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Two Jewish Lawyers Named Louis*

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The year 1856 was a vintage year for brilliant Jewish lawyers named Louis. On November 13, 1856, Louis Brandeis was born in Louisville, Kentucky. One month later, on December 14, 1856, Louis Marshall was born in Syracuse, New York. Louis and Louis were both first-generation Americans, born of central European Jewish parents. They both compiled stellar academic records. They both went on to have a profound affect on American law. Both were considered for seats on the U.S. Supreme Court, although only one of them made it.¹ And both became eminent leaders in American Jewish life.

Yet while both men earned enormous respect within the Jewish and general communities, they never became friends and rarely worked together. They differed religiously, philosophically, and politically. They approached Judaism, America, and even the law itself from sharply different perspectives.

The parents of Louis Brandeis and Louis Marshall arrived in America at approximately the same time in the middle of the nineteenth century.² Brandeis' parents hailed from Prague, Marshall's father from Baden and his mother from Württemberg. The two fathers had experienced prejudice and privation in central Europe that precipitated their emigration. Adolph Brandeis, who grew up in an urban area and studied at the Technical

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1. On the campaign to have President William Howard Taft nominate Louis Marshall to the Supreme Court, see David G. Dalin, "Louis Marshall, The Jewish Vote, and the Republican Party," *Jewish Political Studies Review* 4 (Spring 1992): 69-74.

2. Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (New York: Viking Press, 1946), 11-22, discusses Brandeis' parents. See also Josephine Goldmark, *Pilgrims of '48* (New Haven: Yale University Press, 1930). For Marshall's parents, see Oscar Handlin, "Introduction," in *Louis Marshall, Champion of Liberty: Selected Papers and Addresses*, ed. Charles Reznikoff (Philadelphia: Jewish Publication Society of America, 1957), ix-x. See also Marshall to Edward G. Friton, Apr. 24, 1929, and Marshall to William Prescott Greenlaw, Jul. 6, 1926, in *Louis Marshall, Champion of Liberty*, 6-7.

School of Prague, was imbued with German liberalism and sympathized with the Revolutions of 1848. Jacob Marshall, born in a border village, was more traditional in his outlook. Both men luxuriated in the freedom America granted them, and both were married to fellow immigrants in the United States (Brandeis to Frederika Dembitz and Marshall to Zilli Strauss). Adolph Brandeis, who became a grain and produce merchant in Louisville, prospered. His youngest son, Louis, grew up in what his biographer calls an "atmosphere of comfort and success."³ The family's financial fortunes only declined later, in the 1870s, when Louis Brandeis was a teenager. Jacob Marshall, by contrast, experienced real poverty. For a time, he barely scraped by: he was a porter, a peddler, and ran a fruit stand. The year his eldest son, Louis, was born, he entered the hide and leather business and did better, but never became rich.

Religiously the Brandeises and Marshalls differed markedly. The Brandeises formed part of an extended network of liberal central European Jews, some of whose ancestors had followed the pseudo-messiah Jacob Frank.⁴ Their descendants—people with surnames such as Wehle, Goldmark, Dembitz, and Brandeis—married one another and, with a few notable exceptions (the most outstanding being Louis Brandeis's Orthodox uncle, Lewis Dembitz), steered clear of formal religion. Brandeis' extended family (he called them "*unser eins*") cherished instead a series of "desirable virtues."⁵ Attributed by one descendant to Frank, these included high intelligence, a blameless mode of life, and "the most rigid sense of morals, justice and charity."⁶ Adolph and Frederika Brandeis were buried in Louisville's Adas Israel cemetery but maintained only minimal ties, so far as we know, to Jewish religious life. They observed no Jewish holidays or rituals whatsoever.⁷

The Marshalls, by contrast, were Orthodox Jews. They kept kosher, observed the Sabbath, and celebrated Jewish holidays. When the Syracuse synagogue, Society of Concord (Keneseth Sholom), split over the introduction of religious reforms in 1864, Jacob Marshall was one of those who

3. Mason, *Brandeis*, 24.

4. Goldmark, *Pilgrims of '48*, 192–93; *Reminiscences of Frederika Dembitz Brandeis*, trans. Alice G. Brandeis (n.p.: privately printed, 1943).

5. See, for example, Brandeis to Alfred Brandeis, Jul. 28, 1904, in *The Family Letters of Louis D. Brandeis*, eds. Melvin I. Urofsky and David W. Levy (Norman: University of Oklahoma, 2002), 90.

6. Theodore Wehle, "Notes on the Wehle Family and Their Connection with the Frank Movement," unpublished paper quoted in Goldmark, *Pilgrims of '48*, 194.

7. Ben Halpern, *A Clash of Heroes: Brandeis, Weizmann, and American Zionism* (New York: Oxford University Press, 1987), 62–69; Carol Ely, *Jewish Louisville: Portrait of a Community* (Louisville: Jewish Community Federation of Louisville, 2003), 45.

departed to form the more Orthodox Adath Jeshurun. Louis Marshall's parents remained traditionally observant for the rest of their lives.⁸

Orthodox or not, central European Jews in America, like the Brandeises and the Marshalls, cultivated the ideals of *bildung*. They promoted both the acquisition of knowledge and a sharpened appreciation for everything "good, beautiful and true."⁹ They believed deeply in the value of education. Both Louises, in response, made their parents proud. Brandeis, at sixteen, won a gold medal at the Louisville Male High School for "pre-eminence in all his studies" and spent three terms in Germany, where he became an outstanding student at Dresden's Annen Realschule.¹⁰ Marshall, with his photographic memory, mastered four foreign languages—French, German, Latin, and Greek—at Syracuse High School.¹¹ Neither man went to college but instead, following the custom of the day, went directly to law school, where they became legends in their time. Brandeis at Harvard Law School achieved a record-breaking average of ninety-seven, became the class valedictorian, and graduated several months shy of his twenty-first birthday. It was a feat so unusual that it demanded a suspension of the college's rules in order for him to obtain his diploma.¹² At Columbia University Law School, Marshall managed to complete the entire two-year course in just a year, and was long recalled as a prodigy who could rattle off cases, complete with precise citations and page numbers, when called upon in class. Remarkably, he too left law school prior to his twenty-first birthday. In his case, it meant that he never formally received a degree—"two years actual attendance was required." For several months, until he was old enough to pass the bar, he worked writing briefs for other lawyers.¹³

As newly minted attorneys, Louis and Louis began their careers close to home. Marshall returned to Syracuse and joined the well-regarded

8. Handlin, "Introduction," xiii; Bernard G. Rudolph, *From a Minyan to a Community: A History of the Jews of Syracuse* (Syracuse, NY: Syracuse University Press, 1970), 71.

9. Jonathan D. Sarna, *American Judaism: A History* (New Haven: Yale University Press, 2004), 79.

10. Mason, *Brandeis*, 26–32; Philippa Strum, *Louis D. Brandeis: Justice for the People* (New York: Schocken, 1984), 9–13.

11. Reznikoff, *Louis Marshall, Champion of Liberty*, xi.

12. Mason, *Brandeis*, 33–48; Strum, *Louis D. Brandeis*, 18–24; Allon Gal, *Brandeis of Boston* (Cambridge: Harvard University Press, 1980), 7–11. For a recollection of Brandeis at Harvard ("The Profs. listen to his opinions with the greatest deference, and it is generally correct."), see Thomas K. McGraw, *Prophets of Regulation* (Cambridge: Harvard University Press, 1984), 82–83.

13. Cyrus Adler, "Louis Marshall: A Biographical Sketch," *American Jewish Year Book* 32 (1930–1931): 23–24; Reznikoff, *Louis Marshall, Champion of Liberty*, xi, 8.

law firm headed by William Crawford Ruger, later chief judge of the New York Court of Appeals.¹⁴ Brandeis moved to St. Louis, close to his favorite sister, Fannie, and her husband, and joined a less prestigious law firm headed by a distant relative, James Taussig. Within a year, however, Brandeis returned to Boston and formed a new and more successful partnership with his socially well-connected friend and classmate, Samuel D. Warren.¹⁵ Entering the field when they did, neither Marshall nor Brandeis felt constrained to join a Jewish law firm in order to secure employment. Discrimination against Jews in the legal profession was a somewhat later development.¹⁶

As bright young Jewish lawyers starting out in the profession, the two Louises received encouragement from the Jewish community. In 1880, Brandeis—when he was all of twenty-four—was hired by the United Hebrew Benevolent Association of Massachusetts as a plaintiff's attorney. The case ostensibly involved nonpayment on a pledge but soon developed into a more ominous challenge to the Jewish charity's corporate existence (since subsequent to its organization, the corporate laws of Massachusetts were changed). Brandeis won the case in the Massachusetts Supreme Court, establishing the principle that "the repeal of a general corporation law . . . does not terminate the existence of corporations organized under it."¹⁷

At thirty-five, Marshall was likewise retained to argue a significant case for the Jewish community. He defended the North American Relief Society, set up to *relieve* the indigent Jews of Palestine, in its effort to obtain funds from the will of a Jew named Sampson Simson, who had left money to promote *education* among the poor Jews of Palestine. Marshall valiantly argued that the Jewish concept of "relief" entailed just the kind of educational assistance Simson had stipulated, and he brought in two learned rabbis, one traditional and one Reform, to support his case. Nevertheless, he lost 4-3 in the New York Court of Appeals, a defeat that continued to rankle him some thirty-three years later.¹⁸

14. Adler, "Louis Marshall," 23-24; Reznikoff, *Louis Marshall, Champion of Liberty*, xi-xii, 8-9.

15. Burton C. Bernard, "Brandeis in St. Louis," *St. Louis Bar Journal* 11 (1964): 53-68; Gal, *Brandeis of Boston*, 11-22.

16. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1977), 102-129.

17. *United Hebrew Benevolent Association v. Joshua Benshimol*, 130 Mass. 325 (1881). Alon Gal erroneously claims that this case merely involved suing a member "for back payment of his annual dues." See Gal, *Brandeis of Boston*, 73.

18. *Riker v. Leo*, 133 N.Y. 519 (1892); Reznikoff, *Louis Marshall, Champion of Liberty*, 913-22. On Simson, see Myer S. Isaacs, "Sampson Simson," *Publications of the American Jewish Historical Society* 10 (1902): 109-17.

By the time the North American Relief Society retained him, Marshall was already deeply involved in Jewish communal affairs. In 1878, at age twenty-two, he helped to found the Jewish Orphan Asylum Society of Syracuse. Five years later he lectured at the Young Men's Hebrew Association of New York and by 1890 stood at the very top of the list of regional Jewish leaders compiled by the Rochester *Jewish Tidings* (his father appeared lower on that list). By then Marshall's name also had appeared in Isaac Markens' filio pietistic listing of *The Hebrews in America* (1888). In 1891 Marshall was invited to join a national delegation of Jews asking President Benjamin Harrison to intervene in order to stop the renewed pogroms against Russian Jews. During those years the unmarried Marshall lived with his parents in their modest Orthodox home. According to one source, "he loved the many ritual observances" they kept. Even after he left Syracuse for New York and defied expectations by finally marrying at the age of thirty-eight (see Figs. 2 and 3), he would return annually to celebrate the Passover seder with his parents.¹⁹ Marshall affiliated in New York with the Reform Temple Emanu-El but maintained many ritual practices, much like his friend and fellow congregant, banker Jacob H. Schiff. He believed, as Schiff did, that "there is only one Judaism . . . all of its followers united by the bond of religion."²⁰ That explains how he could be chairman of the board of the Jewish Theological Seminary and president of Temple Emanu-El simultaneously.²¹

Brandeis, by contrast, kept away from Jewish communal affairs in Boston during his early decades in the city, notwithstanding the one case that he argued and won for the United Hebrew Benevolent Association. He observed no Jewish rituals and was indeed quite contemptuous of the "crude, materialistic Boston Jews" whom he encountered.²² "There is nothing in the first fifty-four years of Brandeis's life," Philippa Strum concludes, "to suggest that being Jewish was of any significance in it."²³

19. Reznikoff, *Louis Marshall, Champion of Liberty*, xiii; Rudolph, *From A Minyan to a Community*, 89, 104, 124; Isaac Markens, *The Hebrews in America* (New York: privately published, 1888), 229.

20. Marshall to Editors, *Jewish Daily News*, Feb. 7, 1906, in Reznikoff, *Louis Marshall, Champion of Liberty*, 798. For the parallel to Schiff, see Naomi W. Cohen, *Jacob H. Schiff: A Study in American Jewish Leadership* (Hanover, NH: University Press of New England / Brandeis University Press, 1999), 97-102.

21. See Horace Stern, *Louis Marshall: An Appreciation* (1930), quoted in Reznikoff, *Louis Marshall, Champion of Liberty*, 813.

22. Brandeis to Alice Goldmark Brandeis, Jun. 18, 1919, in *Letters of Louis D. Brandeis*, eds. Melvin I. Urofsky and David W. Levy (Albany: State University of New York Press, 1975), 4:401.

23. Philippa Strum, "Introduction," in *Brandeis on Democracy*, ed. Philippa Strum (Lawrence: University Press of Kansas, 1995), 13.



Fig. 2. Louis Marshall, c. 1894, about the time he left Syracuse to settle in New York City (Courtesy Peter H. Schweitzer).

The only religious holiday mentioned in the Brandeis letters from this time is Christmas, which he observed with a tree. Even his marriage consisted of only a civil ceremony. It was conducted by his brother-in-law, Felix Adler, who had earlier renounced Judaism to found the Ethical Culture movement.²⁴

Brandeis did not live near Jews, did not belong to a synagogue, gave only perfunctory gifts to Jewish charities until he became a Zionist, and socialized largely with non-Jews. Prior to his conversion to Zionism,

24. Gal, *Brandeis of Boston*, 72. On Felix Adler, see Benny Kraut, *From Reform Judaism to Ethical Culture: The Religious Evolution of Felix Adler* (Cincinnati: Hebrew Union College Press, 1979); and Robert S. Guttchen, *Felix Adler* (New York: Twayne, 1974).

some questioned whether he was Jewish at all.²⁵ That explains why Brandeis' name did not appear in the *Jewish Encyclopedia* (1901-1906), while Marshall's did. A few years later, the *American Jewish Year Book*, coedited by Henrietta Szold, contacted Brandeis in order to include him in its biographical listing of Jews prominent in the professions in the United States, but he failed to reply. Unsurprisingly, Marshall replied at length.²⁶

The religious differences between Marshall and Brandeis, as well as the difference in their respective Jewish communal involvements, bespeak significant political and philosophical differences between these two Jewish giants of the law. As time went on, these differences became ever more apparent. The religiously minded Marshall characterized himself as a political conservative ("I have been accused of . . . being an eighteenth-century reactionary in my views on government"²⁷). He supported the Republican Party, continuing to do so even in 1912, when so many other Jews, including Schiff, abandoned it. "It is because the Republican party . . . stands for the preservation of the Constitution, and for the fundamental principles for which the Fathers of the Republic fought and bled, that I would deem myself unpatriotic should I desert it at this juncture," he wrote. To depart from the principles of the Republican Party, he significantly declared, "would be as inexcusable as a departure from my religious convictions."²⁸ To some extent, indeed, his Republican convictions complemented his religious convictions.

By contrast, the religiously latitudinarian Brandeis devoted himself to no particular party but rather to Progressivism as a broad political agenda. He mistrusted big business and cast himself as a defender of the people. A mugwump Republican in his early career, he shifted to the Democrats in 1884 but abandoned the party when it supported William Jennings Bryan and the Free Silver movement—a position he considered economically unsound. In 1908 he supported William Howard Taft, the Republican candidate for president, and later associated with the Progressive Republicans, particularly Robert La Follette. Unlike Marshall, he shifted parties in 1912 and became an ardent supporter of Woodrow Wilson.

25. Gal, *Brandeis of Boston*, 131; Jonathan D. Sarna, "The Greatest Jew in the World Since Jesus Christ: The Jewish Legacy of Louis D. Brandeis," *American Jewish History* 81 (Spring-Summer 1994): 346-64, esp. 347-49.

26. *Jewish Encyclopedia*, s.v. "Marshall, Louis"; *American Jewish Year Book* 6 (1904-1905): 53, 69, 151. Brandeis was similarly rejected for membership in the American Jewish Committee. See Sarna, "Greatest Jew in the World," 348.

27. *American Jewish Year Book* 15 (1913-14): 178.

28. Marshall to Jacob H. Schiff, Aug. 13, 1912, in Reznikoff, *Louis Marshall, Champion of Liberty*, 1154-55.



Fig. 3. Louis Marshall and his wife Florence Lowenstein Marshall on their wedding day, May 6, 1895 (Courtesy Peter H. Schweitzer).

He remained a Democrat for the remainder of his life.²⁹ “Experience of life has made me democratic,” Brandeis explained in 1913. “I began to see that many things sanctioned by expert opinion and denounced by popular opinion were wrong.”³⁰

Whereas Brandeis gravitated toward public opinion, Marshall shrank from it, viewing appeals to mass democracy with grave mistrust. In the words of his biographer, “he considered those who advocated the direct primary or the referendum misguided or demagogues or rogues.”³¹ “It

29. Strum, *Louis D. Brandeis*, 67; Gal, *Brandeis of Boston*, 25.

30. Brandeis, interview in the *New York Times Annalist* (1913), reprinted in Strum, *Brandeis on Democracy*, 36.

31. Reznikoff, *Louis Marshall, Champion of Liberty*, xvii.

was necessary always," Marshall believed, "to elevate laws above men and to avoid the hysteria of mass action."³² As we shall see, this helped to define his differences with Brandeis in the great debate over a Jewish congress.

As much as Marshall feared the masses, he venerated the power of the individual. He cherished personal liberties and somewhat mistrusted big government. He was particularly keen to limit the federal government's powers in keeping with the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") Not even child labor, he thought, "should be brought within federal control."³³ He also opposed the reasoning that undergirded twentieth-century workmen's compensation legislation, believing that individuals should be responsible for their own actions. In 1911 he extolled as "splendidly reasoned, clearly expressed, and characterized by a fine sense of moderation" a unanimous New York State opinion in his favor (*Ives v. South Buffalo Railway Company*) that tossed out the state's workmen's compensation act because it entailed "the taking of the employer's property without his consent and without his fault."³⁴ He characterized the decision as "a substantial dike against the tide of socialism" and "a potent influence in the direction of sanity in respect to legislation in which sociology and law commingle."³⁵ Brandeis, by contrast, characterized the same decision as "woefully wrong."³⁶ Where Marshall worried, particularly in the years following World War I, that "our Government is gradually being transformed into a Socialistic state," Brandeis, the Progressive, advocated "the co-operative idea . . . [that] management and labor should be one."³⁷

Minimum wage legislation similarly divided the two men. Brandeis supported the minimum wage, just as he had earlier supported laws prohibiting women from working more than ten hours a day. Progressive legislation of this sort, he believed, remedied clear social evils. In this case

32. Ibid.

33. Ibid., 1003.

34. 201 N.Y. 271 at 298 (1911).

35. Marshall to William E. Werner, Apr. 1, 1911, box 1580/microfilm 1786, Louis Marshall Papers, Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati (hereafter cited as Marshall Papers).

36. Brandeis to Editor of *The Survey*, Apr. (?) 1911 [*The Survey*, Apr. 29, 1911], in Urofsky and Levy, *Letters of Louis D. Brandeis*, 2:427. See also Brandeis's comments in "The Living Law" (1916), reprinted in Strum, *Brandeis on Democracy*, 62.

37. Marshall (1925), as quoted in Morton Rosenstock, *Louis Marshall, Defender of Jewish Rights* (Detroit: Wayne State University Press, 1965), 29; Brandeis, quoted in "Laborers as Directors With Boss Possible, Says Louis D. Brandeis" (1915), reprinted in Strum, *Brandeis on Democracy*, 106.

the ills in need of a cure were that, first, “a majority of the women in industry were receiving as wages less than was necessary for their decent support; and secondly, that such inadequacy of wages resulted on the one hand in a reduction of vitality and in ill health, and on the other hand in immorality and the corruption of the community.” He cited a large body of literature from around the world that supported minimum wage legislation as beneficial and insisted that the goal of curbing evil justified the limitations on personal liberty the minimum wage entailed.³⁸

Marshall believed government had no business intruding into the free marketplace of relationships between employers and employees. To his mind, constitutional guarantees of personal liberty trumped well-meaning efforts to combat social evil. “There must be a limit to the so-called police power,” he insisted. “The power to fix a minimum wage implies the power to fix a maximum wage.” Besides, he asked, “what right has the Legislature to say to me how much or how little I may receive for that which belongs to me—my labor.” While Marshall did favor health regulations and rules limiting the number of hours that women worked, he drew the line at the minimum wage. He believed it violated “the liberty of the individual, which, after all, is his most precious possession.”³⁹

Marshall’s emphasis on individual liberty helps explain why, when it came to human rights issues, it was he, the self-styled conservative, who staunchly advocated for persecuted individuals and groups, far more than did Brandeis, the Progressive. Brandeis worried about economic disparities, about privacy, and late in life about free speech, but it was Marshall who made his reputation as the “champion of liberty” for Jews and other minorities. Marshall’s name first became associated with this theme during the first decade of the twentieth century, during his long and ultimately successful campaign to abrogate America’s 1832 treaty of commerce with Russia. Over and over in his arguments he insisted that American Jews should enjoy the same liberty as other Americans in trading or traveling within the tsar’s empire. Nor was this just public posturing, as it may have been for some. In a private letter to the Jewish leader Simon Wolf, Marshall described the issue as one that “relates to the integrity of American citizenship, to the rights of our citizens under the Constitution of the United States.”⁴⁰

38. Louis D. Brandeis, “The Constitution and the Minimum Wage,” *Survey* 33 (1914-1915): 491.

39. Marshall to Ethel M. Smith, Apr. 29, 1923, box 1594/microfilm 1795, Marshall Papers. Marshall’s position was in line with the U.S. Supreme Court decision in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), but in a subsequent case, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), Brandeis’ position was vindicated.

40. Marshall to Simon Wolf, Aug. 18, 1911, box 1580/microfilm 1786, Marshall Papers. Jacob Schiff and other Jews, by contrast, defined the battle in particularistic terms, as an

Ironically, the success of Marshall's campaign for abrogation was indirectly indebted to Brandeis, for it was he who helped to sink the political fortunes of the Taft administration through public hearings in 1910 that disclosed government improprieties in the transfer of Alaskan lands to private industry, the so-called Pinchot-Ballinger affair. A weakened Taft, seeking to head off certain congressional action, gave notice of America's intention to terminate the treaty on December 18, 1911.⁴¹

Liberty remained Marshall's lodestar as he turned to the debate over immigration and an ultimately unsuccessful battle to keep America's doors open to Jewish and other immigrants.⁴² For him, he once explained, this was a question of "human rights." He fought valiantly to exempt from immigration restrictions those who sought "admission to the United States to avoid religious or political persecution."⁴³ Subsequently, in battling against social discrimination, he again stressed the themes of liberty and equality. "We must insist upon equality of right and of treatment," he wrote in response to Harvard University's decision to limit the number of Jews it would accept. "The only tests that we can recognize are those of character and scholarship."⁴⁴ Earlier he worked hard behind the scenes to aid Leo Frank, the Atlanta factory manager wrongly charged with murder amid just the kind of mass hysteria Marshall detested. While most Jews, including Louis Brandeis, feared Jewish public involvement in the case, Marshall eventually rallied to Frank's defense, seeking to aid "the unfortunate victim of injustice."⁴⁵ "My interest in this case," he

effort to force Russia to dismantle the Pale of Settlement and improve the lot of its Jewish community. On the campaign, see Reznikoff, *Louis Marshall, Champion of Liberty*, 49-108; Jonathan D. Sarna and Jonathan J. Golden, "The Twentieth Century Through American Jewish Eyes: A History of the *American Jewish Year Book*, 1899-1999," *American Jewish Year Book* 100 (2000): 18-20; Rosenstock, *Louis Marshall*, 71-79; Judith Goldstein, *The Politics of Ethnic Pressure: The American Jewish Committee Fight against Immigration Restriction, 1906-1917* (New York: Garland, 1990), 135-183; Naomi W. Cohen, "The Abrogation of the Russo-American Treaty of 1832," *Jewish Social Studies* 25 (Jan. 1963): 3-41; and Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906-1966* (Philadelphia: Jewish Publication Society of America, 1972), 54-80.

41. Strum, *Louis D. Brandeis*, 132-39, provides details of the affair.

42. Reznikoff, *Louis Marshall, Champion of Liberty*, 109-242; Rosenstock, *Louis Marshall*, 79-89.

43. Marshall to Senator Edward D. Smith, Feb. 17, 1914, in Reznikoff, *Louis Marshall, Champion of Liberty*, 128; Marshall to S. O. Levinson, Jan. 8, 1915, in Reznikoff, *Louis Marshall, Champion of Liberty*, 246.

44. Marshall to A. C. Ratschesky, Jun. 17, 1922, in Reznikoff, *Louis Marshall, Champion of Liberty*, 267; Rosenstock, *Louis Marshall*, 245-53. For background, see Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (Boston: Houghton Mifflin, 2005), 77-109.

45. Brandeis to Roscoe Pound, Nov. 27, 1914, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 3:373; Marshall to Simon Wolf, Sep. 27, 1913, in Reznikoff, *Louis Marshall, Champion of Liberty*, 296.

informed U.S. Chief Justice Edward D. White in 1914, "is not that of a paid counsel, but of one who is impressed with the obligation that he owes to the cause of justice." The Supreme Court rejected his argument, but Marshall lived long enough to see his position vindicated.⁴⁶

Marshall even defended the rights of Jewish socialists and pacifists when they were attacked in the wake of World War I, and he defended the socialist assemblymen who were suspended, because of their views, from the New York State legislature. "Nothing can be more opposed to my economic and political views than [these] doctrines," he explained, but given what he perceived to be a "palpable infraction of the principle lying at the very basis of a republican form of government," he refused to keep silent. Constitutional guarantees, as he understood them, impelled him to speak out.⁴⁷

Marshall was much more, however, than just a "defender of Jewish rights," as his biographer, Morton Rosenstock, dubbed him.⁴⁸ Where the liberties of other minorities were at stake, he likewise charged into battle. To his mind, the rights of Jews and of other racial and ethnic minorities in America were inextricably linked, if not actually interdependent, and he defended them all on the basis of the individual freedom guarantees of the Constitution. Thus, he authored a 1913 Civil Rights Act that prohibited discrimination on account of race, creed, or color in any place of public accommodation or amusement.⁴⁹ In 1923 he joined the legal committee and board of the NAACP. Until his death he more or less directed the organization's legal struggle against political disenfranchisement and residential segregation.⁵⁰ Also in 1923, he authored a

46. Marshall to Chief Justice Edward D. White, Nov. 24, 1914, in Reznikoff, *Louis Marshall, Champion of Liberty*, 303; Steve Oney, *And The Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank* (New York: Pantheon, 2003), 347-48, 365-66, 451, 458-68; cf. Cohen, *Jacob H. Schiff*, 54. Marshall's losing position was vindicated eight years later in the case of *Moore v. Dempsey*, 261 U.S. 86 (1923).

47. *Louis Marshall, Champion of Liberty*, 983; Lucy Dawidowicz, "Louis Marshall and the *Jewish Daily Forward*: An Episode in Wartime Censorship, 1917-18," in *For Max Weinreich on his Seventieth Birthday: Studies in Jewish Languages, Literature, and Society*, ed. Lucy Dawidowicz, et al. (The Hague: Mouton, 1964), 29-43; Jerome Rosenthal, "The Public Life of Louis Marshall" (Ph.D. diss., University of Cincinnati, 1984), 573-80.

48. Rosenstock, *Louis Marshall*.

49. *Ibid.*, 69-70; Jeffrey Gurock, "The 1913 New York State Civil Rights Act," *AJS Review* 1 (1976): 93-120. Gurock (107) relates that Rabbi Julian Morgenstern criticized Marshall's position, insisting on his right to discriminate against African Americans ("I do not associate with them nor do I wish to do so.").

50. Reznikoff, *Louis Marshall, Champion of Liberty*, 422-65; August Meier and Elliott Rudwick, "Attorneys Black and White: A Case Study of Race Relations Within the NAACP," *Journal of American History* 62 (Mar. 1976): 913-46; Nancy J. Weiss, "Long-Distance Runners of the Civil Rights Movement," in *Struggles in the Promised Land*, eds. Jack Salzman and Cornell West (New York: Oxford University Press, 1997), 133-35. Cyrus

brief on behalf of Japanese aliens who under California law were barred from acquiring or leasing land in that state, while other aliens faced no similar restrictions. He lost that case, but again his arguments ultimately prevailed.⁵¹ Two years later, in one of his most important Constitutional victories, he authored an influential amicus brief challenging an Oregon law requiring all children between the ages of eight and sixteen to attend public school. This was a clear anti-Catholic statute, but typically Marshall focused his brief in the case of *Pierce v. Society of Sisters* around the issue of individual rights under the Constitution. The Oregon law, he charged, infringed upon "the liberty of the individual" and deprived those who maintained private or parochial schools "not only of their liberty, but also of their property."⁵² A unanimous court, which by then included Brandeis, agreed.⁵³

Overall Marshall's record on questions of racial and religious rights was far more distinguished than that of Brandeis. The latter never similarly exerted himself in defense of the legal rights of blacks, Japanese, Catholics, or Jews. As a lawyer, he chose to focus above all on the rights of the people at large, or on class conflict, rather than minority rights. As a justice forced to deal with minority rights he stood, in Robert Burt's words, "within the Court consensus, but not ahead of it."⁵⁴ He signed majority opinions involving the rights of racial and religious minorities, including several (like *Pierce*) that upheld positions Marshall had argued, but he did not write opinions of his own. Even where he privately sympathized with the victims of racial and religious prejudice, he urged others to champion their causes. He did not, for the most part, publicly do so himself.⁵⁵

During the first half-century of their lives, Marshall and Brandeis, who lived in different cities and differed politically and religiously, scarcely came into direct contact with one another. No letters are known to have passed between them. They came together in a common cause, probably for the first time, at the age of fifty-three, when in the summer of 1910

Adler suggests that "it may be, because he was a Jew and was aware of the oppression to which minorities are subject, that he took up the cause of the Negro as indeed he did that of many minorities." See Adler, "Louis Marshall," 30.

51. *Porterfield v. Webb*, 263 U.S. 225 (1923); Reznikoff, *Louis Marshall, Champion of Liberty*, 466-500. Marshall's view was vindicated by the California State Supreme Court in the case of *Sei Fujii v. State of California*, 38 Cal. 2d 718 (1952).

52. Reznikoff, *Louis Marshall, Champion of Liberty*, 957.

53. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

54. Robert Burt, *Two Jewish Justices: Outcasts in the Promised Land* (Berkeley: University of California Press, 1988), 84.

55. See, for example, Strum, *Louis D. Brandeis*, 333; Urofsky and Levy, *Letters of Louis D. Brandeis*, 3:373, 383.

both became involved in the effort to solve New York's stormy cloak makers' strike, the "Great Revolt" that idled more than 60,000 workers, most of them immigrant Jews. At the behest of the Progressive-minded Boston department store owner A. Lincoln Filene, Brandeis agreed to mediate this dispute. He spent long hours listening to both sides, resolved many contentious issues, and invented the "preferential union shop," giving preference to union members over nonunion members of equal ability. This was his compromise between the "closed" union shop the workers demanded and the "open" nonunion shop insisted upon by manufacturers.⁵⁶

While Brandeis' encounter with eastern European Jews made a lasting impression upon him and he in turn greatly impressed them, his compromise collapsed, and he returned to the summerhouse he had rented on Cape Cod. One month later, following weeks of misery and suffering on both sides, Marshall came in as mediator, and many of Brandeis's ideas were revived. Marshall finessed the language, applied pressure to both sides, and contributed the term "Protocol of Peace" to the settlement ("Why not call it 'protocol'," he is supposed to have suggested, as the two sides debated how the agreement should be characterized. "Neither group will know what that means and it will achieve the result."⁵⁷) Judge John W. Goff unwittingly spurred on the settlement by enjoining the strikers from picketing or interfering in any way with strike breakers. Under the settlement's terms, cloak makers gained higher wages, improved working conditions, and the "preferential union shop." Manufacturers, meanwhile, gained economic security, since workers surrendered the right to strike in favor of an arbitration board over which Brandeis agreed to preside. To Brandeis, this was a notable contribution to "industrial democracy," while Marshall emphasized the benefits of industrial peace and the alleviation of suffering on all sides. Both men took credit for the Protocol of Peace, which was widely emulated and led to six strike-free years.⁵⁸

During the last of those tumultuous years, however, relations between Marshall and Brandeis deteriorated, particularly once Brandeis converted

56. Louis Levine, *The Women's Garment Workers: A History of the International Ladies' Garment Workers Union* (New York: B. W. Huebsch, 1924), 168-95 and sources cited in n. 58 below.

57. Mason, *Brandeis*, 300.

58. Hyman Berman, "Era of the Protocol: A Chapter in the History of the International Ladies' Garment Workers' Union, 1910-1916" (Ph.D. diss., Columbia University, 1956); Melvyn Dubofsky, *When Workers Organize* (Amherst: University of Massachusetts Press, 1968), 58-66; Leon Stein, *Out of the Sweatshop: The Struggle for Industrial Democracy* (New York: Quadrangle, 1977), 87-175; Mason, *Brandeis*, 291-315; Strum, *Louis D. Brandeis*, 174-79; Reznikoff, *Louis Marshall, Champion of Liberty*, 1127-28. On the role of Judge Goff, see *New York Times*, Aug. 28, 1910, 1.

to Zionism and, in 1914, assumed the chairmanship of the Provisional Executive Committee for General Zionist Affairs. Reprising his American role as the “people’s attorney,” Brandeis cast himself as the Zionist spokesman of the American Jewish masses and, on August 31, 1914, called a meeting “of all the important Jewish organizations and groups in the country,” inviting Marshall to cooperate with him. Marshall, however, was not “Zionistically” inclined and believed American Jews should be represented by a committee of its central leaders—namely the American Jewish Committee, over which he himself presided. Publicly Marshall politely welcomed Brandeis’s cooperation and appointed a committee to meet with him.⁵⁹ Privately, in a letter to his friend Cyrus Adler, he fumed:

Mr. Louis D. Brandeis and his associates are self-advertisers. . . . They have no regard for anything except self-exploitation, and they would be very glad indeed to have it appear that the American Jewish Committee is merely a tail to their kite and that it has acted upon their initiative. I am so disgusted with them, that I almost feel justified in refusing to confer with them. Nothing can come of such a conference anyway, because, no matter what promises they could make, like all fanatics they will consider themselves above the ordinary rules of decency. They are entirely destitute of common sense, and are entirely regardless of consequences.⁶⁰

The meeting between these two legal titans—one ignorant of Judaism, newly converted to Zionism, and claiming to represent the Jewish masses and the other far more learned in his religion, skeptical of Zionism, and claiming to represent the best and the brightest in Jewish life—predictably ended in failure. Brandeis, a leader from the periphery, and Marshall, a leader from the core, symbolized to one another what each most disdained. Brandeis represented to Marshall fanaticism and the wild masses; Marshall represented to Brandeis privilege and concentration of power. The result was a protracted intracommunal battle that lasted well into 1916.⁶¹

Brandeis and the Zionists, echoing classic Wilsonian themes (Wilson had promoted direct primaries in New Jersey and supported the Seventeenth Amendment, requiring U.S. senators to be elected “by the people”),

59. Urofsky and Levy, *Letters of Louis D. Brandeis*, 3:291–94; Marshall to Brandeis, Aug. 31, 1914, box 1583, Marshall Papers.

60. Marshall to Cyrus Adler, Sep. 2, 1914, box, 1583, Marshall Papers.

61. Jonathan Frankel, “The Jewish Socialists and the American Jewish Congress Movement,” *YIVO Annual* 16 (1976): 202–341, provides a richly detailed account. See also Yonathan Shapiro, *Leadership of the American Zionist Organization 1897–1930* (Urbana: University of Illinois, 1971), 77–98.

demanded a democratically elected "congress" of American Jews to advocate to the Great Powers for the rights of Jews in eastern Europe and for the creation of a Jewish homeland in Palestine. Marshall and the American Jewish Committee, preferring their traditional strategy, pressed for a much more limited closed-door "conference" aimed at securing rights for Jews everywhere. "The process by which the American Jewish Committee was called into existence was as undemocratic as the steps you have now taken to create a Jewish conference," Brandeis stormed. "A system of self-election and perpetuation in office . . . and which meets always in secret session, cannot properly be called democratic."⁶² Typically, he cast the issue in the starkest of moral terms: "the irreconcilable conflict between autocracy and democracy in Jewish life."⁶³ Marshall, meanwhile, questioned the fairness of the Brandeis plan, complained that a "small coterie" sought to use the congress to implement a "cut and dried programme, pre-determined. . . by its managers," and feared most of all that the congress would turn "into a mass-meeting, where calm discussion and consideration are quite impossible."⁶⁴

In the midst of this battle, on January 28, 1916, Wilson nominated Brandeis to a seat on the U. S. Supreme Court. For Marshall, this must have been particularly galling since earlier, during the Taft administration, he had himself had been seriously considered for such an appointment and was known to have been bitterly disappointed when he was passed over.⁶⁵ In a confidential handwritten note to him, Cyrus Adler expressed feelings about Brandeis that Marshall himself likely shared:

I do not view the nomination of Mr. Brandeis with complacency: he may have sufficient legal learning, but he seems to me to be a partisan and agitator and not that type of fair character and dispassionate type of mind which should be possessed by members of the most distinguished tribunal of the world.⁶⁶

In public, however, Marshall and Adler remained silent. The appointment of the first Jewish Supreme Court justice thrilled the Jewish masses and resulted in a flood of congratulatory telegrams from Jewish leaders,

62. Brandeis to Cyrus Adler, Aug. 10, 1915, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 3:568.

63. Brandeis to Harry Friedenwald, Jun. 14, 1916, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:220.

64. Marshall to Bernard G. Richards, Mar. 16, 1916, in Reznikoff, *Louis Marshall, Champion of Liberty*, 514-17.

65. Dalin, "Louis Marshall, The Jewish Vote, and the Republican Party," 69-74; Rosenstock, *Louis Marshall*, 55; Reznikoff, *Louis Marshall, Champion of Liberty*, xvii; Cohen, *Jacob H. Schiff*, 44, 147.

66. Cyrus Adler to Marshall, undated handwritten note, 1916, box 47, Marshall Papers. I owe this reference to Dr. Matthew Silver.

including one from Jacob Schiff.⁶⁷ Perhaps, as William Howard Taft claimed, Jews like Schiff and Marshall “all ha[d] to praise the appointment and all hate[d] Wilson for making it.”⁶⁸ Whatever the case, during the stormy debate over Brandeis’ nomination, his Jewish opponents held their fire.⁶⁹

The battle concerning what became known as the American Jewish Congress, however, did not abate. It continued long after Brandeis joined the bench and, in the end, both sides in the struggle felt bruised. Subjected to withering public criticism at a 1916 national conference at the Hotel Astor where he advocated for the congress, Brandeis was advised by the *New York Times* that as a Supreme Court Justice, he was “out of place” and should “leave to others subjects of such controversial nature.”⁷⁰ He thereupon resigned from all his official leadership roles in Zionism, in the proposed congress, and in Jewish relief efforts. Even as he insisted that “my interest in the cause is not lessened,” he retreated from public engagements.⁷¹ Years later, he admitted that his appearance at the Astor Hotel conference “was a mistake.”⁷²

Marshall, meanwhile, met utter defeat in his effort to stop the communitywide momentum favoring a democratically elected Jewish congress. He therefore bowed to the inevitable, and over the objections and fears of some of his own colleagues at the American Jewish

67. See Brandeis to Norman Hapgood, Feb. 1, 1916, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:32; and Brandeis to Schiff, Feb. 7, 1916, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:34. Three years earlier, Schiff had privately warned Wilson that Brandeis was not a “representative Jew.” See Cohen, *Jacob H. Schiff*, 44.

68. William H. Taft to Henry W. Taft, as quoted in A. L. Todd, *Justice on Trial: The Case of Louis D. Brandeis* (New York: McGraw Hill, 1964), 80. Todd (217) suggests that Marshall and Schiff later “counseled retreat,” urging Wilson to withdraw the nomination. I know of no evidence to support this.

69. As Adler wrote to Schiff, “I have kept silent for many months because I did not want to be accused of endeavoring to injure his confirmation to the Supreme Court.” See Adler to Schiff, Jun. 15, 1916, in *Cyrus Adler Selected Letters*, ed. Ira Robinson (Philadelphia: Jewish Publication Society, 1985), 1:308.

70. *New York Times*, Jul. 18, 1916, 8. See also Frankel, “Jewish Socialists and the American Jewish Congress Movement,” 275–78; Shapiro, *Leadership of the American Zionist Organization*, 95. Melvin Urofsky and David Levy suggest that Brandeis was “ambushed” at this conference and that the scene was premeditated, a view that reflects that of Brandeis himself. See Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:251–52; and Shapiro, *Leadership of the American Zionist Organization*, 95. Naomi W. Cohen considers this charge “totally unfounded.” See Cohen, *Not Free to Desist*, 97.

71. Brandeis to Stephen S. Wise, Jul. 21, 1916, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:253.

72. Brandeis to Jacob deHaas, Sep. 16, 1920, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:484.

Committee, participated in the congress and came to champion its call for Jewish "national rights."⁷³ The congress, he admitted in retrospect, "turned out so much better than I thought it would."⁷⁴ The American Jewish Committee survived, and thanks to Marshall even "emerged as the prime shaper of American Jewish diplomacy" at the Versailles peace conference.⁷⁵ But the balance of power in Jewish life unalterably shifted. Henceforth, Zionists and eastern European Jewish immigrants, buoyed by the "influence and prestige of Brandeis," came to play a much greater role in Jewish communal life.⁷⁶ Even those who admired Marshall (and many eastern European Jews did) no longer submitted reflexively to his and the American Jewish Committee's will.

In the years following their great clash, Brandeis and Marshall reconciled somewhat.⁷⁷ They met in Paris during the peace conference of 1919, and Brandeis found Marshall "happy over his achievements." "All speak admiringly of his conduct throughout these months," he wrote to his wife.⁷⁸ The two men met again in Washington that year, and had a long discussion over "the development of Palestine and the cooperation of all American Jews."⁷⁹ A year later, they held another conversation, this time largely concerned with the rise of antisemitism and how to respond to it.⁸⁰ By 1924 Marshall's "non-Zionism" sounded more and more like Brandeis' Zionism.⁸¹

73. Marshall to Isaac Landman, Dec. 19, 1918, in Reznikoff, *Louis Marshall, Champion of Liberty*, 536; Marshall to Jacob H. Schiff, Nov. 14, 1917, in Reznikoff, *Louis Marshall, Champion of Liberty*, 710-14.

74. Marshall to A. Leo Weil, Dec. 21, 1918, in Reznikoff, *Louis Marshall, Champion of Liberty*, 539.

75. Cohen, *Not Free to Desist*, 102. Carole Fink modifies Cohen's conclusion in *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1787-1938* (Cambridge: Cambridge University Press, 2004), 133-235.

76. Shapiro, *Leadership of the American Zionist Organization*, 83.

77. As late as 1919, Cyrus Adler still reminded Marshall that Brandeis was "a Jew who turned his back on the Jewish people until he was 57 or 58 years of age and was unmoved by the 35 years misery of the Jews of Russia." He threatened to attack Brandeis publicly, but apparently relented. See Robinson, *Cyrus Adler: Selected Letters*, 392.

78. Brandeis to Alice Goldmark Brandeis, Jun. 24, 1919, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:405.

79. Brandeis to Julian W. Mack, Oct. 24, 1919, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:434.

80. Brandeis to Julian W. Mack, Nov. 18, 1920, in Urofsky and Levy, *Letters of Louis D. Brandeis*, 4:507.

81. See Urofsky and Levy, *Letters of Louis D. Brandeis*, 5:115n1. On the other hand, by 1927, World Zionist Organization president Chaim Weizmann had wooed Marshall to join what would become the reorganized Jewish Agency. Brandeis responded that "Weiz[mann] is welcome to Marshall. But he wont [sic] get me for his new Commission" (258).

But even if they mellowed as they aged, the differences between Marshall and Brandeis remained keenly profound. Judaism stood at the very core of Marshall's life. He conceived of religion as the glue that bonded Jews together and defined key issues from a Judeocentric point of view. By contrast, Judaism was extremely peripheral to Brandeis' life. He conceived of nationhood—what we would call ethnicity—as the glue that bonded Jews together and defined key issues from a politically progressive point of view. Marshall was a Republican and a conservative. He admired men of wealth and influence, feared the unchecked power of the masses, and conceived of law as an instrument for protecting private property and individual rights. Brandeis was a Democrat and a liberal. He disdained trusts and tycoons, advocated for "the people," and conceived of law as an instrument for protecting societal needs and the public welfare. For Marshall, social justice began with his fellow Jews and proceeded to the defense of other minorities, whose fates he linked with theirs. For Brandeis, social justice entailed narrowing the gap between rich and poor and proceeded toward the reshaping of society on a more equitable basis. In response to antisemitism, Marshall defended the rights of Jews in America and wherever they happened to live; Brandeis promoted Zionism.

For all of this, Jerold S. Auerbach has forcefully reminded us of the similarities between the two men. Both moved from American law to Jewish leadership and associated law and justice with American as well as Jewish tradition. Both insisted that "a good Jew . . . was a patriotic American whose deepest loyalty to the United States must never be compromised."⁸² Both felt anxious about their place as Jews within American society. And in the second halves of their lives, both became committed to the upbuilding of a Jewish homeland in Palestine established on American principles.

Whether one focuses, as Auerbach does, on their similarities, or underscores, as I have done, their differences, this much is certain: Through their lives and careers, the two Jewish lawyers named Louis demonstrated that law, tradition, Judaism, and America spoke in multiple, even conflicting voices. At the highest levels of American Jewish life, they showed that religion, identity, philosophy, and politics could still be respectfully debated and vigorously contested.

The 150th anniversaries of their birth, commemorated just weeks apart in 2006, serve as a salutary reminder that there is more than one way to be an American Jew. There are multiple roads to American Jewish leadership, multiple strategies for exercising communal power, and multiple goals that American Jews may yet seek to achieve.

82. Jerold S. Auerbach, *Rabbis and Lawyers: The Journey From Torah to Constitution* (Bloomington: Indiana University Press, 1990), esp. 17–19, 146–49 (quote is on 147).