CONFERENCE PANEL

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THE GOLDEN LABORATORY:
Legal Innovation in Twentieth-Century California

EDITOR'S NOTE

For the first time, the Annual Meeting of the American Society for Legal History has included a panel of scholars sponsored by the California Supreme Court Historical Society and its journal, *California Legal History*. The 2012 Annual Meeting also appears to be the first at which a panel has been devoted specifically to legal history in California. This panel was one of 35 offered at this year's conference — held at the Four Seasons Hotel in St. Louis from November 8 to 10 — at which papers were presented by scholars from 46 U.S. and 12 foreign universities.

As indicated by its title, "The Golden Laboratory: Legal Innovation in Twentieth-Century California," the panel represents the continuing dedication by the CSCHS to the theme of California's leading role in American jurisprudence.[1] This panel also represents the first occasion on which we

[1] See, for example, the panel program presented by the CSCHS at the 2006 Annual Meeting of the California State Bar, "California — Laboratory of Legal Innovation," published in the CSCHS *Newsletter,* Autumn/Winter 2006, Supplement pages 1–4, available at http://www.cschs.org/images_features/cschs_2006-autumn-winter.pdf.

have brought California-directed legal research to the attention of an international scholarly audience at a venue outside of California.

Sponsorship of this panel furthers several of our objectives: encouraging emerging legal historians to undertake new research in the field of California legal history, giving prominence to scholars who do so, and making known the results of their work, both to their colleagues in person and to a broader readership in print and online. At my invitation, Professor Reuel Schiller of UC Hastings College of the Law, a member of the journal's Editorial Board, undertook with enthusiasm the role of chairing the panel and "shepherding" the project through the process of approval and presentation. Professor Lawrence Friedman of Stanford University, also a member of the journal's Editorial Board (and a past president of the ASLH), who had generously agreed to serve as the panel's commentator, was forced by a family medical emergency to leave the conference early and return to California. The three scholars selected for the panel — Mark Brilliant, S. Deborah Kang, and Felicia Kornbluh — who have already achieved recognition in the field of legal history, were thereby given the opportunity and the impetus to develop further the California aspects of their individual areas of interest, as demonstrated by their papers on the following pages.

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FROM INTEGRATING STUDENTS TO REDISTRIBUTING DOLLARS:

The Eclipse of School Desegregation by School Finance Equalization in 1970s California

MARK BRILLIANT*

My current book project examines the relationship between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt, and the increasing concentration of income and wealth in the hands of the nation's richest one percent that pundits, policy makers, and scholars have begun to refer to as America's new Gilded Age. In my paper, I want to explore a piece of this particular constellation of interrelated developments, namely, the connection between the rise of school busing to promote school desegregation and the rise of school finance litigation and reform, which scored its first major victory in the California Supreme Court in 1971 in the case of *Serrano v. Priest*.

Criticism of the largely property tax revenue basis for funding K–12 schools is almost as old as public schools themselves. Alluding to the

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inequalities in per pupil expenditures between local school districts rooted in their differing property values, no less than Horace Mann himself denounced the notion that "mere circumstance of local residence" should shape a child's access to equality of educational opportunity.[1] Mann's concern anticipated similar reservations voiced by northern members of Congress during Reconstruction and the Gilded Age, Populists, Progressives, and New Dealers, and found expression, almost verbatim, in the California Supreme Court's *Serrano* decision, which rejected the state's school financing scheme for making "the quality of a child's education a function of the wealth of his parents and neighbors."[2]

Given this longstanding criticism, why did it take until the 1970s before school finance reform gained traction, beginning in California and then spreading across the country? The answer, I contend, can be found in the combination of two contemporaneous developments: opposition to school busing to promote desegregation and the burgeoning tax revolt over rising property taxes. The former spurred support for school finance reform whose proponents — from both the left and right — often expressed preference for the redistribution of property tax dollars over the redistribution of students through busing, while the latter prompted efforts to search for alternative sources of revenue for financing public schools.

On January 16, 1970, Daniel Patrick Moynihan delivered a soon-to-become infamous memorandum to President Richard Nixon. "The time may have come when the issue of race could benefit from a period of 'benign neglect,'" Moynihan wrote. By "race," Moynihan meant the "position of Negroes" — "*the* central domestic political issue."[3] And at the center of

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[1] Mann quoted in Robert A. Gross and John Esty, "The Spirit of Concord," *Education Week*, October 5, 1994.

[2] Goodwin Liu, "Education, Equality, and National Citizenship," *Yale Law Journal* 116:2 (2006): 331–411; Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007); David Tyack, Robert Lowe, and Elisabeth Hansot, *Public Schools in Hard Times: The Great Depression and Recent Years* (Cambridge: Harvard University Press, 1987); *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

[3] "Memorandum for the President from Daniel P. Moynihan," January 16, 1970, John D. Ehrlichman Papers, Box 30, Folder Committee for Educational Quality [2 of 2], Richard Nixon Presidential Library (hereafter, RN).

the race issue in the early 1970s was busing, which Nixon would describe in 1971 as "by far the hottest" domestic issue.[4]

California turned up the heat on the busing controversy less than a month after Moynihan's memorandum. On February 11, 1970, Los Angeles County Superior Court judge Alfred Gitelson ruled in the case of *Crawford v. Board of Education of the City of Los Angeles*. "Negro and Mexican children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be," Gitelson announced. His decision drew no distinction between "segregation not compelled by law (allegedly *de facto*)" and segregation "compelled by law (allegedly *de jure*)."[5] Moreover, in the sprawling city of Los Angeles, it required extensive busing to implement. Little wonder, then, that the *Los Angeles Times* described *Crawford* as "the most significant court decision on racial segregation outside the South."[6]

California governor Ronald Reagan was more blunt. He denounced the decision as "utterly ridiculous . . . shatter[ing] the concept of the neighborhood school as the cornerstone of our educational system."[7] Later that year, Reagan reiterated his vigorous opposition to "forced busing," insisting instead that "quality education must be provided for every child" within his or her neighborhood school.[8] Caspar Weinberger, Reagan's director of finance, had suggested how to help make this happen the year before when he called for property taxes — which he described as "one of the most regressive" — to be reduced and replaced with increased income, commercial real estate, and sales taxes. In turn, these taxes, "which are directly related to ability to pay," Weinberger maintained, would support 80 percent of public school costs.[9] Similarly, a Reagan Administration "Issue Paper"

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[4] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[5] *Crawford v. Board of Education of the City of Los Angeles*, "Minute Order of Court's Intended Findings of Fact, Conclusions of Law, Judgment, and for Preemptory Writ of Mandate," February 11, 1970.

[6] "L.A. Schools Given Integration Order," *Los Angeles Times*, February 12, 1970.

[7] "Press Release #101," February 17, 1970, Box GO 74, Folder Busing — General, 1970 (2/3), Ronald Reagan Governor's Papers, Ronald Reagan Library (hereafter, RR).

[8] Ronald Reagan, speech to the California Real Estate Association, October 5, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

[9] Caspar Weinberger, press release, July 22, 1969, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

on education called for property tax reform and greater support for "less affluent" school districts in March 1970, just one day before Reagan vowed to "take all legal steps possible to oppose mandatory student busing."[10]

Richard Nixon concurred with his fellow California Republican's busing diagnosis and school finance prescription. Indeed, if Nixon's *opposition* to school desegregation through busing, represented the "neglect" half of Moynihan's "benign neglect" advice, his *support* for school finance reform represented the "benign" half.[11] In a nationally televised address on busing delivered on March 24, 1970, Nixon blasted *Crawford* as the "most extreme" desegregation decree issued by any court to date owing to its failure to distinguish between unconstitutional de jure segregation and "undesirable" (but not unconstitutional) de facto segregation. Where de facto segregation existed, rooted in "residential housing patterns," Nixon maintained, it was better to employ "limited financial resources for the improvement of education . . . rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools."[12]

Nixon's preference was to redistribute those "limited financial resources" to improve education — to desegregate dollars, rather than desegregate students. He spelled this out just a few weeks earlier in a "Message on Education Reform" in which he denounced the absence of "equal educational opportunity in America." This absence was felt most in school districts with a "low [property] tax base," which "find it difficult or impossible to provide adequate support to their schools." Declaring school finance inequality a "national concern," Nixon called for "narrowing the gap" between "rich and poor states and rich and poor school districts."[13]

To this end, he issued Executive Order 11513, establishing "The President's Commission on School Finance," chaired by Neil McElroy, formerly secretary of defense during the Eisenhower Administration. Nixon's action

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[10] Issue Paper No. 1 (Education), March 2, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR; Draft of form letter to constituents, March 3, 1970, GO 74, Folder Busing — General, 1970 (2/3), RR.

[11] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[12] Richard Nixon, "Statement by the President on Elementary and Secondary School Desegregation," March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

[13] Richard Nixon, "Message on Education," March 3, 1970, Daniel Patrick Moynihan Papers, Box 20, Folder Commission on School Finance [1 of 7], RN.

stemmed from the advice of Robert Finch, secretary of health, education, and welfare, whose recommendation came at a time when, as Finch recollected, "busing" was "driving us nuts."[14] The Commission's tasks included considering alternatives to the property tax for financing public schools, whose regressivity Nixon and other leading members of his administration would repeatedly criticize over the course of the early 1970s.[15]

Nixon's call for school finance reform as a preferred alternative to school busing for promoting equality of educational opportunity reinforced efforts already afoot by lawyers who hailed from the opposite side of the ideological spectrum from him. On August 23, 1968, attorneys from the Western Center on Law and Poverty in Los Angeles and the San Francisco Neighborhood Legal Assistance Foundation filed the case of *Serrano v. Priest* in Los Angeles County Superior Court. The suit challenged the federal and state constitutionality of the "substantial disparities" in per pupil expenditures between school districts that stemmed from differing property values from one district to another. These disparities in per pupil expenditures were, Serrano's lawyers added, racially discriminatory. A "disproportionate number" of non-white students resided in property-poor districts, which levied higher property tax rates but generated lower property tax dollars to fund their public schools owing to their lower property value base.[16]

As *Serrano* and similar cases began to unfold, the *Washington Post* observed how "northern liberals" were embracing school finance equalization litigation as a way to "stay 'liberal' without being in favor of busing."[17] This observation was borne out by Terry Hatter, executive director of the

[14] Robert H. Finch, "View from the Lieutenant Governor's Office," Oral History Interview, Conducted 1983 by Harry P. Jeffrey, Jr., California State Fullerton Oral History Program, for the California Government History Documentation Project, the Reagan Era, 93.

[15] Executive Order 11513, March 3, 1970, Ex FG 273, Box 1, Folder President Commission on School Finance, RN.

[16] *Serrano v. Priest*, Superior Court of the County for Los Angeles, No. 938254, "Suit to Secure Equality of Educational Opportunity Under the Equal Protection Clause of United States Constitution and California Law and Constitution," August 23, 1968, Collection of Briefs, Pleadings, Memoranda, and Other Documents from Plaintiff's Attorney in *Serrano v. Priest* Case, UCLA Law Library (hereafter, *Serrano* Case Files).

[17] "School Revenue Crisis," *Washington Post*, November 28, 1971, in FI, Box 72, RN.

Western Center on Law and Poverty, which helped initiate *Serrano*. "In busing," Hatter declared, "we found a lot of emotionalism, but very little movement toward equal education." By contrast, with school finance reform, "we have a chance at equal education."[18] Hatter's colleague, Derrick Bell, criticized *Brown v. Board of Education* for its emphasis on how segregation harmed black, but not white, students. In part for this reason, Bell gravitated toward school finance equalization over desegregation, despite his earlier involvement with the NAACP in desegregation litigation.[19] Roy Innis, national director of the Congress for Racial Equality, agreed. "The best approach to providing quality education for black children," he maintained, "lies in equalizing the money spent on the education of all children" — desegregating dollars, as opposed to desegregating students. "No one ever learned anything on a bus."[20] A few years later, Detroit's Democratic and African-American mayor Coleman Young, agreed. "I shed no tears for cross-district busing," Young quipped about the United States Supreme Court's 1974 *Milliken* decision that overturned a cross-district busing plan to promote desegregation between Detroit and its suburbs. "I don't think there's any magic in putting little white kids alongside little black kids if the little white kids and little black kids over here have half a dollar for their education and the little black kids and little white kids over there are getting a dollar."[21] To these substantive reservations about busing, *Serrano* attorney Harold Horowitz added a pragmatic one in his marginal comments on one of the briefs in the case in May 1970. "Remedying inequalities from financing," Horowitz wrote, "are simpler than from racial imbalance — not the practical problems as in *Crawford*."[22]

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18 Hatter quoted in transcript of KNXT broadcast, August 31, 1971, Collection of Newspaper Articles and Radio and Television News Transcript Regarding *Serrano v. Priest*, *Serrano* Case Files.

19 Derrick A. Bell, Jr., "School Segregation: Constitutional Right or Obsolete Policy," paper presented at the Seminar on Public Policy (Center for Urban Studies, Harvard University), May 16, 1974.

20 "CORE Head Praises Michigan Property Tax Switch," *Atlanta Journal*, November 18, 1971.

21 Young quoted in James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (New York: Oxford University Press, 2001), 180.

22 Appellants' Reply Brief, May 5, 1970, Collection of Briefs, Pleadings, Memoranda, and Other Documents from Plaintiff's Attorney in *Serrano v. Priest* Case, *Serrano* Case Files.

The qualms Hatter, Bell, Innis, and Young expressed about *Brown* coincided (in part) with Richard Nixon's, who criticized what he called the "smug paternalism" and "racist overtones" implicit in the "assumption [of desegregation] that blacks or others of minority races would be improved by association with whites."[23] Similarly, the prioritization of school finance equalization litigation over desegregation through busing expressed by Hatter, Bell, Innis, Young, and Horowitz, as well as those "northern liberals," in general, to whom the *Washington Post* alluded, also echoed Nixon, Reagan, and members of their administrations.

In a meeting with Nixon in December 1971, John Ehrlichman lauded school finance reform as a way to move beyond busing and enter a "new era" in American education divorced from the "preoccupations of the past."[24] In fact, that new era had already arrived a few months earlier, and Ehrlichman praised Nixon for having anticipated it with his School Finance Commission. On August 30, 1971, the California Supreme Court issued the nation's first ruling against the constitutionality of a state's school financing system. "We have determined that [California's] funding scheme invidiously discriminates against the poor," read the nearly unanimous (6 to 1) decision in *Serrano v. Priest*. "Affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all." Such a system of school financing was unconstitutional.[25]

President Nixon applauded the *Serrano* decision. The case, he declared shortly after it had been decided, was "a shocker" but a "good thing." It would, he believed, propel efforts already under way to reform the "lousy," regressive property tax–based system of public school financing. This, in turn, would help tamp down the "property tax revolt" that was "very real," inextricably bound with the school "finance problem," and gathering momentum across the country.[26] "Taxpayer rebellion against increases in the

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[23] Richard Nixon, "Statement by the President on Elementary and Secondary School Desegregation," March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

[24] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[25] *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

[26] White House Tape Collection, September 30, 1971, Conversation 78-2, RN; Nixon quoted in Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* (Lawrence: University of Kansas Press, 2007), 206.

property tax" was growing, declared *U.S. News and World Report* in November 1971.[27] This was most evident in the record rates of rejection of local bond and tax proposals, as Senator Henry Jackson wrote Elliot Richardson, secretary of health, education and welfare, a few weeks later, which, when coupled with *Serrano*, reflected "a crisis in financing education."[28]

Lewis Engman, assistant director of Nixon's Domestic Council, and Roy Morrey, staff assistant to the council, cautioned against misconstruing the cause of the burgeoning property tax revolt. Yes, public education costs were growing at a rate that outstripped the rate of GNP growth, in general, and in cities, in particular (owing to their higher concentrations of poor and special needs students, declining tax bases, and greater tax dollar competition for other services). However, public opinion polls, Engman and Morrey maintained in a memorandum to John Ehrlichman, nevertheless indicated support for increased funding for education — just not from the "hides of property tax payers."[29]

The property tax, in other words, was the problem. It represented a relic of a time when real property was an accurate proxy for wealth and income in a way that it had ceased to be. No longer an "appropriate measure of ability to pay," Engman wrote in another memorandum to Ehrlichman, the property tax had grown "extremely unpopular," in part owing to its "highly inequitable," regressive nature. Among the "wide range" of corroborating evidence, Engman cited a 1967 study that demonstrated how property owners who earned less than $2,000 per year paid 6.9 percent of their income in property taxes, while property owners who earned more than $15,000 annually paid only 2.4 percent. Compounding the property tax's regressivity problem was its rise, from 2.7 percent of per capita income in 1960 to 4 percent of per capita income in 1970. California property taxes had gone up at an even greater clip than the rest of the country's,

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[27] "Financial Crisis for Public Schools," *U.S. News and World Report*, November 8, 1971, 48–50.

[28] Sen. Henry Jackson to Elliott Richardson, December 1, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [2 of 2], RN. For a similar claim made about California specifically, see, Assemblyman Alan Sieroty, et al., to Reagan, April 30, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

[29] Lewis Engman and Roy Morrey to John Ehrlichman, "A Possible School Finance Initiative," October 20, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [1 of 2], RN.

fully one-third greater.[30] Engman's memorandum was internal. Other Nixon administration officials, however, blasted the property tax's regressivity publicly.[31]

Serrano thus not only brought the "school finance" problem into "particular focus," as Engman and Morrey observed, and offered a "liberal" alternative to desegregation through busing, but it also presented the opportunity for the Nixon administration to respond to the tax revolt and reap the electoral reward of that response. For that reason, Engman wrote Ehrlichman in December 1971, Nixon needed to push for property tax reform before "the Democrats pre-empt the issue. . . . It is a good issue for the man in the street, but we will lose credibility unless we propose legislation early."[32]

Serrano, combined with the escalating property tax revolt, was thus prompting searches for alternative sources of school funding that may "radically restructure the very foundations of public education," wrote the *U.S. News and World Report*.[33] In fact, one of those searches was already under way in the White House. Indeed, even before the California Supreme Court ruled in *Serrano*, White House aide Gerald Miller wrote Lewis Engman about the "major concern" brewing over school finance and the "concomitant problem" of property taxation. Property taxes not only fell particularly hard on "low income persons," but they were an "inadequate vehicle" for financing education.[34]

To fix this, Engman and Morey proposed a school finance initiative for the administration to pursue: a federal Value Added Tax (VAT) that would serve as a more "equitable" substitute for reduced, local property taxes.

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30 Lewis Engman to John Ehrlichman, December 1, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [2 of 2], RN.

31 See, e.g., Secretary of Education Sidney Marland in "New Education Funding Urged," *Atlanta Constitution*, October 13, 1971 and Elliott Richardson in "Financial Crisis for Public Schools," *U.S. News and World Report*, November 8, 1971, 48–50.

32 Lewis Engman to John Ehrlichman, December 1, 1971, Lewis Engman Papers, Box 4, Folder Taxation, School Finance, Property Taxes, RN; Reagan, too, drew a link between *Serrano* and tax reform, calling the latter a step in the direction of meeting the requirements spelled out in the former, Transcript, press conference, September 7, 1971, Box P3, Folder Press Conference Transcripts 7/7/71 through 10/20/71, RR.

33 "Financial Crisis for Public Schools," *U.S. News and World Report*, November 8, 1971, 48–50.

34 Gerald Miller to Lewis Engman, August 13, 1971, Lewis Engman Papers, Box 4, Folder Taxation, School Finance, Property Taxes, RN.

Despite his initial skepticism — as he put it, "property tax relief is a helluv'an issue. It's terribly boring" — Nixon quickly warmed to the idea, especially as he realized how it offered an end-run around busing. Meeting with Nixon and Ehrlichman in December 1971, Moynihan responded to Nixon's comment that busing was the "hottest" domestic issue by suggesting that it "could unravel the last twenty years in race relations." He then praised Nixon, through his Department of Justice, for having made great strides in desegregating public schools in the South — for having "finally delivered on *Brown*." However, he added, with attention shifting to the North, whose schools lacked the South's history of de jure segregation, Nixon should stake out a different approach to equality of opportunity. Ehrlichman suggested school finance reform, linking it to *Serrano* as an alternative to busing to resolve "inequality in educational opportunity." Nixon agreed. Here was an "idealistic" issue that could "assume historic proportions," he replied: "stop forcing people together" and instead ensure that all students have an "equal shot where there is no inferior education." A federal initiative to relieve the property tax burden was essential, as Nixon put it in his inimitable way, "so that we can finance the little bastard kids."[35]

Over the course of the next month, Nixon promoted his property tax relief / school finance reform initiative. Meeting with the Commission on School Finance he had created in 1970, he suggested a VAT as a possible source of "massive federal assistance" and alternative to escalating property taxes.[36] One week later, in his January 20, 1972 State of the Union address, he railed against "soaring" property taxes as "one of the most oppressive and discriminatory of all taxes." They were also, according to a handful of recent court rulings, a "discriminatory and unconstitutional" basis for funding schools. In response, Nixon vowed to make "revolutionary" recommendations to "relieve the burden of property taxes and provid[e] both fair and adequate financing for our children's education."[37]

Though Nixon did not mention a federal VAT in his State of the Union speech, he did mention it in the charge he issued to the bipartisan Advisory Commission on Intergovernmental Relations (ACIR) that same day.

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[35] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[36] White House Tape Collection, January 13, 1972, Conversation 647-10, RN.

[37] Richard Nixon, State of the Union Address, January 20, 1972, http://stateoftheunion.onetwothree.net/texts/19720120.html (last accessed Nov. 26, 2012).

Calling school finance reform "one of the greatest challenges this Nation faces today," Nixon asked the ACIR to consider whether a federal VAT would serve as the "best substitute" for local property taxes and, if so, to suggest ways to "eliminate otherwise regressive aspects" of it.[38] Income tax credits, Engman wrote on behalf of the Nixon Administration, represented one such way.[39] *Washington Post* columnist Stewart Alsop praised Nixon's efforts, describing Nixon's proposed federal VAT as the "most surprising, most interesting and most generally gutsy of President Nixon's bombshells for the election year."[40]

In fact, this bombshell never detonated. As 1972 drew to a close, the ACIR rejected Nixon's suggestion for a federal substitute source of revenue for local property taxes. Though "deeply conscious" of the "discriminatory aspects" of the property tax basis for funding public schools, the cases challenging this approach to public school finance, and the "growing aversion" to increasing property taxes to meet the rising costs of public education, ACIR chair, Robert Merriam, wrote Nixon in December 1972, his Commission did not believe a "massive Federal [VAT] program" was "necessary" or "desirable." Instead, the ACIR insisted that state governments should assume a greater share of the burden of financing public schools from local governments. This would, in turn, "greatly facilitate property tax relief."[41]

With that, Nixon's push for a federal government–led initiative for a "complete overhaul of our property taxes and our whole system for financing public education" ground to a halt. Nixon's 1972 State of the Union address promise to find a federal government solution to the "school finance crisis that [also] provided property tax relief" was now "highly unlikely" to be fulfilled, wrote Engman.[42] Nor, as it soon turned out, would it be fulfilled by another arm of the federal government: the United States Supreme Court. On March 21, 1973, in the case of *San Antonio v. Rodriguez*, the

38 Richard Nixon to Robert Merriam, January 20, 1972, Ex FG 273, Box 1, Folder President's Commission on School Finance 11/1/71 [1 of 2], RN.

39 Lewis Engman to Louis Petro, February 18, 1972, Lewis Engman Papers, Box 4, Folder Taxation, School Finance Correspondence [2 of 2], RN.

40 Stuart Alsop, "Nixon's Tax Bombshell," *Washington Post*, December 10, 1971.

41 Robert Merriam to Richard Nixon, December 14, 1972, Lewis Engman, Box 3, Folder Taxation, School Finance, ACIR, RN.

42 Lewis Engman to David Parker, December 12, 1972, Lewis Engman Papers, Box 4, Folder School Finance, President's Message.

Court refused to apply the logic of *Serrano* to the *federal* constitutionality of inequitable school funding between property-rich and property-poor districts within states.[43]

With the federal government and Constitution now effectively removed from the scene, the locus of school finance equalization reform shifted to state courts and state legislative houses based on state constitutional educational provisions. (Since then, some 45 states have faced state constitution–based legal challenges to their heavily property tax–based school financing systems.[44]) As school finance litigation and legislation waxed — at least at the state level — school desegregation waned over the course of the 1970s.

Whereas state-based cases challenging school finance inequality accelerated after *Rodriguez* foreclosed a federal challenge, nothing analogous at the state level involving desegregation emerged in the aftermath of the Supreme Court's 1974 *Milliken* decision, which found no federal constitutional support for cross-district busing to promote desegregation. Legal scholar James Ryan attributes this difference to the "perceived practical and political difficulties with desegregation — difficulties that must not have seemed as formidable with regard to school finance reform."[45] Put another way, school finance reform was, as Ryan puts it, "an easier pill to swallow" than school desegregation through busing. Ryan's explanation echoes what proponents of school finance reform had to say in its defense over school desegregation through busing, which, in turn, helps explain how and why the former eclipsed the latter as *the* educational civil rights issue beginning in the 1970s.

On the heels of *Serrano*, California governor Ronald Reagan identified school financing and property tax relief as the state's "most urgent" issues. He exhorted the state legislature to "eliminate the chronic crisis in public school financing by shifting the burden from the homeowner to a broader

43 *San Antonio v. Rodriguez*, No. 71-1332, 411 U.S. 1, March 21, 1973.

44 Rebell, 2.

45 James E. Ryan, "*Sheff*, Segregation, and School Finance Litigation," *New York University Law Review* 74 (May 1999): 566.

based tax." If the Legislature failed to act, he warned, the "people may act themselves through the initiative process."[46]

Reagan was wrong. The California Legislature did respond to *Serrano*, but that did *not* stop Californians from taking the initiative with the initiative process. Assembly Bill 65, signed by Reagan's successor, Jerry Brown, in 1977, increased the money that property-poor school districts spent on students, in part, by transferring some of the property tax dollars generated in property-rich districts. The following year, on June 6, 1978, nearly two-thirds of Californians cast ballots in favor of Proposition 13, which drastically cut and capped property tax rates, property assessments, and by extension, property tax dollars collected. It also triggered the nationwide tax revolt, as states across the country adopted tax limitation measures, and ushered in the anti-tax, anti-government ethos that would become synonymous with the Reagan revolution in American politics.

These developments — school finance equalization and property tax reduction — were not simply contemporaneous, but rather connected, at least according to some observers. As veteran California journalist Peter Schrag has noted, by compelling a redistribution of property tax revenues from property-rich to property-poor districts, *Serrano* "undermined one powerful reason to vote against" Proposition 13, namely, the adverse impact that a loss of local property tax dollars would have on the caliber and control of local schools. For this reason, Schrag concludes, *Serrano* "appears to have been a significant factor" in Proposition 13's passage.[47]

Though the causal relationship between *Serrano* and Proposition 13 is the subject of some debate — and even more uncertain is just who exactly benefited from *Serrano* and its progeny (i.e., to what extent did poor and minority students reside in property-poor districts, as so many proponents of school finance equalization litigation presumed) — the impact of *Serrano* and Proposition 13 on California is less debatable.[48] *Serrano*

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46 Reagan quoted in Lou Cannon, *Governor Reagan: His Rise to Power* (New York: Public Affairs, 2003), 363.

47 Peter Schrag, *Paradise Lost: California's Experience, America's Future* (Berkeley: University of California Press, 1999), 148. For a contrary view, see Isaac William Martin, *The Permanent Tax Revolt: How the Property Tax Transformed American Politics* (Stanford: Stanford University Press, 2008).

48 Jon Sonstelie, Eric Brunner, and Kenneth Ardon, *For Better or For Worse? School Finance Reform in California* (Public Policy Institute of California, 2000): "Although

ultimately led to legislation that equalized (more or less) public funding of K–12 public education by redistributing property tax dollars across the state from property-rich to property-poor districts. Proposition 13, however, limited the amount of property tax dollars that could be collected. Before Proposition 13, California ranked in the top ten states in per pupil expenditures in public schools. By the mid-1990s, California ranked in the bottom ten, where it remained over a decade later.[49] Though California's schools were more equally financed across districts thanks to *Serrano*, they were much less generously financed than they had been relative to other states. In short, the combination of Proposition 13 and *Serrano* saw California public school financing leveled down.

Beyond California, as school finance litigation proliferated after *Serrano* and the tax revolt spread after Proposition 13, America's public schools, while more equally financed, became less generously financed relative to the burdens they had to bear, in particular, a massive post-1965 immigration and a steady shift of new jobs from heavy industry and manufacturing toward technology and finance. Between 1949 and 1970, expenditures on elementary and secondary schools as a percent of GDP doubled from 2.3 to 4.6. In the forty years since then, this percentage has flattened or declined on an annual basis, fluctuating between 3.8 and 4.7.[50]

In the post-*Serrano*, post–Proposition 13 era, California has gone from having among the highest college-going rates in the United States in 1970 to being ranked second to last among states in the percentage of high school seniors who enroll in four-year colleges in the early twenty-first century.[51]

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many low-income and minority families lived in low spending school districts, just as many lived in high-spending ones. As a result reductions in revenue inequalities across districts did not help disadvantaged students as a whole." As for Proposition 13's impact, "By limiting property taxes, Proposition 13 eventually led to per pupil spending reductions" (3).

49 Peter Schrag, "Proposition 13 Turns 30: Compounding California's Mess Something Awful," *California Progress Report*, June 4, 2008.

50 http://nces.ed.gov/programs/digest/d11/tables/dt11_028.asp (last accessed Nov. 26, 2012).

51 John Aubrey Douglas, "Treading Water: What Happened to America's Higher Education Advantage," in *Globalization's Muse: Universities and Higher Education Systems in a Changing World* (Berkeley: Berkeley Public Policy Press, 2009), 168; "California at a Crossroads: Confronting the Looming Threat to Achievement, Access and Equity at the University of California and Beyond," (Chief Justice Earl Warren Institute on Race,

Moreover, as its college-going rates have plunged relative to other states, California's income inequality has spiked at rates that outstrip the national rate of growth in income inequality. In 1970, California's income inequality was comparable to the national average. Nearly forty years later, it was greater than all but five states.[52] For economic historian Claudia Goldin and Lawrence Katz, the declining growth rate in educational attaintment nationwide since the late 1970s is a "major contributor" to increasing inequality in family income.[53] To what extent does this hold true for California? And, if so, to what extent does it stem from the connections I have suggested here between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt? These are some of the questions that the book, which this paper is an early step toward, will seek to answer.

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Ethnicity and Diversity, October 27, 2006), http://berkeley.edu/news/berkeleyan/2006/11/images/Brown_Edley.pdf (last accessed Nov. 26, 2012).

[52] Steven A. Camarota and Karen Jensenius, "A State Transformed: Immigration and the New California"(Washington, D.C.: Center for Immigration Studies, June 2010), http://www.cis.org/california-education (last accessed Nov. 26, 2012).

[53] Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology* (Cambridge: The Belknap Press of Harvard University Press, 2008), 325.

IMPLEMENTATION:

How the Borderlands Redefined Federal Immigration Law and Policy in California, Arizona, and Texas, 1917–1924

S. DEBORAH KANG*

> *Implementation is worth studying precisely because it is a struggle over the realizing of ideas. It is the analytical equivalent of original sin; there is no escape from implementation and its attendant responsibilities. What has policy wrought? Having tasted of the fruit of the tree of knowledge, the implementer can only answer, and with conviction, it depends . . . .*
>
> — Jeffrey L. Pressman and Aaron Wildavsky[1]

In their classic study, *Implementation: How Great Expectations in Washington are Dashed in Oakland*, political scientists Jeffrey L. Pressman

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[1] Jeffrey L. Pressman and Aaron Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland; or, Why It's Amazing that Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told By Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes,* 3rd ed. (Berkeley: University of California Press, 1984), 180.

and Aaron Wildavsky stress that we cannot understand public policies without examining their implementation. Pressman and Wildavsky's own focused exploration of one federal agency — the Oakland office of the Economic Development Administration (EDA) — not only reveals the weaknesses of the policy-making process (as suggested by the subtitle of the book, "Why It's Amazing that Federal Programs Work at All") — but also provides important insights into policy formation itself. Implementation, its failures, successes, and everything in-between, informs the shaping and reshaping of public policy; as Pressman and Wildavsky observe, implementation "reformulate[s] as well as [carries] out policy."[2]

While Pressman and Wildavsky focus specifically on EDA implementation of public works and small business projects during the 1960s, their findings provide a powerful analytical framework for understanding implementation in a variety of policy arenas. Since the late nineteenth century, American immigration policy, I will argue, was very much a product of its implementation by the Bureau of Immigration on the U.S.–Mexico border. This article will focus on the policy innovations that developed as a result of the Bureau's efforts to enforce the Immigration Act of 1917 and the Passport Act of 1918 on the nation's southern boundary. As southwestern immigration officials began administering these new laws, their efforts were hampered by a lack of money, manpower, and materiel as well as enormous opposition from border residents (whether Asian, European, Mexican, or American) who were accustomed to crossing the international boundary without restriction.[3]

In response to these enforcement challenges, southwestern immigration officials often waived the rules or created new ones that made their lives and the lives of border residents much easier. The most prominent of these was the wartime labor importation program, initiated to overcome the objections of southwestern industries to the restrictive provisions of the Immigration Act of 1917 and the Passport Act of 1918.[4] In addition, the agency

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[2] Ibid., 180.

[3] George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, November 28, 1917, file 54152/1E, RG 85, National Archives. See also Dr. Cleofas Calleros, interview by Oscar J. Martínez, September 14, 1952, interview 157, transcript, Institute of Oral History, University of Texas at El Paso.

[4] Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900–1940* (Westport: Greenwood Press, 1976).

modified the new regulations for ordinary border residents as well as the rich and powerful. When thousands of locals complained about the literacy test provisions of the Immigration Act of 1917, the Bureau created what I will refer to as "border waivers" for illiterate Mexican nationals who lived on both sides of the border. As the administrators of the Passport Act of 1918, southwestern immigration officials devised additional exemptions, specifically a border crossing card program for local residents. Although the border crossing card primarily assisted Mexican nationals and Mexican Americans, it also benefited Americans and Europeans, as well as Asian, Asian-American, and Asian-Mexican merchants. Together, these policy innovations — to the chagrin of anti-immigration advocates — sustained the transnational character of the borderlands.

All of this is not to deny the Bureau's vigorous efforts to bar Mexican, Asian, and European nationals from admission for permanent residence or to expel unwanted illegal immigrants in this period. Instead, this study demonstrates that, during World War I and well into the 1920s, the Bureau was concerned not only with the restriction of immigrants but also with the regulation of the local border population. While immigration historians have provided extensive accounts of those migrants seeking entry for permanent residence (formally referred to as "immigrants" by the Bureau of Immigration), this paper shifts the focus of attention from immigrants to border crossers (categorized as "non-immigrants"). This population typically included laborers, tourists, local residents, dignitaries, and businessmen who crossed and re-crossed the border on a regular basis for short periods of time. In a stunning departure from the exclusionary intent underlying the Immigration Act of 1917 and the Passport Act of 1918, Bureau of Immigration officials effectively nullified provisions of these laws in order to craft a series of border crossing policies for these border residents and businesses.

This examination of the Bureau's policy innovations challenges a major scholarly and popular conception that the normative function of the nation's immigration policy (and, in turn, the Bureau of Immigration) was to maintain the dividing lines between desirable and undesirable peoples, legal and illegal immigrants, and Americans and non-Americans. Proceeding from this notion, scholars have produced two competing interpretations of the agency's history. On the one hand, some scholars emphasize the

ways in which the Bureau of Immigration and the Border Patrol, during the Progressive Era, succeeded in implementing the nation's restrictive immigration laws, thereby closing the nation's borders to the entry of unwanted immigrants.[5] On the other hand, some studies highlight the contingencies and weaknesses of border enforcement. In his recent study of the Bureau of Immigration, Patrick Ettinger argues that Asian and European immigrants routinely evaded the immigration laws and confounded the Bureau's enforcement efforts between 1891 and 1930.[6] While both sets of scholars have enriched our understanding of the Bureau of Immigration, they describe immigration law enforcement in bipolar terms — as "strong" or "weak," or as "hard" or "contingent." In so doing, they neglect to consider whether the Bureau's operations might be described in more complex and dynamic terms. On this latter point, Pressman and Wildavsky's study is significant because it demonstrates that agencies don't simply succeed or fail; instead, agencies, as I will argue, create new ideas, new policies, and new laws.

This study further departs from the current literature by demonstrating how local, transnational, and even global concerns frequently overrode national imperatives in shaping immigration laws and policies for the borderlands. Thus, whereas current accounts of immigration policy history assume an alignment between Bureau officials in the Southwest, their supervisors in Washington, D.C., and nativist forces in Congress,[7] this essay reveals the conflicts between local and federal agency officials, and the competing demands faced by immigration inspectors in the borderlands. More specifically, this article focuses on agency officials stationed in California, Arizona, and Texas — a region long distinguished by its cultural diversity, transnational infrastructure, global trading partners, world-

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[5] See for example, Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); Kelly Lytle-Hernandez, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010).

[6] Patrick Ettinger, *Imaginary Lines: Border Enforcement and the Origins of Undocumented Immigration, 1882–1930* (Austin: University of Texas Press, 2010). See also, Daniel Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002); Keith Fitzgerald, *The Face of the Nation: Immigration, the State, and the National Identity* (Stanford: Stanford University Press, 1996).

[7] See for example, Ngai, *Impossible Subjects;* Lytle-Hernandez, *Migra!;* and Ettinger, *Imaginary Lines.*

renowned tourist industries, and multinational labor force — who recognized the dissonance between the neat dividing lines delineated by the federal immigration laws and the global realities on the ground. Despite their own attempts to defend the nation-building enterprise of immigration restrictionists, southwestern agency officials quickly realized that they were unevenly matched against the sheer volume of migrants who sought to cross the line each day and the global economic and social forces that brought them to the nation's borders in the first place.[8] In this context, the agency constructed an immigration policy for the borderlands, a policy that departed from the restrictionist tenets of the federal immigration and passport laws but met the needs of border residents.

The first part of this article offers a snapshot of the U.S.–Mexico borderlands. It describes the major demographic, economic, and social trends that created an intricate network of transnational relationships along the U.S.–Mexico border from approximately 1900 until 1920. Yet, as the second section argues, the creation of these very links became a cause for concern among federal, state, and local officials during World War I. Due to wartime xenophobia and fears about an enemy invasion through Mexico, Congress and the Bureau of Immigration adopted a more restrictive approach to border control. Through the passage of the Immigration Act of 1917 and the Passport Act of 1918, the Bureau of Immigration sought to bar the entry of unwanted immigrants and enemy aliens. The passage of legislation in Congress, however, did not guarantee its seamless or effective implementation on the ground. As the final sections reveal, the realities of the borderlands — the thousands of migrants seeking to cross and recross the border each day, the ceaseless demand for migrant labor, and the constant protests of border residents — eroded the restrictive intent underlying Progressive Era immigration legislation. As a result, Bureau of Immigration officials in the Southwest exercised their administrative discretion, waived provisions of the Immigration Act of 1917 and the Passport Act of 1918, and fashioned policies that opened the line to the border crossers.

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[8] For an account of the nativist attitudes of early Bureau of Immigration officials see, Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003), 47–74.

Until World War I, the economic and social needs of the borderlands, rather than immigration regulations, served as the forces driving migration between Mexico and the United States. As historian Mario T. García explains, Mexican immigration was "inextricably linked with the growth of American industrial capitalism."[9] The primary southwestern industries — railroads, mining, ranching, and agriculture — met their labor needs with migrant workers.[10] As these industries triggered the growth of border towns, immigrants, once again, met the burgeoning demand for workers in both the primary (the rail, mining, and ranching industries) and secondary economic sectors (including manufacturing, wholesale and retail trade, and construction).[11] Given the proximity of Mexico, the passage of the Chinese Exclusion Acts (which barred the entry of Chinese laborers in the late nineteenth century), and political upheavals in early twentieth-century Mexico (including the redistributive land policies of the Díaz regime and the Mexican Revolution), Mexican nationals constituted the bulk of the immigrant work force.[12]

Recognizing the importance of immigration to the border economy, federal officials took a highly uneven approach to border enforcement at

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[9] Mario T. García, *Desert Immigrants: The Mexicans of El Paso, 1880–1920* (New Haven: Yale University Press, 1981), 1.

[10] Ibid., 3.

[11] Ibid.

[12] The Chinese Exclusion Act of 1882 suspended the immigration of Chinese laborers for ten years. An 1884 amendment required all Chinese non-laborers to present certificates from the Chinese government and endorsed by the American consul in order to re-enter the country. The Scott Act of 1888 prohibited the return of a laborer once he had left the United States. The Geary Act of 1892 extended the original exclusion act for another ten years; required Chinese immigrants to apply for a certificate of residence; and created the first internal passport system. Finally, the 1904 amendment to the Chinese Exclusion Act permanently barred the admission of Chinese laborers. See Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); John Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52:2 (May, 1983): 191–211; Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1971). On the turn to Mexican immigrant labor after the passage of the Chinese Exclusion Acts, see García, *Desert Immigrants,* 2, 33.

the turn of the last century.[13] While immigration inspectors were vigilant in the application of the Chinese exclusion laws, they simultaneously adopted a *laissez-faire* stance toward Mexican migration across the line.[14] Indeed, at the urging of corporations such as the Southern Pacific Railroad, Congress exempted Mexican immigrants from the head taxes stipulated under the Immigration Acts of 1903 and 1907.[15] While southwestern officials possessed other statutory means to restrict Mexican immigration, they chose not to exercise this authority on a regular basis.[16] Instead, they allowed most Mexican immigrants to cross the international line without inspection.[17] Some immigration officials, according to historian George Sánchez, even recruited migrant workers for southwestern industries in exchange for bribes.[18] As a result of its lax approach to immigration law enforcement, the Bureau of Immigration itself sustained the transnational character of the borderlands.

The porousness of the border not only facilitated the migration of Mexicans north to the United States; it also allowed them to return home or engage in an ongoing pattern of circular migration. Indeed, while many of the 1.5 million Mexican nationals who entered the United States

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13 Ettinger, *Imaginary Lines,* 123–144.

14 Prior to 1917, the Bureau of Immigration focused its enforcement efforts on the Chinese. For an account of the agency's operations on the U.S.–Mexico border in the early twentieth century, see Smith, "Early Immigrant Inspection along the U.S.–Mexican Border," 2; Ettinger, *Imaginary Lines.* But see Grace Peña Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford: Stanford University Press, 2012), 82–84, for a discussion of the contingencies in the enforcement of the Chinese exclusion laws.

15 The Immigration Acts of 1903 and 1907 respectively charged a head tax of $2.00 and $4.00. Lawrence A. Cardoso, *Mexican Emigration to the United States, 1897–1931: Socio-economic Patterns* (Tucson: University of Arizona Press, 1980), 34; David E. Lorey, *The U.S.–Mexican Border in the Twentieth Century: A History of Economic and Social Transformation* (Wilmington: SR Books, 1999), 69–71.

16 Cardoso, *Mexican Emigration to the United States*, 34.

17 Benjamin Heber Johnson, *Revolution in Texas: How a Forgotten Rebellion and Its Bloody Supression Turned Mexicans into Americans* (New Haven: Yale University Press), 72.

18 George J. Sánchez, *Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945* (New York: Oxford University Press, 1995), 51–53. See also, Mario Barrera, *Race and Class in the Southwest: A Theory of Racial Inequality* (Notre Dame: University of Notre Dame Press, 1979), 71–72.

between 1910 and 1920[19] settled permanently,[20] demographers and historians agree that hundreds of thousands more entered on a temporary basis, crossing and re-crossing the border as laborers, merchants, or casual visitors. This category of migrants, referred to by the Bureau of Immigration as non-immigrants or non-statistical entrants, outnumbered immigrants (or those entering for permanent residence) by a factor of three to one.[21] These massive demographic shifts attested to the openness of the border in this period and, more broadly, played a pivotal role in the formation of transnational communities all along the international line.

While Mexican nationals constituted the largest group of migrants crossing and re-crossing the border each day, Anglo-Americans, Asian Americans, Europeans, Japanese and Chinese nationals, and Japanese and Chinese Mexicans, among others, also took advantage of the border's permeability. In the late nineteenth century, many of these migrants traveled back and forth across the border to work for the mining, rail, and agriculture industries that had developed, sometimes in tandem, on both sides of the line.[22] Given the racial segmentation of the workforce, these industries

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[19] This massive migration was one of the most important events on the U.S.–Mexico border in the early twentieth century. Linda B. Hall and Don M. Coerver, *Revolution on the Border: The United States and Mexico, 1910–1920* (Albuquerque: University of New Mexico Press, 1988), 126. Lorey estimates that, between 1910 and 1930, "almost 10 percent of Mexico's population migrated north to the United States." Lorey, *The U.S.–Mexico Border,* 69. On the causes of the migration, see García, *Desert Immigrants,* 33; Rodolfo Acuña, *Occupied America: A History of Chicanos* (New York: Harper and Row, 1988), 145; Barrera, *Race and Class in the Southwest,* 68–69.

[20] This settlement resulted in a dramatic increase in the Mexican-born population from 110,393 in 1900 to 700,541 in 1920. Cardoso, *Mexican Emigration to the United States,* 35. García, *Desert Immigrants,* 35.

[21] Indeed, Hall and Coerver assert that those entering for permanent residence "formed by far the smallest category of migrants." Hall and Coerver, *Revolution on the Border,*130. See also García, *Desert Immigrants,* 35. Lorey estimates that, from 1910 to 1920, 206,000 Mexican nationals entered as legal immigrants while 628,000 arrived as temporary workers. Lorey, *The U.S.–Mexico Border,* 70.

[22] Along the Arizona–Sonora border, for example, the major industries — mining, ranching, and agriculture — grew in tandem. American capital funded the construction of mining facilities on both sides of the line; irrigation projects in Mexico that supported farms in the United States; and ranching ventures that participated in transnational grazing arrangements. In Tijuana, American entrepreneurs and Mexican politicians worked together to develop the town's entertainment industry, constructing gambling halls, race tracks, theaters and spas. Hall and Coerver, *Revolution on the Border,* 29, 41;

sought Anglo-American workers to fill skilled and managerial posts north and south of the border.[23] And while Mexican nationals composed the bulk of the industrial workforce north of the border, European, Chinese, and Japanese laborers supplemented the pool of unskilled workers in the United States and Mexico.[24]

As Asian, European, and Mexican nationals settled in border communities, they often lived transnational lives. Mexican nationals regularly crossed the line to shop for subsistence items in the United States; indeed, these crossings were an absolute necessity, as one State Department official observed: "If they [Mexicans] are refused entry into the United States the Mexican population along the border would starve and the greater number of the shop keepers on the American side would be bankrupted."[25] At the same time, Mexican immigrants and Mexican Americans in El Paso

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Rachel St. John, *Line in the Sand: A History of the Western U.S.–Mexico Border* (Princeton: Princeton University Press, 2011), 148–173; Samuel Truett, "Transnational Warrior: Emilio Kosterlitzky and the Transformation of the U.S.–Mexico Borderlands," in Samuel Truett and Elliott Young, eds., *Continental Crossroads: Remapping U.S.–Mexico Borderlands History* (Durham: Duke University Press, 2004), 249; Paul J. Vanderwood, *Juan Soldado: Rapist, Murderer, Martyr, Saint* (Durham: Duke University Press, 2004), 83, 87; Paul J. Vanderwood, *Satan's Playground: Mobsters and Movie Stars at America's Greatest Gaming Resort* (Durham: Duke University Press, 2010).

23 Hall and Coerver, *Revolution on the Border,* 93–101; García, *Desert Immigrants,* 5; Thomas E. Sheridan, *Los Tucsonenses: The Mexican Community in Tucson, 1854–1941* (Tucson: University of Arizona Press, 1986), 6.

24 For more information about Chinese and Japanese border crossers and border residents, see the following: Donald H. Estes, "Before the War: The Japanese in San Diego," *Journal of San Diego History* 24:4 (1978): 425–455; Katherine Benton-Cohen, *Borderline Americans: Racial Division and Labor War in the Arizona Borderlands* (Cambridge: Harvard University Press, 2009); Robert Chao Romero, *The Chinese in Mexico, 1882–1940* (Tucson: University of Arizona Press, 2010); Julia Maria Shiavone Camacho, *Chinese Mexicans: Transpacific Migration and the Search for a Homeland, 1910-1960* (Chapel Hill: University of North Carolina Press, 2012); Delgado, *Making the Chinese Mexican;* Eric Walz, "The Issei Community in Maricopa County: Development and Persistence in the Valley of the Sun, 1900–1940," *The Journal of Arizona History* 38 (1997): 1–22; Lawrence Michael Fong, "Sojourners and Settlers: The Chinese Experience in Arizona," *The Journal of Arizona History* 21 (1980): 1–30; Evelyn Du-Hart, "Immigrants to a Developing Society: The Chinese in Northern Mexico, 1874–1932," *The Journal of Arizona History* 21 (1980): 49–86.

25 Ralph J. Totten, Consul General at Large, El Paso, Texas, "Report on Conditions on the Mexican Border," January 20, 1918, file 54152/1I, RG 85, National Archives,15; see also, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918,* 317–319.

retained their ties to Mexico thanks to Spanish-language newspapers that provided news coverage about Mexican politics and advertisements from Mexican business establishments.[26]

As Chinese and Japanese migrants established their own businesses (including laundries, restaurants, grocery stores, pool halls, barber shops, boarding houses, farms, and ranches, among others) on both sides of the border, regular border crossings became essential to the success of their enterprises.[27] Merchants in Mexico, for example, sought to replenish inventories through large purchases north of the line.[28] Meanwhile, Chinese business owners, in an effort to evade the American prohibition against the admission of Chinese laborers, frequently transported their Chinese employees north from Mexico. Finally, the very financing of many border businesses was dependent upon the pooling of resources between relatives and friends in the United States, Canada, Mexico, and Asia.[29] Perhaps most important for the purposes of this essay, the social status of Chinese and Japanese merchants widened the possibilities for their physical mobility across the nation's borders. While the Chinese

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[26] Romo notes that over forty Spanish-language newspapers were published in El Paso between 1890 and 1924. David Dorado Romo, *Ringside Seat to a Revolution: An Underground Cultural History of El Paso and Juárez* (El Paso; Cinco Puntos Press, 2005), 18–20.

[27] For an account of these mercantile establishments see, Romo, *Ringside Seat to a Revolution,* 198–200. See also, Delgado, *Making the Chinese Mexican;* Walz, "The Issei Community in Maricopa County"; Fong, "Sojourners and Settlers"; Du-Hart, "Immigrants to a Developing Society"; Delgado, "In the Age of Exclusion"; Estes, "Before the War; Romero, *The Chinese in Mexico.* For an account of Japanese-owned farms in the outskirts of El Paso and San Diego County, see Estes, "Before the War"; Romo, *Ringside Seat to a Revolution,* 201–202. See also Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1917,* 230; and Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919,* 408 (explaining that in Southern California, American-born children of Japanese nationals typically held title to the land as a result of California's alien land laws.) On Chinese businesses established in Mexico, see Camacho, *Chinese Mexicans,* 23–25; A. E. Burnett, Inspector in Charge, to Supervising Inspector, El Paso, April 8, 1920, file 54820/455, RG 85, National Archives.

[28] On the history of Chinese immigrants in Mexico, see Romero, *The Chinese in Mexico;* Delgado, *Making the Chinese Mexican;* and Camacho, *Chinese Mexicans.*

[29] Romero, *The Chinese in Mexico,* 30–65, 97–145. On Anglo, Chinese, and Mexican economic and social relations in the Arizona–Sonora borderlands see, Delgado, *Making the Chinese Mexican,* 41–72.

exclusion acts and the Gentlemen's Agreement of 1907 barred the entry of Chinese and Japanese laborers, both laws contained exceptions for the entry of merchants.[30]

Leisure, as well as labor, led primarily Americans and Mexicans to cross and re-cross the border each day. The entertainment industry drew Americans south of the line, particularly with the start of Prohibition in 1920; as historian David Romo writes of the port of entry at El Paso:

> It was no longer arms smugglers, spies, soldiers of fortune, journalists and revolutionaries crossing the lines. Suddenly the ludic zone across the border became packed with American tourists. Between 1918 and 1919, about 14,000 tourists crossed the border into Mexico; a year later the official U.S. Customs tally was 418,700.[31]

While Ciudad Juárez drew thousands of casual visitors, Tijuana surpassed all other border towns, north or south of the line, as a tourist attraction.[32] Indeed, given the volume of traffic flowing from north to south, Tijuana identified itself less with Mexico than with California.[33] Seeking to take advantage of the tourist trade in Tijuana, Americans, Mexicans, Armenians, Syrians, Japanese, Spaniards, Italians, and Chinese all launched

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30 Merchants were exempted from the exclusionary provisions applied to Japanese (the Gentleman's Agreement of 1907) and Chinese (the Chinese Exclusion Act of 1882) immigrants. The McCreary Amendment of 1893, however, placed strict evidentiary requirements upon Chinese merchants re-entering the United States. On Japanese exclusion, see Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley: University of California Press, 1962). On Chinese exclusion and the McCreary Amendment, see Salyer, *Laws Harsh as Tigers*. Delgado notes that Chinese Mexican merchants could use their citizenship status as well as their merchant status to gain entry into the United States. See Delgado, *Making the Chinese Mexicans,* 26–32; and Camacho, *Chinese Mexicans,* 10–11.

31 Romo, *Ringside Seat to a Revolution,* 145.

32 The growth of the tourist industry in Tijuana was due, in part, to the dry and mountainous landscape, which rendered it inhospitable to the development of the mining and agriculture industries. Robert R. Alvarez, *Familia: Migration and Adaptation in Baja and Alta California, 1800–1975* (Berkeley: University of California Press, 1987), 32. See also, Vanderwood, *Satan's Playground.*

33 Vanderwood, *Juan Soldado*, 76–81.

successful businesses.[34] And as an acknowledgement of the increasingly multinational character of the borderlands, one Tijuana school opened its doors to the children of these tourists and traders.[35]

Taken together, these cross-border demographic, economic, and social ties led local residents to construe the border as an "imaginary line."[36] Yet, on the eve of World War I, these very ties generated concerns about border security among federal officials in the Southwest and Washington, D.C. In particular, the cross-border raids of Mexican revolutionaries exposed the weaknesses of federal authority and the strength of bi-national loyalties to the rebellion. In American border towns, revolutionary forces found a safe haven to retreat from advancing Mexican federal troops, moral support for their political cause, and even a supply of arms and basic necessities.[37] While these cross-border raids had been a feature of the Revolution from its inception, by 1913 a violent regime change intensified political rivalries and military hostilities within Mexico and along its northern frontier.[38] By 1916, the increase in border raiding drew the fixed attention of Washington officials as they sought to bring order to the region.[39] In pursuit of revolutionary leader Pancho Villa and his forces, President Wilson sent General John Pershing and ten thousand troops into Mexico in retaliation for the *Villistas* attacks on American citizens.[40] Yet, Pershing's punitive

34 Ibid., 105.

35 Ibid., 113.

36 Calexico Chamber of Commerce, "Regulations at Crossing of International Boundary at the Port of Calexico, California," n.d., RG 85, file 54410/331G, RG 85, National Archives.

37 García, *Desert Immigrants,* 7. For a discussion of the raiding activities of Mexican revolutionaries on mines and oil fields in Mexico and the United States, see Hall and Coerver, *Revolution on the Border.*

38 In 1913, Victoriano Huerta, chief of staff to President Francisco Madero assumed office in a military coup and ordered Madero's assassination. His military dictatorship galvanized revolutionary forces against him and he fled the country a year later. Huerta's resignation, however, did not bring peace to Mexico as revolutionary forces splintered into rival factions, battling each other for control of the state well after revolutionary leader Venustiano Carranza assumed the presidency in 1917. St. John, "Line in the Sand: The Desert Border between the United States and Mexico, 1848–1934" (Ph.D. diss., Stanford University, 2005), 200.

39 St. John, "Line in the Sand," 200, 206, 216.

40 Acting in retaliation against Wilson's withdrawal of support for a Villa-led government in Mexico, Pancho Villa and his troops killed sixteen Americans traveling on

expedition failed to establish peace along the border and, instead, brought the nation to the brink of war with Mexico.

At the same time, national anxieties about border security were only exacerbated by World War I. Under pressure from German submarine warfare in the Atlantic, federal officials expressed concerns about enemy incursions through the nation's seaports and land borders.[41] The Zimmerman Telegram lent credence to fears about a possible German invasion from Mexico.[42] In addition, federal officials expressed concerns that Mexican revolutionaries, acting to avenge Villa's defeat, would assist Germany in this effort. Finally, the persistence of the overlapping geographical, social, and economic networks between border towns rendered them "logical haven[s]" for enemy aliens as well as revolutionary forces.[43] According to Romo, the Emporium Bar in El Paso served as a meeting place for Pancho Villa and a German spy who allegedly sought leasing rights to submarine bases in Baja California.[44]

At the local level, the apprehension surrounding Villa's raids and the war increased public antagonism toward Mexican immigrants and, in turn, led to a tightening of border inspection procedures. In an atmosphere of paranoia, El Paso city officials alleged that the thousands of refugees fleeing the Revolution would trigger a public health crisis, specifically a

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a train in northern Mexico in January 1916. Several months later, they crossed the border into New Mexico and killed another seventeen Americans. Johnson, *Revolution in Texas,* 138–142. On the complex relationship between the *Villistas* and the borderlands, see St. John, "Line in the Sand," 211–217; Romo, *Ringside Seat to a Revolution.*

41 Lawrence John Briggs, "For the Welfare of Wage Earners: Immigration Policy and the Labor Department, 1913–1921" (Ph.D. diss., Syracuse University, 1995), 164; St. John, "Line in the Sand," 231; Ralph J. Totten, Consul General at Large, El Paso, Texas, "Report on Conditions on the Mexican Border," January 20, 1918, file 54152/1I, RG 85, National Archives.

42 Capitalizing on anti-American sentiments in the aftermath of Pershing's expedition, the German foreign minister, Arthur Zimmerman, proposed an alliance that, in the event of a German victory, promised the restoration of Texas and much of the Southwest to Mexico. Along with Germany's declaration of unrestricted submarine warfare, the telegram fueled anti-German sentiment, garnered popular support for the war, and led President Wilson to abandon neutrality for war.

43 García, *Desert Immigrants,* 7.

44 Romo, *Ringside Seat to a Revolution,* 7.

typhus epidemic.[45] As a solution, they initially proposed a quarantine of all new arrivals.[46] But, in lieu of the quarantine, city officials ultimately conducted health inspections of all the homes in Chihuahuita (the largest Mexican neighborhood in El Paso) while El Paso Mayor Tom Lea proposed to destroy them altogether.[47] By 1917, local representatives of the United States Public Health Service adopted more austere measures, subjecting 127,173 Mexican entrants to a delousing and bathing procedure followed by a rigorous physical and mental examination.[48]

Like their local counterparts, federal officials demonstrated a more enforcement-minded orientation toward the border during World War I, launching cavalry patrols and air surveillance teams in search of revolutionaries and German spies.[49] Congress also enacted statutory measures, specifically the Immigration Act of 1917 and the Passport Act of 1918, to secure the line against alien enemies and unwanted immigrants.[50] In this wartime context, southwestern Bureau of Immigration officials changed their lax orientation toward immigration law enforcement and, for the first time, took seriously their responsibility to enforce the new laws *vis-à-vis* Mexican nationals. In so doing, they attempted to impose a new web of regulations upon a population long accustomed to crossing the border without any restrictions.

In 1917, Congress passed the Immigration Act of 1917, an omnibus bill that consolidated immigration legislation from the prior three decades.[51]

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[45] For a recent account of the refugee crisis, see Julian Lim, "Immigration, Asylum, and Citizenship: A More Holistic Approach," *Legal Studies Research Paper Series, Paper 12-08-03* (St. Louis: University of Washington, School of Law, 2012).

[46] Romo, *Ringside Seat to a Revolution,* 233.

[47] During this inspection, city officials found two cases of typhus, and one incidence each of measles, rheumatism, tuberculosis, and chicken pox. Those found ill were forced to take vinegar and kerosene baths, shave their heads, and burn all of their clothing. Romo, *Ringside Seat to a Revolution,* 231, 234, 235.

[48] Romo, *Ringside Seat to a Revolution,* 243.

[49] Metz, *Border,* 233.

[50] *Immigration Act of February 5, 1917*, 39 *Statutes-at-Large* 874 (1917). *Entry and Departures Control Act,* 40 Statutes at Large 559 (1918) (hereinafter referred to as the Passport Act of 1918 or the Act of May 22, 1918).

[51] As an omnibus bill, the Immigration Act of 1917 became the foundation of this nation's immigration law for the next thirty-five years. While the Immigration Acts of 1921 and 1924 added pivotal features to this nation's immigration law, the Immigration

Its passage marked an apex in Progressive Era efforts to restrict immigration from southern and eastern Europe and Asia. It accomplished the latter by excluding immigrants from a geographic area labeled the "Asiatic Barred Zone" that included all of Asia except for Japan and the Philippines. In order to limit admission from Europe, the Act created a literacy test for all individuals seeking admission into the United States.[52] Despite President Woodrow Wilson's veto of the new immigration act (Wilson was unwilling to reverse a campaign promise not to restrict European immigration[53]), Congress overrode his veto and passed the bill on February 5, 1917.

While the Immigration Act of 1917 was not conceived as a wartime measure, policymakers later relied on its provisions to implement a domestic defense policy within the nation and at the borders. Indeed, once the country entered the war (one month after the passage of the Immigration Act of 1917), President Wilson's concerns about the entry of radicals "dominate[d] the politics of immigration policy."[54] As a result, federal officials relied upon the looser deportation standards created by the new act to expel suspected alien enemies and subversives throughout the country.[55] In the Southwest, the Bureau of Immigration began to reverse its longstanding practice of letting Mexican nationals freely cross the border, attempting to control and restrict their movement under the authority of the new immigration law. For the first time in its history, they enforced the head tax in conjunction with the new literacy test provisions of the Immigration Act of 1917 *vis-à-vis* Mexican immigrants.[56]

Act of 1917 continued to serve as the basic outline or organizational structure. Fitzgerald, *The Face of the Nation*, 129, 132.

52 For a history of the literacy test see, John Higham, *Strangers in the Land, Patterns of American Nativism, 1860–1925* (New York, Atheneum, 1963).

53 Higham, *Strangers in the Land,* 190–93. Robert A. Divine, *American Immigration Policy, 1942–1952* (New York: Da Capo Press, 1972), 5.

54 Briggs, "For the Welfare of Wage Earners," 164.

55 William Preston, *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933* (Urbana: University of Illinois Press, 1994); Briggs, "For the Welfare of Wage Earners," 164; Divine, *American Immigration Policy,* 8.

56 Under the Immigration Act of 1917, Congress decided not to waive the head tax (increased to $8.00) and the new literacy test for Mexican immigrants as it had in the Immigration Acts of 1903 and 1907. Cardoso, *Mexican Emigration,* 46.

In order to restrict the entry and departure of suspected alien enemies, federal officials initially relied on the immigration statutes. They found, however, that the immigration laws failed to provide the regulatory authority necessary to restrict and supervise this category of foreign nationals. An assistant to the attorney general observed:

> When we got into the war we were met, of course, immediately with the necessity of supervising exit from the country and entrance into the country of undesirable persons, and the only law on the subject that came anywhere near reaching them was the immigration law, which was not designed to fit a situation in which spies were moving to and from the country, because the tests prescribed by the immigration statutes for admittance to the country were, of course, simple and designed to meet certain requirements of intelligence, character, previous history, etc.[57]

In response to this lack of authority, Congress passed the Passport Act to prevent the entry of alien enemies. The Act specifically required aliens and U.S. citizens to present passports for inspection at the nation's ports of entry for the duration of the war.[58] This Act constituted another new layer of restrictions that would have a serious impact on the movement of populations across the U.S.–Mexico border.[59]

The administration of the passport law was divided among several federal agencies including Justice, Labor, Commerce, and State. While the State Department was responsible for the issuance of passports and visas, the Bureau of Immigration was responsible for the actual enforcement of the passport law. Thus, prior to conducting their usual immigration inspection, immigration officers would act as passport agents, inspecting

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[57] U.S. Congress, House, Committee on Foreign Affairs, *Control of Travel From and Into the United States,* 65th Cong., 2nd sess., 13 February 1918, 4–5.

[58] *Entry and Departures Control Act,* 40 *Statutes at Large*, 559 (1918). Executive Order 2932, August 18, 1918 (implementing Act of May 22, 1918). Violators of the Passport Act were subject to criminal penalties, including a maximum fine of $10,000 and a prison sentence of twenty years.

[59] For a history of the passport, see John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (New York: Cambridge University Press, 2000); Craig Robertson, *The Passport in America: The History of a Document* (New York: Oxford University Press, 2010).

passports and visas, collecting visa fees, and taking declarations of aliens and U.S. citizens entering and departing the country. The new responsibilities increased the workload of an agency lacking the resources to fulfill its own mandate to enforce the nation's immigration laws.[60] And this, in turn, would compound the problems faced by the Bureau of Immigration in expanding the presence of the federal government in a community long accustomed to its absence.

Initially, the new immigration restrictions had a significant impact on immigration, specifically those individuals seeking entry for permanent admission, across the U.S.–Mexico border. The literacy test plus the head tax created serious obstacles for Mexican immigrants, particularly agricultural workers who, for the most part, were poor and illiterate.[61] For the first few months that the new law was in operation, Mexican immigration declined sharply from the same period the previous year. Historian Lawrence Cardoso reports that only 31,000 Mexicans emigrated to the U.S. in 1917 whereas 56,000 had entered the year before.[62] By 1918, Cardoso notes, 1,771 Mexicans decided against emigrating to the U.S. due to the literacy test, and the Bureau rejected the applications of 5,745 for failure to pay the head tax.[63]

While the new immigration and passport laws closed the border for some, other border residents refused to accept the new restrictions. Some expressed their discontent by crossing and re-crossing the line without an official inspection. As a result, the Bureau reported that the undocumented entry of Mexican nationals — an issue the agency had mostly ignored prior to 1917 — had become one of its greatest concerns; as the supervising inspector for the Mexican Border District wrote in his annual report, "The suppression of attempted illegal entry of countless aliens of the Mexican race, excluded or excludable, under what they deem to be the harsh provisions of the immigration act of 1917, has constituted one of the most difficult problems with which this district has had to contend in the past

60 S. Deborah Kang, "The Legal Construction of the Borderlands: The INS, Immigration Law, and Immigrant Rights on the U.S.–Mexico Border, 1917–1954" (Ph.D. diss., University of California, Berkeley, 2005), 31–41.

61 Cardoso, *Mexican Emigration*, 46.

62 Ibid.

63 Reisler, *By the Sweat of Their Brow*, 24.

year." [64] At the same time, thousands of local residents, as both the State Department and Bureau of Immigration reported, protested repeatedly and vehemently about the ways in which the Immigration Act of 1917 and the Passport Act of 1918 disrupted the transnational character of their daily lives.

Locals complained about the new laws in a variety of ways: writing letters to state and federal politicians; sending telegrams, letters, and petitions to local and federal Bureau of Immigration and State Department officials; publishing editorials in opposition to the new regulations; and arguing with immigration inspectors at the gates. In the Southwest, those industries reliant on Mexican labor were the most vocal and politically powerful opponents of the restrictions imposed by the immigration and passport acts.[65] Southwestern farmers, for example, repeatedly called for exemptions to the new laws, knowing that they would bar the entry of Mexican workers.[66] In addition to southwestern industries, ordinary individuals — including those traveling from Mexico to shop, work, patronize entertainment venues, or socialize with friends and family — all protested, either in writing or in person.[67] Among the protesters were American citizens who lived in Mexico, but worked in the United States; and Asian nationals, Asian Mexicans, and Asian Americans, domiciled in Mexico, who sought a relaxation of the immigration and passport laws for business reasons. [68] Despite the authority possessed by Bureau

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[64] Report of Supervising Inspector, Mexican Border District in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918,* 317–319.

[65] On the supporters and opponents of immigration restriction in the Southwest, see David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987), 182–186.

[66] Totten, "Report on Conditions," 17.

[67] See, for example, Blocker, American Consul, Eagle Pass to Secretary of State, December 6, 1917, file 54152/1E, RG 85, National Archives. Unsigned Memorandum, January 2, 1918, file 54152/1F, RG 85, National Archives. See also, Vicki Ruiz, *From Out of the Shadows: Mexican Women in Twentieth-Century America* (New York: Oxford University Press, 2008), 12.

[68] Alvey A. Adee, Second Assistant Secretary of State, to Anthony Caminetti, Commissioner General, April 11, 1918, file 54152/1J, RG 85, National Archives (on the American border crossers); Alvey A. Adee, Second Assistant Secretary of State to Anthony Caminetti, Commissioner General, January 24, 1918, file 54152/1G, RG 85, National Archives (regarding Japanese merchants living on Mexican side of border

officials, many border residents, as one inspector reported, did not hesitate to criticize the new laws and even verbally abuse immigrant inspectors at the gates.[69]

The Bureau's detractors included not only locals who sought crossing privileges from Mexico to the United States but also those domiciled in the United States with business and personal interests in Mexico. In San Diego, American backers of a Tijuana racetrack were vehement opponents of the passport laws, arguing that these regulations would deter patrons from traveling south of the border and, instead, draw them north to competing entertainment venues in Los Angeles.[70] American tourists and border residents rallied to Tijuana's cause with their feet, defying Prohibitionists' warnings about the dangers of Mexican leisure and liquor, and overwhelming immigration inspectors at the gates with their demands to depart and re-enter the country.[71] Representatives from the Imperial Irrigation District protested that the passport law would halt construction of a canal project in Mexico (by delaying the entry of American skilled laborers) and thereby hurt American farmers who

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wishing to cross border to purchase goods.); F.W. Berkshire, Supervising Inspector, El Paso, to Chief, Division of Passport Control, September 9, 1918, file 54410/331B, RG 85, National Archives; A. E. Burnett, Inspector in Charge to Supervising Inspector, El Paso, April 8, 1920, file 54820/455, RG 85, National Archives (Chinese, with American support, seeking crossing privileges between Calexico and Mexicali).

69 Grover C. Wilmoth, Acting in Charge of District, Mexican Border District to Commissioner General, March 31, 1923, file 55301/217, RG 85, National Archives.

70 Telegram to Frank L. Polk, received December 10, 1917, file 54152/1E, RG 85, National Archives.

71 Prohibitionists opposed any relaxation of passport regulations for those desirous of crossing the border into Mexico, which they called "a moral plague spot menacing soldiers and civilians alike." Charles C. Selegman, President, Los Angeles Ministerial Alliance to Robert Lansing, Secretary of State, November 23, 1917, file 54152/1E, RG 85, National Archives; W. B. Wheeler, General Counsel, Anti-Saloon League of America to Raymond Fosdick, War Department, April 4, 1918, file 54152/1J, RG 85, National Archives; T.A. Storey, Executive Secretary, Interdepartmental Social Hygiene Board to Bureau of Immigration, March 6, 1920, file 54410/331F, RG 85, National Archives. For an account of how Prohibition impacted border closing times in three different border communities, see Robert Buffington, "Prohibition in the Borderlands: National Government–Border Community Relations," *Pacific Historical Review* 63:1 (February, 1994): 19–39.

relied on the water from the canal to irrigate their crops.[72] Also engaged in bi-national ventures, an Arizona mining company requested exemptions for its Mexican workers who hauled ore mined north of the border to a processing facility south of the border.[73] Meanwhile, in Texas, the Bureau received complaints about the passport laws from American ranchers who grazed their stock in Mexico.[74] Finally, because it affected small and large businesses alike, the passport law elicited protests from an American dentist who saw many patients south of the border as well as a request for an exemption from an American doctor who also needed to care for his patients in Mexico.[75]

In the borderlands, the new immigration and passport laws seemed to inconvenience everyone; as a State Department official explained, the passport law, "cause[d] a considerable amount of irritation on both sides of the Border. The Mexicans, in ignorance, feel that it is a measure directed especially against them, to cause them annoyance and prevent them from purchasing the food and supplies they greatly need. The American merchants are dissatisfied because of the loss of trade."[76] In the face of this widespread opposition, Bureau officials began the work of enforcing the Immigration Act of 1917 and the Passport Act of 1918.

In 1918, Commissioner General Anthony Caminetti asked how the agency could create an immigration policy that closed the border to subversives and unwanted immigrants but, at the same time, kept it open for the benefit of local residents who had legitimate reasons for crossing and

[72] C.K. Clarke, General Manager, Imperial Irrigation District, to Senator Hiram Johnson, November 19, 1917, file 54152/1E, RG 85, National Archives.

[73] Grosvenor Calkins, for Duquesne Mining and Reduction Company, to Louis F. Post, Assistant Secretary of Labor, January 17, 1918, file 54152/1G, RG 85, National Archives.

[74] F. W. Berkshire, Supervising Inspector, El Paso, to Commissioner General, January 1, 1918, file 54152/1F, RG 85, National Archives.

[75] George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, January 10, 1918, file 54152/1G, RG 85, National Archives; Dr. J. A. Wallace to Department of State, Bureau of Citizenship, January 10, 1918, file 54152/1G, RG 85, National Archives.

[76] Totten, "Report on Conditions," 17.

re-crossing the border each day.[77] In response, southwestern immigration officials developed new ways of managing the huge populations that crossed the border. Responding to the demands of local residents, border officials used their administrative discretion to waive or amend the rules set forth in the Immigration Act of 1917 and the Passport Act of 1918. In turn, they fashioned a series of policies, including the wartime agricultural labor program, the border crossing card, and a waiver to the literacy test that facilitated the movement of locals across the international boundary.

These administrative devices were significant because they effectively nullified the restrictions imposed on the U.S.–Mexico border by both Acts. The wartime agricultural labor program rendered inoperative the head tax, contract labor laws, and literacy test on the U.S.–Mexico border.[78] The border waiver to the literacy test further diluted the exclusionary intent underlying the Immigration Act of 1917. Meanwhile, the Section 13 certificate (and the subsequent exemptions to the Section 13 certificate itself) removed any incentive for individuals to procure passports. Yet, it is important to note that these exceptions to the new regulations did not generate a condition of lawlessness on the U.S.–Mexico border. Instead, as the following section will explain, immigration officials in the Southwest effectively created a set of immigration policies that were tailored to the needs of border residents and sustained the transnational character of the borderlands.

In shaping an immigration policy for the Mexican border, the Bureau of Immigration relied on the language of the Immigration Act of 1917, the Ninth Proviso of the third section of the Act. The Ninth Proviso specifically stated that the "Commissioner General of Immigration with the approval of the secretary of labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission."[79] In other words, the Ninth Proviso authorized

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77 Anthony Caminetti, Commissioner General to Supervising Inspector, Mexican Border District, August 31, 1918, file 54410/331A, RG 85, National Archives.

78 Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919.*

79 W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, RG 85, File 54275/Gen., Pt. I. (citing Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874, 876 (1917))

the secretary of labor to waive the immigration laws for those migrants who would not pass an immigration inspection (and thereby qualify for permanent residence in the United States) but who demonstrated a need to be in the country for short periods of time. Thus, while nativism inspired its drafting and passage, the Immigration Act of 1917 afforded Bureau of Immigration officials the administrative discretion to unravel the restrictionist spirit of the law.

The most famous invocation of the Ninth Proviso occurred during World War I when the secretary of labor created the nation's first Mexican agricultural labor program. Due to enormous pressure from southwestern growers who claimed wartime labor shortages, the secretary of labor temporarily admitted Mexican farm workers, exempting them from a formal immigration inspection and, more specifically, waiving the literacy test, head tax, and contract labor clauses of the Immigration Act of 1917. Under this program, employers in need of agricultural labor applied to the Labor Department stating the number of workers required, the duration of the work period, and the wages and hours offered. They were also to maintain certain standards regarding living, housing, and working conditions, and wages.[80] In order to ensure that Mexican agricultural laborers returned to Mexico, wages were withheld from their monthly pay and distributed upon their departure from the country.[81] As an additional precaution against the permanent settlement of these Mexican nationals, immigration inspectors also possessed the authority to deport those who quit their jobs or sought work with a non-approved employer.

Despite its efforts to maintain a restrictive immigration policy, the Department of Labor was under constant pressure to admit even more Mexican workers into the country. This was particularly the case during a 1917 draft scare, when thousands of workers hired under the wartime labor program left for Mexico.[82] Growers capitalized on this scare

80 Reisler, *By the Sweat of Their Brow,* 29.

81 Ibid., 30.

82 Under the Selective Service Act of May 18, 1917, foreigners were exempted from the wartime draft. In order to prove their alien status, however, they were required to present proof of foreign citizenship (by means of a birth certificate or the affidavits of two reliable witnesses as to place of birth) to the local draft boards. Uninformed, unable, or unwilling to meet these requirements, thousands of Mexicans repatriated to Mexico. In the Southwest, many of the repatriations were motivated by fear and a deep

to ask the Department of Labor to alter the program in several ways: first, to loosen the provisions regarding the surveillance of workers; second, to allow Mexicans to work in non-agricultural occupations; and third, to extend the period of stay for Mexican laborers.[83] Growers also argued for the suspension of the head tax *vis-à-vis* Mexico altogether so as to facilitate the northward migration of farm workers. Finally, they proposed that the federal government take a more active role in providing them with laborers by stationing officials in border towns to direct Mexican immigrants to agricultural employers.

In response, President Wilson extended the stay of Mexican agricultural laborers for the duration of the war. He also permitted Mexican nationals to work in non-agricultural industries such as the railroads and the coal mines. Later they were authorized to work on other mining operations and construction jobs throughout the Southwest. Finally, Wilson approved the posting of additional immigration inspectors along the Mexican border to assist in the admission of Mexican immigrant workers.[84] At the war's end, Wilson ended the temporary admissions program. But, the protests of southwestern growers led to the extension of the program through June 30, 1919. Two more extensions were granted through January 1921 when the program finally ended and employers were instructed to return their workers to Mexico.[85]

The temporary admissions program proved a boon to southwestern agriculture. It enabled growers to keep wages low despite an overall rise in agricultural wages during the course of the war. A representative from the Arizona Cotton Growers' Association estimated that the wartime labor importation program saved growers $28 million in labor costs from 1919 through 1921.[86] Given these benefits, southwestern growers lobbied

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distrust of the American government given the recent vigilante action undertaken by Anglo-Americans against Mexicans and Mexican Americans in retaliation for the raids of Mexican revolutionaries. Local and state draft board officials only aggravated this distrust by compelling ethnic Mexicans, regardless of their citizenship status, to register for the draft. Johnson, *Revolution in Texas,* 150–153. Cardoso, *Mexican Emigration to the United States,* 50–51.

83 Reisler, *By the Sweat of Their Brow,* 30.

84 Ibid., 33.

85 Ibid., 34.

86 Ibid., 39.

for the permanent suspension of the immigration laws; on their behalf, Congressman Claude B. Hudspeth of Texas introduced a joint resolution exempting Mexican nationals from the literacy test and contract labor provisions of the Immigration Act of 1917. What growers wanted even more, however, was a return to the pre–1917 Immigration Act "policy of an open Mexican border."[87] Assuaging the fears of nativists, supporters of this bill argued that those Mexicans admitted would not become permanent residents; instead, Congressman John Nance Garner of Texas "contended that 80 percent of the Mexicans admitted to the United States would eventually return to Mexico and that never more than 2 percent would leave Texas for other states."[88] In the end, however, the House Committee on Immigration and Naturalization tabled Hudspeth's resolution, adopting the views of the American Federation of Labor that a sufficient labor force was already present in the Southwest. Furthermore, under pressure from Hawaiian growers to admit Chinese immigrants as agricultural laborers, the Committee feared setting a precedent along the U.S.–Mexico border that would open the door to Chinese immigration in Hawaii.

As Bureau officials satisfied the wartime demands of one border constituency, they recognized that they also had to address the vehement demands of ordinary border residents for exemptions to the new literacy test. Indeed, immigration inspectors in the Southwest observed that, for the first year after the passage of the literacy test, the "pressure, protests and complaints" were "well-nigh irresistible."[89] Thanks to the Bureau's longstanding practice of excusing border residents from the head taxes and qualitative restrictions of the immigration laws, border residents had grown accustomed to crossing and re-crossing the international boundary without hindrance. F. W. Berkshire, supervising inspector for the Mexican Border District, was keenly aware that the agency itself had perpetuated this state of affairs — allowing border residents, in his words, to "go and come in the course of their social and business intercourse with the least possible interference and friction." Thus, upon the passage of the 1917 immigration law, Berkshire expressed uncertainty as to whether the agency

87 Ibid., 40.

88 Ibid.

89 George J. Harris to Commissioner General of Immigration, May 24, 1923, RG 85, File 54275/Gen., Pt. I.

ought to maintain what he referred to as its "time honored custom" by excusing border residents from the literacy test.[90]

Between 1917 and 1924, Berkshire and southwestern immigration inspectors addressed this question by again relying upon the discretionary authority afforded by the Ninth Proviso of the third section of the Immigration Act of 1917. As the commissioner general wrote in 1923, "There is no question under the Act and the Regulations as to the propriety of permitting entry of illiterates for purely temporary purposes."[91] Despite the authority provided by the Immigration Act of 1917, the Bureau did not create a holistic waiver, or a general exemption from the literacy test right away. Instead, southwestern agency officials began in a more limited and even tentative fashion, granting waivers to those illiterate migrants who lived in the United States but who, for personal or business reasons, crossed the border on a regular basis.[92] Concerns that locals domiciled in Mexico would use any literacy test exemption to evade a formal immigration inspection and settle permanently in the United States led Bureau officials to prohibit the issuance of literacy test waivers to nonresident aliens. In addition, wartime fears about the entry of enemy aliens and longstanding concerns about illegal Chinese immigration also informed the Bureau's decision to create a limited waiver in 1917.[93]

Border residents, however, remained highly dissatisfied by this initial modification of the literacy test. Bureau officials reported that thousands of locals continued to lobby immigrant inspectors at the gates for a complete suspension of the test. In response, immigration inspectors temporarily

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[90] F. W. Berkshire, Supervising Inspector, to Commissioner General of Immigration, March 9, 1917, RG 85, File 54275/Gen., Pt. I.

[91] W. W. Husband, Commissioner General, "Memorandum for the Second Assistant Secretary," May 17, 1923, RG 54275/Gen., Pt. I (discussing 1917 agency debates regarding use of Ninth Proviso to create an exemption to the literacy test)

[92] On May 7, 1917, Washington, D.C. officials authorized this procedure in the following telegram: "Habitual crossing and recrossing boundary by illiterate aliens residing in United States is permitted by paragraph f, subdivision five, rule four, regarding transit of resident illiterates through contiguous foreign territory but illiterates residing outside the United States cannot be permitted habitual crossing privilege." George J. Harris to Commissioner General of Immigration, May 24, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

[93] A. E. Burnett, Inspector in Charge, Los Angeles, to Commissioner General of Immigration, May 28, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

admitted thousands of illiterate Mexican nationals (domiciled south of the border) so that they could purchase a "loaf of bread, a cake of soap, a pound of starch, a quart of kerosene, a pound of sugar, a pound of flour, a pound of lard, etc."[94] While some inspectors admitted border residents on an unofficial basis, others conducted full-fledged hearings by a Board of Special Inquiry (BSI) to formalize these literacy test waivers.[95] Because these hearings required the participation of southwestern immigration inspectors and their supervisors, the collection of character references from local citizens, and a formal review by Bureau officials in Washington, D.C., they consumed much time and many resources.[96] Given the overwhelming demand for more relaxed border crossing privileges and the burdens of BSI hearings, southwestern immigration officials themselves proposed changes to the exception to the literacy test. In a 1920 report titled, "Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation," southwestern agency officials called for the admission of illiterate border residents who routinely crossed the line for business or personal reasons.[97] In addition, they proposed leniency for illiterate alien residents of the United States who lacked proof of their domicile in the United States.

By 1923, the ongoing protests of border residents led the Bureau to seek ways to broaden the exceptions to the literacy test on the U.S.–Mexico border. As the Bureau observed, "Various chambers of commerce and individual

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94 George J. Harris, Supervisor, to Commissioner General, May 24, 1923, file 54275/Gen., Pt. II, RG 85, National Archives.

95 United States Department of Labor, Bureau of Immigration, *Immigration Laws, Rules of May 1, 1917,* Rule 4, Subdivision 6 (Washington, D.C.: Government Printing Office, 1917), 51. Boards of Special Inquiry provided immigrants with the opportunity to appeal the exclusion decisions of immigration inspectors. While they served as a kind of court of first resort, the Board was not bound by judicial procedures. See Salyer, *Laws Harsh as Tigers,* 141.

96 Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 446. See also, Bureau of Immigration file regarding the Board of Special Inquiry hearing for Jesus Reyes, a Mexican citizen who failed the reading test but sought temporary admission for business purposes in 1922, file 55238/12, RG 85, National Archives.

97 Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation," in Bureau of Immigration, *Annual Report, fiscal year ended June 30,* 1920, 450. See also, J. E. Trout, Inspector in Charge, Laredo, Texas to Supervising Inspector, El Paso, February 12, 1919, file 54410/331D, RG 85, National Archives.

concerns along the Mexican Border are taking concerted action in petitioning both the Bureau direct and through Congressmen and Senators for modification of existing regulations that will permit temporary admission of illiterates for trading purposes."[98] In defense of this proposal, the Bureau itself argued that any new exemption would not only benefit the economy of the border region but also promote American foreign relations with Mexico, as the Commissioner General wrote:

> It is the opinion of the Bureau that in view of the close relations necessarily existing between the neighboring countries of Canada and Mexico and our own country, that some modification of existing practice along the Mexican Border is most desirable that will permit, under proper safeguards, the temporary entry of illiterate aliens for purposes of trade and other sound reasons.[99]

Finally, an official literacy test waiver would allow the Bureau to standardize procedures on the Mexican and Canadian borders. Since the inception of the literacy test in 1917, Bureau of Immigration officials excused Canadian residents[100] seeking temporary entry to visit "sick friends, or relatives, by reason of death, or funerals, or weddings, or business or family affairs, etc."[101] After soliciting specific proposals from its southwestern offices, the Bureau, in 1923, authorized officers stationed on the Mexican and Canadian borders, to admit "illiterate citizens or subjects of Canada and Mexico"

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98 W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

99 Ibid.

100 As the U.S. commissioner of immigration, Montreal, Canada, wrote, "When the reading test became effective in 1917, it served to debar large numbers of aliens who patronized the above [railway] lines. Many of those excluded on account of the reading test were show to be substantial citizens of Canada, who were only desirous of visiting the United States as bona fide temporary visitors. . . . This situation was gone over with former Secretary W. B. Wilson in person, and while declining to modify the Regulations as then drawn, he nevertheless, gave me authority to admit temporarily, in my own discretion, illiterates whose exclusion could be shown to involve the serious hardships referred to above." U.S. Commissioner of Immigration, Montreal, Canada to W. W. Husband, Commissioner General of Immigration, April 2, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

101 W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

who sought temporary entry for personal or business reasons.[102] In sum, these amendments to the literacy test created what one Bureau official termed a "sectional" approach to immigration policy in the borderlands.[103]

Bureau of Immigration officials not only eased the restrictive provisions of the Immigration Act of 1917 for the benefit of border residents; they, in conjunction with State Department officials, also addressed locals' concerns regarding the Passport Act of 1918. While these two agencies would engage in bitter disagreements about the implementation of the Passport Act of 1918, they agreed to develop an exemption to the Act itself, specifically a border crossing card.[104] The border crossing card owed its origins to Rule 13 of the Immigration Laws and Rules, which provided that U.S. citizens and aliens who lived in close proximity to either side of the border and who frequently crossed the border for "legitimate pursuits" could receive a pass (a border crossing card), enabling them to cross the line without embarrassment or delay.[105] By 1918, State Department officials incorporated Immigration Rule 13 into their own regulations regarding the administration of the Passport Act.[106] Referred to as Section 13 certificates, they excused immigrants from paying the head tax,[107] and they were issued due to wartime exigencies, primarily for the

102 W. W. Husband, Commissioner General to U.S. Commissioners of Immigration, Montreal, Canada and Seattle, Washington; Inspectors in Charge, Immigration Service, Buffalo, N.Y., Detroit, Mich., Winnipeg, Can., Spokane, Wash., Los Angeles, California, and San Antonio, Texas; Supervisor, Immigration Service, El Paso, Texas, June 30, 1923, file 54275/Gen., Pt. I., RG 85, National Archives.

103 "Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation," in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920,* 450.

104 For an account of these interagency disputes see, Kang, "The Legal Construction of the Borderlands," 44–45.

105 Confidential Instructions for the Guidance of Officials Connected with the Administration of the Act of May 22, 1918, July 1918, file 54410/331, RG 85, National Archives.

106 Ibid.

107 Gerard D. Reilly, Acting Solicitor of Labor, Memorandum for the Acting Commissioner of Immigration and Naturalization, April 15, 1937, file 55883/600, RG 85, National Archives. Holders of section 13 certificates were exempted from the head tax because the Bureau realized that it would be unreasonable for them to pay the tax upon each entry.

benefit of Europeans who were unable to obtain passports from their home countries.[108]

In the issuance of these cards, the State Department and Bureau of Immigration tried to balance the nation's security needs and the borderlands' economic and social interests.[109] Thus, State Department and Bureau of Immigration officials agreed that Section 13 certificates, particularly in the case of foreign nationals, were not intended to replace passports; as one State Department official wrote, aliens' identification cards, were only "valid for a sufficient period for them to procure passports of the country to which they owe allegiance."[110] As a further security precaution, alien and citizen recipients of the Section 13 certificates were required to be residents of the border region where "residence on the border means residence at no greater distance than ten miles from border."[111] Moreover, these border crossing cards limited the radius of travel: U.S. citizens and aliens were restricted to a ten-mile radius north and south of the border.[112] Finally, border crossing cards were not issued to American citizens who made more frequent trips to non-border, or interior, regions of Mexico; these individuals were required to obtain passports.

Despite these wartime safeguards, the agency eventually relaxed the regulations and began issuing cards to those for whom they were not intended. As a Prohibition measure, the agency originally denied identification cards to "pleasure seekers[,] tourists[,] idlers[,] gamblers[,] race horse followers and the like."[113] Yet, in 1919 after much protest from border residents and proprietors of the entertainment industry, the Bureau instituted

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108 These cards were also in use on the Canadian border, see Kang, "Crossing the Line," 181.

109 Totten, "Report on Conditions,"15.

110 R. W. Flournoy, Acting Chief, Bureau of Citizenship, Department of State to A. W. Parker, Law Clerk, Immigration and Naturalization Service, November 30, 1917, file 54152/1E, RG 85, National Archives.

111 A. Warner Parker, Law Officer, Department of State to Supervising Inspector, El Paso, December 6, 1917, file 54152/1E, RG 85, National Archives.

112 J. E. Trout, Inspector in Charge, Laredo to Supervising Inspector, El Paso District, November 23, 1917, file 54152/1E, RG 85, National Archives.

113 George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, November 27, 1917, file 54152/1E, RG 85, National Archives.

a tourist pass system for those wishing to travel south of the border.[114] Tourist passes, initially good for a single day but later extended for ten-day use, allowed visits "in the border zone on either side of the Mexican border, whether such persons reside within or without the zone [the ten-mile limit], provided their identity, nationality and bona fides are established to the satisfaction of permit agents [immigration officials]." These permits were limited to American citizens, but immigration officials could, at their discretion, issue these permits to foreign nationals.[115]

The Bureau and Department of State also made exceptions to the passport law on an *ad hoc* basis, again to cater to the needs of local communities. In Nogales, Sonora, the local American consul issued 4,000 provisional passports to Mexican citizens so that they could cross the line into Nogales, Arizona in order to shop. Under pressure from local businessmen who complained that passport regulations caused a downturn in the local economy, local immigration and State Department officials agreed to repeated extensions of these provisional passports.[116] In 1920 (when passport regulations had loosened somewhat, but still required non-border residents from Mexico to present visaed passports), the State Department authorized the issuance of identification cards to visitors from non-border (interior) regions of Mexico attending fairs in El Paso and Dallas.[117]

The Bureau also conferred border crossing privileges upon Japanese and Chinese merchants living on both sides of the line.[118] While the

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[114] F. W. Berkshire, Supervising Inspector, Mexican Border District, to Chief, Division of Passport Control, State Department, September 22, 1920, file 54410/331H, RG 85, National Archives.

[115] F. W. Berkshire to Secretary of State, November 6, 1919, file 54410/331F, RG 85, National Archives.

[116] A. J. Milliken, Inspector in Charge, Nogales, Arizona, to Supervising Inspector, El Paso, January 3, 1918, file 54152/1F, RG 85, National Archives.

[117] R. M. Cousar, Inspector in Charge, Nogales, Arizona, to Supervising Inspector, Mexican Border District, October 5, 1920, file 54410/331I, RG 85, National Archives.

[118] For an account of the disparate procedures applied to Chinese-national, Chinese-American, and Chinese-Mexican merchants residing in the United States and in Mexico see, F. W. Berkshire to Inspector in Charge, May 16, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service, Series A: Subject Correspondence Files, Part 2: Mexican Immigration, 1906–1930,* ed. Alan Kraut (Bethesda: University Publications of America), text-fiche, reel 1, frame 947–949.

immigration laws had long permitted these merchants to cross and recross between Mexico and the United States to purchase subsistence items or to engage in trade, these laws imposed strict requirements on their entry and departure. To ensure the latter, the agency had to escort each Japanese entrant out of the country. For the Chinese, the regulations were even more stringent and required a tremendous amount of administrative work for the Bureau.[119] For example, before approving the entry and departure of a Chinese transit, the Bureau needed to conduct medical and background investigations, verify residency in the U.S. if the entrant claimed to be a U.S. resident, complete in triplicate a description, with photo, of the Chinese transit upon entry, and arrange for an official escort upon departure.[120] The Passport Act, then, threatened to impose a new set of restrictions upon these merchants and, from the perspective of local residents, impede border trade.

Indeed, both Japanese and Chinese merchants had strong advocates in border communities; thus, for example, the Bisbee Chamber of Commerce issued a complaint to Congressman Henry Ashurst about the inability of J. F. Hung, a Chinese-Mexican merchant, to cross the line to trade. While the Bisbee Chamber of Commerce made no mention of the racial discrimination encountered by Chinese immigrants on both sides of the line, it protested that "the merchants of Bisbee are being discriminated against."[121] Chambers of commerce in El Paso, Nogales, and Los Angeles, among others, made similar requests on behalf of Chinese merchants.[122] In response

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[119] Because it was easier for Bureau officials to conduct extensive background examinations of merchants residing in the United States, Chinese-American and Chinese-national merchants residing in the United States faced more stringent inspections than Chinese-American, Chinese-Mexican, and Chinese-national merchants residing in Mexico. F. W. Berkshire to Inspector in Charge, May 16, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service,* text-fiche, reel 1, frame 947–949.

[120] F. W. Berkshire, Supervising Inspector, El Paso, to Chief, Division of Passport Control, September 9, 1918, file 54410/331B, RG 85, National Archives.

[121] Robert Hamilton, Secretary, Bisbee Chamber of Commerce to Henry Ashurst, June 24, 1925, file 55301/217, RG 85, National Archives, in *Records of the Immigration and Naturalization Service,* text-fiche, reel 1, frame 925.

[122] Letter and petition from the Nogales Chamber of Commerce to the Secretary of Labor, March 3, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 976–983; El Paso Chamber

to these protests, the Bureau of Immigration, by 1924, had authorized the issuance of border crossing cards to Chinese merchants living on either side of the border and who agreed to enter and depart the country from specific ports in California, Arizona, and Texas.[123] Moreover, that Chinese merchants, in particular, were permitted to enter and depart from Laredo, Eagle Pass, El Paso, Nogales, Calexico, and Tijuana was the result of intense lobbying efforts by border chambers of commerce.[124]

All of this is not to say that southwestern immigration officials suspended their concerns about the enforcement of the Chinese exclusion laws or their own anti-Asian sentiments. Instead, it is to say that southwestern border officials created class-based exceptions for a small group of Asian, Asian-American, and Asian-Mexican merchants and, in so doing, acknowledged the importance of creating an immigration policy that did not obstruct border trade. As the commissioner general himself explained in the case of a Chinese national who obtained border crossing privileges, "Wong J. Hong did not claim citizenship, but admitted, on the other hand, that he is an alien. So extensive were his business interests in Mexicali and the country lying below that city, and so necessary did it appear for him to enter and depart from the United States at will in connection with his business enterprises that the Department made his case an exception." To underscore the highly limited nature of this exemption, the commissioner general noted that the case of Wong J. Hong was not publicized so that "it might not be regarded as a precedent by other Chinese."[125]

As a further reflection of the Bureau's ongoing concerns about Chinese immigration, the border crossing privileges issued to merchants of Chinese descent (residing in the United States) differed from those granted to

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of Commerce to the Secretary of Labor, December 5, 1921, file 51941/10A, RG 85, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 1024; Los Angeles Chamber of Commerce to the Secretary of Labor, May 12, 1922, file 51941/10-13, RG 85, in *Records of the Immigration and Naturalization Service* text-fiche, reel 2, frame 216–218.

123 Robe Carl White, Second Assistant Secretary, Department of Labor, to Carl Hayden, April 29, 1924, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 1025–1026.

124 See, for example, *supra,* note 123.

125 Commissioner General, Memorandum for the Secretary, June 22, 1920, file 54820/727, RG 85, National Archives.

non-Chinese immigrants.[126] American, European, Mexican, and Japanese nationals obtained border crossing cards under Rule 13 of the Immigration Laws and Rules. While at least one Chinese-American merchant sought to obtain a Section 13 border crossing card,[127] the Bureau ultimately chose to issue these merchants "citizens' return certificates" under the more stringent Chinese exclusion laws. Meanwhile, Chinese-national merchants domiciled in the United States received Section 6 certificates (or "exempt return certificates"), which also were stipulated by the Chinese exclusion acts.[128] Because both certificates were only valid for six months, Chinese merchants seeking additional crossing privileges would have to re-apply and undergo another extensive examination verifying their merchant status, U.S. resident status, and, if applicable, U.S. citizenship. Once in possession of these certificates, Chinese merchants were required to cross and re-cross the border at designated ports so that the Bureau of Immigration could continually verify the merchant status of these men.[129]

While the agency relaxed border crossing regulations for their benefit, border residents continued to complain about the impositions of the law. Furthermore, despite wartime concerns about border security, local residents demanded fewer restrictions and even an open border. Writing on behalf of San Diego's business community, William Kettner, congressman for the 11th district of California called for "discontinuing war time restrictions against American citizens going into Mexico" since San Diego

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126 It appears, however, that Chinese-Mexican merchants were able to obtain either a Section 6 or a Section 13 certificate. Some Bureau officials raised questions about the disparity between the border crossing privileges granted to Chinese Mexican and Chinese American merchants. F. W. Berkshire, Supervising Inspector, Mexican Border District to Inspector in Charge, Los Angeles, California, June 1, 1922, file 51941/10-13, RG 85, National Archives, in *Records of the Immigration and Naturalization Service,* text-fiche, reel 2, frame 211–212.

127 W. G. Becktell, Attorney, to Commissioner General of Immigration, San Francisco, May 13, 1920, file 54820/727, RG 85, National Archives (attorney for Sam Poy).

128 Commissioner General, Memorandum for the Secretary, June 22, 1920, file 54820/727, RG 85, National Archives; Memorandum for the Second Assistant Secretary, April 3, 1924, file 51941/10-13, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 2, frame 27–29.

129 See, for example, Harry L. Blee, Immigrant Inspector to Inspector in Charge, Immigration Service, Los Angeles, April 7, 1920, file 54820/455, RG 85, National Archives (correspondence attaching transcript of examination of Lee Thing).

businessmen were "at peace with the people of Lower California."[130] According to Kettner, "full ingress and egress" was essential to the San Diego tourist industry, especially since the town was losing business to Los Angeles under the wartime passport and immigration restrictions. Even San Diego labor unions encouraged a relaxation of passport restrictions as a stimulus to the local economy.[131] Similarly B. Rojo, ad interim *chargé d'affaires* for the Mexican embassy, requested a loosening of border crossing regulations between Presidio, Texas and Ojinaga, Mexico for the benefit of Mexican business.[132] As the Bureau itself realized, any reprieve from the law failed to quell the complaints of border residents and only led to more calls for leniency.

While southwestern immigration officials created new policies for the benefit of border communities, they were not beholden to local interests. They had their own administrative reasons for pursuing alternative policies. Section 13 certificates, the temporary admissions program, and the literacy test waivers were intended to make life easier for immigration inspectors. No longer would the agency have to deal with the daily press of people seeking entry without a passport or seeking the promise of work. No longer would Bureau officials have to hold BSI hearings for illiterate border residents requesting special permission to shop or visit family members across the line. But instead of making things easier, these exemptions only made things worse. Thus, for example, Supervising Inspector Berkshire observed that the relaxation of passport regulations perpetuated the very problem it purported to solve:

> Paradoxical as it may seem, every modification in the [passport] regulations made with a view to facilitating travel across the Border merely adds to the difficulties encountered. The reason is very simple. Relax-

130 William Kettner, Congressman, 11th District, California, to Commissioner General, October 22, 1919, file 54410/331F, RG 85, National Archives.

131 H. M. Hubbard, Secretary, Building Trades Council of San Diego, to William B. Wilson, Secretary of Labor, October 29, 1919, file 54410/331F, RG 85, National Archives.

132 Juan B. Rojo, Chargé d'Affaires ad interim, Mexican Embassy to Frank L. Polk, Acting Secretary of State, July 1, 1919, file 54261/276A, RG 85, National Archives. Fletcher, Under Secretary of State to Secretary of Labor, October 31, 1921, file 54410/331J, RG 85, National Archives.

> ation inevitably increases the volume of travelers to be handled and there is a physical limit to the number of travelers who can be handled by a permit agent under the most favorable circumstances.[133]

Along with the exemptions to the passport laws, the agricultural labor program and the literacy test waivers generated more work for the Bureau of Immigration in the Southwest.

While the Bureau undertook extensive efforts to implement the Immigration Act of 1917, the Passport Act of 1918, and the exemptions to both statutes, it conceded that those efforts could not succeed without more money, manpower, and materiel.[134] This is not to say, however, that southwestern immigration officials gave up. Instead, they called for an end to their responsibilities under the passport law, which, among all of their administrative duties, they blamed for diverting their attention and resources away from immigration law enforcement.[135] More important, it was the agency's experience with the border crossing card program, the agricultural labor program, and the literacy test waivers that led it to call for the formation of a roving police unit that became the immigration Border Patrol.[136]

The wartime mandates increased the responsibilities of the immigration officials on the Mexican border. The border crossing card and temporary admissions program placed a huge new population under the administrative supervision of the Bureau of Immigration. Populations, including agricultural laborers, border crossers, and American citizens, among others, that the Bureau once ignored now had to be processed, surveyed, and policed. Under the temporary admissions program, 72,862 Mexican farmworkers were admitted.[137] Upon the inception of the Passport Act, one State Department official estimated that 100,000 to 200,000

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133 F. W. Berkshire to Philip Adams, Chief, Division of Passport Control, State Department, September 8, 1920, file 54410/331H, RG 85, National Archives.

134 For an account of the Bureau of Immigration's efforts to enforce the Passport Act, see Kang, "The Legal Construction of the Borderlands," 35–38.

135 Ibid., 45.

136 Report of Supervising Inspector, Mexican Border District, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918,* 320.

137 Reisler, *By the Sweat of Their Brow,* 38. The Bureau, however, doubted the accuracy of these figures. Lacking the force to keep track of agricultural admissions, the Bureau relied on the accounting of employers who were believed to be lax in their

border crossers would need to obtain appropriate border crossing identification (be it in the form of passports, identification papers, or alien declarations).[138] Bureau figures further attest to the heavy workload created by the Passport Act. Between September 15, 1918 and June 30, 1919, District 23 (the Mexican Border District) issued 12,917 border permits to alien residents of the United States; 22,693 border permits to residents of Mexico; 15,413 citizens' identity cards to those residing in the U.S.; 362 citizens' identity cards to those residing in Mexico; and 14,130 one-trip tourist passes. During the same period, the agency reviewed the passports of 6,663 U.S. citizens entering the U.S. and 7,526 U.S. citizens departing the country.[139]

Successful fulfillment of these tremendous responsibilities required an administrative infrastructure that did not exist. In its enforcement of the passport laws, labor importation program, and the immigration laws, the Bureau, time and again, found itself underfunded and understaffed. Furthermore, the exemptions to the Passport Act and the Immigration Act of 1917 had a negative impact on the Bureau's budget. Dependent primarily on head tax revenue and administrative fines, the Section 13 certificates and temporary admissions programs left the Bureau strapped for cash by waiving the head tax. These fiscal shortfalls, along with federal budget cuts and the wartime draft, prevented the Bureau from hiring more inspectors. Thus, at many ports of entry, the agency had no more than two inspectors on duty at a time processing applications, renewals, or cancellations of passport documents, in addition to handling regular immigration work.[140] Some southwestern offices tried to ease their workloads by temporarily hiring Army and Customs personnel; but their lack of familiarity with the

administration of agricultural laborers. Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920,* 427.

138 Totten, "Report on Conditions," 12.

139 George J. Harris, Acting Supervising Inspector, Mexican Border District to Secretary of State, August 6, 1919, file 54410/331F, RG 85, National Archives. Letter from George J. Harris, Acting Supervising Inspector to Commissioner General, August 8, 1919, file 54410/331F, RG 85, National Archives.

140 Berkshire to Supervising Inspector, El Paso, October 18, 1920. E.P. Reynolds, Inspector in Charge, Brownsville to Inspector in Charge, Hidalgo, April 25, 1921, file 54410/331J, RG 85, National Archives.

immigration and passport laws often created confusion for immigrants.[141] The general weaknesses of the agency lowered morale within the force and, as a result, some officers took a lax approach to passport enforcement so as to complete their immigration duties.[142] It also led to *ad hoc*, delayed, or inconsistent implementation of the ever-changing passport policies, immigration laws, and the exceptions to both at the border.[143]

The lapses in the agency's approach to border enforcement along with the repeated modifications of the Immigration Act of 1917 and the Passport Act of 1918 rendered the agency the subject of harsh criticism. Some attacked the agency for failing to close the nation's borders to the entry of alien enemies, as one border resident observed:

> The immigration officials here make an effort to be as lenient as possible in the interpretation of the laws and the terms of the treaty existing between Mexico and the United States. Liberal instructions are given the field men in this respect. Inspectors and patrol officers are urged to cooperate with the local Mexican emigration authorities. There seems to be a tendency to lean ever backwards in this — as for example, the waiving of literacy requirements, the recognition of identification cards, permits, and the like in the case of temporary entry of visitors and laborers.[144]

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141 F. W. Berkshire, Supervising Inspector, El Paso, to Commissioner General, August 9, 1918, file 54152/1L, RG 85, National Archives (describing the confused conditions at Calexico where the Bureau of Immigration, Customs and the U.S. military all helped to enforce the passport laws).

142 A. A. Musgrave, Inspector in Charge, Calexico to F.W. Berkshire, April 12, 1918, file 54152/1J, RG 85, National Archives.

143 A. A. Musgrave, Inspector in Charge, Calexico to F.W. Berkshire, December 14, 1917, file 54410/331A, RG 85, National Archives. F.W. Berkshire to Supervising Inspector, El Paso, September 10, 1918, file 54152/1F, RG 85, National Archives. George J. Harris to Commissioner General, January 19, 1920, file 54951/5, RG 85, National Archives. Alvey A. Adee, Second Assistant Secretary, Department of State to Anthony Caminetti, Commissioner General, April 6, 1918, file 54152/1I, RG 85, National Archives. R.M. Cousar, Inspector in Charge, Nogales, Arizona to Supervising Inspector, Mexican Border District, October 5, 1920, file 54410/331I, RG 85, National Archives. F.W. Berkshire to Inspector in Charge, El Paso, September 10, 1918, file 54410/331A, RG 85, National Archives.

144 Thomas R. Taylor to D. Bendeen, Foreign Trade Secretary, Chamber of Commerce, El Paso, Texas, February 4, 1927, file 150.126/163, RG 59, National Archives.

This approach to immigration and passport law enforcement deeply concerned military officials. A Navy officer crossing the border at Laredo was shocked to find himself summarily waved across the line without an inspection. Writing to his superiors in the War Department, he noted, "it is a dangerous way to run such a service during war times and particularly on a frontier such as that of Mexico, which country harbors within its borders many of our enemies."[145]

The Bureau itself was also fully cognizant of the ways in which its administration of the laws left the border open to unwanted immigrants and potential alien enemies.[146] The temporary agricultural labor program sparked an increase in legal and illegal Mexican immigration that, according to the 1920 Annual Report, placed a "severe tax" on the agency.[147] Similarly, southwestern immigration inspectors reported that both official and unofficial literacy test waivers had been used by immigrants to achieve permanent domicile in the United States; as George J. Harris wrote in 1923, upon the inception of the literacy test in 1917 "thousands of aliens pleaded for and secured admission on the pretext that they were coming merely temporarily to make small purchases or to visit friends or relatives and took advantage of the opportunity to remain permanently."[148]

Immigrants also used their border crossing cards to circumvent the laws. In California, the Bureau discovered that Hirochi Nagasaki, a Japanese national residing on the U.S. side of the border, used his border crossing card to recruit Japanese immigrant laborers in Mexico to work on a 360-acre Calexico ranch that spanned the U.S.–Mexico border. Nagasaki was only one of 100 Japanese agriculturalists to whom the Bureau had issued border

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145 Letter from R. H. Van Deman, Colonel, General Staff, Chief Military Intelligence Section, War Department to Commissioner General, January 8, 1918, enclosing correspondence from E. McCuley, Jr., Commander, U.S. Navy, Assistant Director of Naval Intelligence, December 27, 1917, file 54152/1F, RG 85, National Archives. See also, Walter H. Sholes, American Consul, Nuevo Laredo, Mexico to Secretary of State, February 20, 1918, file 54152/1H, RG 85, National Archives; F. W. Berkshire, Supervising Inspector, Mexican Border District, to Secretary of State, November 6, 1919, file 54410/331F, RG 85, National Archives.

146 Anthony Caminetti, Commissioner General to the Secretary of Labor, July 9, 1918, file 54261/202B, RG 85, National Archives.

147 Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 24.

148 George J. Harris, Supervisor, to Commissioner General, May 24, 1923, file 54275/Gen., Pt. II, RG 85, National Archives.

crossing cards for the purpose of traveling to Mexico to lease or purchase agricultural lands.[149] Alarmed immigration agents wrote that Nagasaki had initiated a "Japanese invasion" of undocumented workers. To redress the problem, these particular agents did not call for the revocation of border crossing cards. Instead, they called for the creation of a border patrol.[150]

It is important to note that multiple calls for a border patrol were made by various immigration inspectors posted along the U.S.–Mexico border. Bureau officials who administered the Passport Laws and the border crossing cards, inspectors who issued literacy test waivers, and inspectors who tried to enforce the provisions of the agricultural labor program all concluded that a roving patrol force was necessary for effective border enforcement.[151] And these inspectors independently reached the same conclusion because they all understood the obstacles and problems surrounding immigration law enforcement on the U.S.–Mexico border. Indeed, in calling for a border patrol, southwestern Bureau officials acknowledged that, taken literally, the task of closing the nation's borders to unwanted immigrants was impossible. As a result, in the minds of these immigration officials, an effective border enforcement policy needed to take place at the border itself and beyond. A mobile patrol force, operating in the nation's interior, would be able to monitor and apprehend those immigrants who

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149 W. A. Brazie, Inspector in Charge, to Inspector in Charge, Los Angeles, January 27, 1920, file 54750/36A, RG 85, National Archives.

150 Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919,* 24. For an account of the Bureau's enforcement efforts against illegal Japanese immigrants, see Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919,* 408–409; Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 440.

151 Department of Labor, Bureau of Immigration, Departmental Order, June 12, 1918, file 54261/202B, RG 85, National Archives (reports need for more manpower to track farmworkers once they have been admitted to the United States); George J. Harris, Assistant Supervising Inspector, Mexican Border District to Commissioner General, August 27, 1918, file 54410/331, RG 85, National Archives (proposes a mobile immigration force in response to problems created by passport law enforcement); Report of Supervising Inspector, Mexican Border District, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918,* 319 (general call for border patrol); Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919,* 26 (call for a "patrol service" in response to illegal Chinese and Japanese immigration); Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1921,* 12 (call for a border patrol to assist in enforcement of the Act of May 19, 1921, popularly known as the Quota Act of 1921).

had not only violated the letter of the immigration laws but also benefited from the exemptions to the Immigration Act of 1917 and the Passport Act of 1918 — exemptions created by the Bureau of Immigration itself.

While the Immigration Act of 1917 sharply curbed the numbers of Mexican immigrants seeking admission for permanent residence, it did not diminish the number of border crossers. By the mid-1920s, the regulation of these non-immigrant border crossers, rather than restriction of immigrants, became the central concern of the Bureau of Immigration. In 1928, the commissioner general of immigration underscored this point when he observed that the nation's borders had surpassed Ellis Island as the major ports of entry. On the Mexican and Canadian borders, he continued, "a great change has been taking place . . . steadily are they approaching a place of first importance in the scheme of things from an immigration standpoint. The fiscal year just closed witnessed a movement back and forth across these frontiers made up of citizens and aliens aggregating 53,000,000 entrants. Many of these, of course, were commuters, visitors, excursionists, etc."[152]

In response to these conditions, Bureau of Immigration officials, for the remainder of the twentieth century, exercised their administrative discretion and constructed distinctive immigration policies for the borderlands. By carving out exceptions to the nation-bound premises of federal immigration laws, these policies reflected the agency's own recognition that statutes alone could not halt the circulation of peoples at the border. Between 1917 and 1924, at least three policy innovations — the wartime agricultural labor program, the literacy test waivers, and the border crossing card, were devised to satisfy the immediate needs of border residents and border officials rather than the aspirations of immigration restrictionists.

Yet, these amendments to the immigration and passport laws only generated new quandaries, such as heavier workloads, and aggravated old ones, particularly illegal immigration. The Bureau's own policy innovations became, in Pressman and Wildavsky's words, the "analytical equivalent

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[152] U.S. Department of Labor, Bureau of Immigration, *Annual Report of the Commissioner General of Immigration to the Secretary of Labor, fiscal year ended June 30, 1928* (Washington, D.C.: GPO, 1917), 10.

of original sin."[153] Put differently, the Bureau of Immigration created the very phenomenon — the so-called problem of illegal immigration — that it was mandated to resolve. By 1924, the Bureau formed the Border Patrol to shore up the weaknesses in its border enforcement strategy; in possession of sweeping powers, this mobile immigration force would have the ability to pursue and apprehend undocumented immigrants at the border, between the ports of entry, and within the nation's interior. But, because immigration officials would continue to devise policies for border residents, the Border Patrol acted not only to remedy what nativists construed as the ethical and cultural shortcomings of illegal immigrants but also to absolve the administrative sins of the Bureau of Immigration itself.

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[153] Pressman and Wildavsky, *Implementation,* 180.

TURNING BACK THE CLOCK:

California Constitutionalists, Hearthstone Originalism, and Brown v. Board

FELICIA KORNBLUH*

In 1953, when they were asked by the Supreme Court to reargue *Brown v. Board of Education*, the attorneys of the NAACP Legal Defense and Educational Fund turned to the writings of a blind professor from the Speech Department at UC Berkeley and a deaf librarian from Los Angeles.[1]

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[1] I refer to Graham as "deaf" rather than "Deaf" to indicate his physical impairment as well as his lack of participation in a cultural or linguistic community of other hearing-impaired people. Graham did not communicate in American Sign Language and did not attend any schools that catered to deaf students.

Thurgood Marshall and his team utilized the work of historians such as John Hope Franklin and C. Vann Woodward. However, to answer the critical question of the original meaning of the Fourteenth Amendment — the key question the Court had put to them in its request for re-argument — they built most directly upon the scholarship of Jacobus tenBroek and Howard Jay Graham.[2] These two scholar-activists had been collaborating since the middle 1940s, when both were in Berkeley, on research about the origins of the Reconstruction Amendments. They were the first to argue that the ultimate source of the language in Section One of the Fourteenth Amendment was the antebellum movement for the abolition of slavery. Therefore, they claimed, segregated education violated the Fourteenth Amendment's proscription against states' depriving citizens of "equal protection of the laws."

TenBroek was a scholar, teacher, and advocate who began his career on the far banks of the mainstream but eventually earned a national reputation. He co-authored a now-classic essay in 1949 that predicted and promoted the central role of the Equal Protection Clause in postwar movements for social change. He argued presciently that the Equal Protection Clause was being revivified in the postwar years. TenBroek and his collaborator were responsible for the Venn diagrams that illustrate forms of discrimination under the Equal Protection Clause that are constitutionally prohibited because they are "under-" or "over-inclusive." More ambitious, if less influential, was their argument for a doctrine of "substantive equal protection" that would acknowledge the need for affirmative government action to realize equality.[3] In 1940, tenBroek founded and began to lead the National Federation of the Blind (NFB), the first national group in U.S. history dedicated to blind people's advocacy on their own behalf. The NFB became the most effective organization by and for disabled people and public assistance recipients between World War II and the coalescence of mass

[2] Richard Kluger writes that "[t]he two experts probably most deeply versed in the subject [of the Fourteenth Amendment] shared a pair of traits," that they were Californians and disabled. Kluger, *Simple Justice: The History of Brown v. Board of Education, the Epochal Supreme Court Decision that Outlawed Segregation, and of Black America's Century-Long Struggle For Equality Under Law* (New York: Vintage, 1975), 625.

[3] Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37:3 (September, 1949): 341–381. Graham also argued for substantive equal protection.

movements for disability and welfare rights in the 1960s and 1970s. In a relatively short but productive career, tenBroek wrote field-defining essays on disability rights, income-based discrimination, and the right to travel, and was lead author of the first book-length critique of the Supreme Court and Roosevelt Administration *vis-à-vis* Japanese internment.[4] He chaired the State Social Welfare Board under Governor Edmond ("Pat") Brown, and taught in the Speech and Political Science Departments at Berkeley for almost thirty years.[5] His (zealous) former students included California Supreme Court Justice Joseph Grodin and activist lawyer Michael Tigar, and his colleagues and friends included Chief Justice Roger Traynor.[6]

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[4] Jacobus tenBroek, *The Constitution and the Right of Free Movement* (pamphlet, National Travelers' Aid Association, 1955); tenBroek, "California's Dual System of Family Law: Its Origins, Development, and Present Status," Part I, *Stanford Law Review* 16 (March, 1964): 257–357, Part II, *Stanford Law Review* 17 (July, 1964): 900–981; and Part III, *Stanford Law Review* 17 (April, 1965): 614–682; tenBroek, "The Right to Live In the World: The Disabled in the Law of Torts," *California Law Review* 54:2 (May, 1966): 841–919; tenBroek, Edward Barnhart, and Floyd Matson, *Prejudice, War, and the Constitution* (Berkeley and Los Angeles: University of California Press, 1954). On public assistance and disability, see also, tenBroek and Matson, *Hope Deferred: Public Welfare and the Blind* (University of California Press, 1959), and see discussions in Felicia Kornbluh, *The Battle for Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), 30; Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 20–21, 36; and Matson, *Blind Justice: Jacobus tenBroek and the Vision of Equality* (Washington, D.C.: Library of Congress/Friends of Libraries for the Blind, 2005), 129–148 (on Japanese American project), 171–179 (on theorizing poverty and social welfare).

[5] Adrienne Asch, "Jacobus Tenbroek [sic], Uc [sic] Berkeley's Pioneer in Civil Rights Theory and Action," remarks at the symposium, *Intersections of Civil Rights and Social Movements; Putting Disability in its Place*, held at UC Berkeley, November 3, 2000 and made available via the Regional Oral History Office, Bancroft Library (Bancroft), Berkeley, CA, 2004, http://content.cdlib.org/view?docId=hb5r29n7w0;NAAN=13030&doc.view=frames&chunk.id=div00019&toc.id=0&brand=calisphere [accessed November 26, 2012]; Unsigned tenBroek obituary, *San Francisco Chronicle*, March 28, 1968, and other materials, special issue of *The Braille Monitor*, voice of the National Federation of the Blind, Inkprint edition, Berkeley, July, 1968 devoted to memorializing Jacobus tenBroek, Bancroft. See also Matson, *Blind Justice*, 195, 210.

[6] Joseph Grodin, personal communication with the author, January 30, 2012; Michael Tigar, "Jacobus ten Broek. In Memoriam," *California Law Review* 56:3 (May, 1968): 573–574; Jacobus tenBroek to Howard Jay Graham, July 22, 1947; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind,

TenBroek's collaborator for a decade was Howard Jay Graham.[7] Graham never held a position in a university. Nonetheless, he served as an in-house constitutional historian for the NAACP during the summer of 1953 and a consultant in the fall of 1953, and wrote a substantial portion of the final brief to the Court in *Brown*. In the second volume of his biography of Thurgood Marshall, Mark Tushnet demonstrates that Graham's contribution to the NAACP's effort to prepare for the re-argument of *Brown* was more consequential than C. Vann Woodward's.[8] In a reversal of the traditional understanding of physically disabled adults as the "vulnerable," Judge Robert Carter, in an interview with *Brown v. Board* chronicler Richard Kluger, remembered Graham as one upon whom able-bodied attorneys leaned: Without Howard Jay Graham as an advisor on constitutional history during the preparation of their brief for the reargument of *Brown*, Carter recalled, "'we would have felt very vulnerable.'"[9] Graham laid the groundwork for his NAACP work with influential essays he published between the late 1930s and early 1950s. These undercut the post–Civil War doctrine of corporate personhood; attacked what he called the "conspiracy

Jernigan Institute, Baltimore, MD: "Had a chat with Traynor the other night . . . was provoked by his tie-up of you and Stephen Field to tell an interesting story about the latter. When he was Dean of the Law School, Sproul's administrative ass't called him up one day to ask about hanging a picture of Field in Boalt. Traynor replied immediately that he 'wouldn't hang a picture of that old son-of-a-bitch in a farmer's back house.' He then hung up the phone and began to think about the difference between Roger J. Traynor, Professor, talking to a law student in the basement of Boalt Hall and Roger J. Traynor, Dean, talking to the University administration. Five minutes later he called up the President's office to say that he would be delighted to hang a picture of Mr. Justice Field. He characterized Field as one of the worst judges ever to occupy the supreme bench, intellectually crooked, a man who gave the best reasons for the worst decisions. He said I could repeat the story to you but obviously wouldn't want it spread any further."

7 In addition to my own work, Matson explores their collaboration in *Blind Justice*, 119–127.

8 Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York and Oxford: Oxford University Press, 1994), 197, describes three research papers that "became the center of the NAACP brief," by Howard Jay Graham, John Hope Franklin and constitutional historian Alfred Kelly of Wayne State, and attorney William Coleman (and collaborators).

9 Richard Carter, quoted in Kluger, *Simple Justice*, 625. Feminist legal theorist Martha Fineman has made the idea of vulnerability the center of her approach to gender, disability, and difference. See Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, 20:1 (2008): 1–23.

theory" of a pro-capitalist, anti-civil rights Constitution posited by Charles and Mary Beard; and claimed that passionate citizens outside of the courts fashioned an "extra-judicial" version of substantive due process in the middle nineteenth century.[10] Graham defended the New Deal while renovating the historical reputations of abolitionists and Radical Republicans, and attempted to fashion an interpretation of the constitutional text that made it useful to social-change efforts in post–World War II America.[11]

TenBroek and Graham were virtually alone in researching the legislative and grassroots origins of the Fourteenth Amendment in the years between 1944 and 1950.[12] Early in their collaboration, they concluded that the legislative history of the Amendment could support diverse interpretations of its meaning — including interpretations that troubled their effort to further the cause of African-American civil rights in the middle twentieth century.[13] In response to this difficulty, tenBroek and Graham emphasized the significance of the constitutional thought of the

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[10] Howard Jay Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," Part I, *Yale Law Journal* 47:3 (January, 1938): 371–403; Part II, *Yale Law Journal* 48:2 (December, 1938): 171–194; Editorial Note prior to reprint of the "conspiracy theory" articles, *Everyman's Constitution* (Madison: State Historical Society of Wisconsin, 1968), 23–27; "Four Letters of Mr. Justice Field," *Yale Law Journal* 47:7 (May, 1938): 1100–1108; "Justice Field and the Fourteenth Amendment," *Yale Law Journal* 52:4 (September, 1943): 851–889; and "Procedure to Substance: Extra-Judicial Rise of Due Process, 1830–1860," *California Law Review* 40:4 (Winter, 1952–1953): 483–500. Only a week after publication of his first "conspiracy theory" essay, Justice Black cited it in his dissent in the case *Connecticut General Life Insurance Co. v. Johnson* [303 U.S. 77, 87] (1938), as support for his questioning of the idea of the corporate person that enjoyed the protections of Section One of the Fourteenth Amendment. Graham begins his book with reference to the constitutional rights of "*artificial* persons." See *Everyman's Constitution*, 3.

[11] For the New Deal context of his early publishing, see Graham, *Everyman's Constitution*, 25.

[12] Within the historical profession, they were working against the still-dominant Dunning school, on the right, and the Beardian or Progressive school, on the left. However, in their appreciation of the historical significance of the abolitionist movement, they followed on the heels of Dwight Lowell Dumond's *Antislavery Origins of the Civil War in the United States* (Ann Arbor: University of Michigan Press, 1939; reprint, with foreword by Arthur Schlesinger, Jr., 1959).

[13] For their frustration with what they found disappointing or "embarrassing" views of the Republicans who helped pass the Thirteenth and Fourteenth Amendments, see Howard Jay Graham to tenBroek, October 1 1945; October 28, 1945; and n.d. [filed in-between letters dated October 28 and November 25]; Antislavery Origins of the Fourteenth Amendment,

movement for the abolition of slavery from the early nineteenth century forward, and de-emphasized some of the ideas of the Republicans who formed the Congressional majority after the Civil War.[14] They argued that the abolitionists were the true authors of the Reconstruction Amendments, and that abolitionist oratory and journalism gave precise meanings to the sometimes-opaque phrases particularly of Section One of the Fourteenth Amendment.[15] They extrapolated from this research to articulate a socio-legal, "legal-history-from-below," approach to constitutional history.[16] They concluded that what Graham termed the "hearthstone opinions" of activists outside the courts and legislatures and what tenBroek called the work of "dogmatic, even fanatical, reformers" created some of the most significant changes in constitutional meaning in U.S. history.[17] In their

1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind, Jernigan Institute, Baltimore, MD.

[14] Dumond, rev. ed., 1959, 67–82, preceded tenBroek and Graham in offering an interpretation of anti-slavery and pro-slavery constitutional thought. (NAACP and U.S. Government Briefs for the Reargument included a few additional citations on anti-slavery thought and more generally on Reconstruction.)

[15] I see here something of a California or Berkeley socio-legal constitutional tradition — a tradition that, like the work of Willard Hurst and the Wisconsin School, was Realist in its inspiration. TenBroek and Graham were less interested than was Hurst in turning away from appellate case law and toward the interpenetration of law into daily lives, and more interested in exploring the historical roots of elite legal change. Interestingly, Hurst and Graham reviewed one another's work positively. See Willard Hurst, Review, "Truth and Fiction about the Fourteenth Amendment" by Louis B. Boudin; "The 'Conspiracy Theory' of the Fourteenth Amendment" by Howard Jay Graham; "Equality and the Law" by Louis A. Warsoff, *Harvard Law Review*, 52:5 (March, 1939): 851–860; Hurst, Review of *Everyman's Constitution*, *Journal of American History* 56:1 (June, 1969): 146–148; and Graham, Review of *Law and the Conditions of Freedom in the Nineteenth-Century United States* by James W. Hurst and *The Law of the Commonwealth and Chief Justice Shaw* by Leonard W. Levy, *California Law Review*, 45:5 (December, 1957): 792–796. Graham also reviewed John Phillip Reid's book, *Chief Justice: The Judicial World of Charles Doe, Journal of American History* 54:2 (September, 1967): 426–427.

[16] William Forbath, Hendrik Hartog, and Martha Minow, "Forward: Legal History from Below," *Wisconsin Law Review* (July/August, 1985) 759–766; for a debate and a refinement, see Felicia Kornbluh and Karen Tani, "Below, Above, Amidst: The Legal History of Poverty," *A Companion to American Legal History*, ed. Alfred Brophy and Sally E. Hadden (Blackwell Publishing, 2013), 329–348.

[17] Howard Jay Graham, SCHOOL SEGREGATION CASES — APPENDIX TO APPELLANTS' BRIEFS: "The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Re-examined," NAACP papers, Group

understanding of legal history, what activists such as the abolitionists called illegal and unconstitutional became so; after years of bitter struggle and warfare, the legal and constitutional agenda of these "fanatical" reformers was written into the Constitution.

The NAACP brief for the reargument of Brown echoed tenBroek's and Graham's scholarship, and had Howard Jay Graham as a primary author. The brief made an historical, originalist, and socio-legal argument about the Fourteenth Amendment that has only rarely been revisited. I think that it deserves reconsideration in light of years of second-guessing — from the left as well as the right — of the so-called "living constitutionalism" of the May, 1954, opinion in *Brown* and its reliance upon data from the "doll studies" of Kenneth and Mamie Clark, among other sources. Graham's and tenBroek's appreciation of the role of abolitionist activists in the making of constitutional meaning, combined with their particular originalist historical method, deserves consideration as well in the general context of the renaissance of originalist jurisprudence in the past thirty

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II, Box B 143, Folder titled "Schools – Kansas – Topeka – Brown v. Board of Education (and other cases) – 2nd Reargument – Legal papers – 1954," LOC. Graham wrote, p. 1: "The modern elaboration of due process and equal protection is familiar to everyone. Yet the really decisive shifts in these fields occurred before the Civil War. The synthesis was made, moreover, not by lawyers or judges, but by laymen, and only recently has the significance of this fact begun to be fully appreciated." Also see Graham's essay, "Extra-Judicial Rise of Due Process," which emphasized the activist origins of a theory of substantive due process decades before the late nineteenth century, and the essay he produced closest to his experience working for the NAACP, "The Fourteenth Amendment and School Segregation," *Buffalo Law Review* 3:1 (Winter, 1953): 1–24, which included his appreciation of "hearthstone," or grassroots, constitutional interpretation. See also Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley and Los Angeles: University of California Press, 1951), 94–95: "The three much-discussed clauses of section I of the Fourteenth Amendment were the product of and perhaps took their meaning, application, and significance from a popular and primarily lay movement, which was moral, ethical, religious, revivalist rather than legal in character. The movement was comprised of people who knew little and cared less about the erudition and ancient usages of the law, who came to the reading of the Constitution as dogmatic, even fanatical reformers . . . It was as a culmination of this movement and usage that the clauses of section I of the Fourteenth Amendment were made a part of the Constitution; and their accepted meaning was the meaning which these reformers gave to them on the hustings, in revival meetings, in pamphlets, and in the thousand other outlets to their ardor."

years.[18] Interestingly, Randy Barnett, the leading libertarian originalist legal scholar, recently rediscovered tenBroek's and Graham's scholarship on Section One of the Fourteenth Amendment. However, Barnett reiterated some of the constitutional arguments of leading abolitionists *vis-à-vis* the eighteenth-century Constitution without proceeding, as tenBroek and Graham did, to consider the ways in which nineteenth-century radical politics transformed constitutional meanings and gave the Reconstruction Amendments their liberatory edge.[19]

The originalism of the two disabled, California-based, scholars differed in important ways from Randy Barnett's and from that of present-day conservatives such as Antonin Scalia.[20] It differs as well from the "framework

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[18] The *stunde null* of modern constitutional originalism may be Alexander Bickel's 1955 essay on the use of historical evidence in *Brown*, based upon the research he conducted for Justice Frankfurter in the months after the Court posed its questions for reargument to the parties. Alexander Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69:1 (November, 1955): 1–65.

See also, among other reflections, Erwin Chemerinsky's recent thoughts on the SCOTUS Blog on the significance of Bickel's work in the development of originalism. Chemerinsky argues that the problem derived from Bickel's scholarship, of the legitimacy of "counter-majoritarian" appellate court action, and the answer that originalism appears to provide to this supposed difficulty, are both dead ends for legal thought. Erwin Chemerinsky, "It's Alexander Bickel's Fault," Online Alexander Bickel Symposium, SCOTUS Blog, August 16, 2012 [accessed October 22, 2012]: "Modern constitutional theory began with Alexander Bickel's *The Least Dangerous Branch* and its declaration . . . that there is a 'counter-majoritarian difficulty' in having an unelected judiciary with the power to invalidate the acts of popularly elected officials. The focus of constitutional theory ever since has been on trying to solve the counter-majoritarian difficulty identified by Bickel and on reconciling judicial review with democracy. Unfortunately, this is a misguided and impossible quest, but one that has had profound consequences for constitutional law ever since."

[19] Randy Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," Georgetown Public Law Research Paper No. 10-06, February, 2010, later published in *Journal of Legal Analysis,* 3 (2011). Barnett has been credited as the author of the constitutional challenge to the Affordable Care Act; despite the Court's choice to uphold the law, Justice Roberts's finding that its mandate exceeded what it was permissible under the Commerce Clause may have owed a debt to Barnett. See Sheryl Gay Stolberg and Charlie Savage, "Vindication for Challenger of Health Care Law," *New York Times*, March 26, 2012 [accessed at http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html October 29, 2012].

[20] Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); Antonin Scalia, *A Matter of Interpretation: Federal*

originalism" that the liberal constitutional theorist Jack Balkin has offered as an alternative to the jurisprudence of the Warren Court. However, like Balkin's provocative effort to blend late-twentieth- and twenty-first-century rights jurisprudence with originalism, the constitutional theory of tenBroek, Graham, and the NAACP's reargument in *Brown* was an attempt to claim that the true meaning of the Constitution was an equalitarian one. I do not offer the originalism of the *Brown* reargument as an alternative for today.[21] However, I think that studying the fate of that particular brand of "living originalism" (to borrow Balkin's phrase) can help us understand the legal world before *Brown*, and to comprehend some of the reasons why and ways how the Warren Court came to craft its approach to jurisprudence.[22]

The history of tenBroek's and Graham's role in *Brown v. Board* points toward different understandings of the roots of modern constitutional change than the standard ones. In a parallel to their interpretation of the nineteenth century, tenBroek's and Graham's work and lives indicate that twentieth-century constitutionalism, too, came from unlikely and largely unauthorized sources. Beyond their own biographies as West Coast intellectuals whose bodily experiences powerfully shaped their careers, tenBroek's and Graham's scholarship was also informed by the national and local contexts in which it was formed. For these two students at Berkeley in the 1930s, New Deal constitutional politics were obviously influential. TenBroek's early study of what he called "extrinsic [that is, historical] aids" to constitutional construction, and Graham's impassioned critique of the Beards, were complementary efforts to tear down the edifice of (pro-corporate, anti-labor, and anti-civil rights) post-*Lochner* jurisprudence — a body of jurisprudence that, both scholars would have argued, betrayed the Reconstruction Constitution.[23] For both men, the turn toward historical data as a resource in constitutional interpretation was a Realist intellectual

Courts and the Law, ed. Amy Gutmann, and with responses by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin (Princeton: Princeton University Press, 1997).

21 But see Jamal Greene, "Fourteenth Amendment Originalism," *Maryland Law Review* 71 (2012): 978–1014.

22 Jack Balkin, *Living Originalism* (Cambridge: Harvard/Belknap Press, 2011).

23 Jacobus tenBroek, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review* 26:3 (March, 1938): 287–308; tenBroek, "Use by the United States Supreme Court of Extrinsic Aids

move comparable to Willard Hurst's turn toward history as a window upon the role of law in American life. Graham and tenBroek both paid close attention to African-American civil rights campaigns, but for tenBroek, at least, the campaigns of Japanese and Japanese-American advocates in California were at least as influential as African-American ones.[24] This is evident in the range of cases he and co-author Joseph Tussman cited in their essay on equal protection, on which tenBroek was working at the same time that he was collaborating with Graham, and in the cases and other materials tenBroek taught his students in the Berkeley Speech Department (which he turned into a pre-law department) in the late 1940s and 1950s.[25] TenBroek, and perhaps Graham as well, were also shaped as intellectuals who appreciated the role of outsider groups in creating legal change by the disability rights movements of the 1930s and 1940s, including the statewide and national groups tenBroek co-founded, the California Council of the Blind and the National Federation of the Blind.[26]

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in Constitutional Construction," *California Law Review* 26:4 (May, 1938): 437–454; and Graham, "Conspiracy Theory," Part I and Part II.

[24] For general background on the multiple but distinct threads of civil rights activism in postwar California, see Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978* (New York and Oxford: Oxford University Press, 2010).

[25] Tussman and tenBroek, "Equal Protection of the Laws." In an early edition of the course book for Speech 1A and 1B, which served as the introductory courses in law at Berkeley during tenBroek's years in the Speech Department, tenBroek and Richard Wilson included the Supreme Court opinions in *Missouri ex rel. Gaines v. Canada* and *Smith v. Allwright*, but few other cases regarding African-American civil rights. The book also included materials from the internment cases, from *Yamashita v. Styer* (prosecution of the Japanese commander in the Philippines), and *Duncan v. Kahanamoku* (challenge to martial law in Hawaii). Jacobus tenBroek and Richard Wilson, *Materials for Speech 1A-1B, University of California Syllabus Series — Syllabus RX — Materials for Spech 1-A and 1-B* (Berkeley and Los Angeles: University of California Press, September, 1947), Bancroft. Note that the course book must have been amended after September, 1947, since the *Gaines* case was not decided by the Supreme Court until 1948.

[26] For discussions, see Kornbluh, "Disability, Antiprofessionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s," *Journal of American History* 97:4 (March, 2011): 1023–1047. We may find the roots of their approach to constitutional history as well in the internationalist and social democratic "human rights" politics of the era after the war; the efforts of women to defend their rights to work within and outside of the courts; the legal improvisations of the rising homophile movement of the 1940s; and in the belated revulsion within U.S. public

A LEGAL DILEMMA

Graham and tenBroek had begun to collaborate actively in the early 1940s. This was shortly after tenBroek had completed two years at Harvard Law School and another two at the University of Chicago Law School, earning one doctorate in law at Berkeley and beginning another at Harvard, and attempting to obtain a full-time teaching position. He had also during these years founded the National Federation of the Blind (in 1940, at the age of twenty-nine). Finally, in 1942, he received an offer of a full-time position in the Department of Speech at his alma mater. He began teaching in the fall of 1943.[27] Graham had by this time spent twelve fruitful but perhaps also frustrating years in Berkeley, had completed an M.A. in political science and training in librarianship. Despite his widely acknowledged expertise, Graham held neither a Ph.D. nor a law degree.[28] He started his career at the Los Angeles County Law Library in 1939. He had faced the predictable barriers both to education and to a scholarly career on account of his disability and on account of, first, the Depression and then wartime declines in university enrollments.[29]

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opinion at the treatment of European Jewry by the Nazis and the assertion of Jewish civil rights after World War II.

[27] TenBroek spent two years on a one-year fellowship at Harvard Law School and two in a one-year position at the University of Chicago Law School. On his final settlement with Berkeley, see Letter from Jacobus tenBroek, Chicago, Illinois, to Charles Aikin, Berkeley, CA, March 3, 1942; Letter from Gerald Marsh, Berkeley, CA, to Jacobus tenBroek, March 20, 1942; tenBroek to Marsh, April 13, 1942; and tenBroek to Aikin, April 30, 1942, all quoted in Lou Ann Blake, "Jacobus tenBroek: Letters to Berkeley," *Braille Monitor* 51:3 (March, 2008), no page, http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0803/bm080312.htm [accessed January 11, 2012]. For tenBroek's efforts to find a job generally, see Blake, "Jacobus tenBroek: Letters to Berkeley."

[28] In his foreword to Graham's book, Brandeis University constitutional historian Leonard Levy called Graham "surely the greatest authority on the history of the [Fourteenth] amendment," its "Maitland," and perhaps the greatest living authority on the history of the Constitution in the United States. Levy, "Foreword," to Graham, *Everyman's Constitution*, vii.

[29] Graham, *Everyman's Constitution*, xiii: Graham acknowledges his gratitude to the Berkeley School of Librarianship, "for further professional preparation, often under mutual difficulties — bridged in this instance, as always, by my wife Mary's faithful assistance." For sensitivity to the role of the war in constraining academic careers, I rely upon assorted letters excerpted in Blake, "Jacobus tenBroek: Letters to Berkeley."

The two scholars co-wrote a series of reviews of state constitutional law for the *American Political Science Review* (in 1943–44, 1944–45, and 1945–46).[30] They started work on the project they initially called "The American Judiciary and the American Dilemma" in the early fall of 1945, a year after publication of Myrdal's *An American Dilemma*.[31] By 1946, they were writing to one another several times a week, sharing citations, interpretations of data, and drafts of writing. Their correspondence was particularly rich since Graham was a self-described "lip-reader," and there was at this point in history no assistive technology that would allow him to speak on the telephone.[32] TenBroek was blind and could not read the letters Graham sent. However, his wife, Hazel tenBroek, who was sighted, worked nearly full time reading aloud to him.[33]

As they attempted to contribute to the cause of equality by means of constitutional history, tenBroek and Graham researched the immediate, post–Civil War, political context that produced the Reconstruction Amendments, and most particularly the Fourteenth Amendment. In service of this end, they took the relatively innovative strategy of largely bypassing

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30 "State Constitutional Law in 1943–44," *American Political Science Review* 38 (August, 1944): 670–692; "State Constitutional Law in 1944–45," *American Political Science Review* 39 (August, 1945): 685–719; and "State Constitutional Law in 1945–46," *American Political Science Review* 40 (August, 1946): 703–728.

31 Graham had great respect for Myrdal's study. In the editorial notes following republication of his original *Yale Law Journal* piece on the "conspiracy theory," Graham writes: "Not merely the law review literature, but even the Journal of Negro History reflects the national paucity of constitutional research and discussion at this period [late 1930s]. Such was the price and impact of the 1877–1897 constitutional and sectional 'settlement.' All honor therefore to the work of the NAACP, and to the Carnegie Corporation . . . for launching, in 1937, the foundation study which culminated in An American Dilemma." *Everyman's Constitution*, 67, fn. 11.

32 Graham, in *Everyman's Constitution*, "Preface," xii, describes himself as "a librarian and lipreader — a member of both groups that understand best how corporate and sociological modern research and communication are."

33 Occasionally Graham would acknowledge that the person who was actually reading his letters was Hazel tenBroek, but generally he would not. Howard Jay Graham to Jacobus ("Chick") tenBroek, October 28, 1945; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind, Jernigan Institute, Baltimore, MD: "Hazel, Never mind this I've repeated the important parts of it elsewhere . . . ."

judicial interpretations of the Amendments and focusing instead on congressional materials.[34] Their initial assumption appears to have been that the intentions of the congressional authors of the Fourteenth Amendment, and of the members of Congress who approved it, were broadly equalitarian; by reading their words, one could develop a convincing case to the effect that Jim Crow segregation was inconsistent with their intentions and that appellate jurisprudence on this and similar questions had been incorrect for half a century and needed to be thrown over.

TenBroek and Graham discovered fairly quickly that parsing the "original intent" of the "framers" of the Fourteenth Amendment was an extremely complex matter. As they gathered information about the congressional sponsors of the Reconstruction-era rethinking of the Constitution, they found that not everything these legislators said or did was consistent with their own twentieth-century civil rights politics. The collaborators began to overcome their impasse at the very end of 1945 or beginning of 1946, when they switched their emphasis (and widened the distance between their method and conventional forms of argumentation in constitutional law) from post–Civil War congressional debate to the roots of the Reconstruction Amendments in the ideology of the movement for the abolition of slavery. As tenBroek wrote later, with a degree of understatement that sounds almost ironic, "the discovery of the antislavery origins of the Civil War amendments dissipates much of the confusion resulting from the congressional and ratification debates."[35]

To a degree that may seem contradictory to a contemporary reader, tenBroek and Graham's approach to the Constitution was simultaneously originalist, historicist, and non-elite. It was originalist in that it centered on the quest for the true meaning of the document; it was historicist in that it sought that meaning in the rich documentation of the past; and it was non-elite, in that it encompassed not only the interpretations of existing constitutional texts by radical activists but also made them, as the sources of the ideas that found their way into Section One of the Fourteenth Amendment, the primary authors of constitutional change in U.S.

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34 See tenBroek, "Extrinsic Aids" essays.

35 tenBroek, *Antislavery Origins*, 4.

history.[36] Graham, writing in 1953, found the relationship between abolitionism and the Reconstruction Amendments to be "perhaps the classic example of moral and ethical revision of the law and of creative popular jurisprudence and constitution making — at least in the nineteenth century. 'Hearthstone opinions' in this process," he continued, "obviously were far more vital and determinative than judicial opinions. Constitutional Law here was growing at the base rather than at the top."[37]

PROVOKING THE ARGUMENT FROM HISTORY

The NAACP argued *Brown v. Board* before the Supreme Court for the first time in December, 1952.[38] Thurgood Marshall and the other attorneys submitted to the Court a thirteen-page-long brief accompanied by an appendix signed by leading researchers, including social psychologists Kenneth and Mamie Clark, Robert Merton of the Columbia Sociology Department, psychologist Gordon Allport, and the psychiatrist, Dr. Viola Bernard. The NAACP brief included a quotation from the Kansas court whose decision it appealed, a portion of which the Warren Court ultimately included in its own opinion. The quotation concerned the negative effects of segregation upon "colored children."[39] "'Segregation,'" the brief quoted, "'has a tendency to retard the educational and mental development of negro children and . . . instills in [the African-American child] a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society.'"[40] In passages that did not ultimately find their way into the Supreme Court opinion,

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[36] For such an approach to legal meaning-making, see Forbath, Hartog, and Minow, "Legal History from Below."

[37] Graham, *Everyman's Constitution*, chapter 6 (originally *Buffalo Law Review*, 1953), 284–85.

[38] I rely for background upon Tushnet, *Making Civil Rights Law*, 196–231, and Kluger, *Simple Justice*, 582–699.

[39] Brief for Appellants, in the Supreme Court of the United States, October Term, 1952, No. 8 – Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmuel, et al., Appellants, vs. Board of Education of Topeka, Shawnee County, Kansas, et al., Appeal from the United States District Court for the District of Kansas, NAACP papers, Series II, Box B138, Folder 10: "Schools – Kansas – Topeka – Brown v. Board of Education – Legal papers – 1951–1953," Library of Congress (LOC), Washington, D.C., 8.

[40] Ibid., 9.

the scholars argued that *white* children in a segregated society were likely to develop characteristics that intellectuals of the Frankfurt School had identified with the Authoritarian Personality, hating "the weak while they obsequiously and unquestioningly conform to the demands of the strong." The social and medical scientists argued that African-American children attending segregated schools "tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist."[41]

In response to these arguments regarding the "intangible" effects of segregation, the Supreme Court deadlocked.[42] Justice Douglas, writing in 1954, remembered that after the initial oral argument in *Brown*, there were four in favor of striking down segregation statutes, three in favor of upholding the *Plessy* doctrine, and Frankfurter and Jackson in-between, eager to avoid facing "the question if it was possible to avoid it."[43] The stalemate was settled by a consensus decision to request reargument. Despite his partial endorsement, in an informal memorandum, of the idea that constitutional meanings change with the times, Frankfurter helped settle the stalemate by drafting questions for the reargument that centered on research into the original meanings of the Reconstruction Amendments.[44]

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41 Ibid., 5.

42 I have come to understand the importance of the "intangible" from Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1986). However, the idea of intangibles shifted from the higher education cases discussed by Tushnet, which treated matters such as a law school's reputation and the intellectual value of dialogue with other talented students as the relevant "intangibles," to the psychological and sociological intangibles that came to the foreground in the consideration of elementary- and secondary-school segregation.

43 William O. Douglas, "Memorandum for the File in re Segregation Cases," May 17, 1954, William O. Douglas papers, Box 1149, file titled "Segregation Cases O[ctober] T[erm] 1953 – Segregation Cases No. 1, 2, 4, 8, 10," Manuscript Division, LOC.

44 Felix Frankfurter, informal memorandum to the other justices, with handwritten notation in upper right corner: "Written during the Summer 1952 and [reworked?] on September 26, 1952 by F.F." Earl Warren papers, Box 571, "SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953, File titled "SEGREGATION – STATE CASES," LOC. Frankfurter circulated the draft questions with a prefatory note, in which he expressed the belief that they properly reflected the ambivalence of the Court — and in which he also revealed the ubiquity of psychological thinking in the Court in the middle 1950s by writing about pro-segregation thought in psychological terms: "I know not how others feel, but for me the crucial factor in the problem presented by these cases

The first two questions, revised slightly with input from the other justices, were:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> a. that future Congresses might, in the exercise of their power under [section] 5 of the Amendment, abolish such segregation, or
>
> b. that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?[45]

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is psychological — the adjustment of men's minds and actions to the unfamiliar and the unpleasant. Time, in truth, is the ameliorative factor in the process of adjustment. It is therefore, in my mind, all to the good that the minds of those who are opposed to a change should accustom themselves to the idea of it long before they are confronted with it." Felix Frankfurter, Note accompanying Memorandum for Conference on the Segregation Cases, June, 1953, Felix Frankfurter papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Position 00243.

[45] These queries may, as Mark Tushnet has suggested, have represented a genuine effort on Frankfurter's part to settle his mind by means of some dispositive historical evidence. Or perhaps, as Frankfurter himself later suggested, it was a play for time that he thought would allow for greater consensus both on and off the Court (of course, the delay did in fact lead to the unexpected resolution of the issue when Chief Justice Vinson died and Earl Warren was appointed to his place). Douglas copy, Felix Frankfurter, "Memorandum for the Conference, RE: The Segregation Cases," June 4, 1953, William O. Douglas papers, Box 1149, folder titled "SEGREGATION CASES O.T. 1953 – Segregation Cases No. 1, 2, 4, 8, 10," LOC; Original and subsequent drafts of the questions for reargument, Frankfurter Papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Positions 00219-00242; Frankfurter, "Memorandum for the Conference . . ." June 4, 1953, copy, papers of Earl Warren, Box 571, "SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953 – SEGREGATION – STATE CASES,"

These questions set in motion a flurry of historical research concerning the nineteenth-century meanings of the Reconstruction Amendments. The NAACP legal team pursued the most far-reaching and labor-intensive effort, engaging professional historians such as John Hope Franklin and C. Vann Woodward, devoting countless hours of research time by in-house and affiliated counsel, gathering data from allies throughout the United States, and drawing upon such help as was available from scholars of constitutional law, including especially Howard Jay Graham, then employed as a bibliographer at the Los Angeles County Law Library, and Alfred Kelly of Wayne State University. In the fall of 1953, the NAACP submitted a brief of over two hundred pages covering the questions the Court had posed, with an unsigned appendix by Graham that summarized his argument about the abolitionist roots of the Reconstruction Amendments.[46] Graham's appendix played a role in the brief for reargument that paralleled the

LOC; and final Court Order, including questions, quoted in NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, Respectively, 13.

46 [Howard Jay Graham] "SUPPLEMENT: An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment," NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, Respectively, 199–235. Compare with Howard Jay Graham, "SCHOOL SEGREGATION CASES – APPENDIX TO APPELLANTS' BRIEFS The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Reexamined," n.d., NAACP papers, Group II, Box B 143, "Schools – Kansas – Topeka – Brown v. Board of Education (and other cases) – 2nd Reargument – Legal papers – 1954," LOC.

role of the statement signed by social and medical scientists in the original *Brown* brief. The authority of constitutional history — as practiced by an amateur scholar with an outsiderly, socio-legal orientation — here took the place of the authority of social psychology. (In the final *Brown* opinion of May, 1954, the authority would of course switch back from history to social and medical science.)

Lawyers within the U.S. Department of Justice, too, studied the record of the past and produced a gloss on the history and historiography of constitutional Reconstruction. The Justice Department authors (chiefly, the former Frankfurter clerk, Philip Elman) relied heavily upon Graham's and tenBroek's scholarship.[47] The legal advocates of the southern and border states engaged in their own historical investigations, to prove that the Reconstruction Congress did not contemplate racial integration in the public schools or a legislature that was empowered to take such sweeping action.[48] And the Supreme Court itself, specifically the chambers of Justice Felix Frankfurter, became a laboratory for the study of the constitutional past. Frankfurter assigned his clerk, Vincent McKusick, to gather historical evidence related to the segregation cases.[49] By September of 1952, Frankfurter had passed the assignment to McKusick's successor, Alexander Bickel. Bickel spent untold hours reading the *Congressional Globe* and other primary sources, as well as exploring the secondary material. As he was leaving the Court, he drafted a memorandum of over fifty pages on

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47 See discussion of Justice Department Brief in Kluger, *Simple Justice*, 650–652, and below.

48 See discussion in Kluger, *Simple Justice*, 646–650.

49 Letter from Vincent [McKusick], to Alexander Bickel, Esq., Washington, D.C., September 2, 1952, Felix Frankfurter papers, Harvard Law School, microfilm edition, LOC, Series II, Reel #4, at position 0329. "Dear Al: . . . [T]he chief thing that comes to my mind [that Frankfurter wanted] is his desire that you look into the 'sociological state of the art' in regard to segregation and its consequences. He had in mind that you should investigate whether in 1897 or whatever the date of the Plessy v. Ferguson case was, the literature showed that people realized the psychological and other subtle handicaps imposed by segregation. He also wanted you to make the same investigation in regard to the time of the Gaines case . . . As I remember Harlan's opinion . . . at least when the opinion is read in the light of our present knowledge, that he has some inkling of these intangible factors. Of course, Harlan's allusion to these factors does not mean that in 1897 they could be documented scientifically with the state of knowledge of that time."

the legislative history of the Fourteenth Amendment. Frankfurter invested countless effort in editing Bickel's work and summarizing it for his colleagues. He presented his main findings to the other justices while they were deliberating over the reargument, but Warren's opinion made little use of this evidence.[50] The dissertation or disquisition Bickel produced under Frankfurter's tutelage became grist for the younger man's scholarly career, but it was virtually useless in the Court's jurisprudence.[51]

ABOLITIONIST CONSTITUTIONALISM IN THE TWENTIETH-CENTURY COURT

The brief for the reargument of *Brown* by the NAACP utilized Graham's and tenBroek's conclusions about the abolitionist roots of constitutional thought. The NAACP lawyers encountered the same problems in answering the questions Frankfurter posed in 1953 that tenBroek and Graham had encountered when they began to research the legislative history of the Fourteenth Amendment in the 1940s: It was not at all clear that members of Congress or state legislatures who approved the Amendment believed that it would integrate public schools. The "Framers" of the Reconstruction Constitution were not all champions of thorough-going integration; some simply never considered educational integration, and others were appalled at the idea of frequent social contact or intermarriage between whites and blacks. In addition to arguing, then, that the Congressional majority during Reconstruction intended the Fourteenth Amendment to create sweeping changes in African Americans' status in the direction of complete equality, Marshall and his team drew upon tenBroek's and Graham's writing to argue that the mandate for the abolition of Jim Crow lay in the far-reaching equalitarian passions of the movement for the abolition of slavery — in the work of moralists, activists, propagandists, and politicians who began decades before the Civil War to give meaning to the phrases that were ultimately included in the Amendments.

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50 See details below.

51 Bickel, "Original Understanding"; *The Least Dangerous Branch* (New York: Bobbs–Merrill, 1962); and *Politics and the Warren Court* (New York: Harper and Row, 1965).

Part Two of the brief was the center of the NAACP's argument, and of the query the Court had posed. It contained the most new information, legal-historical data that had not been available to the Court when it deliberated over *Brown* the first time and that was directly germane to the question before it. In its first twenty-six pages, tenBroek's *Antislavery Origins of the Fourteenth Amendment* was the only piece of contemporary scholarship cited.[52] Following Graham and tenBroek, the brief argued that "[t]he framers of the Fourteenth Amendment were men who came to the 39th Congress with a well-defined background of Abolitionist doctrine."[53] They were, it was claimed, enlightenment humanists inspired by the Declaration of Independence. The brief continued: "The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in light of this revolutionary idealism that the questions propounded by this Court can best be answered."[54] In a section titled "The Framers of the Fourteenth Amendment," the NAACP argued, again following tenBroek's and Graham's research, that the Joint Committee of Fifteen that drafted the Fourteenth Amendment "was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition."[55] In conclusion, according to Part Two of the brief, "[t]he Fourteenth Amendment," as drafted and approved, "was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language."[56]

The Justice Department's Supplemental Brief, too, drew upon tenBroek's and Graham's scholarship and the framework of their argument.[57]

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52 NAACP Brief for Reargument (1953), 67–93.

53 Brief for Reargument, 68. The footnote here was to tenBroek, *Antislavery Origins*, 185–186.

54 Brief for Reargument, 69. The passage also reads: "In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion."

55 Ibid., 93.

56 Ibid., 103. Note that this is a section heading.

57 Herbert Brownell, Jr., Attorney General, J. Lee Rankin, Assistant Attorney General, and Philip Elman, Special Assistant to the Attorney General, "Supplemental Brief for the United States on Reargument," NAACP papers, Series II, Box B143, Folder 1,

The second section of the brief, immediately following the introduction, covered the "historical origins and background of the Fourteenth Amendment," and included two subsections, the first of which was "[t]he antislavery origins of the reconstruction amendments."[58] Rather than utilizing legislative history of the Fourteenth Amendment, narrowly understood, to grasp its framers' original intentions, the Government echoed Graham and tenBroek in claiming that "the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War. The abolitionists," the brief claimed, citing tenBroek, Graham, and a small number of other scholars, "propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the 'natural and fundamental' rights of all persons, white and black alike."[59]

In the end, the Supreme Court made little use of the multiple mini-monographs on legislative, doctrinal, and social-movement history that were written to answer Frankfurter's queries. Despite the historical research it received, or perhaps because of it, the Court created what is referred to today as the jurisprudence of the living Constitution. The internal debate over *Brown v. Board* also planted a seed that grew over decades, by means of the scholarship of former Frankfurter clerk Alexander Bickel, into what we call originalism. It virtually erased from memory the abolitionist, activist, socio-historical, and "hearthstone" approach to constitutional interpretation practiced by tenBroek and Graham — driving this fugitive mode of interpretation underground, from which it reemerged late in the

pp. X–XI, listed citations to Graham's essays, "The Early Antislavery Backgrounds of the Fourteenth Amendment," *Wisconsin Law Review* (May, 1950), 479-507, and "Extra-Judicial Rise of Due Process," and multiple citations to tenBroek, *Antislavery Origins of the Fourteenth Amendment*. By comparison with the work of professional historians who were involved in the case, it cited C. Vann Woodward's book, *Reunion and Reaction*, once, and John Hope Franklin not at all.

[58] Justice Department Supplemental Brief, I.

[59] Ibid., 9–10. This statement was followed, pp. 10–11, by an extended quotation from tenBroek, *Antislavery Origins of the Fourteenth Amendment*.

twentieth century as an occasional academic practice but never as a mainstream judicial one.

It is easy to understand why the justices' deliberations were different after the reargument than they had been after the initial argument. Chief Justice Vinson died in September, 1953, and Warren replaced him. These events not only gave the Court a new personality at its helm but also changed the vote on segregation from 4–3–2 (as Douglas had it) to 5–2–2, a clear majority in favor of overturning *Plessy*.[60] It is also easy to imagine that the justices were disappointed by the historical evidence they received from the NAACP, the Justice Department, and the segregating states. I do not think that the argument Earl Warren ultimately chose to emphasize in the *Brown* opinion was *per se* stronger or more true than the one from abolitionist constitutionalism that he rejected. The Supreme Court ultimately based its judgment in *Brown* upon supposedly scientific data suggesting that African Americans emerging from Jim Crow were damaged, even disabled — data that raised immediate questions about whether integration would endanger the educational experiences of white students or the overall quality of schools. The apparent consensus among researchers about the negative effects of segregation on African-American children, which undergirded the scientific appendix to the first *Brown* brief, appears to have been a chimera; Daryl Scott has argued persuasively that the empirical record was thin, and that some of the limited evidence available indicated that children who left the segregated south for integrated northern school systems in which they were outnumbered had *worse* self-images and educational outcomes than the children in all-black schools.[61] However, psychologists and sociologists appeared overwhelmingly to support the claims made in the scientific appendix.[62] In place of large numbers

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60 Kluger, *Simple Justice*, 694–695, reports that Justice Jackson was seriously considering writing a concurrence, perhaps with Frankfurter's signature as well. Jackson had a heart attack and was hospitalized before he had the opportunity to draft anything.

61 Daryl Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche* (Chapel Hill: University of North Carolina Press, 1996), 123–124, and, generally, 93–136. Some of Scott's writing is heavy-handed; I do not find all of his claims or suggestions, such as the idea that Kenneth Clark "manipulat[ed images of damaged African Americans] to gain white sympathy" (96) persuasive.

62 Statement of Counsel, Appendix to Appellants' Briefs, "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," in the Su-

of empirical studies supporting their arguments, the authors of that appendix introduced a poll of social scientists, who had not necessarily investigated the issues in question empirically but virtually all shared the NAACP's "opinion . . . concerning the probable effects of enforced segregation under conditions of equal facilities."[63] By contrast, in 1953, there was no consensus among professional historians, political scientists, or law professors about abolition, Reconstruction, or the Reconstruction Amendments. Nor was there a large body of scholars with elite credentials in these fields who could sign a brief in response to Frankfurter's historical queries — nor an overwhelming majority in those fields that would agree in a poll that the Constitution, as amended after the Civil War, demanded educational integration.

The historical arguments were rejected by their original champion, Justice Frankfurter, once it was clear that the Court would vote in favor of the NAACP plaintiffs. Frankfurter and Bickel were not interested in pursuing tenBroek's or Graham's "hearthstone" approach to constitutional history, and appear to have misunderstood the Californians' arguments somewhat. Moreover, Frankfurter bypassed the findings of the more conventional legislative history of the Fourteenth Amendment that Bickel wrote (at Frankfurter's insistence) because they went the wrong way; as tenBroek and Graham, and the NAACP LDEF, and the Justice Department lawyers, had realized earlier, Reconstruction-era Republicans did not necessarily support the social or educational mixing of blacks and whites.

Frankfurter had Bickel pursue a conventional but exhaustive legislative history, reading virtually everything printed in the *Congressional Globe* related to passage of the Fourteenth Amendment. However, Bickel did not consider primary documents from before the Civil War, or go beyond official sources. "Valid legislative history," he wrote, "is the study of what a legislative body was on notice of before it voted. Period."[64] However, Bickel

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preme Court of the United States, October Term, 1952 – Brown, et al., v. Board of Education, NAACP papers, Box B138, Folder 10, LOC, no page: "The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals."

63 "Social Science Statement," 10–11.

64 Letter from Alexander Bickel to Felix Frankfurter, August 22, 1953, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #4, at position 00212.

and Frankfurter considered tenBroek and Graham's argument insofar as it impinged directly on the legislative history of the Amendment. "Abolition thought went far," Bickel's draft memorandum, as edited by Frankfurter, read, "but it does not conform to the facts to say that it actuated the majority which submitted the Fourteenth Amendment or that it was embodied in the measure."[65]

There was a mismatch between Bickel's and Frankfurter's research method, a narrowly historical quest to divine the framers' original intentions, and their conclusions. Bickel argued privately to Frankfurter that it was "impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."[66] However, he ultimately claimed that the Fourteenth Amendment permitted jurists in the twentieth century to extend its reach in the service of racial equality well beyond what was explicitly endorsed by Congress or the state legislatures that ratified the Amendment.[67] He wrote: "[T]he legislative history leaves this Court free to remember that it is a *Constitution* it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a *Constitution* they were

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[65] Alexander Bickel, "Legislative History of the Fourteenth Amendment," n.d., with edits by Felix Frankfurter, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #3, at positions 00979–00980. Bickel cited tenBroek's *Anti-Slavery Origins of the Fourteenth Amendment*. Bickel made much the same point in Bickel to Frankfurter, August 22, 1953, at position 212: Bickel to FF: "There was of course the uncompromising abolitionist tradition behind a number of men in the Congress: Sumner, and Stevens, too, and others. Abolitionist thought went far, but it does not conform to the facts to say that it was consciously embodied in the Fourteenth Amendment by the 39th Congress. Cf. tenBroek, The Antislavery Origins of the Fourteenth Amendment. Stevens didn't think it had been. And if anything is clear, it is clear (it was bitterly clear to Sumner) that the Amendment did not extend suffrage."

[66] Bickel to Frankfurter, August 22, 1953, at position 00213.

[67] Ibid.: The Congressional majority "pointed . . . in Section 1 of the Fourteenth Amendment to the general manner in which problems similar to those with which it was dealing should in future be solved. This I believe is the most that can be said, and it is supported it seems to me by the authority of this Court which has extended the solution of the Fourteenth Amendment to problems — notably jury service — which were as little in focus in 1866 as segregation, and concerning which an even better case can be made out to show that the 39th Congress affirmatively indicated that they were without the scope."

writing."[68] Frankfurter summarized Bickel's main finding in a note to his Brethren that circulated in December, 1953: Bickel's work, he wrote, "indicates that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools or authorized legislation to that end, nor that it manifested the opposite."[69] Having thus reached an originalist dead end, Frankfurter and Bickel made the leap into a living constitutionalism, arguing that the original meaning left wide scope for changes in the Amendment's interpretation and application to new problems.

Earl Warren arrived at a 'living' interpretation of the Constitution with a lot less hand-wringing and historical research effort than Frankfurter and Bickel expended. His overwhelming interests were in maximizing the unanimity of the Court and in not inflaming southern segregationist opinion. It was his judgment call that relying upon a narrative of change in the available scientific evidence from 1896 to 1954 was a better route to those ends than rehearsing the record of the past — whether by means of what would have had to have been a careful reading of the legislative debates over the Fourteenth Amendment or (following the NAACP, Justice Department, tenBroek, and Graham) of a declaration of final victory for the radical abolitionists. Warren concluded before drafting the opinion, and without any apparent angst, that *Brown* could not "be decided on the basis of the intended scope of the Fourteenth Amendment because the evidence is inconclusive." His turn away from history in this sense was one death knell for the tenBroek–Graham approach. Warren marched even more steadfastly away from that approach when he added: "The opinion

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[68] Bickel to Frankfurter, at position 00214.

[69] [Douglas's Copy of] F.F. [Felix Frankfurter], "Memorandum for the Conference," December 3, 1953, Papers of William O. Douglas, Box 1149, File titled "SEGREGATION CASES O.T. 1953 — Segregation Cases No. 1, 2, 4, 8, 10," LOC. Frankfurter argued in a separate memorandum on the legislative history that his labors convinced him that it was "reasonably clear what the majority in the 39th Congress did not have specifically in mind." It was less clear exactly what that majority did have in mind. [Felix Frankfurter], "Prefatory Note to LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT," n.d., from Earl Warren papers, Box 571, "EARL WARREN – SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953," Folder titled, "SEGREGATION – STATE CASES."

should be *short*, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory. No section of the country and no segment of our population can justly place full responsibility on others. They must assume a measure of that responsibility themselves."[70]

Despite these warnings, there was language in the early drafts of the opinion that was destined to be left by the chief justice on the editing room floor. These drafts did not reprise the tenBroek–Graham argument, but they did include verbiage about racial subordination, history, and sharp divisions within the American body public. Warren's clerk William W. Oliver, for example, signed a draft (perhaps based upon an earlier draft by Warren himself that did not survive in the archives[71]) that included this passage: "[T]he Court has been guided . . . by that which all men know in their hearts about segregated schools. Segregated schools exist for one reason — as an expression of the dominant group's belief in the inferiority of the minority group. No equality of physical facilities can remove that implication."[72] The Oliver draft explained the Supreme Court's choice not to utilize the historical evidence it had gathered by suggesting that the Fourteenth Amendment was poorly crafted (not an idea that would quiet southern segregationist complaints about the Court's role in their lives), and by reminding readers about "[t]he four years of fratricidal warfare" that had created the conditions for its creation.[73] Oliver's version of the opinion included one passage that Warren decided to keep, in support of the Court's decision to disregard the historical evidence it had amassed. In a section on the changed role of education in the U.S. in the twentieth versus the nineteenth century, the Oliver draft read: "In approaching this

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[70] Warren Memorandum, Draft II, May 5, 1954. Note that this is a second draft; the first no doubt preceded the Oliver and Pollock drafts, below.

[71] Kluger, *Simple Justice*, 695, says that Earl Pollock himself remembered seeing a draft by Warren in April, 1954.

[72] [William W. Oliver], DRAFT OPINION, Brown v. Board, Supreme Court of the United States, Nos. 1, 2, 4, 8 and 10 – October Term, 1953, Earl Warren papers, Box 571, Folder titled "SEGREGATION – STATE CASES," LOC, 9. On Oliver, who taught for forty-one years at the University of Indiana Maurer School of Law, see http://law.indiana.edu/support/special/chairs/oliver.shtml [accessed November 3, 2012].

[73] Oliver Draft, 4. In another politically risky passage, Oliver reminded readers that the Fourteenth Amendment was endorsed only grudgingly by the states of the former Confederacy, which "were opposed to its letter and spirit" (4).

important question [of public primary and secondary education], we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1895 [sic], when Plessy v. Ferguson, supra, was decided."[74]

An early draft on which the chief justice's other clerk, Earl E. Pollock, worked was closer to the tone and substance Warren ultimately chose for the *Brown* opinion. Pollock, too, included references to the "fratricidal warfare" and "[i]ntense emotion" that were the backdrop to drafting the Amendment, and of the absence of representatives of the former Confederate states from the Congress that passed it.[75] However, the Pollock draft bypassed the argument about abolitionist origins, and the Justice Department's deployment of that argument in its brief. It included the suggestion that the Court "conclude, as did the Government [??], that the legislative history of the Amendment is inconclusive as far as the problem presented in these cases is concerned."[76] He also included language that was similar to that in the final opinion regarding the social and psychological consequences of segregation. Pollock's draft included the quotation from the Kansas court regarding the harms African Americans suffered under conditions of segregation, and the retardation of their education. "To separate them from others of similar age and qualifications solely because of their color," the draft read, "puts the mark of inferiority not only upon their status in the community but also upon their young hearts and minds in a way that is unlikely ever to be erased."[77]

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[74] Oliver Draft, 6.

[75] Note from E[arl] P[ollock] to Mr. Chief Justice, May 3, 1954, and, attached, Draft, May 7, 1954 (with edits in pencil), 3, Earl Warren papers, ibid.

[76] Pollock Draft, 3.

[77] Pollock Draft, 8 and [Pollock], handwritten draft, n.d., 8, in ibid. This language was added originally in the margin of the hand-written draft, perhaps indicating that it was added by Warren. Thinking in disability terms, the language here about students' "qualifications" seems to suggest that educational segregation on the basis of intellectual ability or disability would be acceptable. This issue would re-emerge in consideration of the implementation decree in *Brown II*, and in the local integration battles that followed. Note that the social-science brief in *Brown I* (first argument) made reference to the issue of segregation on the basis of intellectual ability, and argued that this might be damaging to young people in much the same way that segregation on the basis of race was damaging to them. The metaphor of "hearts and minds" was popularized by the British in the Malayan war of 1948–60. That language, too, seems to resonate in a disability register: it suggests that social circumstances can imprint upon people and change their psychological make-up.

In the final drafting of the *Brown* opinion, Warren and the other justices removed even more the history that gave rise to the Reconstruction Amendments and suggestions that white southerners did anything illegal or wrong. They relied ever more on the "modern authority" of Kenneth and Mamie Clark's doll studies and the fortress of apparent consensus among elite social scientists. They overturned *Plessy* without really imputing fallibility, or bad motives, to their predecessors on the Court, and without calling into question (as an abolitionist constitutionalism that asserted a true meaning for the Fourteenth Amendment that had been abrogated by appellate courts in the nineteenth century would have) decades of constitutional doctrine.[78]

Most of this change was accomplished by the time Chief Justice Warren completed his edits of the extant drafts on May 4. Warren removed the language about "fratricidal warfare" and the contentious, perhaps hasty, historical process that produced the Fourteenth Amendment. He substituted phrases that were close to the bland language that appears in the final opinion: "The historical evidence brought to the Court on reargument of *Brown*," he wrote, "and our own investigation convince us that these sources cast little light on the problem with which we are faced. At best, they are inconclusive."[79] Warren's draft did not explore the pre–Civil War period or engage the suggestions that abolitionist politics caused the Civil War and the battles of Reconstruction, and provoked the passage of the Fourteenth Amendment. Focusing only on the postwar period, his draft reflected on the divisions within the 39th Congress and enacted a kind of blue-grey (or at least a moderate-radical) peace that mirrored the peace

[78] For Graham, and, on at least two occasions for Justice Black (and once for Douglas), such a fundamental rethinking of post–Civil War constitutional doctrine would allow for a rethinking of the modern doctrine of corporate personhood. See Black's dissent in *Connecticut General Life Insurance Company v. Johnson* [303 U.S. 77] (1938), which cited Graham's two articles against a "conspiracy theory" of a corporate Constitution as scholarly support for the argument that corporate personhood with Fourteenth Amendment protection was a product of simply erroneous nineteenth-century appellate doctrine. See also Douglas's dissent (with Black's concurrence) in *Wheeling Steel Corporation v. Glander* [337 U.S. 562, 576–581] (1949); and Graham, "An Innocent Abroad: The Constitutional Corporate 'Person," reprinted as Chapter 9, *Everyman's Constitution*, 382; and "The Early Antislavery Backgrounds of the Fourteenth Amendment," reprinted as Chapter 4, *Everyman's Constitution*, 158.

[79] Chief Justice Warren, Mark-up and Draft, May 4, 1954, 4–5.

for which he clearly hoped in the middle twentieth century: "The most avid proponents of the post–Civil War Amendments," his draft read, "undoubtedly intended them to remove all distinctions among 'all persons born or naturalized in the United States.' Its opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect."[80] He removed language in prior drafts to the effect that separate educational institutions had never, in fact, been equal. And he incorporated and elevated in importance the phrase from the Oliver draft about time: "In approaching this question, we cannot turn the clock [Warren crossed out the words "of education"] back to 1868 . . . or even to 1896."[81] Warren at first removed, and then re-added, the language about "hearts and minds," and preserved the quotation from the Kansas court that claimed segregation had a " 'detrimental effect upon the colored children . . . [and] a tendency to retard the educational and mental development of negro children."[82]

The final drafts completed the work of effacing the bitter historical and political antecedents to the Reconstruction Amendments and their interpretation by the courts. In an unsigned draft of May 7, someone, presumably Warren, removed the last remaining use of the phrase, "Civil War," from the opinion.[83] In the draft that contained edits by the other justices, Justice Black was the only one who amended the opinion slightly in favor of the historical data, changing the passage about the data presented at reargument from "these sources cast little light on the problem with which we are faced" to "these sources cast *some* light *but not enough to resolve* the problem with which we are faced."[84] On the side of effacement, Frankfurter and Justice Stanley Reed appear to have concurred in removing a paragraph on

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80 Ibid., 5–6.

81 Ibid., 6.

82 Ibid., 8–9.

83 [Earl Warren], Draft with edits, May 7, 1954, 3, ibid.: "In the first cases in this Court construing the Fourteenth Amendment, decided shortly after ITS ADOPTION [someone has written this in pencil and crossed out the phrase "the Civil War"], the Court interpreted IT [crossed out: 'the Amendment'] as proscribing all state-imposed discriminations against the Negro race."

84 Mark-up of the Brown Decision with Edits from the Justices, Earl Warren papers, 3, Box 571, EARL WARREN – SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O[ctober] T[erm] 1953, Folder titled, "SEGREGATION – STATE CASES," LOC.

state legislative review of the Fourteenth Amendment.[85] Justices Harold Burton and Tom Clark altered historical sections that contained hints of accusation toward the south: Burton amended a passage that had the education of African Americans "forbidden by law in most Southern States" to read that education of blacks was "forbidden by law in some States."[86] Clark changed the passage that had education for African-American children having "received wide acceptance in the North," to read that it "had advanced further in the North" than in the South.[87] None of the justices amended the passage averring that they could not "turn the clock back to 1868 . . . or even to 1896." Endorsing the argument from social psychology, or, in Daryl Scott's terms, "black damage" (or, in mine, disability), Frankfuter amended the claim that segregation "puts the mark of inferiority . . . upon their hearts and minds" to read instead that educational segregation "generates a *feeling* of inferiority . . . that *may affect* their hearts and minds."[88] All of the justices let stand the reference to the Kansas court that found that segregation harmed "colored children" — but did not acknowledge the social science finding that white students under Jim Crow were susceptible to psychological harm and to becoming 'ordinary Germans' under authoritarian political rule.[89]

Frankfurter and Bickel, and Warren and his clerks, bypassed the argument from abolitionist constitutionalism. They considered only the arguments the NAACP and Justice Department — and Bickel himself — made about the post–Civil War legislative history of the Fourteenth Amendment. Unsurprisingly, they arrived at the same conclusions tenBroek and Graham had reached in the late 1940s: the 39th Congress was no place to look for a consensus about integration by race into all sectors of American life. However, once Earl Warren became chief justice, there was no chance that the Supreme Court would rule on the basis of that troubling history to uphold

[85] Mark-up with Justices' Edits, 3. The passage read: "The records of congressional and state legislative debates is not adequate for this purpose and in many of the State Legislatures ratification was accomplished with little or no formal discussion."

[86] Ibid., 4.

[87] Ibid.

[88] Ibid., 8.

[89] Ibid.

Plessy. Historical findings that could have been treated as conclusively opposed to integration were instead interpreted as "inconclusive" — and not just by Warren, but by the future tribune of opposition to countermajoritarian judicial action, Alexander Bickel, and the standard bearer for judicial deference, Felix Frankfurter. In the final stages of crafting an opinion, Warren and the other justices edited ever more of the historical specificity from it, virtually disappearing the Civil War and suggesting that neither the promise of Reconstruction (1868) nor the depredations of the early Jim Crow era (1896) was relevant. As they left the historical content on the cutting room floor, they relied instead upon the argument from social science (black disability) to support their twentieth-century interpretation of the Fourteenth Amendment.

Why did this occur? Historians concur in thinking that Warren and others wanted the opinion to be non-accusatory and non-inflammatory — to maximize the Court's unity and because white segregationists would, Warren no doubt believed, read the opinion carefully. But it is difficult to write honestly about the history of slavery, abolition, Reconstruction, and Jim Crow without being accusatory — including being accusatory toward some of the Republicans who formed the Congressional majority that approved the Fourteenth Amendment. Abolitionist constitutionalism was a stronger foundation upon which to build a modern, equalitarian understanding of the Fourteenth Amendment than was the legislative history offered by Bickel. But it recalled to mind more sharply the "fratricidal warfare" that eliminated the evil of slavery. TenBroek and Graham argued essentially that there were two irreconcilable factions in early nineteenth-century America. One of these factions was victorious in the Civil War and the other was defeated. The meaning of the Fourteenth Amendment was the meaning imputed to its terms by the winning side. There was little room in this picture of the past for the kind of blue-grey, moderate-radical temporizing that Warren ultimately wrote into the *Brown* opinion.

I place considerable stock as well in the state of scholarship in the middle 1950s. If the Supreme Court was going to take the risks that accompanied an abolitionist constitutional understanding of the past, then it would have wanted a strong scholarly consensus behind it. No such consensus existed at the time *Brown v. Board* was argued. The situation was different in terms of sociology and social psychology (if not also of the medical

sciences). Scholarly agreement appears to have been as persuasive to the Court as were the specific findings of the "doll studies" and other empirical data.

As an historian, I understand why Earl Warren and the other key actors in this drama did what they did. In 1954, the *Brown* opinion, which avoided so many potential political pitfalls, struck many as a work of genius.[90] At the same time, however, I am aware that much was lost in the Court's unwillingness to turn back the clock to the nineteenth-century roots of the nationally defining issues that came before it in *Brown*. Of course, as we know now, the intellectual maneuvering of the opinion did not prevent bitter, "fratricidal" battles over school integration in the 1950s, 1960s, and 1970s. The suggestion that African Americans were intellectually and psychologically damaged came to haunt the Court in *Brown II* in the local implementation battles that followed — and set the stage for the limited forms of integration that ultimately occurred in many parts of the country. The doll studies came under persistent assault as a basis for the judgment. And the Court never said in a clear voice that the abrogation of Reconstruction was a legal or moral wrong.

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[90] In introductory notes to the reprinted version of an essay based upon his work for the NAACP, Graham noted the lack of overt reference to the historical data in the final opinion. However, he allied himself and his own scholarly method with the "living" one (although he did not use that word) that ran through Warren's work. See Graham, Editorial Note, Chapter 6, *Everyman's Constitution*, 269: "The *School Cases* were decided May 17, 1954, with scant reference to the historical rebriefings or to framer intent or original understanding. Rather, political and judicial ethics, social psychology — what the equal protection of the laws means, and must mean, in our time . . . these were the grounds and the essence of Chief Justice Warren's opinion for a unanimous Court. *Affirmative* constitutional protection in short. *Affirmative equal* protection. Psychoanalysis of draftsmen and ratifiers, and obeisance to a dead past, can provide no Constitution for Everyman in this century. That is the argument here."