.S. Constitution embodied these ideas was the purest legal fiction. But as Brandeis declared it to Jewish audiences, it became a cultural fact. "Asserting Jewish Nationality" was a matter of "group equality" under "our Constitution," and it made one a "truer American," so said Justice Brandeis. What Jewish nationhood and Jewish nationalism meant would continue to vary and change, taking many forms Brandeis might have lamented and others he might have celebrated. But the first Jewish Supreme Court Justice brought this thicker, modern, hyphenated conception of American Jewishness into the mainstream for the first time. It was a conception much closer to what the new immigrant "Jewish masses" fashioned for themselves in their everyday lives than the more thoroughgoing assimilationist one on offer from Brandeis's foes in the Reform Jewish establishment. That, I think, is why - with his profoundly successful assimilation into American life and institutions alongside his bold assertion of

[316] *Id.* at 23.
[317] *Id*.
[318] Worth underscoring that at Paris and Versailles, Kohler, Straus and other leaders of the American Jewish Committee like Louis Marshall all championed group rights (in the cultural and educational spheres) and Minority Treaty provisions expressly covering the Jews of Poland, Romania, and other states formed in the aftermath of World War I. I have yet to find sources in which they juxtapose their views on individual and group rights in the U.S. versus international arenas. See note __, supra.

Jews' public "individuality" and Jewish nationalism - Stephen Wise called Brandeis the "first American Jew."[319]

CONCLUSION

These four sketches have illustrated my notion that law and lawyers and the contending ideas and ideals of the era's legal culture – about individuals and groups and the boundaries of their public and private actions and identities - played important, protean parts in the shaping of Jewish American identities in the Progressive Era. Of course, the paths along which late 19th and early 20th century American Jews wedded Jewishness and Americanness were complex and various. These sketches have left most of those paths unexplored. Most Jews were not lawyers, and most Jewish lawyers were not as powerful as these four. Because they were powerful, however – as litigators, advocates and publicists (in the nineteenth-century sense of producing public discourse about international law), policy makers and high state officials, founders and leaders of the most important national Jewish organizations – they helped fashion important and

[319] Brandeis never brought group rights or the normative vocabulary of pluralism into his jurisprudence. In part, that may be because his group rights and pluralist claims were largely aimed against private, melting-pot-minded Jewish institutions of social governance and "Americanization." Likewise, when Brandeis championed pluralism and hyphenated American identities before broader publics and audiences (see his 1915 "True Americanism" July 4th address), he was addressing institutions of social governance and Americanization chiefly run by "private" associations. Still, it is noteworthy that Brandeis did not seize on cases like Meyer v. Nebraska, 262 U.S. 390 (1923) or Pierce v. Society of Sisters, 268 U.S. 510 (1925) to express his pluralist ideals in the context of voting to strike down state-imposed cultural uniformity.

durable terms of Jewish and immigrant entry and belonging to America. Representative Jews, representing Jews, they became both gatekeepers and defenders of those whom the gatekeepers excluded.

None of the lawyers set out to craft identities. Phrases like "racial identities" and questions like "What is it to be a Jew?" and "Are Jews a race?" were in the air, but they didn't set out to address them. They were lawyers, not theorists. Practical exigencies and crises pushed them. Louis Brandeis did not get up one day with the aim of justifying a thicker "hyphenated" public identity for American Jews. His contribution was the by-product of being pressed into service as war-time leader of American Zionism, when the loyalty and patriotism of Zionists were a problem for Reform Jews as well as gentiles. Brandeis up-ended the problem, turning the practical and ideological tables at least part-way around against the old Reform Jewish elite. Practically, he and his team of lawyers and jurists orchestrated the remaking of the Zionist federation into a transnational administrative and diplomatic organization, to which American Jewry of all stripes turned to help fellow Jews in war-torn Europe. At the same time, Brandeis's voice and authority as the nation's leading Progressive attorney and Supreme Court Justice, his wounds at the hands of the Brahmins, his take on Wilsonian foreign policy and international law and, finally, his reworking of the ideas of his Zionist friend, the philosopher and cultural critic, Horace Kallen combined to produce a critique of assimilation and a defense of "group rights," "multiple loyalties" and "Jewish National Assertion" on the part of a deeply assimilated, profoundly "American" Jew. And these helped supply a new vocabulary for many of the aspirations and lived experiences of becoming American for Jewish newcomers from Russia and Eastern Europe.

New immigrant Jews chafed under the Americanization programs founded and overseen by the Reform Jewish establishment leaders like Jacob Schiff, Straus and Kohler. These men were sometimes downright authoritarian when it came to using their considerable resources to try nudging Russian Jews away from orthodoxy, Zionist nationalism, Yiddishkeit and the Lower East Side. They declared Jews were not a race or nationality, while Brandeis blithely affirmed the contrary. At the same time, they were more steeped in Jewish traditions than he. Jacob Schiff insisted that Zangwill send no more Jews unwilling to break the Sabbath. But Schiff wore tefillin and prayed every morning, established a conservative Jewish seminary to bridge the gap between Reform Judaism and orthodoxy, and happily spoke Yiddish with the new immigrants in the settlement houses his wealth supported.[320] Straus and Kohler were avid historians of the Jewish "race" and the "germs" of modern justice and morality Jews carried, even as they wrote briefs and testimony invoking modern anthropological and ethnographic authorities to deny Jews were a "race." So, we shouldn't confuse the ideological contours and categories of the classical liberal Reform Jewish American identity with the fullness and untidiness of imagination and lived commitments and practices. No less than the new immigrants, these Reform Jews were determined to have it both ways.

Like Brandeis's, Wolf, Straus and Kohler's identity-crafting and ideological handiwork arose in a particular and pressing political context: keeping the gates open to all the new immigrant "races" of Europe during three decades of mass immigration; averting the racial categorization of Jews in American law; crafting "liberal" immigration reforms to appease a Congressional majority that favored harshly restrictive and

[320] Naomi W. Cohen, Jacob Schiff: A Study in Jewish American Leadership 84-85 (1999).

racialized laws against the new immigrants; advocating against stern and illiberal application of the very laws they had helped craft. The deceptive ideal of the free-standing, self-sufficient immigrant-free laborer and the bars on "paupers" and "imported" and "assisted" immigrants predated the Reform Jewish lawyers' involvement in immigration politics. But they supplied some of the key elements of the "liberal" constellation of immigration policies they championed. They also fitted snugly into the smugly bourgeois side of their legal and political imaginations; yet, they ended up contributing to the demise of many of their own efforts at transnational philanthropy and administrative state building.

The liberal grammar of Jewish belonging Wolf, Straus and Kohler helped fashion – along with its compromises and evasions[321] – would outlive the particular doubts and dilemmas that inspired it. Defending the rights of Jews and other racial others, they wedded their understanding of American Jewishness to the promises of the turn-of-the-century liberal Constitution. That Constitution, in its individualism, its promise of religious liberty, equal rights and careers open to talent, its condemnation of "class legislation" in general and racial classifications in particular, harmonized with their Reform Jewish outlook and their class-bound experience of American life. [322]

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[321] Wolf, Straus, and Brandeis all proved willing to draw a circle around what Brandeis called "the white nationalities" and Wolf the "great [racial] divisions of the human family – White, Black, American Indian and others," excluding non-whites from their working definitions of the national community constituted by the Constitution. This was a craven bow to white racism; it implicated them in the fraught historical construction I mentioned earlier - the distinction between the emerging category of white "ethnic groups" whose differences were chiefly cultural and the category of color-coded "races" whose differences were somehow deeper and more natural. Kohler didn't bow. He rarely failed to condemn Jim Crow and Asian exclusion laws as "inconsistent" with the liberal Constitution he was expounding.

[322] This was also true of these lawyers' friend and fellow founder of the American Jewish Committee, Louis Marshall, who also helped found the NAACP and served - along with the liberal, laissez-faire minded WASP Moorfield Storey - as its leading Supreme Court advocate in these same years. The anti-classification principle and its attendant individualism would have a long life among the Reform Jewish establishment. They animated Reform Jewish organizations' attacks on California's alien land laws against

This grammar of belonging might have sounded like this, if one of them were to have brought its basic structure of ideas and feelings to the surface: We, Reform Jews, have stripped away the old, anachronistic features of Judaism as a communal form of self-government (and what some of us even call a "ghetto religion"). "Enlightened" and "modern," we no longer conceive our faith in the old "Oriental" ways; we hew to its "universal" and "Western" "core." Our "Zion" is "America." Our "law and Covenant" are the Constitution.

We are not only claimants of the constitutional promise of equal rights and liberty; we are its champions and arbiters. For us, the heart of the 14th Amendment is these promises: no racial classifications and every individual on his own merits. We are not racial others; and we won't allow government to classify or cast out our co-religionists as racial others. We'll take this same battle up for all people whom the government classifies and spurns as racial others. We were "strangers in the land"; we are destined to hold the nation to its deepest liberal commitments. And if we are going to talk about blood and race (and Reform Jews never actually ceased doing so), remember this. Our Jewish ancestors bequeathed to your Pilgrim ancestors and Founding Fathers their first and holiest examples of the rule of law, equal justice, and republican self rule. That, at least, is roughly how I imagine a Wolf, Straus or Kohler might have imagined key elements of his Jewish Americanness. Like Brandeis's contributions and often fused with them, they would have a long and interesting life.

Asian land ownership and Jim Crow laws in the South, and framed the AJC's opposition to affirmative action decades later.