

# **“Death by Bureaucracy”: How the U.S. State Department Used Administrative Discretion to Bar Refugees from Nazi Europe**

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*During the Nazi era, the United States could have remained within overall and country-by-country quotas limiting immigration and still have admitted an additional 350,000 refugees from Germany and German-occupied or -allied countries. Instead, the State Department, whose consular officers abroad decided whether visas were to be issued, denied them to hundreds of thousands seeking refuge between 1933 and 1945. Largely untethered by judicial or public oversight, consular officials deployed their discretion in a way that produced direct and often deadly consequences for the mostly Jewish refugees. This episode has been largely overlooked in histories of administrative or immigration law, and minimized in historical accounts focused upon congressional intransigence and presidential acquiescence in failing to change the statutory scheme. Its meaning has been lost in the gap between disciplines. This article seeks to bridge the divide by showing how State Department officials used the discretion afforded them under the immigration statute and through judicial decisions to implement an anti-foreign, antisemitic policy. Understanding the multiplicity of decisions officials faced gives lie to the oft-repeated refrain that the law in the form of an impenetrable statute dictated the result. Reviewing the history also demonstrates the power of the “law made me do it” claim, as it persists decade after decade, despite overwhelming evidence that “the law” did no such thing. This tragic case study ultimately illuminates the need for historians to develop a better understanding of law, and for legal scholars to gain a better understanding of history.*

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## INTRODUCTION

During the Nazi era, the United States could have remained within overall and country-by-country quotas limiting immigration and still have admitted an additional 350,000 refugees<sup>1</sup> from Germany and German-occupied or allied countries.<sup>2</sup> Instead, the State Department, whose consular officers abroad decided whether visas were to be issued, denied them to hundreds of thousands seeking refuge between 1933 and 1945.<sup>3</sup> Largely untethered by judicial or public oversight, consular officials deployed their discretion in a way that produced direct and often deadly consequences for the mostly Jewish refugees.<sup>4</sup> It was what Stephen S. Wise, the rabbi leading American Jewry's response to the Nazi catastrophe, called "death by bureaucracy."<sup>5</sup>

The German quota provides a particularly dramatic example. Only once

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1. The term "refugees" will be used throughout this article with the understanding that a special category for those escaping political or religious persecution did not exist in the 1930s and 1940s under U.S. immigration law. Still, refugee is a commonly used term now and was then, and it captures the plight of the vast majority seeking to immigrate. The refugees referred to are primarily Jews and those of Jewish descent who sought to escape Nazi Europe, as well as a smaller number of political dissidents. There also is significant overlap in those categories. U.S. immigration agencies did not keep track of the religion of those immigrating or those seeking to immigrate. Given the forces propelling emigration—the rise of antisemitism in Germany and its spread to much of continental Europe under German occupation—it is safe to assume that Jews, or those of Jewish descent, made up the bulk of the refugees.

2. Arriving at a precise number of refugees from Nazi Europe denied entry to the United States is difficult. Almost every book or article on the matter includes a different number for the total number of immigrants to the United States versus the number of quota spaces. The differences depend primarily on what countries the source included in its count and during what years. Some differences also reflect a source's identifying Jewish immigrants in particular, or adding those who came as temporary visitors. *See, e.g.*, ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, at 79 (2004); HENRY L. FEINGOLD, *THE POLITICS OF RESCUE: THE ROOSEVELT ADMINISTRATION AND THE HOLOCAUST, 1938-1945*, at 126 (1970); RAFAEL MEDOFF, *BLOWING THE WHISTLE ON GENOCIDE: JOSIAH E. DUBOIS, JR. AND THE STRUGGLE FOR A U.S. RESPONSE TO THE HOLOCAUST 4* (2009); ARTHUR D. MORSE, *WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY* 109 (1968); BARBARA MCDONALD STEWART, *UNITED STATES GOVERNMENT POLICY ON REFUGEES FROM NAZISM, 1933-1940*, at 554 (1982); BAT-AMI ZUCKER, *IN SEARCH OF REFUGEE* 60, 135 (2001). My calculations of about 350,000 turned away comes closest to Arthur Morse's estimate of 341,567 unfilled places within U.S. immigration quotas "allotted to citizens of countries dominated or occupied by Germany or her allies." MORSE, *supra* at 131. Morse added: "Each unfilled place represented a potential life exposed to annihilation." *Id.* My precise calculations can be found at <https://repository.library.northeastern.edu/files/neu:h989rt69w#stay/>.

3. Another complicating factor is that it is not possible to know how many German Jews would have liked to immigrate to the United States but could not. The U.S. government did not keep track of those who applied and were rejected, just the number of visas issued. In addition, the Berlin consul, who supervised the other two German consulates that issued immigration visas, actively and successfully discouraged German Jews from applying for visas. STEWART, *supra* note 2, at 65; ZUCKER, *supra* note 2, at 65; RICHARD BREITMAN & ALAN M. KRAUT, *AMERICAN REFUGEE POLICY AND EUROPEAN JEWRY* 21, 44 (1988). It is hard to know whether German Jews' unwillingness to apply for visas they were told they could not get affected the common and increasingly discredited narrative that Jews did not want to leave Germany until it was too late. *See, e.g.*, SHELDON MORRIS NEURINGER, *AMERICAN JEWRY AND UNITED STATES IMMIGRATION POLICY, 1881-1953*, at 89.

4. Given that the vast majority of Nazi-era refugees were denied visas abroad, this article will not examine other aspects of immigration law, including the denial of admittance at ports of entry or expulsion of those already in the country.

5. STEPHEN WISE, *CHALLENGING YEARS* 190 (1951). In his memoir, Wise, a New York rabbi who led the World Jewish Congress, uses the term as the title of a chapter on the State Department's actions throughout the Nazi era.

during twelve years of Nazi rule was the German quota filled: in 1939 when the combined German and Austrian annual quota was 27,370.<sup>6</sup> For every other year, the German quota was below the numbers allowed, leaving nearly two thirds of the quota unfilled. The total number of visas issued for all countries during that time period was 378,000, well below the two million allowed.<sup>7</sup>

This episode has been largely overlooked in histories of administrative or immigration law,<sup>8</sup> and its meaning has been lost in the gap between disciplines. Legal scholars have long recorded the broad discretion afforded immigration officials, but have neglected the way it operated to accomplish a policy outcome: lower immigration in the 1930s and early 1940s.<sup>9</sup> Historians have described this episode, but have disregarded or downplayed the administrative discretion involved, blaming inflexible quotas for the failure of more European Jews to find refuge in the United States.<sup>10</sup> Both

6. The German/Austrian quota was close to filled the following year. *See* discussion *infra* Section I.B.

7. ZUCKER, *supra* note 2, at 60.

8. Some legal scholarship has touched on this issue. Patricia Russell Evans' dissertation is a detailed, historical look at the public charge clause, which as will be seen, was the primary means of denying visas during the Nazi era. Although Evans analyzes changes in interpretation of the public charge clause that in theory could have affected the treatment of refugees from Nazism, she ends her study in 1933, the year Hitler becomes chancellor in Germany, thus providing no context for the Nazi era. Patricia Russell Evans, "Likely to Become a Public Charge": Immigration in the Backwaters of Administrative Law, 1882-1933 (May 10, 1987) (Ph.D. dissertation, George Washington University) (ProQuest). Prompted by the Trump administration's attempt to expand the grounds for public charge exclusion in 2018, Joseph Daval explored its past uses, but mentioned the Nazi era in two sentences. Note, *The Problem with Public Charge*, 130 YALE L.J. 998, 1013 (2021). Although Nazi-era immigration is not the focus of Patrick Weil's article, he does devote several paragraphs to the period. *Races at The Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001). The one law review article squarely on point, Esther Rosenfeld, Note, *Fatal Lessons: United States Immigration Law During the Holocaust*, 1 U.C. DAVIS J. INT'L L. & POL'Y 249 (1995), recounts the history of the era but does not engage in legal analysis.

9. Most of the attention has been on the public charge clause, its use in deportation cases, and its conflict with public welfare expansion. Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18 (1939); Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENV. L. REV. 1 (2019); Kim R. Anderson & David A. Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 SAN DIEGO L. REV. 87 (1978); Daval, *supra* note 8; Anna Shiffrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363 (2020); Mae M. Ngai, *The Strange Career of the Illegal Alien in Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & HIST. REV. 69 (2003); Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge"* 78 DENV. L. REV. 1161 (2001); *see also* ADAM B. COX & CRISTINA M. RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020); Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113 (2010); Donald S. Dobkin, *Race and the Shaping of U.S. Immigration Policy*, 28 CHICANA/O-LATINA/O L. REV. 19 (2009); CYBELLE FOX, THREE WORLDS OF RELIEF: RACE, IMMIGRATION AND AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL (2012); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 14 IMMIGR. & NAT'Y L. REV. 3, 10 (1992); Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975); Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

10. For a detailed discussion, see Laurel Leff, *The Unfilled Immigration Quotas: How Historians Lost Sight of the Reason Jewish Refugees Did Not Reach the U.S.* (October 17, 2022) (unpublished manuscript) (on file with author). As a brief sampling: "The rise of fascism and anti-Semitism in Europe in the 1930s coincided with the Great Depression, creating an unfavorable political climate within the

incomplete narratives have done damage. Legal scholarship has missed an opportunity to analyze the way discretion was wielded in a real-life example that likely contributed to the deaths of tens of thousands of people. Holocaust scholarship has been distorted by a focus upon congressional intransigence and presidential acquiescence in failing to change the statutory scheme, often obscuring the role of the administrative officials who actually erected the “paper walls” that blocked refugees’ admission.<sup>11</sup>

Assessing the uses of administrative discretion within a deeper historical context can provide a better understanding of both the time period and the law. This article demonstrates how State Department officials used the discretion afforded to them under the immigration statute and through judicial decisions to implement an anti-foreign, antisemitic policy that went beyond what Congress had prescribed. Understanding the multiplicity of decisions officials faced gives lie to the oft-repeated refrain that the law in the form of an impenetrable statute dictated the result. Reviewing the history also demonstrates the power of the “law made me do it” claim, as it persists decade after decade, despite overwhelming evidence that “the law” did no such thing. This tragic case study ultimately illuminates the need for historians to develop a better understanding of law, and for legal scholars to gain a better understanding of history.

The State Department’s record of denying visas to refugees seeking to escape Nazi Europe has been established by many historians over many years.<sup>12</sup> I draw from their accounts, as well as from my own examination of

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United States for lifting the strict immigration quotas imposed in 1924. An easing of these quotas would have allowed in more Jewish refugees from Germany and Austria.” PETER KARSTEN, *ENCYCLOPEDIA OF WAR & AMERICAN SOCIETY* 310 (2005). A recent essay in *The New York Times* also blamed the quotas. A decade after enactment of the Immigration Act of 1924, “the new quotas helped prevent millions of European Jews from escaping the Holocaust.” Kevin Baker, Opinion, *Living in L.B.J.’s America*, N.Y. TIMES, Aug. 28, 2016, at § SR1. “From the beginning of his presidency Roosevelt had been sympathetic to the plight of the Jews. Yet he faced insurmountable obstacles. The Immigration Act of 1924 was unyielding, and the Seventy-Eighth Congress was in no mood to consider changes.” JEAN SMITH, *FDR 607* (2007). Even historians who have examined the refugee crisis itself and recognize that the quotas went unfilled tend to conclude that government officials’ strict enforcement of the law, not their subjective interpretations of the law, led so many refugees to be excluded. Excellent Holocaust historians such as Stewart, Zucker, Breitman and Kraut, and Wyman, whom I rely on heavily, still subscribe to the idea that “strict enforcement,” or following the letter of the law, indubitably meant issuing fewer visas.

11. See DAVID S. WYMAN, *PAPER WALLS: AMERICA AND THE REFUGEE CRISIS 1938-1941* (1985), the first detailed, scholarly examination of the obstacles refugees from Nazism faced.

12. I rely particularly on two excellent and unfairly overlooked books, STEWART, *supra* note 2, and ZUCKER, *supra* note 2, as well as the more frequently cited BREITMAN & KRAUT, *supra* note 3, and WYMAN, *supra* note 11. Recently, Melissa Jane Taylor, of the State Department’s Office of the Historian, has tried to present the consular officials’ actions more positively. See Melissa Jane Taylor, *American Consuls and the Politics of Rescue in Marseille, 1936-1941*, 30 *HOLOCAUST & GENOCIDE STUD.* 247 (2016); Melissa Jane Taylor, *Bureaucratic Response to Human Tragedy: American Consuls and the Jewish Plight in Vienna, 1938-1941*, 21 *HOLOCAUST & GENOCIDE STUD.* 243 (2007); and Melissa Jane Taylor, *Diplomats in Turmoil: Creating a Middle Ground in Post-Anschluss Austria*, 32 *DIPL. HIST.* 811 (2008). Through an examination of the consuls in Marseille and Vienna, Taylor documents that consular officials treated applicants politely (based primarily on self-reports), worked long hours, and wisely went along with their offices’ restrictionist “esprit de corps.” Taken together, she describes this posture as a “middle ground” between diplomats who “implemented the law to the strictest

State Department correspondence with refugee organizations in individual cases.<sup>13</sup> What I do differently is to emphasize the degree to which State Department officials exercised discretion in determining what the law meant and how it should be implemented. Although my focus will be on decisions involving the issuance of visas, two other ways in which the State Department did not simply follow the law as enacted by Congress should be borne in mind. First, State waged bureaucratic warfare against other government agencies, including the Labor Department, the Justice Department, and ultimately the Treasury Department. Responsibility for immigration was divided among these Cabinet departments, with State issuing visas abroad, Labor deciding admittance at U.S. ports of entry through its Immigration and Nationalization Service unit, and Justice spelling out rules of enforcement. Treasury became involved when asked in 1943 to issue waivers to the economic blockade of Axis countries and ran into State's obstructionism in all aspects of U.S. policy toward European Jews.<sup>14</sup> Throughout this period, State officials engaged in intense lobbying of President Franklin Roosevelt and his advisors to ensure its positions prevailed.<sup>15</sup> Second, during this period State was both attempting to defeat and attempting to enact specific legislation with respect to immigration. Again, State officials were not just following the law, they were actively

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degree possible" and those "who risked their livelihood to help significant numbers of Jews." Taylor, *Diplomats in Turmoil*, *supra* at 812. But it is hard to see why this is a middle ground between positions based essentially on the number of visas issued. Even if her description reflects the consuls' actions accurately (and there are reasons to doubt), she does not offer any evidence that these actions led to more visas being issued—in other words, a shift from few visas granted under strict implementation toward a more generous posture. Taylor does not even present evidence that more consul officials pushed back against State Department policy, even if unsuccessfully. For a detailed critique of Taylor's article on Marseille, see Pierre Sauvage, *Marseille 1940-41: Americans and That Refugee Crisis* (April 21, 2017) (unpublished manuscript) (on file with author). For a detailed critique of all three articles, see Laurel Leff, *Seeking the Middle, Creating a Muddle: State Department Historians' Failed Effort at Reinterpreting Consuls Role in Nazi-Era Refugee Crisis*, 16 *ISR. J. FOREIGN AFFS.* 129 (2022).

13. LAUREL LEFF, *WELL WORTH SAVING: AMERICAN UNIVERSITIES' LIFE-AND-DEATH DECISIONS ON REFUGEES FROM NAZI EUROPE* 120 (2019); Laurel Leff, *Combating Prejudice and Protectionism in American Medicine: The Physicians Committee's Fight for Refugees from Nazism, 1939-1945*, 28 *HOLOCAUST & GENOCIDE STUD.* 181 (2014); and Laurel Leff, *Rebuffing Refugee Journalists: The Profession's Failure to Help Jews Persecuted by Nazi Germany*, 17 *JOURNALISM & COMMUN MONOGRAPHS* 149 (2015).

14. Treasury Department officials quickly approved the request that would have allowed Jewish organizations to send food to Jews trapped in ghettos in occupied Europe even as the war raged. When State Department officials delayed approving the licenses to allow shipments, Treasury officials investigated the holdup and concluded State had adopted an obstructionist posture toward helping European Jews throughout the Nazi era. Treasury officials pushed successfully for the creation of the War Refugee Board in 1944 over State's continuing objections. This episode has been chronicled in many histories, including: DAVID S. WYMAN, *ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945*, at 209-307 (1998); RICHARD BREITMAN & ALLAN J. LICHTMAN, *FDR AND THE JEWS* 262 (2013); REBECCA ERBELDING, *RESCUE BOARD: THE UNTOLD STORY OF AMERICA'S EFFORTS TO SAVE THE JEWS OF EUROPE* (2019).

15. State's first fight was with the Labor Department led by the liberal Frances Perkins. "The two departments argued not only over jurisdiction but also over almost every immigration issue." STEWART, *supra* note 2, at 196, 54, 408. See also BREITMAN & LICHTMAN, *supra* note 14, at 67.

trying to make it.<sup>16</sup>

This article tackles the State Department's record in three parts that track both chronology and shifts in policy. Part I: Deploying Discretion to Curb Immigration covers the period from 1933 to 1937 during which the State Department used economic rationales to clamp down on immigration. Part II: Deploying Discretion to Fill Quotas traces the period from 1938 to the first half of 1939, during which demand for immigration grew substantially and the State Department was more willing to grant visas. Part III: Deploying Discretion During Wartime chronicles the period from 1939 to 1945, the years of World War II, during which the State Department again restricted immigration, though this time based primarily on professed security fears. The Conclusion: Hiding in History describes how the use of administrative discretion enabled the State Department to further a restrictionist agenda largely without public, judicial, and legislative oversight. The relative lack of contemporaneous news coverage, case law, and enacted legislation also helped to hide the episode in history. Pulling history's pall from the story of the unfilled Nazi-era quotas enables historians to examine more deeply the motives of government officials, including the president, without the distraction of the immovable law, and leads legal scholars to understand more thoroughly the full force of administrative discretion as wielded by policy-driven officials.

## I. DEPLOYING DISCRETION TO CURB IMMIGRATION: 1933-1937

### A. *The Statutory Backdrop*

In a move that is generally acknowledged to have been driven by xenophobia and racism, the U.S. Congress in the 1920s changed immigration laws to limit the overall number of immigrants to the United States, particularly those from southern and eastern Europe. Jews were a particular target, as a State Department official made clear in a 1920 letter to the chair of the House committee on immigration summarizing officials' observations from recent trips overseas: "[T]he great mass of aliens passing through Rotterdam are Russian Poles or Polish Jews of the usual ghetto type . . . [T]hey are filthy unamerican and often dangerous in their habits . . . [E]very possible care and safeguard should be used to keep out the undesirables."<sup>17</sup> The Emergency Quota Act of 1921 established a numerical

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16. Two examples are discussed later in this article: State's actions to defeat the Wagner-Rogers Act in 1939 that would have allowed 20,000 refugee children to be admitted to the United States above the immigration quota, *infra* Section II.B; and State's efforts to enact a 1941 law that enabled consuls to block the entry of immigrants who had close relatives remaining in Nazi Europe, *infra* Section II.A.

17. Evans, *supra* note 8, at 203, quoting Letter from Wilbur J. Carr to Rep. Albert Johnson, Chairman, House Committee on Immigration (Dec. 4, 1920) (on file with the National Archives). Chairman Johnson then used this language in a House report on a bill to suspend immigration that was then being considered, leading to charges of antisemitism. The State Department defended its language

limit on immigration for the first time, restricting immigrants to 153,000 a year, about a fifth of the number arriving in the decades around the turn of the century.<sup>18</sup> The 1921 act also established country-by-country limits based on three percent of that nationality's residence in the United States at the time of the 1910 census.<sup>19</sup>

Three years later, with the act set to expire, Congress extended the principle of overall and country-by-country limits in the Immigration Act of 1924.<sup>20</sup> Concluding the temporary, country-by-country quotas would admit too many Jews, Italians, and Slavs, Congress changed the base level to two percent and used the 1890 census, when fewer southern and eastern Europeans were in the United States.<sup>21</sup> The act banned the Japanese from entering the country entirely.<sup>22</sup> Chinese had already been excluded in 1882, and those from the "Asiatic Barred Zone," such as India, Burma, and Afghanistan, were excluded in 1917.<sup>23</sup> Congress delayed calculating the country-by-country quotas twice, thus keeping them from going into effect officially until July 1929.<sup>24</sup>

In another change that would prove critical to refugees in the next decade, the 1924 Act altered where immigration visas were issued and which government officials made the decision.<sup>25</sup> Until the 1920s, officials of the Immigration and Naturalization Services, which was then under the Labor Department, decided at U.S. ports of entry, such as Ellis Island, whether an immigrant would be admitted. The 1924 Act gave consular officials in selected consuls abroad the authority to issue visas and thus determine who would be allowed to immigrate, reducing both public and judicial oversight.<sup>26</sup> Robert Schulzinger explains that the change made it harder for prominent politicians or citizens to interfere in such decisions and prevented

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and position.

18. Pub. L. No. 67-5, 42 Stat 5.

19. *Id.*

20. Johnson-Reed Act, Pub. L. No. 68-139, 43 Stat. 153 (1924).

21. *Id.*

22. Bat-Ami Zucker, *American Refugee Policy in the 1930s*, in REFUGEES FROM NAZI GERMANY AND THE LIBERAL EUROPEAN STATES 151, 154 (Frank Caestecker & Bob Moore eds., 2010).

23. Congress ended Chinese exclusion in 1943, setting a quota of 105 immigrants a year from China. Absolute barriers for those from India and the Philippines were removed in 1946 with the establishment of an annual quota of 100 from each country. Charles Gordon, *Racial Limitations in Immigration and Naturalization Laws*, 23 FOREIGN POL'Y REPS. 20 (1947).

24. ZUCKER, *supra* note 2, at 34.

25. Johnson-Reed Act, *supra* note 20. In 1924, Congress also enacted the Foreign Service Act (also known as the Rogers Act) that began the melding of the diplomatic and consular forces within the State Department. Diplomats continued to handle the U.S. government's official relationship with foreign governments, and consuls continued to interact with local governments, take care of Americans within their jurisdiction, and perform administrative tasks such as issuing passports and visas. The Rogers Act paved the way for the complete merger of the two functions within one Foreign Service by the end of the next decade. Waldo H. Heinrichs, Jr., *Bureaucracy and Professionalism in the Development of American Career Diplomacy*, in TWENTIETH-CENTURY AMERICAN FOREIGN POLICY 119, 120, 183 (John Braeman, Robert H. Bremner & David Brody eds., 1971).

26. Johnson-Reed Act, *supra* note 20.

the bad publicity that resulted from reporters writing “sob sister” articles about the deportation of aliens.<sup>27</sup> Foreign Service officers far from the States could better withstand the “misguided and meddling Americans”<sup>28</sup> who “swoop down on us [Immigration Service officers] to admit some derelict who has arrived at some United States port,” William Husband, the Commissioner General of Immigration from 1921 to 1925, is quoted as saying.<sup>29</sup> James Davis, who served as labor secretary in the 1920s, also welcomed an end to the “clamor by well-meaning individuals, organizations, and newspapers” at U.S. ports that made enforcement “exceedingly difficult.”<sup>30</sup>

Moving entry decisions overseas also made it impossible to challenge those decisions in court. Courts already tended to defer to immigration officials’ decisions.<sup>31</sup> The switch to visa issuance overseas meant refugees there could not even bring such court challenges for both practical and legal reasons. Seeking judicial review was impracticable when the Atlantic Ocean lay between the refugees and U.S. courts.<sup>32</sup> Those denied visas abroad did not have the legal protections afforded those denied admission at U.S. ports of entry. The latter had to be detained before being deported and thus obtained due process rights under the law.<sup>33</sup> Keeping potential immigrants out of the courts and out of the country seemed to be the intent of congressional restrictionists and State Department officials. After touring American consulates in Europe, Robert Tod, commissioner at Ellis Island, noted that those examined overseas were more likely to be denied admittance than those inspected at U.S. ports of entry where they “can appeal to the Courts here and with the powerful assistance of different organizations will succeed in landing.”<sup>34</sup>

### *B. Fleeing Nazi Germany*

Although the 1920s laws reflected concerns about too many Jews

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27. ROBERT D. SCHULZINGER, *THE MAKING OF THE DIPLOMATIC MIND: THE TRAINING, OUTLOOK, AND STYLE OF UNITED STATES FOREIGN SERVICE OFFICERS 1908-1931*, at 133.

28. *Id.*

29. *Id.*, citing Husband to FSS (Apr. 25, 1925).

30. DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 155 (2002), citing James J. Davis to the White House (Apr. 12, 1923) (on file with the Massachusetts Historical Society).

31. In *London v. Phelps*, 27 F.2d 288 (2d Cir. 1927) and *Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929), two federal appellate courts refused to interfere with State Department officials’ decisions to deny visas. WILLIAM C. VAN VLECK, *THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 42 (1932). See also Evans, *supra* note 8, at 147, 252; Daval, *supra* note 8, at 1012.

32. Evans, *supra* note 8, at 183 (“judicial review lost its immediacy when separated by oceans and continents”).

33. While being held, “[h]e is in custody under or by color of authority of the United States.” *United States v. Jung Ah Lung*, 124 U.S. 621, 621 (1888); VAN VLECK, *supra* note 31, at 149, 158, 188.

34. TICHENOR, *supra* note 30, at 155, citing THOMAS M. PITKIN, *KEEPERS OF THE GATE: A HISTORY OF ELLIS ISLAND* (1975).



entering the United States, they were not designed to block Jews escaping Nazi Germany in particular.<sup>35</sup> That was neither anticipated by the law nor intended to be its result. It was, however, the consequence. After years of growing Nazi power, Adolf Hitler became chancellor on January 30, 1933 and immediately helped enact laws that limited Jews' participation in all forms of economic and civic life, from purging them from German universities, to limiting their ability to practice law, medicine, and journalism. Although it is hard to gauge exactly how many of Germany's 600,000 Jews and non-Aryans (meaning those of Jewish descent) wanted to leave Germany, particularly in the early years of the regime, it is safe to say the numbers were greater than the 25,957 annual quota limit. At the dawn of the Nazi regime, three of the thirty American consuls in Germany—those in Berlin, Hamburg and Stuttgart—issued the 25,957 visas allowed annually for those born in the country.<sup>36</sup> Immigrants fell under the country quota for their place of birth, with a few exceptions. As German Jews fled to other European countries, and under pressure from Jewish groups, the State Department allowed U.S. consuls in the country to which the refugees had fled to issue them visas, though they still fell under the German quota. Over the next twelve years, consuls issued the full quota contingent only once, in 1939, when the German and Austrian quotas were combined to 27,370.<sup>37</sup> The reason was not that too few Germans were applying to fill the quota but that tens of thousands were being turned down.<sup>38</sup>

### C. State Department Rules

The State Department's methods for adopting and implementing rules during this period were murky. Agencies only began publishing proposed regulatory rules with the advent of the Federal Register in 1936.<sup>39</sup> It would take another decade for the Administrative Procedures Act to go into effect and mandate that agencies establish procedures for adopting such rules.<sup>40</sup> A contemporaneous legal treatise explained that Section 24 of the Immigration Act of 1924 authorized the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, to "prescribe rules and regulations" for the act's enforcement, but added that "all such rules and regulations, in so far as they related to the administration of this act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Attorney General."<sup>41</sup> In addition, State's Visa

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35. In fact, Germany, whose citizens were considered desirable immigrants prior to the Jewish migration in the 1930s, had a relatively high quota allotment.

36. ZUCKER, *supra* note 2, at 65.

37. *Id.*

38. *Id.* at 77.

39. Evans, *supra* note 8, at 185.

40. Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

41. SIDNEY KANSAS, U.S. IMMIGRATION EXCLUSION AND DEPORTATION AND CITIZENSHIP OF THE

Division could help consular offices interpret “for their guidance the Immigration laws and regulations,” as long as it did not “take any interest to direct the issuance of visas by the various consulates in foreign countries; to do so would relieve the Consul of his responsibility.”<sup>42</sup>

State’s internal procedure for developing rules to guide consular officials in interpreting immigration laws was not specified. The procedure can best be inferred from the results: State officials in Washington developed rules, seemingly in consultation with the department’s legal counsel, and then communicated them to the consular officials abroad either through an internal communique, a State official’s visit abroad to each relevant consular office, or both. Individual consular officials could decide whether to follow the guidance in individual cases. An American general consul in Tirana, Albania explained how State Department higher-ups communicated their desires: “[T]he whole secret of the work lies in the interpretation of existing written law and regulations, and that this interpretation can only be learned by word of mouth from other officers who have themselves been taught and had experience.”<sup>43</sup>

State Department officials in Washington took a step to more directly shape policy at the beginning of the 1930s. After the stock market crash in 1929 and the onset of the Great Depression, the Hoover Administration wanted to reduce the number of immigrants coming to the United States below that of the quotas. Hoover sought the State Department’s advice on how to reduce immigration without having to go through Congress and change the Immigration Act. State advised using a provision that was originally part of the Act to Regulate Immigration of 1882 that enabled immigration officials to exclude “paupers or persons likely to become a public charge.”<sup>44</sup> The Immigration Act of 1917 incorporated that provision into Section 3, elucidating the classes of aliens who could be excluded from the United States, including “persons likely to become a public charge.”<sup>45</sup>

#### *D. The Uses of the LPC Clause*

The State Department turned to the “likely to become a public charge” clause, or the LPC, both because it seemed to fit Depression-era conditions and because it could and had been interpreted to deny visas based on just about anything. In the early 1930s, William C. Van Vleck, dean of The George Washington University Law School, conducted a study to see how immigration officials interpreted various aspects of immigration law,

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UNITED STATES 67 (2d ed. 1941).

42. *Id.* at 17.

43. Weil, *supra* note 8, at 643, citing Riggs to John Farr Simmons (Mar. 3, 1937) (on file with the National Archives).

44. An Act to Regulate Immigration of 1882, Pub. L. No. 47-376, 22 Stat. 214.

45. Pub. L. No. 64-301, 39 Stat. 874.

including the LPC.<sup>46</sup> He spent two weeks at Ellis Island observing immigration officials in action, examined 500 exclusion cases and 500 expulsion cases, interviewed officials, and analyzed case law. Because he observed officials at the Ellis Island port of entry, not abroad, Van Vleck's exclusion cases were of "aliens" who had been in the United States under a variety of circumstances, had left temporarily, and then were denied admission when they tried to return.<sup>47</sup>

Van Vleck concluded that the LPC was used "as a kind of miscellaneous file into which are placed cases where the officers think the alien ought not to enter, but the facts do not come within any specific requirements of the statutes."<sup>48</sup> Its use had little to do with the applicants' economic status. "As administered by the department, this ground for exclusion has become so broad and so indefinite that it means substantially, 'thought by the immigration officers to be excludable on general principles,'" Van Vleck wrote.<sup>49</sup> That was true even though grounds for deportation—the cases Van Vleck examined—were spelled out in the statute and could be challenged in court.<sup>50</sup> Van Vleck anticipated that the "very great discretionary power" given to the Department of State by the new system of overseas decision-making without statutory or case law guidance might prove even more worrisome.<sup>51</sup> The statute said nothing about the basis for exclusion beyond the LPC language itself. "In prejudiced or arbitrary hands, it could become oppressive," Van Vleck warned.<sup>52</sup>

The LPC may have been used as a catch-all, but in general, it caught very

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46. VAN VLECK, *supra* note 31.

47. In describing his "method of investigation," Van Vleck does not say when he conducted the study, though other references in the book suggest that it was somewhere between 1929 and 1932. *Id.* at 1-2. He also does not specify how many of the 500 exclusion cases he examined relied upon the LPC as the grounds for visa denials.

48. *Id.* at 54.

49. *Id.* at 217. The U.S. Citizenship and Immigration Services also notes that the LPC "worked as a 'catchall' category of exclusion" when examiners "doubted an alien's qualifications for admissions but could not find them excludable under any other section of the law." U.S. CITIZENSHIP & IMMIGR. SERVS., PUBLIC CHARGE PROVISIONS OF IMMIGRATION LAW: A BRIEF HISTORICAL BACKGROUND, <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/public-charge-provisions-of-immigration-law-a-brief-historical-background/> (last visited July 21, 2021) [<https://web.archive.org/web/20210723150407/https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/public-charge-provisions-of-immigration-law-a-brief-historical-background/>].

50. The officials' interpretation that came closest to the "requirements of the statute" was to exclude applicants who were likely to be detained in a jail or prison on criminal charges, and thus would become a public charge. But even then the category was "stretched to include situations where the issue is disobedience to law, disrespect for and lack of cooperation with the immigration officers, moral unfitness, general undesirability in the minds of the immigration officers, or even the question of whether the aliens in question would not be better off at home." VAN VLECK, *supra* note 31, at 54. Not one of the exclusion cases Van Vleck studied included "evidence to show any serious probability that the applicants would become a financial charge on the public because of inability to make a living." *Id.* at 59.

51. *Id.* at 211.

52. *Id.*

few applicants during its first five decades. The U.S. Citizenship and Immigration Services' website explains that during the twentieth century's first decades, only two percent of newly arrived foreigners were excluded for any reason, and of those, two thirds were excluded as likely to become public charges.<sup>53</sup> Among that small number, most were excluded because they were not able to work due to physical or mental handicaps.<sup>54</sup> Therefore, the number rejected on purely economic grounds was even smaller.

In 1930, the Hoover Administration decided the LPC clause could serve a different purpose. On September 13, 1930, the State Department issued a press release that read:

The consular office . . . will, before issuing a visa have to pass judgment with particular care on whether the applicant may become a public charge; and if the applicant cannot convince the officer that it is not probable, the visa will be refused . . . . If the consular officer believes that the applicant may probably be a public charge at any time . . . he must refuse the visa.<sup>55</sup>

Ten weeks later, in his annual message to Congress, Hoover said immigration laws needed to be changed to be "more limited and more selective."<sup>56</sup> He noted, "Under conditions of current unemployment it is obvious that persons coming to the United States seeking work would likely become either direct or indirect public charges."<sup>57</sup> Hoover said that as a "temporary measure," the consular officers issuing visas have been "instructed to refuse visas to applicants likely to fall into this class," and had decreased immigration from 24,000 a month to 7,000 a month.<sup>58</sup> Still, Hoover encouraged Congress to take further steps to assure the new interpretation of the LPC was backed by law. Congress did not.<sup>59</sup> In the congressional session right after Hoover's call for LPC legislation, four immigration bills and eight immigration resolutions were introduced, proposing various means of curtailing immigration.<sup>60</sup> Only one made it out of committee—a bill calling for a ninety percent reduction in the quotas, as well as additional restrictions on non-quota immigrants. It was never acted

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53. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 49. Although the site does not state this clearly, it seems that its figures for exclusions based on the LPC during this period refer only to those issued visas abroad and then denied entry at domestic ports, not those denied visas abroad who never traveled to the United States.

54. BREITMAN & KRAUT, *supra* note 3, at 7.

55. Zucker, *supra* note 22, at 40, quoting Press Release, U.S. Department of State (Sep. 13, 1930).

56. Annual Message to the Congress on the State of the Union, December 2, 1930, AM. PRESIDENCY PROJECT (Oct. 23, 2022), <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-22/>.

57. *Id.*

58. *Id.*

59. WYMAN, *supra* note 11, at 4.

60. EDWARD P. HUTCHINSON, *Legislative History of American Immigration Policy 1798-1965*, at 220 (1981).

upon.<sup>61</sup>

Whether Hoover's change in interpretation of the LPC was an executive order, as some historians have concluded,<sup>62</sup> or was merely a press release without the force of law as others have suggested,<sup>63</sup> did not matter much. What mattered is that the State Department immediately invoked it to begin rejecting visa applicants without pushback on formalist grounds. "This was a radical change in administrative policy, since previously the public charge clause had not been invoked if the immigrant had the money for passage and expressed the intent of finding employment as soon as he arrived in the United States," Robert A. Divine explains, noting that immigration statistics quickly established the policy's effectiveness.<sup>64</sup> In October of 1930, a month after the release was issued, twenty-two percent of the available quota numbers were used. By December that had dropped to thirteen percent and dropped further in February 1934 to less than ten percent. "Thus within five months," Divine continues, the State Department succeeded in cutting European immigration by 90 per cent."<sup>65</sup> For most of the 1920s, the temporary country-by-country quotas had been filled.<sup>66</sup> The State Department effectuated that change by calling conferences of consular offices and sending two State officials to Europe to further inform consular officials that the LPC was now to be used to slacken "labor immigration from all parts of the world to the United States."<sup>67</sup> State Department officials told the consuls in Germany orally to cut immigration visas to ten percent of the quota.<sup>68</sup> Although State officials were not always so direct and specific, they were clear throughout this period that the department's goal was to reduce immigration to below the quota numbers. Visa Division officer John Farr Simmons wrote in 1937 that the administrative measures had led to "'an immediate and considerable reduction in immigration' keeping one million aliens who would have been admitted in 'normal times' out of the United States."<sup>69</sup>

### *1. Evading Congressional Intent*

Whatever the Hoover administration was doing in deciding to use the

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61. *Id.* at 220-21.

62. STEWART, *supra* note 2, at 10; ZUCKER, *supra* note 2, at 185 n.18.

63. Robert Divine states flatly that "[t]he new policy was announced in the form of a press release and was not an executive order, as was frequently alleged in Congress." AMERICAN IMMIGRATION POLICY, 1924-1952, at 78 n.4 (1957).

64. *Id.* at 78-79.

65. *Id.* at 79.

66. MARION T. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 61-62 (1963).

67. ZUCKER, *supra* note 2, at 40.

68. BREITMAN & KRAUT, *supra* note 3, at 15, 43, citing Letter from Charles E. Wyzanski, Jr. to Paul Freund (Oct. 27, 1982) (on file with Richard Breitman).

69. ZUCKER, *supra* note 2, at 42, citing Letter from John Farr Simmons to Pierrepont Moffat, Chief, Div. of W. Eur. Affs. (Sept. 2, 1937).

LPC to limit immigration, it was not merely following the law's dictates. For almost fifty years, the law had been interpreted one way; the Hoover Administration decided it would be interpreted another way to effectuate a specific policy.<sup>70</sup> The policy goal was not merely an overall drop in immigration. State's objective also was to control the type of immigrant allowed to enter the United States. A bureaucratic fight early in the Roosevelt Administration illustrates that the newfound use of the LPC clause was about more than ensuring that poor foreigners would not add to the nation's economic burden. Concerned about the number of German Jews whose visas were being rejected, leaders of the American Jewish community, including federal judge Julian Mack and prominent lawyer Joseph Proskauer, approached State and Labor Department officials. They suggested that Section 21 of the 1917 Immigration Act could be used to assure aliens would not become public burdens.<sup>71</sup> The section gave discretion to the Secretary of Labor to admit aliens otherwise excluded under the LPC "upon the giving of a suitable and proper bond or undertaking, approved by said Secretary."<sup>72</sup>

Labor Department officials accepted the idea of using such bonds, but State fought it fiercely, mostly because the department wanted to maintain broad discretion for consular officials to deny visas for other than financial reasons. State Department legal adviser Green Hackworth, who had been in his position since 1925, insisted that consular officials should be able to reject applicants "based principally upon the peculiar mental or physical characteristics . . . rather than upon a mere lack of money or of connection in the United States."<sup>73</sup> Another State legal counsel, Richard W. Flournoy, weighed in, saying that the LPC clause should be used to exclude "those with criminal tendencies (even if they had no criminal record), moral deficiencies, and mental abnormalities."<sup>74</sup> Although the Attorney General sided with the Labor Department on the bond issue,<sup>75</sup> the immigration commissioner got cold feet in the face of State's objections and the idea for a bond died in 1934.<sup>76</sup> Had State's goal been to ensure that a nation in the grip of a depression did not have to use limited resources to support thousands more foreigners, the department would have at least considered allowing the issuance of bonds.

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70. Breitman and Kraut conclude that the instruction "subverted the intent of the Immigration Act of 1924." *Supra* note 3, at 15. The U.S. Citizenship and Immigration Services agree: "This interpretation represented a shift away from the original intent of the policy, which was meant to exclude only those who could not or would not work, as opposed to those who were capable of work and were merely poor at the time of applying for admission." *Supra* note 49.

71. BREITMAN & KRAUT, *supra* note 3, at 18.

72. Pub. L. No. 64-301, 39 Stat. 874.

73. MORSE, *supra* note 2, at 148.

74. BREITMAN & KRAUT, *supra* note 3, at 20.

75. *Id.* at 21. See also STEWART, *supra* note 2, at 69.

76. BREITMAN & KRAUT, *supra* note 3, at 22-26.

The State Department also maneuvered around the legislative mandate to admit, for example, 25,957 emigres from Germany, unless there were grounds to deny individual visas. An agency determining that the statutorily-allowed number was too high—it should be 2,595, or ten percent, as State demanded in 1933—was not one of those grounds; that was Congress’ judgment to make. It would be different had the statute given the State Department the discretion to determine that, under certain conditions, the level of overall immigration to the United States was too high, or even that the level of immigration to the United States from specified countries was excessive.<sup>77</sup> But the statute did not.

Congress had many opportunities to clarify or change the provision. From 1933 to 1936, Congress entertained bills and resolutions both expanding and contracting immigration, including by increasing and decreasing the quotas. None of them passed.<sup>78</sup> By 1933, “[t]he early Depression period concern with such matters as public charges, unemployment and immigration restriction had largely waned,” concludes Edward P. Hutchinson, who did an exhaustive study of all legislative action on immigration from 1798 to 1965.<sup>79</sup> In fact, although dozens and dozens of bills were introduced in the 1930s, Hutchinson finds that no major legislation passed, only minor and technical fixes, such as a 1938 bill that prohibited aliens from fishing in the waters of Alaska.<sup>80</sup>

Hutchinson attributes this inaction both to a lack of support for the bills and the ability to accomplish policy objectives without legislation.<sup>81</sup> Restrictionists “could no longer command sufficient votes to carry through their proposed legislation,” Hutchinson writes.<sup>82</sup> “In addition it was found that restriction of immigration below the quotas could be achieved by means of a more strict interpretation of the already established excludable classes of aliens, especially those considered likely to become public charges.”<sup>83</sup> Government officials understood that. Immigration and Naturalization Services Commissioner Daniel MacCormack, who served from 1933 to 1937, described the application of the LPC clause as “amending the immigration law by administrative fiat” in order to restrict immigration “with little regard to whether the alien is likely to become a public

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77. The Labor Department insisted throughout this period that if the administration wanted to base immigration on prevailing economic conditions, it was within the Labor Department’s purview, not the State Department’s. See discussion *infra* Section I.D.2.

78. HUTCHINSON, *supra* note 60, at 229-42.

79. *Id.* at 230.

80. *Id.* at 248.

81. *Id.* at 244 (“[T]he restrictionist bills were the product of a small but persistent group in Congress that reintroduced their favorite bills session after session.”). This is not to suggest that there was not strong restrictionist sentiment in Congress but that Congress’ failure to turn this sentiment into legislation means something.

82. Edward P. Hutchinson, *Immigration Policy Since World War I*, 262 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 18 (1949).

83. *Id.*

charge.”<sup>84</sup> Assistant Secretary of State Wilbur Carr wrote a subordinate in 1936 that the department had “achieved administratively” what unsuccessful bills had not. Another State official acknowledged during hearings on a bill to cut the quotas ninety percent that administrative regulations worked so well that there was “no urgent need for legislation.”<sup>85</sup>

Some Congressmen and liberal publications recognized State’s maneuverings at the time and voiced their objection. At a hearing on a bill to reduce the quotas attended by a *New York Times* reporter, Representative Emanuel Celler of New York accused the State Department of circumventing Congress. *The Times* quoted Celler: “When Congress passed immigration laws ‘ . . . the State Department ha[d] no right to reduce quotas ninety-two percent.”<sup>86</sup> Celler added: “Instead of a slap at the State Department . . . I will say the State Department is slapping Congress in the face.”<sup>87</sup> According to *The Times*, Representative Adolph Sabath of Chicago seconded Celler, “[saying] President Hoover went beyond his powers in issuing the curtailment order in 1930, and [] accus[ing] the American consuls of being ‘czars.’”<sup>88</sup> Representative Samuel Dickstein, Chairman of the House Immigration Committee, introduced a bill to revoke the changed interpretation of the LPC.<sup>89</sup> “The least we could do . . . was to compel American Consuls to fill the quotas which have been unfilled for the last three years, which would permit entry of about 300,000 to 400,000 persons,” Dickstein, who later dropped the legislation,<sup>90</sup> told *The New York Times*.<sup>91</sup> Throughout the decade, *The Times* occasionally noted the quotas were not being fulfilled.<sup>92</sup>

## 2. *Who Will Be a Public Charge*

Deciding to use the LPC to limit immigration was the beginning, not the end, of the State Department’s deployment of discretion. Even if the goal was to cut immigration to below the amount allowed, consular officials had

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84. BREITMAN & KRAUT, *supra* note 3, at 22, citing MacCormack Memorandum to the Secretary (Jan. 12, 1934) (on file with the National Archives).

85. DIVINE, *supra* note 63, at 85; *see also* Sheldon Neuringer, *American Jewry and United States Immigration Policy, 1881-1953* (1969) (Ph.D. dissertation, University of Wisconsin), at 222 (“It was mainly the effectiveness of the public charge policy as a device for reducing immigration to all-time low levels that accounted for the fact that restrictionists did not push harder for the kind of legislation they wanted.”).

86. *Carr Fights Easing of Curb on Aliens*, N.Y. TIMES, Mar. 30, 1933, at 2.

87. *Id.*

88. *Id.*

89. Neuringer, *supra* note 85, at 215.

90. *Id.* at 217.

91. *Jews Here to Push Boycott on Hitler*, N.Y. TIMES, Aug. 21, 1933, at 2.

92. *See, e.g., German Immigration Far Under the Quota*, N.Y. TIMES, June 26, 1938, at 23; William R. Conklin, *La Guardia Advises on Refugees’ Entry*, N.Y. TIMES, Nov. 21, 1938, at 3, quoting Rep. Samuel Dickstein (“We have unused quotas at the end of every fiscal year amounting to about 120,000 admissions annually.”).



to accomplish it through decisions on individual applications. A consular official sitting in Berlin, Hamburg, or Stuttgart had to assess an applicant's likelihood to become a public charge based on his interpretation of the language of the 1917 act and the 1930 press release. (Because there were almost no female consular officials at this time, I will use the masculine pronoun in all cases.) The officer had complete discretion and almost never had to explain his decisions. The State Department often issued guidelines, but the guidelines were not enforceable and shifted over the decade.<sup>93</sup> Because individual consul officials did not have to explain why a visa was denied, the ways in which they applied the LPC emerge mainly through responses to complaints of refugee advocates. Occasionally, prodded by outside criticism, consuls defended their decisions to deny visas. For example, in January 1934 the State Department requested comments from the consuls after *Today Magazine* criticized the implementation of the LPC clause. In defending its decision to reject fifty-eight of seventy-four applicants, all but one based on the LPC clause, the Rotterdam consul sent the case histories that included the reasons for the rejection.<sup>94</sup>

Importantly, no law required that Hoover's interpretation of the LPC clause continue past Hoover's presidency, which ended in March 1933, just two months into Hitler's reign. If a press release, with or without the force of an executive order, could change the interpretation of the LPC clause to allow almost no one to immigrate to the United States under the quotas, another executive order, this time issued by a newly elected President Roosevelt, could have changed it back. Aware of the impact on German-Jewish migration, the American Jewish Congress and the Hebrew Immigrant Aid Society called on Roosevelt the month of his inauguration to revoke the order and to allow the German quota to be filled.<sup>95</sup> Or the new president could have changed the interpretation to something else entirely, as then Harvard Law professor and presidential adviser Felix Frankfurter understood in drafting two possible executive orders in 1933.<sup>96</sup> One directed the Secretary of State to instruct American consuls abroad to enforce immigration laws and regulations in the manner applied before the Hoover change—but only for those escaping religious or racial persecution.<sup>97</sup> The second draft gave FDR the option of avoiding reference to the LPC and just giving preference to visa applicants escaping racial or religious

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93. "Under the guarded grant of discretion, consuls were nudged and prodded to conform to a Department-wide interpretation of the clause, but there was no legal or binding avenue of ensuring compliance." Evans, *supra* note 8, at 176-77.

94. MORSE, *supra* note 2, at 140.

95. Neuringer, *supra* note 85, at 215, citing SAMUEL JOSEPH, JEWISH IMMIGRATION TO THE UNITED STATES, 1881-1910, at 33, 46-48, 56-60 (1914).

96. BREITMAN & KRAUT, *supra* note 3, at 13.

97. *Id.*

persecution.<sup>98</sup> Some members of the new administration even claimed that interpreting the LPC was not within the State Department's prerogatives. FDR's Secretary of Labor from 1933 to 1945, Frances Perkins, argued to State officials and to Roosevelt that Labor, not State, should determine whether "the economic conditions in the United States" meant that an immigrant would require public support.<sup>99</sup> State's only concern should be any impact on foreign relations, she contended.<sup>100</sup>

The new administration chose to leave the LPC interpretation imposed by the 1930 press release in place, telling consular officers to deny visas to anyone who could not prove they probably would not become a public charge at any point in the future. But how was that to be determined? Because of another provision in the 1917 act, "the contract labor clause," the applicant could not have a job lined up upon arrival in the United States, unless he or, more likely she, was a domestic.<sup>101</sup> "On one hand, applicants had to prove they were not likely to become a public burden to the community," Zucker explains. "[O]n the other hand, if they admitted that work was waiting for them, they were rejected."<sup>102</sup> Consular officials therefore tended to require applicants to show proof of assets that they would be able to transfer to the United States. But what kind of assets and in what amounts? There was no stated sum.<sup>103</sup> Each officer decided himself.

With the goal of admitting just 2,500 people a year, consul officials in Germany at first rejected just about everyone who applied, issuing visas to just 1,324 people in 1933. But as would often happen during this period, State Department officials felt pressure from prominent people about individual cases (reducing, if not eliminating, this pressure was one reason visa issuance was moved to consuls abroad), and from Jewish and liberal groups about the overall policy. So in the summer of 1933, new State Department guidelines instructed consul officials to modify their interpretation of the clause. To reject an applicant, consuls from now on should find that an applicant would *probably*, not *possibly*, become a public charge. In another change, the guidelines enabled rejected applicants to prove through a preponderance of evidence submitted, not conclusive evidence, that they would not be a public charge.<sup>104</sup> In addition and most significantly, consul officials could now make their judgments based on

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98. *Id.*

99. *Id.* at 14.

100. *Id.*

101. Domestic employment received an exemption under the law. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

102. ZUCKER, *supra* note 2, at 88.

103. STEWART, *supra* note 2, at 191.

104. ZUCKER, *supra* note 2, at 44, 90. VAN VLECK, *supra* note 31, at 206, found that officials often employed higher standards of proof: "[T]here is much evidence of an attitude on the part of immigration officers in both exclusion and expulsion cases that the alien must establish his right beyond a reasonable doubt, and that in any doubtful case the decision must be against him."

more than the applicant's personal financial resources. Consul officials could also consider statements from American citizens vowing in sworn affidavits to support applicants once they arrived in the States so they would not become public charges.<sup>105</sup> In fact, a provision of the 1924 Act specifies that any citizen could file "a petition" promising to support an immigrant "if necessary to prevent such immigrant from becoming a public charge."<sup>106</sup> But the American consuls in Germany apparently had not been taking such petitions or affidavits into account and thus required a nudge from Washington.<sup>107</sup>

At first, affidavits from Americans were not all that essential. During the first few years of the Nazi regime, German Jews were able to move some assets out of the country and thus had a shot at proving they possessed sufficient resources to avoid becoming public charges. Different consuls, however, defined sufficient resources differently. Some consuls required evidence that the refugees could live on the income generated by capital they had managed to get out of Germany;<sup>108</sup> others said refugees had to have removed enough marks to put up a \$500 cash bond upon arrival in the United States;<sup>109</sup> still others insisted upon an irrevocable trust set up for the immigrant, or a contract guaranteeing the immigrant support for life.<sup>110</sup> As German legislation increasingly limited German Jews' ability to take money out of the country and basically ended it with the Nuremberg laws in 1935, the need for American affidavits grew. The Stuttgart consul reported in fall 1936 that nearly all applicants had to depend on relatives or other connections.<sup>111</sup>

### 3. *Who Can Provide Affidavits*

The fact that American citizens could provide affidavits in support of refugees did not end the consuls' discretion; it just changed the factors. Consular officials considered *who* could provide such an affidavit, *how many* affidavits someone could provide, and *what* financial resources the sponsor had to have. Some officials accepted an affidavit from anyone, others insisted upon affidavits only from relatives, and still others insisted on affidavits only from *close* relatives, with the definition of "close" also

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105. BREITMAN & KRAUT, *supra* note 3, at 17.

106. Johnson-Reed Act, Pub. L. No. 68-139 § 7, 43 Stat. 153, 157.

107. Berlin consul George Messersmith told his staff that only applicants who were "in possession of funds or property sufficient to support themselves during the probably indefinite period of the present economic crisis, i.e., funds or property yielding an income sufficient to provide their support" should be granted visas. Barbara L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy with Respect to German Jews During 1933-1939*, at 29 (May 10, 2011) (Ph.D. dissertation, The City University of New York) (quoting George Messersmith to Secretary of State, January 7, 1931).

108. ZUCKER, *supra* note 2, at 143.

109. *Id.* at 149.

110. *Id.* at 151.

111. *Id.* at 89.

varying from official to official. Often times, particular consulates set unofficial rules. The Hamburg consulate, for example seemingly only accepted affidavits from a parent, a child, an aunt, or an uncle.<sup>112</sup> The Rotterdam consul did not take affidavits from uncles. For example, it denied a visa to a twenty-one-year-old German electrician even though his uncle provided an affidavit showing he had a business worth \$25,000, real estate of \$15,000, and savings of \$2,800 (assets of over \$700,000 in contemporary dollars).<sup>113</sup>

Without fixed rules or legally binding documents (the assumption, though it was not tested, was that affidavits were not enforceable), the standard seemed to be whether the relationship between the citizen and the refugee made the former likely to continue to support the latter. More often than not, the officials concluded it did not. "Throughout this period, except for a short respite in the early months of 1937, and the instructions from Washington notwithstanding," Zucker writes, "American consuls seldom accepted affidavits from distant relatives or friends as sufficient evidence to counter the LPC clause."<sup>114</sup>

Some consuls looked not just at who was providing the affidavit, but also at what financial resources he or she had. The asset requirements for American citizens providing affidavits were as variable as they were for applicants. Often the sponsor needed to provide \$5,000, or bank account equivalents, deeds to unencumbered real estate, transcripts of long-term bank deposits, auditors' statements, and statements from employers that they would continue to be employed. George Warren of the International Migration Service complained in 1934 that the financial requirements for those providing affidavits were "oppressive and illogical, and so varied that no two consuls make the same stipulation."<sup>115</sup> Some refugees, who fled to Sweden to await immigration to the States, had affidavits approved by consuls in Stuttgart that were deemed inadequate in Stockholm. Wyman found that not a single affidavit convinced the Swedish vice consul that an immigrant would not become a public charge.<sup>116</sup>

Some consuls looked at the sponsor's financial obligations as well as financial resources, rejecting sponsors who had signed too many affidavits. The Oslo consul set the limit as one affidavit per sponsor.<sup>117</sup> Other consuls rejected sponsors who had too many dependents, or even those who had not listed their dependents. The Rotterdam counsel explained to the State Department that it had denied visas to a thirty-three-year-old physician and his thirty-one-year-old wife because the cousin, sister, and friend who

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112. MORSE, *supra* note 2, at 193.

113. STEWART, *supra* note 2, at 259.

114. ZUCKER, *supra* note 2, at 147.

115. *Id.* at 144.

116. WYMAN, *supra* note 11, at 161.

117. *Id.*

provided affidavits of support did not indicate how many dependents they had.<sup>118</sup> Questions about the standard of proof arose as well, this time in the context of a sponsor's, rather than the applicant's abilities. Did the sponsor have to prove that he or she had the resources so the applicant was not "likely" to become a public charge, as the statute specified; was not "probably" going to be a public charge, as the Hoover directive seemed to indicate; or could not "possibly" become a public charge, as the consuls seemed to demand? State Department officials in Washington used the terms as a kind of code for shifting policies, to signal to the consular officials that they should ease or tighten the granting of visas. Facing criticism in the summer of 1933, and then again in the fall of 1936, State Department officials instructed consuls to reject applicants only if they *probably* would become a public charge.<sup>119</sup>

Finally, the consuls had to decide over what time period the support would need to be provided. As the Hamburg consul asked the State Department: "How far in the future should the officer attempt to extend his calculations as to public charge?"<sup>120</sup> And what role, if any, should current economic conditions factor into that calculation? Did it matter that, when the Hamburg consul posed that query, economic conditions had improved from the depths of the Depression?<sup>121</sup>

Shifting instructions could be disorienting, as the general consul in Albania explained upon learning of the State Department's more lenient December 1936 instructions.

That all my interpretative training received since my arrival at this post is in almost every detail directly in contradiction with the policy of interpretation and decision expounded in the Department's instruction of December 30. I was taught among other things that "the public charge provisions should be stringently applied" since it is the Department's desire to keep immigration to a minimum in view of unemployment and that affidavits of relatives who could not be legally held for support were of very little value as evidence in rebuttal of the likelihood of "likely to be a public charge." I was told that the "department will support you to the limit in 'likely to be a public charge' refusals."<sup>122</sup>

Further instructions followed on January 5, 1937, leading to an uptick in the number of visas granted under the German quota to 10,895 in fiscal year 1937—still fewer than half the allowed amount.<sup>123</sup> The Albania general

118. MORSE, *supra* note 2, at 141.

119. BREITMAN & KRAUT, *supra* note 3, at 35; ZUCKER, *supra* note 2, at 44, 94.

120. STEWART, *supra* note 2, at 190.

121. *Id.*

122. WEIL, *supra* note 8, at 644, citing Letter from Riggs to John Farr Simmons (Mar. 3, 1937) (on file with the National Archives).

123. BREITMAN & LICHTMAN, *supra* note 14, at 95; ZUCKER, *supra* note 2, at 44, 94; STEWART,

consul's discomfort probably did not last long; most consuls soon reverted to their more restrictive approach, presumably with the higher ups' approval.<sup>124</sup>

#### 4. *Striking Inconsistencies*

State officials in Washington thus interpreted the LPC clause, concluding it meant different things at different times, as the consuls abroad applied those shifting interpretations to the thousands of individual cases in front of them. Consul officials knew this resulted in striking inconsistencies.<sup>125</sup> “The interpretation of the public charge’s provision . . . has not only varied somewhat as between one consular office and another . . . but it has varied strikingly from one year to another, even in the hands of the same officials,” Malcolm C. Burke, vice consul in Hamburg wrote to the Secretary of State in February 1934.<sup>126</sup> “In many instances, an examining officer is thrown back largely upon intuition and instinct, and cannot avoid forming in his own mind an opinion—favorable or unfavorable—which he is later unable fully to justify by analysis and argument.”<sup>127</sup> The head of the Visa Division confirmed these varying interpretations in December 1938, saying in a public lecture: “If it appeared to the consular officer, or if the consular officer knew or had reason to believe that the immigrant was inadmissible, he was obliged to deny him a visa. The directive led to varied interpretation not only in different posts but also in the same office.”<sup>128</sup> The office-to-office variations were not just a theoretical problem. Often a refugee would apply initially in Hamburg or Vienna, say, where an official would require one type of proof, and then she would flee to Sweden or Switzerland or Portugal to wait for a quota number to be issued or to come due, and the new consul would require an entirely different type of proof.<sup>129</sup>

Significantly, the fact that individual consular officials had discretion and could decide what proof applicants or sponsors needed, did not dictate that most refugees should be denied admittance. The LPC language, as modified in the 1930 press release, was open-ended enough to allow consular officials to exercise their discretion on behalf of applicants. They could have found

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*supra* note 2, at 261; DIVINE, *supra* note 63, at 90.

124. ZUCKER, *supra* note 2, at 144.

125. Alpert analyzed deportations based on court cases involving the public charge clause, concluding the decisions “are equally and hopelessly conflicting.” *Supra* note 9, at 21. The deportation cases had an additional flummoxing wrinkle, as Alpert explains: “The clause, it cannot be too strongly emphasized, refers to aliens as of the time they enter the United States. To pervert the clause, as the Immigration Service and some courts have done, into holding aliens deportable as of the time of entry on the ground that after entry they committed a crime, or took relief, or did other undesirable things, is an unpardonable inversion cutting the statute into paper dolls.” *Id.* at 37.

126. ZUCKER, *supra* note 2, at 86.

127. *Id.*

128. ZUCKER, *supra* note 2, at 143.

129. *Id.* at 147.

more refugees not likely to become public charges and thereby have granted many more visas, at least up to the quota limit. And a few individuals did.<sup>130</sup> But State, both through the directives to the consuls and through its pattern of promotions, indicated that the department wanted a restrictive policy. Most consuls got the message.<sup>131</sup> “[D]ue to any consul’s natural desire for promotion and the wish to avoid a reprimand, he would carry out the policy of those above as nearly as he understood it,” Stewart explains.<sup>132</sup>

Stewart even suggests that the law’s very ambiguity may have served that goal more effectively than specific rules would have.

The uncertainty . . . was to a large extent deliberate. [Assistant Secretary of State Wilbur Carr] felt that any formula which achieved uniformity would tie the consul’s hands to such a degree that he would not be able to use his own “good sense.” Moreover, it would “play into the hands of bright lawyers” who would contrive to meet the technical requirements and make it impossible for a consul to deny a visa to an alien who, by any standard of good judgment, should not be admitted. The Department of State successfully fought to maintain its prerogative to interpret the law with flexibility against the demands for specific guidelines.<sup>133</sup>

##### 5. *More Restrictions*

The LPC clause was the primary means of limiting immigration, but not the only one. Section 7(c) of the Immigration Act of 1924 required each immigrant to provide, along with an application: “two copies of his ‘dossier’ [passport] and prison record and military record, two certified copies of his

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130. Hiram Bingham IV in the Marseille consul is the best-known official who tried to issue as many visas as possible. After nearly five years in Marseille, Bingham was transferred to Portugal in 1941 and then to Argentina. Cynthia Jaffee McCabe, “Wanted by the Gestapo: Saved by America” – *Varian Fry and the Emergency Rescue Committee* in *THE MUSES FLEE HITLER: CULTURAL TRANSFER AND ADAPTATION 1930-1945*, at 79 (Jarrell C. Jackman & Carla M. Borden eds., 1983). In a 1978 study, Anderson & Gifford, *supra* note 9, documented how under similar public charge provisions in the 1970s the presumption had shifted toward granting visas. “It takes considerably more time and paperwork to deny a visa than to issue one, and the Visa Office looks upon numerous denials with disfavor. Moreover, visa issuances are seldom, if ever, reviewed. Consequently, in questionable cases a consular officer may issue visas to avoid excess work or the disapproval of his superiors.” 97.

131. ZUCKER, *supra* note 2, at 81.

132. STEWART, *supra* note 2, at 56.

133. *Id.* at 195. Neither Evans nor Daval consider the possibility that inconsistency was the point, not a problem. Evans recognizes that the statute’s language “operated in a hazy area where interpretation by low level officials was done on a case-by-case basis.” *Supra* note 8, at 5. But she assumes that “[o]f course government sought to standardize those interpretations so as to have a uniform application of the law.” *Id.* at 5-6. She also assumes the government, in implementing the LPC, was trying to ferret out who would be an actual burden on society if admitted. *Id.* at 176-78. Daval is interested primarily in the tension between the public charge’s exclusion of those who might need benefits and an expanding assistance regime that sought to improve the wellbeing of eligible populations. *Supra* note 8, at 1014. But there is only such a tension if the government is actually trying to determine who might make use of government programs. In certain historical periods, such as the one examined here, the government may be using the LPC clause as a pretext to reduce overall immigration and thus might decide inconsistency serves that goal better. Understanding the historical period can change the analysis of the law.

birth certification and copies of all other available public records concerning him kept by the Government to which he owes allegiance.”<sup>134</sup> Obtaining these records from the Nazi government was not a routine matter for Jews in Germany or for those who had fled and would have to return for the documents. “Although the notion of a Jew dropping by police headquarters to receive a certificate of good character from his oppressors may strike the reader as a particularly sardonic touch of bureaucracy,” Arthur Morse observes, “State Department files refer repeatedly to this requirement and its importance.”<sup>135</sup> Morse attributes the initial State Department reading of this provision to Hackworth, the State Department’s legal adviser, quoting him:

[I]t is believed that the mere fact that a Jew has been driven out of Germany into another country, or has found it desirable to flee from Germany to escape persecution does not in and of itself excuse him from producing the documents required by Section 7(c) if it is reasonably possible for him to obtain such documents upon applying therefor to the appropriate German authorities.<sup>136</sup>

But the law’s language, “if available,” and its interpretation, “if . . . reasonably possible,” provided for exceptions. Relying on congressional debates at the time, Zucker concludes that the “if available” language was included to deal with circumstances just like those that arose in Nazi Germany, to allow for the immigration of people persecuted for religious or political reasons.<sup>137</sup> Still, State officials were reluctant to waive the requirement. Under pressure from Jewish and other groups, the State Department legal adviser in January 1934 agreed that consuls could waive requirements for documents that could only be acquired with “serious risk of inconvenience, personal injury, financial loss, or the peculiar delay and embarrassment that might attend the request of a political or religious refugee to his former government.”<sup>138</sup>

Yet applicants seemingly were never told that the requirement for document production could be waived. “I have not located a single case where the applicant was informed of such an option,” Zucker concludes. “On the contrary the consuls insisted on submission of the full list of documents.”<sup>139</sup> The consuls also could be finicky about the documents that were produced. They often rejected documents if the notary was not to their liking or if the police record did not include the last five years (when Jews were being arrested at the drop of a hat), or if a certificate reflected that a

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134. Johnson-Reed Act, Pub. L. No. 68-139, 43 Stat. 156.

135. MORSE, *supra* note 2, at 137.

136. *Id.*; see also ZUCKER, *supra* note 2, at 137.

137. ZUCKER, *supra* note 2, at 82, 137.

138. BREITMAN & KRAUT, *supra* note 3, at 20.

139. ZUCKER, *supra* note 2, at 137.



marriage had been performed under Jewish law but not civil law (thereby excluding the spouse and children of the union).<sup>140</sup>

State officials also had latitude in interpreting the laws that allowed foreigners to be admitted to the United States outside of the quota system. Two categories under the non-quota provisions, which had no numerical limits, could have applied to a substantial number of European refugees. (It should be noted that this was not a work “around the quota,” as Breitman and Lichtman suggest,<sup>141</sup> but a separate provision of the law.) First, Section 4(d) of the Immigration Act of 1924 provided a non-quota visa to ministers and professors who intended to practice their vocation in the United States, and to their wives and unmarried children under 18 years of age.

As had been the case with the quota laws, State officials had to interpret 4(d) and did so in such a way as to limit the numbers entering the country under this provision. Refugee advocates complained in particular about four ways the State Department interpreted the statute to restrict immigration.<sup>142</sup> First, 4(d) specified that the prospective immigrant had to have been teaching “continuously for at least two years immediately preceding the application for admission to the United States.”<sup>143</sup> However, most of those trying to immigrate had not been teaching continuously for two years prior to immigration because they had been expelled from their university positions in 1933. A few consuls considered the applicants to be “on furlough” and thus qualified for a non-quota visa, but many did not and routinely turned down applicants.<sup>144</sup> Second, the law stated that the immigrant needed to be a “professor of a college, academy, seminary, or university.”<sup>145</sup> Consul officials determined which German institutions qualified, often excluding college preparatory schools that fell somewhere between high schools and universities and many seminaries.<sup>146</sup> Third, they routinely determined that to be a “professor” one had to have been a classroom teacher, disqualifying researchers and librarians,<sup>147</sup> and even those who had taught but presumably not for long enough.<sup>148</sup> Fourth, many consuls refused to give non-quota visas to even scholars who had been “professors” in Europe because they determined they would not be able to

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140. *Id.* at 139.

141. BREITMAN & LICHTMAN, *supra* note 14, at 74, 166.

142. For a more detailed discussion of the State Department’s attitude toward professors trying to immigrate on non-quota visas, see LEFF, *supra* note 13, at 120.

143. Johnson-Reed Act, Pub. L. No. 68-139, 43 Stat. 156.

144. LEFF, *supra* note 13, at 126-27.

145. Johnson-Reed Act, *supra* note 143.

146. REINHARD SIEGMUND-SCHULTZE, MATHEMATICIANS FLEEING FROM NAZI GERMANY: INDIVIDUAL FATES AND GLOBAL IMPACT 105 (2009); Michael A. Meyer, *The Refugee Scholars Project of the Hebrew Union*, in A BICENTENNIAL Festschrift for Jacob Radar Marcus, 359, 364, 371 (Bertram Wallace Korn ed., 1976); LEFF, *supra* note 13, at 122.

147. LEFF, *supra* note 13, at 123; Meyer, *supra* note 146, at 364.

148. LEFF, *supra* note 13, at 123; BIOGRAPHICAL DICTIONARY OF WOMEN IN SCIENCE 1393 (Marilyn Ogilvie & Joy Harvey eds., 2000).

continue “the vocation . . . of professor” in the United States.<sup>149</sup> In interpreting what “continue in their vocation” meant, the State Department insisted that refugee scholars had to have an offer from an American university for at least a one-year position. Even then, the non-quota visa might be denied based on the consul’s determination that the scholar was too old or too foreign to be a classroom teacher.<sup>150</sup>

After the Kristallnacht pogrom in November 1938 led to worldwide condemnation of the Nazi regime and pressure to respond in the United States, the State Department agreed to grant visas even to those who had not been teaching during the two years prior to immigration if the professor had lost his or her position “for reasons beyond his control, such as discrimination on account of race, religion, or political opinion.”<sup>151</sup> The instructions broadened the types of institutions that qualified to include college preparatory schools and particular seminaries.<sup>152</sup> The consuls did not necessarily follow the new State Department instructions, and State seemed to stick to its requirement that professors had to have been classroom teachers in Europe and would have to continue to be classroom teachers in the United States. State even fought to keep a provision in the law that specified non-quota visas could only be issued to a qualifying scholar’s wife. State Department officials interpreted the provision to exclude the husbands of female scholars or ministers.<sup>153</sup> When Congress tried to change the provision, the Secretary of State helped defeat the legislation.<sup>154</sup> Between 1933 and 1941, just 5,760 persons entered the United States as non-quota immigrants under Section 4(d), or fewer than 700 a year, including 944 professors, 2,184 ministers, and their wives and children.<sup>155</sup>

The Immigration Act of 1924 also allowed students to immigrate on non-quota visas. Section 4(e) provided non-quota visas to “bona fide” students who were at least fifteen years of age, planned to study at “an accredited school,” and had sufficient funds to cover education and living expenses “for the entire duration of his stay in the United States.”<sup>156</sup> The last part of 4(e) proved most troublesome for student refugees, who had to “show to the

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149. LEFF, *supra* note 13, at 124-25.

150. *Id.* at 152, 236.

151. ZUCKER, *supra* note 2, at 121.

152. LEFF, *supra* note 13, at 127.

153. Consuls did count rabbis as ministers. Jonathan D. Sarna and Zev Eleff, *The Immigration Clause that Transformed Orthodox Judaism in the United States*, 101 AM. JEWISH HIST. 357, 364, 373 (2017).

154. ZUCKER, *supra* note 2, at 114. It was not until 1952 that the law allowed spouses of non-quota immigrants, and not just wives, to receive visas. McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 166. See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 604 (1991).

155. ZUCKER, *supra* note 2, at 159. American universities’ reluctance to offer positions to refugee scholars also contributed to the small numbers. For a detailed discussion, see LEFF, *supra* note 13.

156. Johnson-Reed Act, Pub. L. No. 68-139, 43 Stat. 155 (1924).

satisfaction of the Consul that . . . he intends to leave the United States when his studies are completed.”<sup>157</sup> American consuls just assumed German students would not be able to prove they would leave because neither Germany, nor any other country, would accept them.

The Labor Department’s Isador Lubin did not think “rules and regulations” required such proof and argued that affidavits from the students stating they planned to return to Germany should be good enough. But the State Department would not consider such affidavits. American consuls in Germany issued “wholesale rejections of requests for students’ visas.”<sup>158</sup> At the end of the 1930s and into the 1940s, the State Department piled on requirements. In 1939, students had to prove they would not become a public charge or endanger public safety. In 1940, the Visa Division required an oath from the applicant, evidence of admission to a known and eligible institution of higher learning, a financial guarantee from an American sponsor, a return domicile, and a moral guarantee, preferably by an American citizen. Between 1933 and 1940, only 13,322 students were admitted from all countries on student visas, among them only 698 who identified themselves as “Hebrews.”<sup>159</sup>

A final provision of the immigration laws did not actually allow for immigration to the United States yet provided another potential lifeline for European refugees. The 1924 Act listed six categories of aliens who could enter the United States temporarily and were not considered immigrants, including “an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure.”<sup>160</sup> At the beginning of the Nazi era, visitor visas were relatively easy to obtain. Unlike immigration visas, there was no limit on the number, and all consuls could issue them without applicants having to provide dozens of documents or prove they would not become a public charge. Most consuls just required a statement that the applicant was a bona-fide non-immigrant.<sup>161</sup> Those who came on visitor visas could change their status to a quota immigrant, but they had to apply from outside the United States. By the latter half of the decade, however, consuls became stingier in issuing these visas and, as was the case for quota visas and other non-quota visas, they required additional documents, such as a letter from a German employer.<sup>162</sup>

Besides interpreting the various provisions of the immigration statute, consuls had other means of applying discretion to limit immigration. “[D]ozens and dozens of individuals whose credentials . . . were in perfect form . . . were denied visas,” Philadelphia philanthropist Jacob Billkopf

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157. *Id.*

158. ZUCKER, *supra* note 2, at 156.

159. *Id.* at 159; STEWART, *supra* note 2, at 547.

160. Johnson-Reed Act, *supra* note 156, at § 3.

161. WYMAN, *supra* note 11, at 139-140.

162. ZUCKER, *supra* note 2, at 161.

wrote to Judge Mack.<sup>163</sup> “The FSOs [foreign service officers], particularly in the provinces, are pretty adamant . . . [and] in Berlin, too, they are so busy that they adopt the ‘course of least resistance.’”<sup>164</sup> Zucker found that many consuls used all sorts of technicalities to prevent visa applications from even being filed. Some made applicants return repeatedly to American consulates in Germany, each time requiring additional proof or finding an error in what had been submitted. In one instance, a German rabbi who had obtained a visa in Berlin on May 8, 1940, planned to depart from Lisbon on August 8, 1940, when his visa would expire. But when he tried to board the ship, the Lisbon vice-consul would not let him on, claiming his visa expired at midnight on August 7.<sup>165</sup>

Technical barriers were erected on American shores as well. David Wyman cites the case of a *Time* magazine executive, Laura Hobson, who later became a novelist best known for *Gentleman’s Agreement*. Hobson had her affidavit of support for a Viennese businessman and his family repeatedly rejected because she had not provided a notarized copy of her tax return, nor stated specifically she felt obligated to support the family; among other deficiencies. She contacted State Department officials repeatedly and, as an influential person with a five-figure income, she eventually got the department to relent. “Unquestionably, many other refugees met similar complications,” Wyman writes, “but were unable to solve them and failed to obtain the crucial permission to enter the United States.”<sup>166</sup>

During the first five years of the Nazi regime, the U.S. State Department used all the administrative means at its disposal—the LPC clause, document requirements, interpretations of non-quota visas, technicalities—to admit as few refugees as possible to the country. Although State officials did so under the guise of economic concerns at a time of high unemployment, they seemed less interested in assessing applicants’ ability to support themselves and more dedicated to finding rationales for rejections.

## II. DEPLOYING DISCRETION TO FILL QUOTAS: 1938-1939

World events led to dramatic changes in the refugees’ situation and concomitant changes in U.S. immigration policies, first in 1938 and then again in 1939. The first change led to a temporary easing of U.S. immigration policy, while the second, the advent of the world war, led to new barriers. In March 1938, Germany officially annexed Austria to the

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163. Bailin, *supra* note 107, at 34, quoting Letter from Jacob Billikopf to Judge Julian W. Mack (Sept. 14, 1933), *Messersmith Papers* (on file with the University of Delaware Archives).

164. *Id.*

165. ZUCKER, *supra* note 2, at 152.

166. WYMAN, *supra* note 11, at 160. Hobson tells a fictionalized account of her difficulties in aiding a refugee family in her first novel. LAURA Z. HOBSON, *THE TRESPASSERS* (1943).

Reich and immediately imposed antisemitic restrictions on its 200,000 Jews and non-Aryans. In July, an international conference that convened to solve what had become a refugee crisis failed to produce any meaningful results.<sup>167</sup> In November, the countrywide pogrom known as Kristallnacht pushed Germany's remaining Jews to try to leave the country immediately. Even before Kristallnacht, Berlin Consul General Raymond Geist estimated that about 125,000 Germans had applied for the 27,300 quota spots available for Germany and what had been Austria, meaning that the waiting list to come to the United States stretched to three or four years. "This is a desperate situation for many, who are sure unless they can effect their emigration to the United States they cannot survive," Geist wrote in October 1938. The problem only grew worse in early 1939 with the German conquest of Czechoslovakia, pushing that nation's Jews to try to emigrate along with those in the German-allied countries of Rumania, Hungary and Italy.<sup>168</sup>

Given the growing numbers, the growing attention, and the growing sense of an international crisis, the State Department felt pressure to admit more refugees under the existing quotas. The *New York Daily News*, the *New York Post*, *The Seattle Times* and *The Houston Chronicle* all editorialized in favor of greater immigration.<sup>169</sup> Right after the Anschluss, Representative Celler introduced a bill exempting victims of religious and political persecution from the quota system. Representative Dickstein introduced a bill calling for unused quotas from countries outside the Nazi net be made available to refugees.<sup>170</sup>

State Department officials altered administrative procedures in response to the crisis. They added personnel to the consuls. They made the application process easier and quicker, allowing quota numbers to be obtained by letter rather than a visit to the consulate, and enabling affidavits to be cabled to consul offices rather than being sent by mail. The allotment numbers among consuls in the same country also were adjusted so that if one consul could not fill its allotment within a month, the spots could be used by another consul and not lost altogether, as had been the previous practice.<sup>171</sup> Many consuls also rejected fewer applicants under the LPC clause, particularly as more Americans provided affidavits promising support.<sup>172</sup> And, as previously discussed, the State Department issued instructions making it easier for professors and ministers to receive non-quota visas.

Yet State rejected many proposals facilitating immigration, such as one

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167. MORSE, *supra* note 2, at 214-15.

168. STEWART, *supra* note 2, at 392.

169. *Id.* at 496.

170. Neuringer, *supra* note 85, at 229.

171. STEWART, *supra* note 2, at 404; WYMAN, *supra* note 11, at 168.

172. STEWART, *supra* note 2, at 403.

encouraging more Americans to submit affidavits by limiting the amount of time they would have to support the refugee or by allowing organizations to provide affidavits. State also rebuffed overtures from foreign governments, such as a British offer to relinquish a portion of its unused quota to those attempting to escape, and a Dutch plan to shelter refugees for a year or two as long as they were guaranteed admittance to the United States.<sup>173</sup> Nor would State or administration officials entertain any plan to increase the quotas, which changed from a theoretical issue in the first half of 1938 (the German and Austrian quotas were sixty-six percent filled) to a real concern by the end of the year. The administration had a fixed policy not to ask Congress for any change in the quota system based both on Congressional opposition and its own assessment of the political risks.<sup>174</sup>

Instead, the administration took two steps in early 1939 to at least appear to be alleviating the crisis. First, it combined the German and Austrian quotas to 27,370, giving the 200,000 Austrian Jews, almost all of whom were trying to leave, a better chance at coming to the United States.<sup>175</sup> The previous Austrian quota was 1,413.<sup>176</sup> (Of course, this did not actually allow more people to be admitted; it just shifted the allocation.) Second, the administration allowed refugees who were in the United States on visitor visas to remain in the United States for an additional six months. The President told State to extend automatically the visas of 12,000 to 15,000 refugees in the United States, though the immigration commissioner later claimed the number of those allowed to stay for a longer period did not exceed 5,000.<sup>177</sup> Roger Daniels describes the President as finally using “a little of his executive authority in the interests of refugees.”<sup>178</sup> To Arthur Morse, the fact that visitor visas could be extended demonstrated that “legalities could be circumvented under emergency conditions” and that other proposed changes, such as making available unused British quota numbers or mortgaging of future quotas, could have been implemented.<sup>179</sup>

State also undercut the usefulness of visitor visas as a way to save more Jews. As those on visitor visas already in this country were allowed to stay longer, those abroad trying to get the visas were rejected more frequently.<sup>180</sup> As Esther Caulkin Brunauer with the American Association of University Women wrote to a Dutch colleague in March 1939:

It is now impossible to bring anybody as a visitor or student since the

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173. *Id.* at 401.

174. *Id.* at 390.

175. ZUCKER, *supra* note 2, at 65.

176. *Id.*

177. ZUCKER, *supra* note 2, at 127.

178. ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 299 (1990).

179. MORSE, *supra* note 2, at 235-36.

180. BREITMAN & KRAUT, *supra* note 3, at 66; see also TICHENOR, *supra* note 30, at 162.

consuls have been advised not to grant permits to anyone who is a refugee or who may become a refugee. I believe the reason for this action is that the State Department is under a great deal of criticism for having admitted some six or seven thousand people on visitors' visas. They cannot go back to Germany and yet there is no other place to deport them.<sup>181</sup>

State sent the visa division chief to Europe to tell consuls not to grant too many visitor visas. What had been a routine procedure no longer was: American consuls in Germany, in particular, began requiring those applying for visitor visas to put up a high bond and prove they had established residences outside of both Germany and the United States.<sup>182</sup>

After the world war started in September 1939, the State Department instructed consuls to scrutinize requests for visitor visas, particularly from belligerent countries, to determine whether issuing one would be contrary to public safety.<sup>183</sup> The visa division even issued instructions that refugees needed an exit permit to receive a visitor visa, despite the fact that German and Vichy authorities only granted exit permits to those with visas. Joseph Chamberlain, a Columbia University law professor who chaired an umbrella organization of refugee aid groups, noted a sharp decrease in the number of visitors entering the United States beginning in early 1939.<sup>184</sup> Zucker estimates that for the years 1933 to 1940, only between 20,000 and 30,000 people who obtained visitor visas remained in the country.<sup>185</sup>

For a brief period, a shift in government policy led to a shift in the interpretation of immigration law that led to filled European quotas. The law in the form of a statute had not changed, just the way consuls chose to implement it.

### III. DEPLOYING DISCRETION DURING WARTIME: 1939-1945

#### *A. Delay as the Order of the Day*

The 1939 problem of admitting more refugees in the face of filled quotas did not last. Once the European war began in September 1939, the State Department returned to its practice of keeping immigration well below the quota limits, armed with a new, and perhaps even more effective, rationale: security. “[T]he fear of German spies and saboteurs would, by mid-1940, replace the ‘Jobs for Americans’ slogan as the major rallying cry for those who would lock the country’s gates against refugees,” Sheldon Neuringer

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181. Letter from Esther Caulkin Brunauer to Van der Kolf, (Mar. 16, 1939) (on file with American Association of University Women, Washington, D.C.).

182. ZUCKER, *supra* note 2, at 128-30.

183. *Id.* at 130.

184. *Id.* at 164.

185. *Id.* at 131. Because consular officers did not keep track of those who entered on visitor visas and stayed, the numbers are impossible to know for certain.

writes.<sup>186</sup>

Unlike the earlier economic concerns that found some support in LPC statutory language, security concerns were not mentioned as a basis for exclusion in the nation's immigration laws. That did not stop the State Department. As it had done during the first six years of the Nazi regime, State both issued instructions and counted on the consuls' discretion to keep immigration under the quota limits. Among the instructions the State Department issued in 1940: consuls had to demand that German good conduct certificates contain all previous convictions, including any crimes that might have been expunged;<sup>187</sup> consuls had to conclude that applicants had a legitimate reason to enter the United States, "not just good reasons for leaving Europe";<sup>188</sup> and consuls must withhold visas unless they had "no doubt whatsoever concerning the alien."<sup>189</sup>

State Department officials insisted it was "essential to take every precaution at this time to safeguard the best interests of the United States."<sup>190</sup> Breckinridge Long, the new assistant secretary in charge of the visa division, laid out the department's strategy in a June 26, 1940 memo:

We can delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls to put every obstacle in the way and to require additional evidence and to resort to various administrative devices which would postpone and postpone and postpone the granting of the visas.<sup>191</sup>

Consular officials took the memo to heart. "Delay was the order of the day, as consuls, aware of the unsympathetic attitude of their superiors toward refugees, outdid themselves in an effort to build up a good record," Henry Feingold writes.<sup>192</sup> It was a reversion to form. "Strict regulation with the intent of exclusion was thus not a new policy, merely the resumption of an old one," Breitman and Kraut conclude. "No new laws were enacted; instead, the discreet, less politically volatile path of altering bureaucratic procedure was taken, as it had been before."<sup>193</sup>

With more public attention on the refugee issue, however, State's preferred approach, quietly changing its own practices, did not work quite as well. State therefore intensified its fight for legislative changes and

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186. NEURINGER, *supra* note 3, at 95. That this fear was unfounded is discussed later, *infra* Section II.B.

187. BREITMAN & KRAUT, *supra* note 3, at 120.

188. BREITMAN & LICHTMAN, *supra* note 14, at 168.

189. *Id.*, quoting State Department Circular Telegram to Consuls (June 5, 1940).

190. WYMAN, *supra* note 11, at 174.

191. FEINGOLD, *supra* note 2, at 142, quoting Long to Adolf Berle and James Dunn (June 26, 1940); see also RAFAEL MEDOFF, *FDR AND THE HOLOCAUST: A BREACH OF FAITH* 6 (2013).

192. FEINGOLD, *supra* note 2, at 141.

193. BREITMAN & KRAUT, *supra* note 3, at 120.



against other departments. State unsuccessfully fought the Justice Department's efforts to allow refugees on a Portuguese freighter into the United States. The ship had stopped in Norfolk, Virginia to refuel for a return trip to Europe, having been turned away from Nicaragua and Mexico.<sup>194</sup> A few months later, State successfully fought both the Justice Department and Interior Department after they supported the governor of the Virgin Islands' decision to permit refugees to wait for their visas in the American territory.<sup>195</sup>

Perhaps the most consequential bureaucratic fight occurred after the German conquest of France in June 1940, which left tens of thousands of political and Jewish refugees under Nazi control, including many who had fled Germany years earlier. Under pressure from liberals and intellectuals, the Roosevelt Administration decided to grant emergency visitor visas to select refugees allowing them to stay past the usual six-month limit. The applicants for these emergency visas had to declare they would leave as soon as possible, provide affidavits of financial support, and describe in a brief biographical sketch their political activities, potential contributions to the United States, and reasons they were endangered. Along with the affidavits of financial support, the applicant also had to supply a "moral affidavit" from an American citizen stating the refugee would not harm the United States and that the citizen would keep track of him or her after arrival.<sup>196</sup>

State Department officials objected to the emergency visa program as "a departure from long-established interpretation of the immigration law in order that visitor visas . . . could be issued to refugees desiring to come here and who probably will remain in this country."<sup>197</sup> FDR went ahead with the program, relying on the President's Advisory Committee on Political Refugees (PACPR) to generate a list of refugees in France entitled to the temporary emergency visas.<sup>198</sup> PACPR quickly assembled such a list, submitting by the beginning of September 1940 the names of 567 Justice Department-approved<sup>199</sup> refugees who should receive emergency visas.<sup>200</sup> By the end of the month, however, only forty visas had been issued.<sup>201</sup>

State seemed intent both on sabotaging the program by issuing few emergency visas and challenging the program by objecting to the particular

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194. FEINGOLD, *supra* note 2, at 143.

195. BREITMAN & LICHTMAN, *supra* note 13, at 175; FEINGOLD, *supra* note 2, at 155; TED MORGAN, *FDR: A BIOGRAPHY* 586 (1985).

196. WYMAN, *supra* note 11, at 141.

197. *Id.* at 140, quoting Breckinridge Long to Adolf A. Berle, Jr., Feb. 7, 1941, BL Papers, Box 211.

198. DIVINE, *supra* note 63, at 102.

199. Immigration services had been moved from the Labor Department to Justice for "national defense reasons." TICHENOR, *supra* note 30, at 165.

200. BREITMAN & KRAUT, *supra* note 3, at 128.

201. WYMAN, *supra* note 11, at 143.

people whom PACPR had selected. Jewish and labor organizations had had too much influence in creating the PACPR list, according to State. Assistant Secretary Long then approached Roosevelt to take action to minimize the importance of the PACPR list and give consuls “some latitude of judgment” in issuing visas.<sup>202</sup> FDR seemingly agreed, but, when PACPR objected, he left it to PACPR, State, and Justice to work out whether the emergency visas would be issued, to whom, and how.<sup>203</sup> In November 1940, the bureaucracies reached a compromise that allowed PACPR to continue to submit lists of refugees for emergency visas as long as it intensified its scrutiny of the refugees.<sup>204</sup> The deal also established a committee to examine refugees from a national security perspective and advise State and Justice. The final decision remained with the consul.<sup>205</sup>

State Department officials thought they could control the new committee, but, in case they could not, they also changed consular procedures to limit the number of refugees admitted. Consuls were instructed to drop from visa waiting lists anyone lacking travel documents, exit permits, and steamship accommodations.<sup>206</sup> Outmaneuvered, PACPR voted to terminate its list at the end of December 1940.<sup>207</sup> By July 1941, only 1,236 emergency visas had been granted of the 3,268 visas authorized.<sup>208</sup> State explained that many refugees could not make use of the visas because they were in France in hiding, or they were in Eastern Europe and could not travel to the consul in Moscow.<sup>209</sup> But David Wyman attributes the fact that only one third of the approved visas were used to State’s reluctance to issue them. Another 800 refugees arrived under emergency visas at the end of 1941, for a total of 2,000.<sup>210</sup>

### *B. Securing Legislation*

Although State’s procedural roadblocks and bureaucratic victories worked relatively well in reducing the number of immigrants, top State officials were determined to secure legislation that would give them the authority to reject applications for security reasons. Visa head Breckinridge Long worked throughout 1940 and into 1941 for such legislative authority and finally obtained it.<sup>211</sup> The Act of June 20, 1941 authorized the consular and diplomatic officers to refuse visas to any alien who, in their opinion,

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202. *Id.* at 145.

203. BREITMAN & KRAUT, *supra* note 3, at 132.

204. WYMAN, *supra* note 11, at 148.

205. *Id.*; BREITMAN & KRAUT, *supra* note 3, at 134, citing Minutes of Forty-First Meeting of PACPR, Wise Papers, Box 65 (Oct. 30, 1940), (on file with the American Jewish Historical Society).

206. BREITMAN & KRAUT, *supra* note 3, at 134.

207. *Id.* at 135.

208. WYMAN, *supra* note 11, at 148.

209. *Id.* at 149.

210. *Id.*

211. *Id.* at 173, 194.

desired to enter the United States “for the purpose of engaging in activities which will endanger the public safety.”<sup>212</sup> The act also gave the President the power to act “in the interests of the United States” to prevent the entry or facilitate the departure of any alien.<sup>213</sup>

Two days after the June 20 law passed, State changed the entire visa process, voiding all current applications and requiring them to be reinitiated with new forms provided by State in Washington. All applicants now had to provide a biographical sketch and two affidavits from Americans willing to vouch for the applicant’s moral and political trustworthiness and to guarantee financial support. State also created a D.C.-based apparatus to handle the applications and a new process for assessing visa applicants. An Interdepartmental Advisory Committee that included State’s visa division, the immigration service, Justice, the FBI, Military Intelligence Service and Office of Naval Intelligence, would conduct a three-to-six-week investigation and then send a recommendation to the appropriate consul abroad, with the consul retaining the right to reject a positive recommendation. Even if the visa was approved it only remained good for the remainder of the fiscal year. If the applicant was not able to arrange transportation to the United States during that time, he or she would have to start the application process again.<sup>214</sup>

In conducting its review, the D.C. committee was supposed to take into account whether the applicant had close relatives in German territory, which most of the applicants did and which ended up being almost completely disqualifying.<sup>215</sup> Of the 985 applications received by September 1941, more than 800 were rejected.<sup>216</sup> “[T]he new machinery for processing applications in Washington turned out visas at a distressingly slow rate,” Wyman concludes.<sup>217</sup> An appeals process that was seemingly intended to help refugees did so only slightly. Refugees who had been denied a visa by the six-agency review committee could appeal to another committee made up of representatives of the same agencies. The second committee could hear testimony from sponsors or other representatives of the refugees. If the second committee sided with the refugee and the State Department did not object, the recommendation to grant a visa was forwarded to the appropriate consul abroad. The consul still could object to issuing a visa, but it had to

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212. Pub. L. No. 77-113, 55 Stat. 252.

213. MARION T. BENNETT, *AMERICAN IMMIGRATION POLICIES: A HISTORY* 70-71 (1963).

214. BREITMAN & KRAUT, *supra* note 3, at 135-36.

215. WYMAN, *supra* note 11, at 194. Two weeks before the law passed, State had sent instructions to the consuls to reject applicants if they had “‘children, parents, spouse, brothers or sisters’ still residing in the ever-widening territories under Nazi domination.” BREITMAN & KRAUT, *supra* note 3, at 135, quoting Circular Telegram to Certain Diplomatic Missions and to All Consular Offices except Those in France, Belgium, The Netherlands, Germany, and Italy, June 5, 1940.

216. FEINGOLD, *supra* note 2, at 162, citing Alfred Wagg III, *Washington’s Stepchild*, *NEW REPUBLIC* (Apr. 28, 1941), 592-94.

217. WYMAN, *supra* note 11, at 197.

provide an explanation. If the second committee agreed with the initial reviewing committee that a visa should not be offered, the applicant could then appeal to a two-person board appointed by the president. If that board split, or the State Department objected to the board's decision, State's position prevailed. The review committee sustained the primary committee eighty-five to ninety percent of the time. The two-person review board was somewhat more sympathetic to refugees so that twenty to twenty-five percent of the cases changed from disapproved to acceptable.<sup>218</sup>

During the summer of 1941, American consuls in German-controlled territory, including the three visa-issuing consuls in Germany and the one in Vienna, were closed.<sup>219</sup> That made it almost impossible for refugees in the Reich to obtain U.S. visas. German and Austrian refugees still could obtain visas under the combined German quota from other consuls, but they had to get there first.

### C. Defeating Legislation

While the State Department fought for some laws, it fought against others. At the beginning of the refugee crisis, it had worked to defeat several pro-immigrant bills introduced by House Immigration Committee chair Dickstein.<sup>220</sup> George Messersmith, as assistant secretary of state, tried to head off the introduction of the Wagner-Rogers Act that would have allowed 20,000 children to be admitted on non-quota visas over a two-year period.<sup>221</sup> When Congress introduced the bill anyway, State submitted a formal letter from the secretary laying out a myriad of administrative and political problems with the bill. It also confidentially polled Immigration Committee members to discern their support for the bill.<sup>222</sup> When the Senate Immigration Committee altered the bill's language to require the children be admitted *under* the quota, and thus displace those who had already received their quota numbers, Wagner objected. The bill was never officially reported to Congress and died in committee.<sup>223</sup> Interestingly, the State Department did not object to a bill passed a year later to allow British children seeking to escape the Blitz to immigrate outside the quotas, even assuring the public that "all the red tape has been cut and all the nonessential requirements have been eliminated."<sup>224</sup>

Neither the beginning of the Holocaust in mid-1941 nor the United States' entry into World War II at year's end changed State officials' approach to

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218. *Id.* at 201-02.

219. ZUCKER, *supra* note 2, at 4.

220. STEWART, *supra* note 2, at 194.

221. Shlomo Shafir, *George S. Messersmith: An Anti-Nazi Diplomat's View of the German-Jewish Crisis*, 35 JEWISH SOC. STUD. 32, 39-40 (1973).

222. TICHENOR, *supra* note 30, at 164.

223. STEWART, *supra* note 2, at 536.

224. TICHENOR, *supra* note 30, at 165.

allowing Jewish refugees into the United States. David Wyman, whose *Abandonment of the Jews* focuses on the war years, points to the State Department's cumbersome procedures as the primary explanation for the quotas from Axis-controlled countries being only ten-percent filled, with just 21,000 refugees entering the United States between Pearl Harbor and the war's end.<sup>225</sup> The procedures also effected non-quota immigrants. The new committee began rejecting professors who had job offers in the United States because their expertise, philosophy or finance, for example, would not help win the war.<sup>226</sup>

In April 1943, after seven Jewish congressmen complained to FDR about the State Department's "complex and stringent screening process,"<sup>227</sup> State officials actually added obstacles. A new visa application form introduced in July 1943 was more than four feet long and required American sponsors to submit six copies of an affidavit that listed all their residences and employers for the last ten years and included character references from two reputable American citizens.<sup>228</sup> In the fall of 1943, visas were routinely denied to refugees who were not in "acute danger," even though those in acute danger could not apply for visas because there were no consulates in Axis-controlled countries (having been closed in July 1941).<sup>229</sup>

It should be emphasized that none of these procedures—multiple committees made up of several agencies that required reams of evidence—was mandated by legislation. The Act of June 20, 1941 empowered consuls to refuse visas to any alien who would "endanger the public safety," but it never specified how consuls should assess such a threat or what, if any procedures, should be established.<sup>230</sup> It can be argued, and seems to be implicitly by some historians, such as Richard Breitman in *American Refugee Policy* and *FDR and the Jews*, that State had no choice but to respond to the legislative mandate with procedures and rules of its own to combat the dire threat to national security. That may be right, but State is still responsible for the particularly onerous form the procedures took.

The State Department slowed down the immigration process just when

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225. Wyman does not accept a common explanation for why the number of immigrants was so low: "The most frequent excuse, the unavailability of shipping, was a fraud." *Supra* note 14, 335. He cites as one example the willingness of military authorities in Casablanca to take refugees on ships that had brought troops to North Africa and were to return to the States empty. The consulate in Casablanca agreed to cooperate and refugee organizations arranged for the refugees to depart. Then the State Department's Visa Division refused to provide quota numbers to refugees in North Africa until they had assurance of transportation, and the military would not assure they had transportation until the refugees had quota numbers. *Id.* at 128.

226. LEFF, *supra* note 13, at 222. Unlike most quota applicants who could not have job offers, the State Department interpreted the 4(d) provision to mean professors and clergy had to have positions waiting for them to receive a non-quota visa.

227. WYMAN, *supra* note 14, at 100.

228. *Id.* at 127.

229. *Id.* at 127.

230. Pub. L. No. 77-113, 55 Stat. 252.

speed was of the essence: the Germans had begun deporting Jews to their deaths in Poland. Consider one example. In January 1942, the six-member immigration committee denied a non-quota visa to Slavic scholar Michel Gorlin, who was in an internment camp in France and had a two-year appointment waiting for him at the New School for Social Research in New York.<sup>231</sup> The committee decided Gorlin had “little or nothing to add to the war effort.”<sup>232</sup> Throughout the spring of 1942, the New School and Gorlin’s sister, who was in the United States, pushed his appeal. On July 16, Gorlin was deported to Auschwitz. In September, the New School finally convinced the State Department to grant Gorlin a non-quota visa. But Gorlin was already dead, having succumbed in Auschwitz on September 5, 1942 at the age of thirty-three.<sup>233</sup>

Moreover, there is a serious question of whether these procedures were in fact a necessary response. That the refugees ended up posing no threat whatsoever to the United States is well established.<sup>234</sup> Breitman and Kraut and Saul Friedman in *No Haven for the Oppressed* rely upon the same statistics: Of the 23,000 “enemy aliens” who arrived in 1940 from German and Soviet territory (the Soviet Union being Germany’s ally at that point), fewer than half of one percent were taken into custody for questioning, and only a fraction of those were indicted—for violating immigration regulations, not espionage.<sup>235</sup>

So the question does not turn on whether Jewish refugees were a threat (they were not) but whether policymakers at the time considered them to be. In other words, did State Department officials perceive a genuine threat or did they use security concerns as a pretext for continuing restrictionist policies? “[T]he threat to national security was more than a thinly veiled justification for the anti-Semitism of particular State Department officials or continuation of the government restrictionist policies, ‘a device for keeping refugee entry to a minimum,’” Breitman and Kraut conclude. “Throughout the government and among the general population there was increasing worry that a number of Jewish refugees placed under duress by

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231. LEFF, *supra* note 13, at 200.

232. *Id.* at 225.

233. *Id.* at 228.

234. Only Robert N. Rosen, in his over-the-top defense of FDR, argues that the threat was real, though that is mostly because he changes the terms of the debate. Rosen insists that despite “assertions by Roosevelt critics among Holocaust historians to the contrary,” the “threat of German sabotage and espionage in the United States was real.” *SAVING THE JEWS: FRANKLIN D. ROOSEVELT AND THE HOLOCAUST* 189 (2006). The problem with Rosen’s argument is that Holocaust historians do not say the threat of German sabotage was not real, just that the role of refugees in it was minimal, if not nonexistent. Rosen recounts examples of espionage but addresses the real point of contention, the role of refugees, only in a footnote and there merely to cite BREITMAN & KRAUT, *supra* note 3, and a few others. ROSEN 578 n.14. He does not offer his own evidence. NEURINGER, *supra* note 3, also defends the restrictionist policy, seemingly because it ended up proving “effective in screening out Nazi infiltrators” even if they were not refugees. 97.

235. BREITMAN & KRAUT, *supra* note 3, at 124; SAUL S. FRIEDMAN, *NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938-1945*, at 126 (1973).

America's enemies might permit themselves to be used by their former government to undermine the United States and sabotage its institutions."<sup>236</sup>

Yet even as they argue that the government and the public were increasingly worried about the refugee threat, Breitman and Kraut acknowledge there was not much basis for their concern. They cite to a memo from the U.S. ambassador in Moscow about possible Soviet infiltrators, not (it should be highlighted though the authors do not) German Jewish refugees.<sup>237</sup> They point to rumors from novelist Thomas Mann's daughter that playwright Bertolt Brecht was a communist agent, and from the Cuban ambassador that some Jewish refugees celebrated the fall of Paris.<sup>238</sup> Breitman and Kraut thus seem to set a low bar for what is required for government officials to conclude a threat is genuine: State officials' security concerns were legitimate as long as the officials had not "contrived the security issue or colluded to exploit unscrupulously the public fears of" fifth columnists.<sup>239</sup> To Breitman and Kraut, State officials were justified in assuming refugees posed a genuine threat even if little meaningful evidence corroborated it.

Other historians are more skeptical of State officials' motives, given the weakness of the evidence of refugee espionage and State's "scant interest" in material that refuted the spy story."<sup>240</sup> Wyman examined records of the State Department and other sources and concluded examples of refugees suspected of subversive activities were exceedingly few and ultimately unconvincing.<sup>241</sup> Wyman also cites contemporaneous sources that diminished the refugee threat: speeches of government officials, an appeals board report, and assessments of refugee advocates.<sup>242</sup>

Reports of refugee spies did not increase once the United States became involved in the war. "The conclusion is that a legitimate need, guarding the nation against subversion, was used as a device for keeping refugee entry to a minimum," Wyman writes.<sup>243</sup> A Treasury Department lawyer

236. BREITMAN & KRAUT, *supra* note 3, at 113.

237. *Id.* at 123. In his subsequent book with Allan Lichtman, *FDR and the Jews*, Breitman backs off somewhat from the claim that the Ambassador Lawrence Steinhardt's cable shows the State Department was not motivated by antisemitism. *Supra* note 14, at 173.

238. BREITMAN & KRAUT, *supra* note 3, at 121. MORGAN, *supra* note 195, at 495, suggests that former U.S. ambassador to France, William Bullitt, may also have had an influence through his "poisonous letters" to the President, including one that suggested more than half of 200 military spies the French Army had arrested were "genuine Jewish refugees from Germany – men and women who had been persecuted and expelled by Hitler – who for gain had entered his employ while enjoying French hospitality." Bullitt apparently received his information from former French Prime Minister Edouard Daladier, who said "'it really appears that on earth some races are maudites [doomed].'" Bullitt then told the President: "'I believe you should instruct our counter-espionage services of all sorts to keep an especially vigilant eye on the Jewish refugees from Germany. Sad, isn't it?'" *Id.*

239. BREITMAN & KRAUT, *supra* note 3, at 125.

240. FEINGOLD, *supra* note 2, at 130; FRIEDMAN, *supra* note 235, at 126.

241. WYMAN, *supra* note 11, at 212.

242. WYMAN, *supra* note 14, at 131-32.

243. *Id.* at 132.

concluded in a 1943 report on the State Department's visa policy: "Under the pretext of security reasons so many difficulties have been placed in the way of refugees obtaining visas that it is no wonder that the admission of refugees to this country does not come anywhere near the quota."<sup>244</sup> Add "under the pretext of *economic* and security reasons," and that sentence tells the twelve-year story.

#### CONCLUSION: HIDING IN HISTORY

The State Department's Nazi-era immigration policy is an epic example of an agency using its administrative discretion to implement a desired policy with its decision-making largely shielded from public, judicial, and ultimately historical scrutiny. The full import of this example has not been recognized because legal scholars have failed to notice this history, and historians have not grasped the full implications of the law. Scholars in both disciplines need to reexamine this critical period to have a better sense of why State officials adopted this policy, how they implemented it, and what led a liberal president seemingly sympathetic to refugees to accept it. From my preliminary sketch here, three observations can be made about how the State Department minimized oversight and thus maximized its ability to achieve the objective of immigration way below the quota numbers. Whether this was by design, a result of happenstance, or some combination, is another area that requires further exploration.

First, the 1924 immigration act's shift of visa-issuing authority from officials at ports of entry to those in consuls abroad made it far easier to deny hundreds of thousands of visas and face little public outcry. A refugee denied a visa at a consul abroad returned to a home in Hamburg, or Vienna, or Prague, perhaps to write an anguished letter to a relative in the States, but without the means to make more of a fuss. Now, imagine if hundreds of refugees, many of them well-to-do and well-connected, arrived every day at Ellis Island expecting to be greeted by relatives and ushered into new American lives. Instead, picture the refugees being denied entry and told they will be deported back to Nazi Europe. Pandemonium likely would ensue at American ports of entry. That happened in 1939 when Cuba refused to admit 900 refugees on the ship *St. Louis*. Distraught relatives in small boats bobbed in Havana harbor trying to glimpse their loved ones aboard the *St. Louis*. The story received several-day, front-page coverage in American newspapers, at least partly because it was taking place in the western hemisphere in view of the media.<sup>245</sup> Now consider how such visa

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244. *Id.* at 133, quoting Greenstein, Summary of Invitation Conference Oct. 18, 1941, (on file with Am. Friends Service Com. Archives).

245. DEBORAH LIPSTADT, BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST 115 (1986); LAUREL LEFF, BURIED BY THE TIMES: THE HOLOCAUST AND AMERICA'S MOST IMPORTANT NEWSPAPER 43 (2005). Although the public uproar did not enable the *St. Louis'*



denials might have played out in the center of Jewish and journalistic life in the United States. To imagine those scenes in New York City is to realize they could not have happened.

Even had visa denials occurred at U.S. ports of entry, the outcome still might have been different. Refugees would have been detained prior to deportation, thus affording them due process rights and the ability to challenge their deportations in court. The government still might have been able to ship refugees back to Europe—judges likely would have deferred to administrators—but the process would have been slowed considerably. At the very least, government officials would have had to explain and defend their actions in each individual case. The proceedings would make the underlying actions more visible, leading to press coverage and, perhaps, to inclusion in case law. Some scholars have examined the relatively small number of post-1924 exclusion cases at ports of entry, mostly involving immigrants who had been resident in the United States, left, and tried to reenter,<sup>246</sup> but not the far more numerous denials abroad. By moving the decision-making overseas, there was literally no case law to see at the time or in retrospect. Without cases to analyze, legal scholars have leaped over this use of administrative discretion. Contemporaneous decisions that shielded the State Department from public scrutiny also have inhibited scholarly inquiry.

Second, the reliance on administrative means of exclusion not only kept the refugee problem off the public stage, it also kept it out of the legislative arena—at least in terms of actual legislation. Many bills were introduced, but few were acted upon and none were enacted.<sup>247</sup> Historians have noted that refugee advocates tried to avoid giving Congress an opportunity to enact legislation that would have reduced quotas or halted immigration entirely. Less recognized is that supporters of greater restrictions also were not eager to fight a legislative battle, not when their goals could be met by other means, as many government officials admitted at the time.

Fights over legislation are more visible than behind-the-scene actions by bureaucrats. Scholars too are more accustomed to chronicling the back-and-forth between branches of government over adopting legislation than they are to tracking decisions by little-known administrators. Central to the common conceptualization of the American government is that Congress is the main site of competition over policy priorities with statutes embodying the winning priorities.<sup>248</sup> This assumption was even more deeply rooted in

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passengers to enter the United States, it did prevent them from having to return to Germany. The American Jewish Joint Distribution Committee brokered a deal whereby the passengers were admitted to Great Britain, Belgium, France, and the Netherlands. Within a year, the latter three nations were overrun by Germany and the passengers were once more endangered.

246. Alpert, *supra* note 9; VAN VLECK, *supra* note 31.

247. HUTCHINSON, *supra* note 60.

248. Keith Whittington & Daniel Carpenter, *Executive Power in American Institutional*

this area in this era because the executive branch was just beginning to exert its authority over immigration policy.<sup>249</sup>

That may be why Divine in *American Immigration Policy* concludes that “the most significant transformation” in immigration in the 1930s and early 1940s was the “encroachment of the executive branch of the government on Congressional control of immigration policy.”<sup>250</sup> And yet, Divine’s two chapters on this period dwell on the failed congressional efforts, not the successful executive ones.<sup>251</sup> Phil Orchard and Jamie Gillies acknowledge the nation was able to implement a restrictionist policy through purely administrative means, and yet they too concentrate on Roosevelt’s posture toward Congress, not the State Department.<sup>252</sup> Scholarly attention should be refocused. The appropriate question is not: why did FDR not buck the Congress to protect imperiled Jews (an issue that has received a great deal of scholarly attention)?<sup>253</sup> The better question is: why did Roosevelt not buck his own State Department (an issue that has not been addressed adequately thus far)?

Finally, by tying its use of discretion to popular fears over unemployment and national security, the State Department minimized the inquiry into whether those concerns applied in any individual case. Analyzing the application of the LPC clause is tricky because the clause itself seems comprehensible only by adopting sweeping positions at the extremes. Either anyone capable of working is judged not likely to become a public charge, and thus almost everyone is issued a visa (the understanding during the LPC’s first decades); or anyone could become a public charge in the future, and thus almost everyone is denied a visa (the understanding during the Nazi era).

To sort out in individual cases who is likely to become a public charge, as the discretion afforded individual officers under the statute requires, seems impossible. How is it possible to determine what will happen to any one person in the future, not to mention whether that future occurrence is likely, probable, or possible? Yet when pushed (and those are the only instances we know about thorough responses to inquiries), consular officials did seem to apply the statute, determining the likelihood, probability, or possibility of someone becoming a public charge at some

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*Development*, 1 PERSPS. ON POLS. 495, 496 (2003). Of course, this is a conceptualization that has been and should be challenged.

249. ZUCKER, *supra* note 2, at 36.

250. DIVINE, *supra* note 63, at 108.

251. *Id.* at 77-109.

252. Phil Orchard & Jamie Gillies, *Atypical Leadership: The Role of the Presidency and Refugee Protection, 1932-1953*, in 45 PRES. STUD. Q. 490 (2015); see also Edwin Harwood, *American Public Opinion and U.S. Immigration Policy*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 203 (1986).

253. See, e.g., KENNETH M. DAVIS, *FDR: INTO THE STORM 1937-1940*, at 370 (1993); MORGAN, *supra* note 195, at 584; PATRICK J. MANEY, *THE ROOSEVELT PRESENCE: A BIOGRAPHY OF FRANKLIN DELANO ROOSEVELT* 116 (1992).

indeterminate time based upon myriad factors that varied from consul to consul, from case to case.

On one hand, these decisions in the face of a confounding mandate is a testament to the power of the idea of consistent, neutral lawmaking. Officials felt obligated to look as if they were engaging in this form of lawmaking and discomfited when they looked as if they were not—thus the occasional plaintive wail from a consular official abroad about the LPC’s inconsistent application. On the other, the varying standards established and the inability of most refugees to meet them seem intended to erect roadblocks to immigration, not to assess who might prove to be a genuine burden upon the nation’s budget. The State Department gave up the game at the beginning of the Nazi era when it fought the only measure that reasonably could be said to protect against an immigrant being a public charge—the Labor Department’s statutorily-based proposal to allow bonds to be secured that immigrants could use should they ever need financial support.

Yet in a time of economic distress, the LPC had a surface plausibility. Whatever the consular officials did, however they denied visas on economic grounds, seemed to make sense during a great depression with staggeringly high levels of unemployment.<sup>254</sup> So State officials testifying before Congress could evoke the LPC with minimum pushback. Historians could come across the explanation and leave it at that. Even if the denial of a visa based on the LPC might not have made sense in any individual case, the concept so resonated with the public mood that it was hard to challenge.

A similar phenomenon occurred with the use of national security threats during the world war. Here, the application seemed even more peremptory. In interpreting “engaging in activities which will endanger the public safety” in the Act of June 20, 1941,<sup>255</sup> State Department officials did not spell out the suspicious activities; they just asserted a possible threat, perhaps citing to an aspect of the applicant’s background.<sup>256</sup> In interpreting the rule denying visas to those with a close relative in enemy territory, State assumed an across-the-board approach, even though the department publicly stated that the close relative exclusion should be just one of several factors to weigh in denying visas.<sup>257</sup> Consular officials tended to refuse to grant visas to anyone with a close relative—children, parents, spouse, brothers or sisters, or others the consul so defined—remaining in German

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254. Criticisms of the notion of a one-for-one exchange of jobs appeared in both the popular and academic press at the time. See for example, Henry Smith Lieper, *Those German Refugees: Facts Do Not Justify the Propaganda About Refugees Displacing American Jobholders*, 50 CURR. HIST. 19, 19-22, 63 (1939).

255. Pub. L. No. 77-113, 55 Stat. 252.

256. *E.g.*, LEFF, *supra* note 13, at 224.

257. BREITMAN & LICHTMAN, *supra* note 14, at 178; FEINGOLD, *supra* note 2, at 161.

territory, which meant almost everyone.<sup>258</sup>

State did not feel much need to substantiate its overall policy either. As we saw, there was very little evidence that refugees were or would be spies and saboteurs, yet that did not stand in the way of denying entry on those grounds. Little more than an expression of fear during a time of great stress justified a restrictionist policy.<sup>259</sup> For many historians too, the overarching security issue seemed so genuine that they did not need to examine individual cases to assess whether security fears served as a pretext. As long as a proffered rationale fit the zeitgeist—unemployment concerns during a depression, security threats during a war—officials were given great latitude to carry out the policies with little explanation. And they did, resulting in 350,000 people being turned away from the United States, many to remain trapped in Nazi-dominated Europe. It is a story worth telling both as a matter of history and as a matter of law.

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258. LEFF, *supra* note 13, at 131.

259. This is more than an academic or semantic issue as the twenty-first century witnesses similar concerns about refugees. “Pervasive fears of threats to American security in the spring and summer of 1940 resembled the climate of opinion in the United States after the terrorist acts against the World Trade Center on September 11, 2001.” BREITMAN & LICHTMAN, *supra* note 14, at 166. There were better grounds for such fear in 2001; in 1940, the United States itself had not been attacked, and the countries that had been were attacked by the armies of the Third Reich, not Fifth Columnists. The parallel may be more appropriate to Trump-era efforts to ban travel by citizens of predominantly Muslim countries who had not attacked the United States directly. It seems that both historians and contemporary policy makers need to do a better job of thrashing out what it means to have legitimate security concerns, neither relying on hindsight judgments that there was no threat, nor cavalier conclusions that any assertion of fear, whether grounded or not, is enough to implement restrictionist policies.