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REFUGEE RIGHTS ARE NOT NEGOTIABLE

JAMES C. HATHAWAY* AND ANNE K. CUSICK**

America's troubled relationship with international law, in particular human rights law, is well documented.[1] In many cases, the United States simply will not agree to be bound by international human rights treaties. For example, the United States has yet to ratify even such fundamental agreements as the International Covenant on Economic, Social and Cultural Rights,[2] the Convention on the Elimination of all Forms of Discrimination Against Women,[3] and the Convention on the Rights of the Child.[4]

When the United States does agree to become a party to an international human rights treaty, it has often sought to condition its acceptance of international obligations on the supremacy of its domestic constitution.[5] In the view of most other governments and experts, this kind of highly qualified ratification of human rights treaties may not be substantive ratification at all; after all, the whole point of international law is for states to agree to bring

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1. *See, e.g.*, LOUIS HENKIN, THE AGE OF RIGHTS 65 (1990) ("In the process that achieved the universalization and internationalization of human rights, the United States has played a major part. Yet the significance of international human rights in the policy of the United States has hardly been understood either abroad or at home, and indeed it has been riddled with apparent contradictions.").

2. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, S. DOC. NO. 95-2 (1977), 993 U.N.T.S. 3. This treaty was signed by the United States on October 5, 1977, but has not been ratified.

3. Convention on the Elimination of all Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33. This treaty was signed by the United States on July 17, 1980, but has not been ratified.

4. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448. This treaty was signed by the United States on Feb. 16, 1995, but has not been ratified.

5. In the case of [the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Elimination of Racial Discrimination] the Reservations, Understandings and Declarations which the Senate attached to United States accession have reflected certain assumptions or 'principles,' namely that no treaty obligations should be undertaken that are inconsistent with the [U.S.] Constitution; ratification should effect no change to United States law or practice where it fell below international standards; treaties should be non-self-executing; and implementation should be by states except for areas within the competence of the federal authorities.

Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only?*, *in* THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., forthcoming 2000) (on file with authors).

their domestic laws into compliance with international standards, not the reverse.[6]

Third, the United States routinely refuses to condone the enforceability of whatever highly conditioned international human rights obligations it accepts. In part it achieves this goal by reliance on an extraordinarily fungible notion that most international rights are not "self-executing,"[7] in consequence of which American courts are precluded from implementing them. Additionally, the United States refuses to allow its own citizens the right to access United Nations individuated complaint mechanisms, including those established to adjudicate civil and political rights, racial discrimination, and freedom from torture.[8] In refusing such access, the United States sadly denies to Americans rights held by the citizens of even less democratic countries like Algeria, China, and Libya.

The commitment of the United States to international refugee law should logically stand out as a positive exception to this tale of international apostasy. The United States is a party to the Protocol relating to the Status of

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6. As per *General Comment No. 24(52)*, U.N. Human Rights Committee, 52nd Sess., 1382nd mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994):

> Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other State parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

7. As first enunciated by Chief Justice Marshall in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829),

> [o]ur Constitution declares a treaty to be the law of the land. It is . . . equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

8. The United States is not a party to the First Optional Protocol to the International Covenant on Civil and Political Rights, which establishes an individual right of petition to the U.N. Human Rights Committee in respect of breaches of the Covenant. Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 2, 999 U.N.T.S. 302, 6 I.L.M. 383. Nor has it agreed to either Article 14 of the Convention on the Elimination of Racial Discrimination nor Article 22 of the Convention Against Torture, each of which similarly authorizes a right of individual petition in relation to the rights guaranteed by those treaties. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, art. 14, 5 I.L.M. 352, 361-62; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 22, 23 I.L.M. 1027, 1035 [hereinafter Torture Convention].

Refugees,[9] which incorporates by reference both the definition of a refugee and a catalogue of refugee rights derived from the earlier Convention relating to the Status of Refugees.[10] In acceding to the Protocol, the United States moreover made only two, quite modest reservations relating to rights of taxation and the duty to extend social security benefits to refugees.[11] No attempt whatsoever was made to condition ratification on compatibility with American domestic law, including the Constitution.[12] And it is absolutely clear that the passage of the Refugee Act in 1980[13] was intended to implement American obligations under the Protocol.[14] Yet the fact remains that the American asylum system is one of the most parochial in the world.

One consequence of this isolation from the broader refugee law community is an impoverished understanding of refugee law in the United States. While there are more than 130 nations bound by precisely the same refugee law obligations as the United States, American decision-makers only rarely show any awareness of the ways in which even these countries' highest courts have implemented the Convention and Protocol. Indeed, the Supreme Court's most recent refugee decision in *INS v. Aguirre-Aguirre*[15] contains the first reference by the Court to the jurisprudence of another state party to the

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9. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]. Pursuant to Art. I(1) of the Protocol, "[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." *Id.* at 606 U.N.T.S. 268.

10. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention].

11. Specifically,

> The United States of America construes Article 29 of the Convention as applying only to refugees who are resident in the United States and reserves the right to tax refugees who are not residents of the United States in accordance with its general rules relating to non-resident aliens . . . The United States of America accepts the obligation of paragraph 1 (b) of Article 24 of the Convention except insofar as that paragraph may conflict in certain instances with any provisions of title II (old age, survivors' and disability insurance) or title XVIII (hospital and medical insurance for the aged) of the Social Security Act. As to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances.

19 U.S.T. 6223, 6257 (reservation deposited by the Government of the United States upon ratification of the Protocol).

12. "In 1968 the United States acceded to the United Nations Protocol . . . . The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention . . . with respect to 'refugees' as defined in Article 1(2) of the Protocol." INS v. Stevic, 467 U.S. 407, 416 (1984).

13. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

14. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol [r]elating to the Status of Refugees . . . ." INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987). As Joan Fitzpatrick has observed, "the legislative history of the Refugee Act is replete with general expressions of intent to bring U.S. law into conformity with international norms." Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 6 (1997); *see also* Carolyn P. Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT'L L. 38 (1997); Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States*, 15 BERKELEY J. INT'L L. 27 (1997). *See generally infra* notes 144-48.

15. INS v. Aguirre-Aguirre, 119 S. Ct. 1439 (1999).

Convention and Protocol as support for its reasoning.[16] In contrast, the top courts in other leading common law countries, including those of Australia,[17] Canada,[18] and the United Kingdom,[19] routinely draw on the thinking of judges in other countries before determining refugee status and adjudicating the content of refugee rights. A commitment to treat similarly situated asylum seekers comparably in each state party makes ethical good sense and provides decision-makers with a practical means of profiting from a broader range of experience. By refusing to look to caselaw from outside its own borders, the American refugee jurisprudence is strikingly anomalous.[20]

As important as this substantive critique is, we wish to focus here on a more subtle, but quite fundamental, way in which the United States has distanced itself from full compliance with international refugee law. The uniquely American protection system rejects the most basic premise of the international refugee regime, namely that all persons who meet the refugee definition are *entitled* to benefit from internationally established rights. The legacy of the foundational jurisprudence of the U.S. Supreme Court has been illegitimately to substitute access to discretion for entitlement to rights.

I. THE SUPREME COURT'S REJECTION OF REFUGEE RIGHTS

The essential theory underlying the Refugee Convention is a simple one: persons who are in fact refugees, even prior to formal recognition as such,[21]

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16. In correctly rejecting the argument that an applicant for protection can be excluded under Art. 1(F)(b) only if the gravity of his crimes outweighs the seriousness of the persecution feared, the Court cited the 1996 House of Lords decision of *T. v. Secretary of State for the Home Department*, 2 All E.R. 865, 882 (H.L. 1996). The Supreme Court rejected the so-called "balancing test," finding comfort in Lord Mustill's common sense observation that "[t]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if returned." *Aguirre-Aguirre*, 119 S. Ct. at 1447.

17. In *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 142 A.L.R. 331 (Austl.), the Australian High Court referred to both U.S. and Canadian caselaw as well as four pertinent international treaties in construing the application of the "particular social group" category to persons at risk of sterilization for violation of China's one-child-family policy.

18. In *Pushpanathan v. Minister of Employment and Immigration*, No. 25173, 1998 Can. Sup. Ct. LEXIS 29 (June 4, 1998), the Canadian Supreme Court invoked two decisions of the International Court of Justice, and relied on twelve international treaties to inform its interpretation of Article 1(F)(c) of the Convention, pursuant to which persons reasonably believed to have acted contrary to the principles and purposes of the United Nations are excluded from refugee status.

19. In *Islam v. Secretary of State for the Home Department*, 2 W.L.R. 1015 (H.L. 1999), the House of Lords considered caselaw from Australia, Canada, New Zealand, and the United States as well as the Convention on the Elimination of All Forms of Discrimination Against Women in considering whether women from Pakistan should be deemed a "particular social group" for purposes of the Refugee Convention.

20. *See, e.g.*, INS v. Elias-Zacarias, 502 U.S. 478 (1992) (insisting that refugees are to be denied protection unless somehow able to prove the state of mind of the person or entity that would persecute them); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (misstating the duty of *non-refoulement* that encourages states to avoid their duties towards refugees by arm's-length deterrent practices).

21. The UNHCR advises that

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

are the holders of rights that may be invoked in relation to any state party.[22] All persons who meet the Convention refugee definition are entitled to the same catalogue of rights, namely those stipulated in Articles 2 through 34 of the Convention. The reason to both define and adjudicate refugee status is to identify those persons who are entitled to claim the Convention's list of basic guarantees.

To be clear, persons who meet the Convention definition of a refugee are *not* entitled to "asylum," understood in the sense of permanent admission to a state party.[23] The drafters of the Convention were adamant that they were not engaged in an effort to constrain state authority over permanent entry of non-citizens.[24] The issue of immigration was left entirely to state discretion, with Article 34 codifying what amounts to no more than a duty of states to give sympathetic consideration to the naturalization of refugees. The *quid pro quo* for the recognition of fulsome state discretion over the granting of asylum, however, was a clear and uncompromising duty to extend a broad-ranging set of rights to all refugees under one's jurisdiction. Socioeconomic rights are emphasized in order to ensure that refugees are able quickly to become self-sufficient in their country of refuge. On a plain reading of the text, these are not standards of achievement, but rights enforceable against state parties stated in the language of legal obligation.[25]

The Supreme Court's first decisions after accession by the United States to the Refugee Protocol arrived at a nearly opposite understanding. Read together, the judgments in *Stevic*[26] and *Cardoza-Fonseca*[27] determined that there is really only one clear obligation owed under the Refugee Convention, namely Article 33's duty of *non-refoulement*. Yet in the Supreme Court's view not even this duty is owed to persons who meet the Convention's definition of a refugee, but only to a subset of super-refugees able to show a

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UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 28 (1979) [hereinafter UNHCR HANDBOOK].

22. *See infra* Part II.

23. The attempt to draft a Convention on Territorial Asylum resulted in failure. *See* ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM (1980). While Article 14 of the Universal Declaration of Human Rights does provide for "the right to seek and to enjoy in other countries asylum from persecution," this provision is not of binding force. *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), U.N. GAOR, 183rd mtg. at 74, U.N. Doc. A/810 at 71 (1948).

24. See, for example, the statement of the French representative:

> To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience. It was normal in such cases that he should apply for a visa to the authorities of the country in question.

Conference of Plenipotentiaries on the Status of Refugees and StatelessPersons: Summary Record of the Fourteenth Meeting, U.N. GAOR, 14th mtg. at 10, U.N. Doc. A/CONF.2/SR.14 (1951) (statement of Mr. Colemar of France).

25. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention].

26. INS v. Stevic, 467 U.S. 407 (1984).

27. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

probability of persecution in their country of origin. Persons able simply to meet the Convention's requirement of having a "well-founded fear of being persecuted"[28] (correctly defined by the Supreme Court to require only a "reasonable possibility" of persecution[29]) are not rights-holders at all. They may simply appeal to the Attorney-General to grant asylum in her discretion.

These decisions obviate fundamental duties under international refugee law. Misinterpreting Article 33, the Court held that there is an obligation to avoid *refoulement*, but it is not a duty owed to refugees *qua* refugees. And relying on the flimsiest of all duties in the Convention, namely Article 34's stipulation that states should " . . . as far as possible facilitate the assimilation and naturalization of refugees,"[30] the Court reduced the duty to protect refugees to no more than an obligation to consider an act of charity. Somehow, Articles 2 through 32 of the Refugee Convention disappeared into thin air.[31]

The practical ramifications of this mistaken de-linkage of refugee status and refugee rights were initially few. Against the backdrop of the clarification in *Cardoza-Fonseca* that the lower, internationally correct "well-founded fear of persecution" standard of proof governs applications for asylum, restrictions on the negative exercise of discretion to grant asylum set by the Board of Immigration Appeals ("BIA")[32] meant that nearly every "refugee" was granted asylum under U.S. domestic law.[33] Because persons granted asylum are entitled to apply for permanent residence in the United States after one year,[34] in practice refugees nearly always received full Convention rights.[35]

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28. Convention, *supra* note 10, at 152 (art. 1(A)(2)).

29. The Supreme Court found that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a fifty percent chance of the occurrence taking place." *Cardoza-Fonseca*, 480 U.S. at 431. The Court clarified the import of the "reasonable possibility" test by insisting that "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10 [percent] chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening." *Id.* at 440.

30. Convention, *supra* note 10, at 176 (art. 34).

31. There is a footnote in the *Stevic* decision which recognizes the potential relevance of Article 32(1) of the Convention, which constrains the ability of a state to expel a refugee lawfully in its territory. *Stevic*, 467 U.S. at 417 n.10. The balance of the judgment and the decision in *Cardoza-Fonseca*, 480 U.S. 421, however, do nothing to give practical effect to this momentary acknowledgment of additional refugee rights under international law.

32. *See In re* Pula, 19 I. & N. Dec. 467, 473 (BIA 1987) ("In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion."). But " . . . *Matter of Pula* was decided before the adoption of the regulations which now control both mandatory and discretionary denials of asylum . . . . *Matter of Pula* was the BIA's 'attempt to fill a gap left in INS regulations,' . . . a gap that has now been filled by the subsequent action of the INS." Andriasian v. INS, 180 F.3d 1033 (9th Cir. 1999).

33. Soon after *Cardoza-Fonseca*, however, a pattern emerged whereby asylum claims were denied not on grounds of discretion or lack of credibility, but on a narrow interpretation of the concept of persecution and political opinion. *See* Deborah Anker & Carolyn Patty Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in* INS v. Cardoza-Fonseca, 1 INT'L J. REF. L. 67, 69-70 (1989).

34. *See* Immigration and Nationality Act (INA) § 209, 8 U.S.C. § 1159 (Supp. III 1998).

35. Even after passage of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, Pub. L. 104-193, § 400, 110 Stat. 2260, refugees and asylees were exempted from sweeping restrictions imposed on access to public benefits imposed on other immigrants who failed to meet stringent

More recently, however, the implicit ability of U.S. asylum law to counter the de-linkage of refugee status and refugee rights has broken down. In 1996, the Immigration and Nationality Act ("INA")[36] was amended[37] to establish statutory bars to the granting of asylum for reasons not authorized by the Refugee Convention. Further, the Attorney General is granted the continuing authority to define additional grounds for the refusal of asylum.[38] If these bars were simply restrictions on access to "asylum" defined in the sense of a right to permanent residence in the United States, they would be legally unexceptional (since, in accordance with Article 34 of the Convention, there is no duty to grant refugees a right to assimilate or to naturalize). The international legal concern arises from the fact that the United States impliedly relies on the asylum system to deliver the rights owed to refugees under international law. Notwithstanding the erroneous holdings in *Stevic* and *Cardoza-Fonseca* which denied that refugees are rights-holders, the United States has been able to avoid violating international law because refugees in practice received asylum; and asylum in practice delivered Convention rights. With the imposition of bars on access to asylum (and indeed, even on the duty to withhold the deportation of super-refugees) for reasons not contemplated by international law, the United States has now severed this automatic, if indirect, means of granting refugee rights to all refugees. Because there is no longer a dependable mechanism to offset the decisions in *Stevic* and *Cardoza-Fonseca*, persons who are in fact Convention refugees, but who fall under a statutory bar to the granting of asylum, will be denied access to their Convention rights.

In our view, the legislative record of accession to the United Nations Refugee Protocol and adoption of the Refugee Act of 1980 shows that both the Executive and Congress intended the United States to be bound by international refugee law norms. While some Executive representations were overstated, and while Congress did not legislate with precision, the text of the Refugee Act considered by the Supreme Court in *Stevic* and *Cardoza-Fonseca* could readily have been interpreted to implement the obligations of the United States under the Refugee Protocol. There was no solid reason not to have done so. To the contrary, respect for established canons of interpretation would have led the Court to adopt an understanding of U.S. law that was in harmony with the structure of international refugee law.

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residency requirements. *Id.* at § 402(a)(2)(A). Non-resident aliens are accorded the protection of the Bill of Rights, which indirectly provides access to many Refugee Convention rights. *See generally,* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 177-78 (1983).

36. Immigration and Nationality Act (INA), Pub. L. No. 414, 66 Stat. 163 (1952).

37. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

38. *See* INA § 208(b)(2)(C), 8 U.S.C. § 1158(b)(2)(C) (1994 & Supp. II 1997).

Our analysis below aims to show how the substitution by the United States Supreme Court of discretion for entitlement is irreconcilable to our treaty obligations, in that it creates protection gaps which expose genuine Convention refugees to both the risk of *refoulement* and, more generally, to treatment below international norms. We first consider the nature of the relationship between refugee status and refugee rights as structured under international law. We next review the history of U.S. accession to the Protocol in 1968 and of the adoption of the Refugee Act in 1980, which we believe signals the commitment in principle of Congress to a linkage between refugee status and refugee rights as conceived under international law. This conclusion leads us critically to appraise the contrary reasoning of the Supreme Court in *Stevic* and *Cardoza-Fonseca*, decisions that provide a legal rationalization for the imposition of bars on access to asylum and withholding of deportation which put the United States squarely in breach of its legal obligations towards refugees.

II. REFUGEE RIGHTS UNDER INTERNATIONAL LAW

There are at least three reasons to recognize that refugees—that is, persons who in fact meet the definition of a "refugee" stipulated in Article 1(A)(2) of the Refugee Convention—are entitled to claim the benefit of the rights articulated in Articles 2 through 34 of the Convention. First, the intention of the treaty to establish a legal obligation to afford rights to refugees is clear from the literal text and structure of the Convention itself. The goal of the Convention was ". . . to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope and protection accorded by such instruments by means of a new agreement."[39] State parties "[h]ave agreed"[40] to a non-derogable definition of a "refugee,"[41] and to "apply the provisions of this Convention to refugees without discrimination . . ."[42] The duties owed to refugees by state parties are all stated in mandatory ("shall") language. On the plain meaning of the text, refugees are the holders of rights exercisable in relation to state parties to the treaty.[43]

The non-discretionary nature of refugee rights is also clear from the decision strictly to delimit the circumstances in which states may deviate from the duties set by the Refugee Convention. The drafters of the Convention considered—but rejected—an all-embracing power of derogation in

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39. Convention, *supra* note 10, at 150 (Preamble, ¶ 3).
40. *Id.* at 152 (Preamble, ¶ 6).
41. *Id.* at 152-54 (art. 1(A)), 182 (art. 42(1)).
42. *Id.* at 156 (art. 3).
43. ". . .[T]his 'ordinary meaning' does not necessarily result from a pure grammatical analysis. The true meaning has to be arrived at by taking into account all the consequences which normally and reasonably flow from the text." IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 121 (1984).

time of national crisis.[44] In particular, the British proponent of the derogation clause wanted governments to be in a position to withhold rights from refugees if faced with a mass influx during wartime or other crisis. Because it would be impossible immediately to verify whether each person should be excluded from refugee status on security grounds,[45] governments might otherwise be effectively compelled to grant rights to persons who represented a danger to the host state.[46] His concern was valid, since a significant number of rights accrue to refugees even before their status has been formally determined.[47] Yet, as the American delegate insisted, it was equally important that any exception to the duties owed refugees be limited to "very special cases."[48] A balance was achieved between these two concerns in the design of Article 9 of the Refugee Convention, which allows governments to suspend refugee rights *only* when faced with a critical and exceptional crisis and *only* on an interim basis, allowing them time to investigate particular claims to refugee status.[49]

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44. "A contracting State may at a time of national crisis derogate from any particular provision of this Convention to such extent only as is necessary in the interests of national security." *United Kingdom: Amendments to Draft Convention Relating to the Status of Refugees (E/1618)*, U.N. ESCOR Ad Hoc Comm. on Refugees and Stateless Persons, 2nd Sess., U.N. Doc. E/AC.32/L.41 (1950).

45. Convention, *supra* note 10, at 156 (art. 1(F)). The exclusion clauses, which form an integral part of the definition of refugee status, also provide critical safeguards for governments. On this topic, see generally ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES UNDER INTERNATIONAL LAW 262-304 (1966); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 214-33 (1991).

46. The British representative

> recalled the critical days of May and June 1940, when the United Kingdom had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them. It was not impossible that such a situation could be reproduced in the future.

U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 21st mtg. at 8, U.N. Doc. E/AC.32/SR.21 (1950) (statement of Sir Leslie Brass); *see also* U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 34th mtg. at 20, U.N. Doc. E/AC.32/SR.34 (1950) (statement of Mr. Theodoli of Italy) (" . . . [T]he main concern was to know whether at a time of crisis the Contracting States could resort to exceptional measures. He referred to the situation of Italy at the outset of the war when thousands of refugees had flocked to the frontiers of Italy.").

47. The assurance of the representative of the United States that "the doubts of the United Kingdom representative might be resolved by the fact that any Government would be free to hold that any individual was not a *bona fide* refugee, in which case none of the provisions of the convention would apply to him" failed to recognize this critical point. U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 21st mtg. at 8, U.N. Doc. E/AC.32/SR.21 (1950) (statement of Mr. Henkin of the United States); *see also* U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 34th mtg. at 19, U.N. Doc. E/AC.32/SR.34 (1950) (statement of Mr. Henkin of the United States).

48. U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 34th mtg. at 21, U.N. Doc. E/AC.32/SR.34 (1950) (statement of Mr. Henkin of the United States). In particular, Mr. Henkin agreed that the Convention "ought not to prevent Governments in time of war from screening refugees to weed out those who were posing as such for subversive purposes." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 35th mtg. at 6, U.N. Doc. E/AC.32/SR.35 (1950). His concern was simply that "any limitation . . . ought to be defined more precisely than had been proposed, rather than leaving it open to countries to make far-reaching reservations. He would like the limitation to be as narrow as was possible . . . ." *Id.*

49. The president of the conference recalled that

> there had been no doubt that dangerous persons, such as spies, had to be dealt with under national laws. The question had then been raised as to the action to be taken in respect of refugees on the declaration of a state of war between two countries, which would make it impossible for a

Thus, state parties may withhold rights from refugees "in time of war or other grave and exceptional circumstances." Serious economic difficulties do not warrant a suspension of rights.[50] Nor is it sufficient for a government to invoke "public order" concerns,[51] or even "national security" interests.[52] While the original formulation, in which governments could suspend rights only during a "national emergency" was ultimately softened,[53] more than just "grave tension"[54] is clearly required. The circumstances must truly be "exceptional."[55]

Most important, Article 9 does not authorize generalized derogation on an ongoing basis, but only as a provisional measure.[56] A state that wishes to

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particular State to make an immediate distinction between enemy nationals, in the country, supporting the enemy government, and those persons who had fled from the territory of that enemy country. The *Ad Hoc* Committee had come to the conclusion that, while a government should not be in a position to treat persons in the latter category as enemies, it would need time to screen them.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. GAOR, 6th mtg. at 15, U.N. Doc. A/CONF.2/SR.6 (1951) (statement of The President, Mr. Larsen).

50. U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 34th mtg. at 21, U.N. Doc. E/AC.32/SR.34 (1950) (statement of Mr. Robinson of Israel).

51. A suggestion to adopt this traditional formulation made by Mr. Perez Perozo of Venezuela was not taken up by the drafters. U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 35th mtg. at 10, U.N. Doc. E/AC.32/SR.35 (1950).

52. This language was suggested by Mr. Shaw of Australia. *Conference of Plenipotentiaries on the Status of Refugees and StatelessPersons: Summary Record of the Sixth Meeting*, U.N. GAOR, 6th mtg. at 13, U.N. Doc. A/CONF.2/SR.6 (1951). It was, however, " . . . felt that there might be reasonable grounds for objecting to the Australian proposal that the phrase 'or in the interests of national security' should be inserted, since it would enable a State to take exceptional measures at any time, and not only in time of war of a national emergency." *Id.* at 14 (statement of Mr. Hoare of the United Kingdom); *accord id.* (statements of Mr. Chance of Canada and Mr. Baron van Boetzelaer of the Netherlands). In the result, only a subset of national security concerns, namely those that arise during war or other grave and exceptional circumstances, were deemed sufficient to justify provisional measures.

53. This standard was adopted by the Ad Hoc Committee on Refugees and Stateless Persons at its Second Session. *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, U.N. ESCOR, 2nd Sess., at 16, U.N. Doc. E/AC.32/8 (1950). It was, however, dropped at the Conference of Plenipotentiaries, at which it was noted that "the expression 'national emergency' seemed unduly restrictive." *Conference of Plenipotentiaries on the Status of Refugees and StatelessPersons: Summary Record of the Sixth Meeting*, *supra* note 52, at 14 (statement of Mr. Rochefort of France).

54. The Australian delegate proposed the language "time of grave tension, national or international," which was explicitly rejected by the Conference of Plenipotentiaries. *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixth Meeting*, *supra* note 52, at 16. The French view that derogation should be allowed in the event of "cold war, approximating to a state of war, tension, a state of emergency or an international crisis calling for certain precautions" must therefore also be taken to have been impliedly rejected. *Id.* at 14.

55. This language was proposed by the representative of the Netherlands, and adopted by the British delegate in the motion which ultimately was approved at the Conference of Plenipotentiaries. *Id.* at 16. It remains that this is a more fluid standard than, for example, that subsequently adopted in the Civil and Political Covenant, which only allows a suspension of rights if there is a "public emergency which threatens the life of the nation." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4(1), 999 U.N.T.S. 171, 174.

56. This is, of course, clear from the literal text of the article, which explicitly sanctions a state "taking provisionally measures which it considers to be essential to the national security . . . pending a [refugee status] determination." Indeed, while the Australian representative argued perhaps most strenuously for a wide-ranging power of derogation, even he made clear "that it was never his delegation's intention to open the way to an indefinite extension of the circumstances in which states could take exceptional measures." *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixth Meeting*, *supra* note 52, at 14 (statement of Mr. Shaw).

avail itself of the provisional measures authority must proceed in good faith to verify the claims to refugee status of all persons whose rights are thereby suspended.[57] If a particular person is found not to be a Convention refugee, including on the basis of criminal or other exclusion under Article 1(F), no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.[58] If, on the other hand, an individual is found to satisfy the Convention refugee definition, Article 9 establishes a presumption that the provisional measures shall no longer be applied to that person.[59] Clearly, by disallowing suspension of refugee rights either generally or in circumstances that do not meet the rigorous standards of Article 9, the Convention cannot possibly be understood to establish no more than a hortatory rights regime.

The obligatory nature of refugee rights is clear not only from the plain meaning of the Convention's textual structure and the strictly limited right to suspend respect for refugee rights under Article 9, but more generally from the way in which the Refugee Convention defines the acquisition of refugee rights. Specifically, refugees acquire rights as a function of their level of attachment to a particular state party. They are entitled to an expanding array of rights as their relationship with the asylum state deepens over the course of a four-part assimilation path. At the lowest level of attachment, some refugees are subject to a state's authority simply because they are physically present within territory under its jurisdiction. A greater attachment is manifest when the refugee is deemed to be lawfully present within the state. A still more significant attachment is inherent when the refugee is lawfully staying in the country. Finally, a small number of rights are reserved for refugees who can demonstrate durable residence in the asylum state. The Convention requires that a more fulsome range of needs and aspirations be met as the refugee's relationship to the asylum state is solidified.

The drafters' decision to grant refugee rights on an incremental basis reflected the experience of states confronted with the unplanned arrival of refugees at their frontiers. While overseas asylum states continued mainly to

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57. "During the war . . . [i]t was impossible to give all persons entering the country as refugees a thorough security examination, which had to be deferred till exceptional circumstances made it necessary." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 35th mtg. at 8, U.N. Doc. E/AC.32/SR.35 (1950) (statement of Sir Leslie Brass of the United Kingdom). As Robinson observes, "[t]he purpose of Art. 9 is to permit the wholesale provisional internment of refugees in time of war, followed by a screening process." NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 95 (1953).

58. Countervailing domestic or international legal obligations, for example duties to avoid removal under the Torture Convention, may operate independently to prevent removal from the asylum country. Torture Convention, *supra* note 8, at 1028 (art. 3(1)).

59. Robinson argues that the provisional measures "have to be suspended if the person involved can prove conclusively his status as a refugee." ROBINSON, *supra* note 57, at 95. The literal meaning of Art. 9 cannot, however, sustain this interpretation. The requirement that in the case of a refugee "the continuance of such measures [must be] necessary in his case in the interests of national security" is, however, a sufficient basis to argue that absent such a finding, provisional measures must be terminated. Convention, *supra* note 10, at 160 (art. 9).

receive refugees pre-selected for resettlement,[60] several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and unauthorized arrival of refugees at a state's borders. The drafters of the Convention explicitly considered how best to align the refugee rights regime with this transition from an essentially managed system of refugee migration, to a mixed system in which at least some refugees would move independently:

> [T]he initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As the definition of refugee made no distinction between those who had been properly admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.[61]

The compromise reached was that any unauthorized refugee at or within a state's borders would benefit from the protections of the Refugee Convention,[62] but they would not immediately acquire all the rights of "regularly admitted" refugees, that is, those pre-authorized to enter and to reside in an asylum state. Instead, as under French law, basic rights would be granted to all refugees, with additional rights following as the legal status of the refugee was consolidated.[63] The Refugee Convention implements this commitment by defining a continuum of legal attachment to the asylum state.

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60. The Chairman,

> speaking as the representative of Canada, observed that the question raised by the initial reception countries did not apply to his country, which was separated by an ocean from the refugee zones. Thanks to that situation, all refugees immigrating to Canada were *ipso facto* legally admitted and enjoyed the recognized rights granted to foreigners admitted for residence.

U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 7th mtg. at 12, U.N. Doc. E/AC/32/SR.7 (1950) (statement of Mr. Chance of Canada).

61. *Id.* at 12 (statement of Mr. Cuvelier of Belgium).

62. It did not follow, however, "that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties . . . . [W]hether or not the refugee was in a *regular position*, he must not be turned back to a country where his life or freedom could be threatened." U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 20th mtg. at 11-12, U.N. Doc. E/AC.32/SR.20 (1950) (statement of Mr. Henkin of the United States) (emphasis added).

63. According to the French representative,

> the problem would be seen more clearly if it were divided into three different aspects: the first concerned the treatment of refugees before they had reached an understanding with the authorities of the recipient countries; the second referred to their right to have their situation regularized and the conditions in which that was to be done; the third dealt with their rights after they had been lawfully authorized to reside in the country, which meant, in the case of France, after they were in possession of a residence card and a work card.

U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 15th mtg. at 15, U.N. Doc. E/AC/32/SR.15 (1950) (statement of Mr. Rain of France).

A significant number of rights are attributed to "refugees" without qualification of any kind,[64] and several other rights accrue to all refugees who are simply "in" or "within" a contracting state's territory.[65] In most cases,[66] these formulations amount to the same thing: any refugee physically present, lawfully or unlawfully, in territory under a state's jurisdiction may invoke these rights,[67] including protection against *refoulement* and discrimination, access to a state's courts, religious freedom, and the right to benefit from rationing and educational systems.[68] Identity papers are to be issued to refugees without documentation, penalties on account of illegal entry or presence are prohibited, and restrictions on internal freedom of movement must be justifiable. This conclusion follows not only from the plain meaning of the physical presence text, but also from the express intention of the drafters[69] and the context of the Convention as a whole.[70] These rights may not legitimately be withheld pending regularization of status, but must be granted even to " . . . refugees who had not yet been regularly admitted into a country."[71]

Refugees who are not simply physically present, but who are also lawfully in the territory of a state party, are further entitled to claim the rights that

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64. *See* Convention, *supra* note 10, at 156 (art. 3 "non-discrimination"), 162 (art. 12 "personal status"; art. 13 "movable and immovable property"), 164 (art. 16(1) "access to courts"), 166 (art. 20 "rationing"), 168 (art. 22 "education"), 172 (art. 29 "fiscal charges"), 176 (art. 33 "prohibition of expulsion or return—'refoulement' "; art. 34 "naturalization").

65. *See id.* at 156-58 (art. 4 "religion"), 172 (art. 27 "identity papers"), 174 (art. 31(1) "non-penalization for illegal entry or presence"; 31(2) "movements of refugees unlawfully in the country of refuge").

66. Rights attributed to "refugees" without qualification must, however, be granted to all refugees who, while not within a state's own territory, are in territory under a state's de facto control (e.g., in illegally occupied territory).

67. In a critical exchange, the American representative observed "that some of the articles did not specifically indicate to which refugees they applied. He presumed that the mention of 'refugees' without any qualifying phrase was intended to include all refugees, whether lawfully or unlawfully in a territory." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 41st mtg. at 18, U.N. Doc. E/AC.32/SR.41 (1950) (statement of Mr. Henkin of the United States). The immediate and unchallenged response of the Chairman was "that the United States representative's presumption was correct." *Id.* (statement of the Chairman, Mr. Larsen of Denmark).

68. *See supra* notes 64-65.

69. *Accord* U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 15th mtg. at 22, U.N. Doc. E/AC.32/SR.15 (1950) (statement of Mr. Larsen of Denmark) who persuaded the Ad Hoc Committee to draw up "a number of fairly simple rules for the treatment of refugees not yet authorized to reside in a country." To similar effect, the representative of the International Refugee Organization stressed the importance of including in the Convention "provisions concerning refugees who had not yet been regularly admitted." *Id.* at 18.

70. The interpretation of the Refugee Convention as granting rights even prior to formal verification of status is buttressed by the specific incorporation of Art. 9 in the Refugee Convention. Article 9 allows governments provisionally to suspend the rights of persons not yet confirmed to be refugees *if* the asylum state is faced with war or other exceptional circumstance. It follows from the inclusion of this provision in the Convention that, absent such extreme circumstances, states cannot suspend rights pending verification of status. *See* Convention, *supra* note 10, at 160 (art. 9).

71. U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 15th mtg. at 18, U.N. Doc. E/AC.32/SR.15 (1950) (statement of Mr. Henkin of the United States). The Danish representative similarly distinguished between "refugees regularly resident" and "those . . . who had just arrived in the initial reception country." U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 16th mtg. at 11, U.N. Doc. E/AC.32/SR.16 (1950) (statement of Mr. Larsen of Denmark).

apply at the second level of attachment. Lawful presence entitles refugees to engage in self-employment, enjoy internal freedom of movement, and be protected against expulsion.[72] Lawful presence is broadly defined.[73] Most important, the stage between "irregular" presence and the granting of permission either to stay in the asylum state or to resettle elsewhere is a form of "lawful presence."[74] Presence is lawful in the case of " . . . a person . . . not yet in possession of a residence permit but who had applied for it and had the receipt for that application. *Only those persons who had not applied*, or whose applications had been refused, were in an irregular position" (emphasis added).[75] The drafters recognized that refugees who travel without pre-authorization to a state party, but who are admitted to a process intended to assess their suitability for admission to that or another state, should " . . . be considered, for purposes of the future convention, to have been regularly admitted."[76]

It is nonetheless sometimes suggested that a refugee is not lawfully present until permanent residence is granted,[77] or at least until refugee status has

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72. *See* Convention, *supra* note 10, at 166 (art. 18 "self-employment"), 172 (art. 26 "freedom of movement"), and 174 (art. 32 "expulsion"). Goodwin-Gill, however, asserts that Art. 32 rights need be granted only to refugees who are "in the State on a more or less indefinite basis." GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 308 (1996). He offers no legal argument to justify this clear deviation from the express provisions of the Convention, relying instead on a bald appeal to the importance of achieving consistency with relevant state practice. State practice may assist in establishing the *interpretation* of a treaty provision. *See* Vienna Convention, *supra* note 25, at 340 (art. 31(3)(b)). However, state practice standing alone cannot give rise to a legal norm that may be relied upon to challenge the applicability of a conflicting treaty stipulation.

73. The French representative described this level of attachment as "a very wide term applicable to any refugee, whatever his origin or situation. It was therefore a term having a very broad meaning." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 42nd mtg. at 12, U.N. Doc. E/AC.32/SR.42 (1950) (statement of Mr. Juvigny of France).

74. The French description of the three phases through which a refugee passes distinguished the second step of "regularization" of status from the third and final stage at which "they had been lawfully authorized to reside in the country." U.N. ESCOR Ad Hoc Comm. on Stateless & Related Persons, 1st Sess., 15th mtg. at 15, U.N. Doc. E/AC.32/SR.15 (1950) (statement of Mr. Rain of France).

75. *Id.* at 20 (statement of Mr. Rain of France).

76. *Id.* (statement of Mr. Henkin of the United States).

77. Grahl-Madsen, for example, equivocates in his analysis of the status of refugees awaiting verification of their claims by authorities. He suggests that "a refugee may be 'lawfully' in a country for some purposes while 'unlawfully' there for other purposes . . . Furthermore, a refugee's presence may, on the face of it, be 'illegal' according to some set of rules (e.g. aliens legislation), yet 'legal' within a wider frame of reference (e.g. international refugee law)." ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 363 (1972). He ultimately adopts the definition of "regularization" stated by the British delegate to the Conference of Plenipotentiaries, namely "the acceptance by a country of a refugee for permanent settlement, not the mere issue of documents prior to the duration of his stay." *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, U.N. GAOR, 14th mtg. at 16, U.N. Doc. A/CONF.2/SR.14 (1951) (statement of Mr. Hoare of the United Kingdom). While this approach was endorsed by the representatives of some states not then experiencing the direct arrival of refugees, it was rejected as insufficiently attentive to the situation of those countries, such as France, that were obliged to process refugees arriving directly through a process of regularization involving successive stages. *See* U.N. ESCOR Ad Hoc Comm. on Statelessness & Related Problems, 1st Sess., 15th mtg. at 22, U.N. Doc. E/AC.32/SR.15 (1950) (description of the French system provided by the Belgian delegate). The inappropriateness of the equation of a "lawful presence" with admission to permanent residence was explicitly brought to the attention of the Conference of Plenipotentiaries by its President:

been formally verified.[78] In our view, these positions contradict the plain meaning of "lawful presence." Where the laws of a state authorize the direct arrival of refugees who submit to a status determination or comparable procedure, it cannot sensibly be argued that refugees who avail themselves of this legal option are not lawfully present. So long as a refugee has provided authorities with the information that will enable them to consider his or her entitlement to refugee status, in particular, details of personal and national identity and the facts relied upon in support of the claim for admission, there is clearly a legal basis for the refugee's presence.[79] The once irregularly

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> [S]uch a suggestion would probably cover the situation in the United States of America, where there were [only] two categories of entrants, those legally admitted and those who had entered clandestinely. *But it might not cover the situation in other countries where there were a number of intermediate stages*; for example, certain countries allowed refugees to remain in their territory for a limited time.

Conference of Plenipotentiaries on the Status of Refugees and StatelessPersons: Summary Record of the Fourteenth Meeting, U.N. GAOR, 14th mtg. at 17, U.N. Doc. A/CONF.2/SR.14 (1951) (statement of the President, Mr. Larsen of Denmark) (emphasis added). The only response to this clarification was an assertion by the representative of the United States that his country's system was not quite as simple as the President had implied. No delegate, however, challenged the accuracy of the President's understanding of "lawful presence" as including refugees subject to the various "intermediate stages" which a country might establish while verifying the claims of refugees arriving directly at their territories.

Grahl-Madsen's approach is also problematic because it conflates the categories of "lawful presence" and "lawful stay," thereby raising a concern of consistency with the general context of the Convention. Even as the drafters varied the level of attachment applicable to specific rights, they expressly opted to grant some rights at an intermediate point between "physical presence" and "lawful stay"—namely, "lawful presence." Yet under Grahl-Madsen's approach, there is no such intermediate point. Refugees would move directly from being merely physically (but "irregularly") present, to securing simultaneously all the rights associated with both "lawful presence" and "lawful stay" when and if permanent residence is granted. *See also* ROBINSON, *supra* note 57, at 154.

78. While there is limited support in the drafting history for such an interpretation (*see, e.g.*, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, U.N. GAOR, 14th mtg. at 15, U.N. Doc. A/CONF.2/SR.14 (1951) (statement of Mr. Larsen of Denmark)), this approach risks allowing genuine refugees to be "held hostage" to a state decision not to formally process a claim to Convention refugee status. An interpretation that "lawful stay" begins only at the time of official recognition of status erroneously assumes that states are under an obligation formally to verify refugee status. Because there is in fact no such duty, the conditioning of "lawful presence" on formal verification of refugee status would allow states perpetually to deny refugee rights defined by the second level of attachment by refusing formally to verify refugee status, an interpretation clearly in conflict with the general context of the Refugee Convention and the duty to implement treaties in good faith.

79. Consistent with the duty of states to implement their international legal obligations in good faith, it must be possible for all Convention refugees to fulfill any such requirements. Excluded, therefore, are any requirements that are directed to matters unrelated to refugee status, including suitability for immigration on economic, cultural, personal, or other grounds. Account must also be taken of any genuine disabilities faced by particular refugees, for example by reason of language, education, lack of trust, or the residual effects of stress or trauma, which may make it difficult for them to provide authorities with the information required to verify their refugee status. Because refugee status assessment involves a *shared* responsibility between the refugee and national authorities, *see* UNHCR HANDBOOK, *supra* note 21, ¶ 196, it is the responsibility of the receiving state to take all reasonable steps to assist refugees to state their claims to protection with clarity. *See generally* ROBERT BARSKY, CONSTRUCTING A PRODUCTIVE OTHER: DISCOURSE THEORY AND THE CONVENTION REFUGEE HEARING (1994); JAMES C. HATHAWAY, REBUILDING TRUST (1993); A. LEISS & R. BOESJES, FEMALE ASYLUM SEEKERS (1994); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE (1994); Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L. MIGRATION REV. 230 (1986).

present refugee is now lawfully present,[80] as he or she has satisfied the administrative requirements established by the state to consider which persons who arrive without authorization should nonetheless be allowed to remain there. Lawful presence continues during the assessment process and pending any review or appeal. The applicant's presence ceases to be lawful upon a final decision to refuse recognition of refugee status.

Those refugees who are not simply lawfully in a country's territory, but who are lawfully staying there, also benefit from freedom of association, the right to engage in wage-earning employment and to practice a profession, access to housing and welfare, protection of labor and social security legislation, intellectual property rights, travel documentation, consular assistance, and exemption from legislative reciprocity.[81] There was extraordinary linguistic confusion in deciding upon how best to label this third level of attachment.[82] The term "lawfully staying" was ultimately incorporated in the Convention as the most accurate rendering of the French language concept of "résidant régulièrement," the meaning of which was agreed to be controlling.[83]

Most fundamentally, "résidence régulière" is not synonymous with such legal notions as domicile or permanent resident status.[84] Instead, the drafters

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80. Grahl-Madsen suggests one potentially important exception to this general principle. He argues that a refugee who is detained pending verification of his claim to Convention refugee status (presumably on grounds that meet the justifiability test of Art. 31(2) of the Convention) can no longer be considered to be "lawfully" present. GRAHL-MADSEN, *supra* note 77, at 361-62. This conclusion is clearly tenable, though not based on decisions reached during the drafting process. A detained refugee claimant would still be entitled to those rights that are not restricted to refugees whose presence is lawful, i.e. the rights defined by the first level of attachment.

81. *See* Convention, *supra* note 10, at 162 (art. 14 "artistic and industrial property"; art. 15 "right of association"), 164 (art. 17 "wage-earning employment"), 166 (art. 19 "liberal professions"; art. 21 "housing"), 168 (art. 23 "public relief"; art. 24 "labour legislation and social security"), 170 (art. 25 "administrative assistance"), and 172 (art. 28 "travel documents"). In specific circumstances, the benefit of Arts. 7(2) ("exemption from reciprocity") and 17(2) (exemption from restrictive measures imposed on aliens in the context of "wage-earning employment") may also be claimed.

82. "The Chairman emphasized that the Committee was not writing Anglo-American law or French law, but international law in two languages. The trouble was that both the English-speaking and the French-speaking groups were trying to produce drafts which would automatically accord with their respective legal systems and accepted legal terminology." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 42nd mtg. at 25, U.N. Doc. E/AC.32/SR.42 (1950) (statement of the Chairman, Mr. Larsen of Denmark).

83. "The Committee experienced some difficulty with the phrases 'lawfully in the territory' in English and 'résidant régulièrement' in French. It decided however that the latter phrase in French should be rendered in English by 'lawfully staying in the territory.'" *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting: Report of the Style Committee*, U.N. GAOR, Agenda Item 6, at 2, U.N. Doc. A/CONF.2/102 (1951).

84. The U.S. representative

> could not accept "résidant régulièrement" if it was to be translated by 'lawfully resident,' which would not cover persons who were not legally resident in the English sense. It would not, for example, cover persons staying in the United States on a visitor's visa, and perhaps it might not even cover persons who had worked for the United Nations for five years in Geneva. The word 'residence' in English, though not exactly equivalent to 'domicile,' since it was possible to have more than one residence, had much of the same flavour.

U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 42nd mtg. at 24, U.N. Doc. E/AC.32/SR.42 (1950) (statement of Mr. Henkin of the United States).

emphasized that it was the refugee's de facto circumstances which determine whether or not the third level of attachment is satisfied.[85] The notion of 'résidence régulière' is "very wide in meaning . . . [and] implie[s] a settling down and, consequently, a certain length of residence."[86] While neither a prolonged stay[87] nor the establishment of habitual residence[88] is required, the refugee's presence in the state party must be ongoing in practical terms.[89] Professor Grahl-Madsen, for example, argues that lawful stay may be implied from an officially tolerated stay beyond the last date that an individual is allowed to remain in a country without securing a residence permit (usually three to six months).[90]

Finally, a few rights are reserved for refugees who reside in the contracting state. Habitually resident refugees have a right to legal aid, and to receive national treatment in regard to the posting of security for costs in a court proceeding.[91] After a period of three years' residence, refugees are also to be exempted from both requirements of legislative reciprocity,[92] and any restrictive measures imposed on the employment of aliens.[93] As can be seen from the short list of rights subject to the fourth level of attachment, there was

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85. "[T]here were two alternatives: either to say 'résidant régulièrement' and 'lawfully resident,' or to say 'lawfully' in which case 'résidant' must be omitted, otherwise, there would be too many complications in the translation of the various articles . . . [I]t would be better to say 'régulièrement,' since 'légalement' seemed too decidedly legal." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 42nd mtg. at 33-34, U.N. Doc. E/AC.32/SR.42 (1950) (statement of Mr. Juvigny of France).

86. *Id.* at 12 (statement of Mr. Juvigny of France).

87. "[T]he expression 'résidant régulièrement' did not imply a lengthy stay, otherwise the expression 'residance continue' . . . would have been employed." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 41st mtg. at 17, U.N. Doc. E/AC.32/SR.41 (1950) (statement of Mr. Juvigny of France).

88. "In the articles in question, the term used in the French text had been 'résidence habituelle' which implied some considerable length of residence. As a concession, the French delegation had agreed to substitute the words 'résidance régulière' which were far less restrictive in meaning." U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 42nd mtg. at 12, U.N. Doc. E/AC.32/SR.42 (1950) (statement of Mr. Juvigny of France).

89. The French representative suggested that the refugee's presence would have to be "more or less permanent" to satisfy the third level of attachment. *Id.*

90. According to Grahl-Madsen,

> [c]onsidering that three months seems to be almost universally accepted as the period for which an alien may remain in a country without needing a residence permit . . . it would seem that once a refugee, having filed the requisite application, has remained for more than three months, he should be considered 'lawfully staying', even though the authority for his continued sojourn merely is a 'provisional receipt' or its equivalent . . . . This leads us to the more general observation, that a refugee is 'residant regulierement' ('lawfully staying') . . .if he is in possession of a residence permit (or its equivalent) entitling him to remain there for more than three months, or if he actually is lawfully present in a territory beyond a period of three months after his entry (or after his reporting himself to the authorities, as the case may be).

GRAHL-MADSEN, *supra* note 77, at 353-54.

91. Convention, *supra* note 10, at 164 (art. 16(2)).

92. *Id.* at 158 (art. 7(2)).

93. An earlier exemption from alien employment restrictions is required in the case of a refugee who was already exempt from such requirements at the time the Convention entered into force for the state party; or where the refugee is married to, or the parent of, a national of the state party. *Id.* at 164 (art. 17(2)).

little enthusiasm among the drafters for the conditioning of access to refugee rights on the satisfaction of a durable residence requirement.

In sum, there is simply no basis to suggest that the Refugee Convention establishes anything other than a binding regime of rights that inhere in all refugees. This is clear from the basic textual structure of the treaty, which first defines a "refugee" and then enumerates the rights that follow from refugee status; from the extremely limited ability of states to depart from the duty to respect those norms; and from the carefully crafted system for allocating rights on the basis of a particular refugee's attachment to a particular country of refuge. Except to the extent it has exercised its right to make reservations under Article 42, no state has the right to redefine the entitlements that follow from Convention refugee status.

III. ACCESSION BY THE UNITED STATES TO THE INTERNATIONAL REFUGEE REGIME

The United States played an important role in drafting the Refugee Convention and in elaborating the rights of refugees provided therein, but it did not sign the Convention. U.S. policy was instead to respond to refugee crises on an *ad hoc*, discretionary basis.[94] Even the 1952 Immigration and Nationality Act,[95] drafted immediately after the entry into force of the Refugee Convention, contained no specific duty to admit refugees. It did, however, move modestly beyond reliance on situation-specific legislative responses by establishing two generic means by which refugees might be admitted to the United States.

First, refugees could be brought to the United States by the Executive in reliance on its general authority to parole into the United States any person whose entry "for emergent reasons [was] deemed strictly in the public interest.[96] Under the terms of the 1952 Immigration and Nationality Act, this entry was both discretionary and temporary, and could be revoked at any time by the Attorney General. Because persons allowed to enter under the parole authority were not technically "admitted" to the United States, they were moreover not rights-holders under U.S. law."[97] In practice, however, because refugee admissions were seen as an instrument of Cold War foreign policy, parolees (almost all from Communist-dominated countries or the Middle East) were routinely allowed to regularize their status in the United States.[98]

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94. Such an *ad hoc* approach was consistent with the pattern of earlier congressional enactments in response to specific situations. *See, e.g.*, Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (amended in 1950 and 1951). This practice continued with legislation such as the Refugee Relief Act, Pub. L. No. 203, 67 Stat. 400 (1953), extended in 1957, and the Fair Share Law, Pub. L. No. 86-648, 74 Stat. 504 (1960).

95. INA, Pub. L. No. 414, 66 Stat. 163 (1952).

96. *Id.* at § 212(d)(5).

97. *See* Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 15 (1981).

98. *See id.* at 13.

Alternatively, persons already inside the United States and facing deportation could apply for relief under § 243(h) of the Act, which authorized the Attorney General to withhold the deportation of an applicant illegally in the United States upon a finding that he would be subject to "physical persecution" if returned to his country origin. As in the case of parole, however, an affirmative decision on withholding did not result in any specific grant of rights or protections. The withholding provision moreover came to be interpreted by the BIA in a highly restrictive fashion, so that a favorable grant of discretion was limited to cases "of clear probability of persecution of the particular individual petitioner."[99] While purely a creature of administrative interpretation, this standard of proof was in practice determinative because of the extraordinary deference granted to BIA practice by reviewing courts.[100]

Congress substantially amended INA in 1965 in an effort to regularize somewhat the admission of refugees to the United States. As regards the entry of refugees selected abroad, § 203(a)(7) of the amended Act established a fixed quota of conditional entry visas to be allocated to persons who

> . . . because of persecution or fear of persecution on account of race, religion, or political opinion had fled . . . from any Communist or Communist-dominated country or area, or . . . from any country within the general area of the Middle East, and [who] are unable to unwilling to return to such country or area on account of race, religion, or political opinion . . . .[101]

Refugees admitted under this category were subject to a review of admissibility after two years in the United States. If successful, they were entitled to apply for permanent resident alien status.[102] While this conditional entry system was intended by Congress to constrain the Executive's use of the parole authority to the admission of refugees from overseas in limited, emergency situations, the scope of the parole power was left fully intact to enable its use in situations serving the national interest.[103] Because the numerical cap established by Congress on § 203(a)(7) visas was so limited, the Attorney General continued to resort to parole as an additional means by which to admit refugees to the United States.[104]

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99. *In re* Joseph, 13 I. & N. Dec. 70, 72 (BIA 1968).

100. *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967); Lena v. INS, 379 F.2d 536 (7th Cir. 1967); Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *modified* 676 F.2d 1023 (5th Cir. 1982).

101. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 912.

102. *See* David Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INTL. LEGAL STUD. 91, 96; Anker & Posner, *supra* note 97, at 18.

103. The failure simply to abolish the parole power may be explained by its utility beyond the refugee field. *See* Martin, *supra* note 102, at 93.

104. *See* Anker & Posner, *supra* note 97, at 18-19. A maximum of 10,200 immigration visas per annum was authorized.

The 1965 amendments also moved the United States substantially closer to de facto incorporation of the Refugee Convention into domestic law. Whereas previously only persons already in the United States and able to show that they had been, or would be subject to, "physical persecution" had been entitled to seek relief by way of withholding of deportation, the 1965 legislation amended the withholding authority in two ways.[105] First, the reference to "physical persecution" was deleted in favor of the international standard of "persecution" (without qualification). Second, a variant of the international nexus criterion was adopted, pursuant to which withholding could be sought by persons who feared or who had experienced "persecution on account of race, religion, or political opinion."[106] These changes did not, however, bring the United States into compliance with international refugee law.

First and most obviously, two of the five grounds upon which the Refugee Convention authorizes claims to be made, nationality and membership of a particular social group, were still missing. Second, the BIA's probability-based standard of proof (rather than simply "well-founded fear of persecution") continued to govern access to the remedy of withholding of deportation. Third, withholding of deportation was inaccessible to persons at, as opposed to within, the U.S. borders. While under international law an individual arriving at a state's borders is entitled to claim refugee status and hence protection against *refoulement*,[107] an alien was authorized to request withholding of deportation under U.S. law only once technically inside the territory of the United States. Because a refugee at a port of entry was not legally able to assert a right to § 243(h) protection,[108] there was a critical gap between the U.S. remedy of withholding of deportation and the duty of *non-refoulement* under international law.

U.S. refugee protection efforts prior to accession to the Refugee Protocol were thus fairly schizophrenic. The unquestioned focus of the U.S. system was the resettlement of refugees from the Communist world and the Middle East.[109] These refugees were admitted through the Executive's parole authority or under conditional entry visas without any serious examination of particularized risks, and were in most cases quickly processed for permanent admission to the United States. On the other hand, a person who managed to enter the United States through independent effort was required to satisfy a very high standard of proof in order to benefit from a discretionary grant of

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105. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 11, 79 Stat. 911, 913.

106. *Id.*

107. *See supra* text accompanying notes 64-68.

108. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958) (holding that an alien in exclusion proceedings who had been paroled into the United States had not made an "entry" and so was ineligible to seek withholding of deportation).

109. *See* Ira J. Kurzban, *A Critical Appraisal of Refugee Law*, 36 U. MIAMI L. REV. 865, 871-72 (1982). On occasion, other refugee groups benefited from comparably generous treatment, e.g., Ugandan Asians expelled by Idi Amin. *See* Anker & Posner, *supra* note 97, at 26 n.76.

withholding of deportation. If able to show an individualized risk amounting to a probability of persecution, asylum seekers on American territory were eligible to request the Attorney General to allow them to remain in the United States, but were without any clear or durable status.

This early experience is important, because it set the tone for all future American refugee protection efforts. While the international refugee regime does not even address the resettlement of at-risk persons who have yet to leave their own country or who have found temporary safety in camps or elsewhere, such work was the essence of the U.S. "refugee" system. Indeed, the United States routinely referred to such persons as refugees, and granted them extensive rights in the United States. On the other hand, persons not pre-selected for resettlement in the United States, but who arrived at U.S. borders of their own initiative to seek protection, were not treated as refugees, and were dealt with on a purely discretionary basis. This approach, too, was the opposite of what the international refugee regime required. Persons inside or at the frontier of a state party who meet the Convention refugee definition are rights-holders under international law, and must be protected against *refoulement* and granted the balance of the rights stipulated in the Refugee Convention. U.S. practice, in contrast, was simply to allow refugees arriving directly in the United States to seek purely discretionary protection from the Attorney General, based on a standard that bore only a general resemblance to the international refugee definition.

A. *Ratification of the Refugee Protocol*

The United States formally signaled its intention to be bound by international refugee law when it acceded to the Refugee Protocol in 1968. During the Senate hearings on ratification of the treaty, both the Executive and Senate clearly acknowledged that the decision to become a party to the Protocol resulted in legal obligations towards refugees. In his report to President Lyndon Johnson recommending submission of the Protocol to the Senate, Secretary of State Dean Rusk stated that the Protocol

> . . . binds acceding states to apply substantive Articles 2 through 34 of the Convention. Thus, parties to the Protocol are bound to extend to refugees the benefits of the Convention . . . . Given these [Convention] rights, the opportunity exists for refugees to become self-supporting and to live in dignity and self-respect . . . .[110]

In his testimony before the Senate Committee on Foreign Relations, the acting deputy director of the State Department's Office of Refugee and Migration Affairs emphasized this view, repeating that "[t]he Protocol binds acceding states to apply substantive Articles 2 through 34 of the Convention,

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110. S. EXEC. DOC. NO. 90-K (1968), *cited in* 63 AM. J. INT'L. L. 123, 124 (1969).

which in fact comprise the Bill of Rights for refugees."[111] He elaborated that the Protocol was a "universal covenant designed to secure necessary protection in asylum countries for those fleeing from their homelands because of persecution, and also, importantly, those rights which are necessary to their re-establishment as self-supporting members of other societies."[112] When the Protocol was introduced on the Senate floor, excerpts from the Committee report were included in the record, specifically that "[i]f the United States accedes to the Protocol, it is automatically bound to apply Articles 2 through 34 of the 1951 Convention . . . ."[113] There can therefore be no doubt that the United States understood that the Protocol entitles refugees to claim a specific set of rights from state parties.

At the level of detail, however, the Executive did not clearly indicate to the Senate what changes would be required to bring U.S. law into conformity with the Protocol. To the contrary, the essential position taken by the Executive was that the United States was already in compliance with all legal duties that would follow from signing the Protocol.[114] The Senate was told that the withholding of deportation provisions of the INA were "consistent with"[115] Articles 32 and 33 of the Refugee Convention, in consequence of which the Attorney General would "be able to administer such provisions in conformity with the Protocol, without amendment of the [Immigration and Nationality Act]."[116] This declaration was clearly misleading, but was nonetheless technically true on most points if understood simply as an indication that the Executive *could* bring the United States into conformity with the Protocol without need of new legislation.

The most fundamental problem with the Executive's representation is that the Refugee Convention consists of more than just Articles 32 and 33. Even if the withholding of deportation remedy were to implement those two international duties, it was not (and is not) designed to ensure that refugees receive the benefit of the balance of the rights owed them under Articles 2-31 of the Refugee Convention. On the other hand, the Executive's representation was not clearly false, since nothing in § 243(h) prevented the United States from granting the additional rights owed to refugees.

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111. S. REP. NO. 90-14, at 6 (1968) (statement of Laurence Dawson).

112. *Id.* at 4.

113. 110 CONG. REC. 22931 (daily ed. Oct. 3, 1968).

114. "[R]efugees in the United States have long enjoyed the protection and the rights which the Protocol calls for, on at least a basis equal to that which signatories to the Protocol would undertake to implement for refugees within their respective territories." S. REP. NO. 90-14, *supra* note 111 (testimony of Laurence Dawson).

115. *Id.*

116. *Id.* In Professor Fitzpatrick's view, "[t]he Administration's minimization of the obligations immanent in the Protocol is understandable as a cautious strategy to secure the Senate's consent and bring the United States within a crucial international legal regime. The Administration had good reason to fear that the Senate remained under the sway of 'Bricker Amendment' skepticism towards treaties with a human rights dimension. If the Senate could be convinced that the Protocol would effect no alterations in domestic law, Senate consent would be secured much more easily." Fitzpatrick, *supra* note 14, at 5.

Also problematic was the simplistic equation of the domestic remedy of withholding of deportation with the duties of non-expulsion and *non-refoulement* under Articles 32 and 33 of the Refugee Convention. While the domestic and international standards admittedly address comparable substantive concerns, they are not interchangeable. First, withholding of deportation was a purely discretionary remedy, whereas the protections of Articles 32 and 33 are mandatory. The only way that withholding of deportation could implement Articles 32 and 33 would therefore have been for the Attorney General to conform administrative practice to international obligations.[117] That is, the Attorney General could have complied with U.S. duties under the Protocol by interpreting the phrase "alien . . . subject to persecution" to include all persons able to show a "well-founded fear of being persecuted," and by committing the United States to always agreeing to withhold deportation for persons able to meet this standard, the technically discretionary charter of § 243(h) notwithstanding. While the textual fluidity of § 243(h) might have theoretically allowed the Attorney General to make such a shift, conflicting administrative practice made this difficult. As previously noted, the BIA interpreted § 243(h) to set a higher (probability based) standard to determine eligibility than the "well-founded fear of persecution" standard of the Protocol.[118]

And even if it had been possible to overcome this administrative law impediment to the equation of the standard of proof, two other inconsistencies between the duty of non-removal of refugees under international and U.S. refugee law remained. As noted in the preceding section, both the failure to embrace claims based on a nexus to either nationality or membership of a particular social group[119] and the refusal to allow persons at, but not inside, the border to seek withholding from deportation[120] meant that U.S. practice fell short of the Protocol's requirements. Yet here again, at least the second of these concerns could have been addressed by a change in the regulations, that is, without need of new legislation.[121]

Giving the Executive the benefit of the doubt, the State Department representations must have been intended to reassure the Congress that it would not be required to enact new legislation in order to give force to the Refugee Protocol. There is simply no basis upon which the Senate could reasonably have been advised that U.S. practice prior to accession to the Protocol in fact conformed to international law. Because that practice did not link refugee status to refugee rights; was fundamentally discretionary, rather

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117. *See* Fitzpatrick, *supra* note 14, at 4.

118. *See supra* notes 99-100 and accompanying text.

119. *See supra* note 106 and accompanying text.

120. *See supra* notes 107-08 and accompanying text.

121. *See infra* note 123 and accompanying text. It was also suggested by the Supreme Court in *Stevic*, 467 U.S. 407, 428 n.22 (1984), that the absence of reference to "nationality" and "membership in social groups" could have been overcome by "existing statutory provisions, . . .[given] the considerable discretion in interpreting and implementing such statutory provisions . . . ."

than rights-based; predicated even protection against removal on a higher standard of proof than "well-founded fear"; did not recognize two of the five grounds upon which refugee status could be claimed; and was not accessible to persons at, but not inside, U.S. borders, American *practice* was clearly out of step with international law.

This failure to fully confront the import of accession to the Protocol led to conflicting policies and practices. On the one hand, in 1972 the Secretary of State confirmed that a

> . . . primary consideration in U.S. asylum policy is the [Protocol] . . . . The principle of asylum inherent in this international treaty . . . and its explicit prohibition against the forcible return of refugees to conditions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.[122]

A regulatory asylum procedure established in 1974 partially closed one of the gaps between U.S. and international law by allowing aliens "at an airport or seaport of entry" to submit an asylum claim for determination by an Immigration and Nationality Service ("INS") district director following an oral hearing before an immigration officer.[123] In 1979, the regulations were amended again to open the inland discretionary asylum procedure to aliens already inside the United States, and to refer decisions on the claims lodged at airports and seaports to an immigration judge in the context of an exclusion hearing.[124] Yet the standard of proof for access to asylum was not the "well-founded fear of persecution" language of the Refugee Convention, but was instead still the probability-based withholding of deportation test. Nor did success on an application for asylum lead to the granting of the catalogue of refugee rights set by the Refugee Convention. To the contrary, it merely entitled the successful applicant to request an exercise of administrative discretion.

The key 1973 BIA decision in *Matter of Dunar*[125] exemplifies this confusion. On the one hand, the Board referred to the Protocol as a self-executing treaty and recognized that the United States was obliged to

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122. U.S. Dep't of State, *Press Release Jan. 11, 1972: General Policy for Dealing with Requests for Asylum by Foreign Nationals*, 66 DEP'T. ST. BULL., 124, 124-25 (1972).

123. The new regulation nonetheless refused to consider the asylum claims of persons arriving at "a land border port or pre-clearance station." Applications from such persons were merely referred to "the nearest American consul," suggesting that claimants would be (illegally) turned away from the U.S. border pending consideration of their refugee claims. 39 Fed. Reg. 41,832 (1974) (subsequently codified at 8 C.F.R. § 108).

124. 8 C.F.R. § 108 (1980).

125. 14 I. & N. Dec. 310 (BIA 1973).

grant refugees the benefit of Articles 2 through 34.[126] Yet the Board appeared not to have been troubled by the fact that the duty to protect refugees was to be implemented in U.S. law through the remedy of withholding of deportation under § 243(h), which does not deliver the rights stipulated in Articles 2 through 32. Nor did the Board appear concerned that withholding of deportation was a purely discretionary remedy, whereas *non-refoulement* is a mandatory obligation. The Board ignored this dissonance, asserting that it knew of no cases "in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which § 243(h) withholding has nevertheless been denied in the exercise of administrative discretion."[127] Thus, the "sounder approach is to regard the entire determination as a discretionary assessment of the likelihood of persecution . . ."[128] and to resolve any concerns on a case-by-case basis.[129]

Second, because the Board chose to work within the framework of § 243(h), it simply continued past practice of insisting on "probability" (rather than "well-founded fear") as the relevant standard of proof applicable to withholding of deportation proceedings. It found that Article 33 of the Refugee Convention "can produce no meaningful change in the way § 243(h) has been applied. Thus far, relief thereunder has never been denied to an alien who has established that he will probably be persecuted."[130] This extraordinary result was reached by an examination of the legislative history of accession to the Protocol that "satisfie[d the Board] that the United States Senate . . . did not contemplate that radical changes in existing immigration laws would be effected."[131] This is an inaccurate reading of the highly ambiguous legislative history, for reasons canvassed above.[132] But even if Congress had expressed itself clearly on this point, domestic legislative history cannot be relied upon to avoid American duties under a treaty by which it had agreed to be bound. While the United States was of course free to limit access to the domestic remedy of withholding of deportation on any basis it wished, it was not entitled to limit access to protection against *refoulement* on terms other than as set by the Refugee Convention. The Board's decision in *Matter of Dunar* was in error because it failed to recognize that once the United States chose to rely on the withholding remedy to implement its duty of *non-refoulement*, it lost the flexibility to constrain entitlement to withholding on grounds not foreseen by international law.

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126. "In acceding to the Protocol, the United States undertook to apply Articles 2 to 34, inclusive, of the Convention to refugees as defined in the Protocol . . . . Such a treaty, being self-executing, has the force and effect of an act of Congress." *Id.* at 313.

127. *Id.* at 322.

128. *Id.* at 323.

129. *See id.* at 320-21.

130. *Id.* at 323.

131. *Id.* at 314.

132. *See supra* notes 110-13 and accompanying text.

In sum, *Matter of Dunar* purported to recognize that the United States is duty-bound to grant the benefit of Articles 2 through 34 of the Refugee Convention to refugees, yet reached substantive results that are irreconcilable to that position. The withholding remedy does not deliver the full range of rights required by the Refugee Protocol; and the one right it does deliver (non-return) is reserved for only a subset of persons able to meet the international test of a "well-founded fear" of persecution, and even then is subject to administrative discretion. And while it is certainly possible to implement the duty of *non-refoulement* through a purely discretionary procedure, there is no reason apart from slavish adherence to past domestic practice to see reliance on discretion as a "sounder approach." To the contrary, the risk of error was clearly increased by the Board's decision to see § 243(h) as an appropriate mechanism by which to implement Article 33.

This decision may reflect the Board's failure to realize its ability to correct administrative practice and conform the § 243(h) standard in use to the requirements of Article 33,[133] or, less charitably, a concerted effort to maintain existing administrative practice with no regard for logic or legal obligation. Regardless of which explanation is closer to the truth, the damaging effect of the *Dunar* decision on the course of U.S. asylum law cannot be overstated. The view that accession to the Protocol required nothing more than a continuation of pre-Protocol practice under § 243(h) was endorsed by the courts of several circuits, which held that the well-founded fear and the clear probability standards "will in practice converge,"[134] leading them to reject a duty to protect refugees who meet the Convention's "well-founded fear" of persecution standard.[135] And, as addressed in Part III, this practice had a near determinative impact on the understanding of refugee law as ultimately adopted by the Supreme Court.

Beginning in 1969, Congress occasionally considered legislative action to bring U.S. refugee law more fully into line with international obligations.[136] In particular, an early consensus emerged on the importance of domestic

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133. *See* Sharon C. Weinman, INS v. Stevic*: A Critical Assessment*, 7 HUM. RTS. Q. 391, 406 (1985).

134. Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977).

135. *See, e.g.*, Fleurinor v. INS, 585 F.2d 129, 132-34 (5th Cir. 1978) (affirming the immigration judge's finding that the petitioner had failed to show a well-founded fear of persecution because the evidence did not prove probable political persecution); Rejaie v. INS, 691 F.2d 139, 146 (3rd Cir. 1982) (holding that "well-founded fear" equates with "clear probability."). Note that *Rejaie* was decided after passage of the Refugee Act, demonstrating that some courts apparently refused to recognize that the Refugee Act had much practical effect. The Supreme Court in *Stevic* cited, along with *Kashani* and *Fleurinor*, *Pereira-Diaz v. INS*, 551 F.2d 1149 (9th Cir. 1977) and *Zamora v. INS*, 534 F.2d 1055 (2nd Cir. 1976) as holding that the two standards converged. 467 U.S. at 420. The latter two cases, however, do not so clearly support this conclusion.

136. *See, e.g.*, S. 3202/H.R. 15093, 91st Cong. (1969); H.R. 9112, 91st Cong. (1969); H.R. 17370, 91st Cong. (1970). "In congressional hearings, representatives of the State Department assured Congress that ratification of the 1967 Refugee Protocol would not require revision of United States law to implement the Protocol. However, the executive's deeds fell short of its promises, thereby prompting congressional action." Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2343 (1991).

incorporation of the full Convention refugee definition.[137] But efforts to reform the inland asylum system took a backseat to the greater attention paid throughout the 1970s to reforming the overseas refugee admissions program in order to curb the Executive's use of its parole authority, under which large numbers of refugees were admitted from overseas without any meaningful consultation with Congress.[138] No serious attention was paid to the importance of ensuring that determinations of refugee status of applicants physically in the United States were made in accordance with international law.[139]

Thus, the early record on the efforts to implement the obligations of the Protocol is a decidedly mixed one. The clear intention and policy of the executive branch was to bring domestic law into compliance with international law, and to ensure that refugees received the rights they were due. But administrative action fell short of that goal. The BIA and many courts continued to apply the existing "clear probability" standard to inland determinations, sometimes in language that flagrantly nullified the meaning of accession to the Protocol. Neither did Congress act decisively to ensure that the inland refugee protection system conformed to international standards, as it was caught up in trying to exert control over the numbers of refugees admitted from overseas.

B. *The Refugee Act of 1980*

The legislation rightly hailed as a turning point in U.S. asylum law, the Refugee Act of 1980,[140] ironically addressed asylum for persons arriving in the United States only as an afterthought. In line with the traditional view that refugees were persons resettled to the United States from overseas, the impetus to pass a new law was congressional preoccupation to constrain the practice of the executive branch to admit large numbers of refugees on the basis of its parole authority. While reform of the domestic refugee protection system was ultimately included in the legislative package, most congressional debate focused on the primary goal of managing refugee admissions from abroad.[141] It was only at a hearing before the Senate Committee on the

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137. *See* S. 3202/H.R. 15093 § 6(a); H.R. 9112 § 9; H.R. 17370 § 9.

138. *See generally* Anker & Posner, *supra* note 97, at 21-42.

139. "We had experienced a decade of neglect following the 1965 Act. No immigration legislation of any consequence had been before Congress for a decade, and the Senate Judiciary Committee had not held a single hearing or meeting on immigration issues during this period. The unfinished agenda from 1965 was simply ignored, and there was no sign of progress." Edward M. Kennedy, *Foreward to Immigration and Nationality Symposium*, 19 SAN DIEGO L. REV. 1, 1 (1981).

140. *See supra* note 13.

141. *See, e.g.*, Remarks of Congressman Rodino,

> Our history in refugee crises has been one of reaction rather than one of anticipation, preparation and long-range planning. This was brought forcefully to our attention in the spring of 1975 when in the wake of our withdrawal from Vietnam we were faced with having to care for and resettle immediately more than 135,000 refugees . . . . This experience demonstrated, in a dramatic way, the necessity for enacting coherent legislation to meet future and continuing refugee emergencies.

H.R. REP. NO. 96-608, at 6 (1979).

Judiciary that Senator Edward Kennedy noted the recommendation of the United Nations High Commissioner for Refugees that the bill contain some further clarification on asylum policy.[142] Kennedy therefore suggested that "it is important that we try and get some recommendations on how we are going to handle asylum questions."[143]

Perhaps because action on inland refugee protection was not originally a goal of the new legislation, very little clear thought was given to how best to "handle asylum questions" in the United States. The Senate seems to have latched onto, but not entirely understood, a non-governmental proposal[144] to take two forms of action: first, the codification of a process for persons wishing to seek protection as a refugee in the United States; and second, an amendment to the existing withholding of deportation rule to ensure that no refugees would be faced with removal from the United States. The combination of these two provisions was thought sufficient to ensure that the United States protected refugees affirmatively seeking protection, as well as those who were already involved in removal proceedings.

Neither of these legislative goals was carefully executed. In order to ensure that refugees already in removal proceedings were protected, the Refugee Act amended the traditional U.S. rule on withholding of deportation. While the withholding provision was not designed with refugee protection in mind,[145] Congress nonetheless declared that it was re-tooling § 243(h) to bring it into line with the Refugee Protocol's duty of *non-refoulement.* The

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142. *The Refugee Act of 1979, S. 643: Hearing Before the Comm. on the Judiciary United States Senate*, 96th Cong. 36 (1979) (statement of Senator Edward Kennedy). *See also* Martin, *supra* note 102, at 109 ("In a March 1979 letter to the Secretary of State . . . the U.S. office of the U.N. High Commissioner for Refugees . . . discreetly suggested that more should be done with regard to asylum. Noting that the U.S. is a party to the Protocol . . . the UNHCR urged that these commitments be reflected in mandatory, rather than discretionary, provisions of U.S. law.").

143. *The Refugee Act of 1979, S. 643: Hearing Before the Comm. on the Judiciary United States Senate, supra* note 142.

144. Ingrid Walter, testifying in her capacity as Chair of the Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies for Foreign Service, submitted the following proposed provision on asylum:

> Any person within the United States or at its borders who meets the definition of a refugee as contained in section 101(a)(42) shall be given an opportunity to apply for asylum in the United States. The Attorney General shall establish a uniform procedure for an alien, regardless of his status, applying for asylum who is physically present in the United States, and shall admit any such alien for lawful permanent residence who meets the definition of a refugee in section 101(a)(42) . . . .
>
> When granted asylum, a refugee shall be eligible to adjust his status to that of a permanent resident in compliance with section 207(b)(1).

Id. at 52. The amendment to § 243(h) was proposed in order to more clearly conform it to the Protocol:

> The Attorney General shall not deport or return any alien admitted as a refugee or who meets the definition of a refugee in section 101(a)(42), other than an alien described in section 241(a)(19) [deportable on grounds consonant with the Protocol], to any country where such alien has a well-founded fear of persecution on account of his race, religion, nationality, membership of a particular social group, or political opinion.

Id.

145. *See supra* note 99 and accompanying text.

earlier phraseology under which withholding was available only to persons who "would be subject to persecution" was replaced by a reference modeled on Convention Article 33's extension of protection to persons whose "life or freedom would be threatened"; the duty to withhold deportation was made mandatory; return, as well as deportation, was prohibited; and the nexus criteria were brought into line with those in the Convention refugee definition by addition of nationality and membership in a particular social group to the pre-existing list of grounds of claim.

It is important to recognize that Congress felt compelled to make all of these changes to § 243(h) even though both the Executive and the BIA had asserted that the United States *could* implement its duty of *non-refoulement* under the old version of § 243(h). The congressional reports betray a lack of faith in the efficacy of administrative and regulatory efforts to bring U.S. law and practice into accord with international obligations, and a concomitant recognition of the need to legislate to avoid U.S. practice in conflict with duties under the Protocol. For example, the House Committee determined that it would be "desirable, for the sake of clarity, to conform the language of that section to the Convention .... As with the asylum provision, the Committee feels that the proposed change in [section] 243(h) *is necessary* so that U.S. statutory law clearly reflects our legal obligations under international agreements."[146] The conference report stated the intention of Congress even more clearly, noting that it adopted the House version of the withholding provision "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[147] The House version explicitly listed four conditions under which a person would not be allowed to benefit from the withholding provision, which essentially mirrored grounds stipulated in Articles 1(F) and 33(2) of the Convention.[148] This history indicates the very clear intention of Congress to ensure that the withholding provision in U.S. law would be applied in conformity with the requirements of international law.

Notwithstanding these signals that withholding of deportation should be reformed to implement the duty to protect refugees in removal proceedings, Congress failed explicitly to state that the right to withholding of deportation inheres in "refugees." Because § 243(h) had not traditionally been a mechanism for the protection of refugees as such, and because Congress did not dictate that it should be transformed into a rule for the benefit of refugees, it was possible for the Supreme Court subsequently to rule that refugees are not entitled to benefit from withholding of deportation. While the evidence is overwhelming that Congress intended to make § 243(h) a mechanism of

146. H.R. REP. NO. 96-608, *supra* note 141, at 18 (emphasis added).
147. H.R. CONF. REP. NO. 96-781, at 20 (1980).
148. H.R. REP. NO. 96-608, *supra* note 141, at 47; H.R. CONF. REP. NO. 96-781, *supra* note 147, at 20; S. REP. NO. 96-590, at 20 (1980).

refugee protection, the decision to pour new international wine into the old domestic bottle of withholding of deportation proved to be a fatal error.

The confusion in defining the new mechanism for persons who affirmatively seek protection as refugees under § 208(a) was even greater. The Senate bill which proposed the affirmative asylum provision inexplicably linked the ability to benefit from asylum to the test for withholding of deportation. It recommended a

> . . . uniform procedure [including] . . . a provision allowing all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, provided an order to show cause has not been issued. Asylum shall be granted if the alien is a refugee within the definition provided in [Section] 101(a)(42)(A) and his deportation or return is prohibited under [Section] 243(h).[149]

This was a curious formulation, since it proposed that a grant of "asylum" would depend not only on being a refugee, but also on the ability to satisfy the American withholding of deportation test. The House version helpfully deleted the reference to § 243(h), but inserted a much more devastating limitation on access to asylum. Whereas the Senate had correctly understood that being a refugee entails an international legal right to be protected, the House of Representatives amended the provision to make the grant of asylum an act of discretion, rather than an entitlement.[150] As finally adopted, § 208(a) therefore correctly identifies the beneficiary class simply as refugees, but only allows a refugee " . . . to apply for asylum in the discretion of the Attorney General." This is a very strange outcome. On the one hand, Congress expressly intended to " . . . insure a fair and workable asylum policy which is consistent . . . with [U.S.] obligations under international law, and it feels it is both necessary and desirable that [U.S.] domestic law include the asylum provision in the instant legislation."[151] Yet the means it chose to implement that goal did not expressly link refugee status to any right to be protected.

At a technical level, there is a plausible explanation. Because § 208(a) addresses "asylum," which under U.S. law links to a right ultimately to apply for permission to remain indefinitely in the United States, it may well have been thought that there was no practical need to mandate protection. After all,

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149. S. REP. No. 96-256, at 9, 16 (1979).

150. The § 208(a) language of the House version, adopted by the Conference Committee, provided that

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

H.R. 2816, 96th Cong. § 208(a) (1979).

151. H.R. REP. No. 96-608, *supra* note 141, at 17-18.

Article 34 of the Refugee Convention does not insist that states assimilate or naturalize refugees, but simply calls on them to "as far as possible to facilitate" these goals[152]—a formulation quite consistent with a domestic discretionary procedure. And if a refugee not granted discretionary asylum were to be threatened with *refoulement*, he or she could, in the context of removal proceedings, invoke Article 33 rights via the reformulated withholding of deportation rule. The possibility that the Supreme Court might ultimately deny protection against *refoulement* to refugees (that is, to persons able to prove a well-founded fear of persecution for a Convention reason) is unlikely ever to have occurred to members of Congress.

On balance, however, it appears that the congressional debates suffered from a fundamental confusion regarding the nature of U.S. obligations under the Refugee Protocol. The term "refugee" had never been used in U.S. practice to refer to persons arriving in the United States to seek protection, but was instead a label employed for persons being resettled into the United States from overseas. Because the United States was slow to opt into the international refugee protection regime, it developed a unique view that "refugees" were persons admitted to the United States from abroad under discretionary parole power, and later under § 203(a)(7). In contrast, persons already in the United States and who were to be protected from removal due to the risk of persecution under the § 243(h) withholding power were not labeled as refugees, but simply as "aliens" who benefited from withholding, or at best as "asylees."

Yet the purpose of the Refugee Act was to implement a treaty under which the understanding of a "refugee" is the opposite. Persons voluntarily resettled from overseas are not refugees with rights under the Refugee Convention or Protocol, but are essentially immigrants. No government has a duty to admit them, and whatever admissions occur may be based on whatever definitional construct a resettlement state opts to employ. Persons genuinely at risk of persecution who arrive at the border of an asylum state, in contrast, are refugees under international law, and are hence entitled to protection. They may not lawfully be treated simply as the objects of discretion.

In drafting the Refugee Act, neither the Executive nor Congress appears clearly to have appreciated the distinction between the U.S. and international notions of a "refugee." Instead, there was a general sense that accession to the Protocol ought logically to compel the United States to conform its overseas resettlement programs to international law. For example, "Congress was told that the extant asylum procedures for refugees outside of the United States [were] acceptable under the Protocol, except for the fact that it made various unacceptable geographic and political distinctions."[153] Because

152. Convention, *supra* note 10, at 176 (art. 34).
153. INS v. Cardoza-Fonseca, 480 U.S. 421, 434-35 (1987).

"refugees" were understood to be persons under consideration for admission from overseas, Congress determined that the primary class of refugees to be resettled by the United States would be selected on the basis of the Protocol's definition of a refugee.[154]

There is, of course, nothing wrong with the United States opting to tie its overseas resettlement program to the international refugee definition. To the contrary, this is an admirable form of internationalism, albeit one that is in no sense legally compelled. The concern arose, however, when Congress decided also to legislate in regard to the inland asylum system. Quite appropriately, it did so by tying the new affirmative asylum system under § 208(a) to the international refugee definition. For the sake of simplicity, a single provision, § 101(a)(42) of the INA, was enacted to serve as the definitional standard for both overseas resettlement efforts under § 207 and the new inland affirmative asylum procedure under § 208.[155]

This form of drafting, however, gave rise to confusion. Because § 101(a)(42) sets out the general definition of a refugee, and is specifically linked to both overseas resettlement and eligibility for asylum, the fact that withholding of deportation under § 243(h) is not comparably linked to § 101(a)(42) may be thought to be legally significant. That is, since Congress expressly dictated that the Protocol definition should govern efforts under § 207 and § 208, but left § 243(h) open to "aliens" whose life or freedom would be threatened for a Convention reason, a case might be made that Congress did not intend the Protocol definition to be relied on for purposes of withholding deportation. But in the context of the Refugee Act, this implication is countered by the fact that Congress had clearly indicated its intention to conform § 243(h) to international refugee law.[156]

Yet Congress' failure to link withholding of deportation to the § 101(a)(42) standard seems nonetheless to justify a somewhat weaker implication. The decision of Congress to rely on a common definition of "refugee" under § 101(a)(42) to govern the resettlement of refugees from abroad under § 207 and the protection of refugees in the United States under § 208 may indicate

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154. In addition to Part "A"of the overseas refugee admission process (which relies on the Protocol refugee definition), Congress has also enacted "Part B" under which persons within their own country and who are persecuted for a Convention reason may be admitted "in such special circumstances as the President after appropriate consultation [with the Congress] . . .may specify." *See* Martin, *supra* note 102, at 102-03.

155. The Senate report on Bill S. 643 stated that "the new definition will bring U.S. law into conformity with our international treaty obligations under the [Protocol]." S. REP. NO. 96-256, *supra* note 149, at 4. The House report on Bill H.R. 2816 also emphasized that the new definition "will finally bring U.S. law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the [Convention] and the Protocol, which our government ratified in 1968." H.R. REP. NO. 96-608, *supra* note 141, at 9.

156. *See supra* text accompanying notes 146-48. It is important to recall that Congress merely amended § 243(h) via the Refugee Act. The pre-existing form of words allowed an "alien" to seek withholding of deportation, which language was simply not changed. Refugee Act of 1980, 8 U.S.C. § 1253(h) (1976). The failure to amend language ought not to be equated to an affirmative decision to include particular language for the purpose of deciding whether an implication of substance arises.

that Congress really did not understand the nature of duties owed under the Refugee Protocol. Because "refugees" under U.S. law had always been conceived as the beneficiaries of discretion, it may be that Congress erroneously believed that persons seeking recognition of refugee status in the United States under § 208 should, like their fellow members of the (U.S.-defined) "refugee" class, be dealt with on a purely discretionary basis. Under the House version of the Refugee Act, which ultimately prevailed, persons able to meet the refugee definition are, of course, not entitled to insist on protection in the United States, but are merely authorized to ask the Attorney General to exercise her discretionary authority.[157]

If Congress believed that refugees arriving in the United States could be legally assimilated to persons overseas seeking U.S. protection, then Congress was clearly wrong as a matter of international law. But this is a very different allegation than the strong thesis that the absence of a statutory linkage between § 101(a)(42) and § 243(h) reflects an *intention* of Congress to withhold international rights, including to protection against *refoulement*, from refugees. The implication is simply that Congress legislated poorly. Because Congress was working from within a specifically American conceptual framework of refugees as the beneficiaries of discretion, rather than as the holders of international rights, the Refugee Act did not follow through comprehensively on its principled commitment to implement international refugee law in U.S. law.

In the end, then, the Refugee Act of 1980 contained a smorgasbord of poorly coordinated mechanisms related to the protection of refugees seeking protection in the United States. Congress clearly recognized that the withholding mechanism had not in practice ensured U.S. compliance with international law. Yet there is no denying that Congress failed to take what would arguably have been the most logical step to bring U.S. law into conformity with international refugee law, namely the abandonment of the bifurcated domestic system of withholding of deportation and asylum in favor of a single, simple system in which all refugees, defined under the proper standard, received the rights as spelled out in the Protocol. The inherent logic of a unified mechanism to implement a common legal duty appears never to have been seriously considered.[158]

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157. This is not an internationally acceptable categorization. A group of persons defined under international refugee law as a single category, "refugees," was, under U.S. law, divided into two fundamentally different sub-categories. One sub-group (the members of which could show a well-founded fear of persecution) was entitled to nothing more than the opportunity to seek an exercise of discretion, whereas a second sub-group (composed of persons able to meet the higher standard for withholding of deportation under § 243(h) of U.S. law) was entitled to assert a right to remain in the United States.

158. *See, e.g.*, S. REP. NO. 96-256, *supra* note 149, at 9 (noting that the new asylum procedure would allow applicants the opportunity to have their claims considered outside a deportation proceeding, "*provided the order to show cause has not been issued*" (emphasis added)). See also Anker & Posner, *supra* note 97, at 40, regarding the debate during hearings in 1977 in which the extension of the withholding provision to excludable aliens was discussed. The underlying assumption was that aliens who

It is worth noting, however, that many congressional statements affirm a desire to conform U.S. law to the Refugee Protocol,[159] and no arguments were made for the contrary position. The preponderance of evidence therefore suggests that Congress believed that it was acting to align U.S. and international law, even though the last minute deliberations on the protection of refugees physically present in the United States were not conducive to maximal clarity of thought or drafting. As regards the most critical right of refugees, protection against *refoulement*, there is nothing in the text of § 243(h) as approved by Congress that can be read to *require* an interpretation of the withholding provision in conflict with international law. The legislative history, in other words, cannot be relied on to justify an interpretation of U.S. law that denies a *right* to protection from return to persons able to show a "well-founded fear" of being persecuted. Nor does it provide a solid foundation for a more general de-linkage of refugee status and refugee rights. All in all, Congress legislated inadequately and sometimes incoherently. But it most certainly did not legislate decisively to avoid U.S. duties under international refugee law.

IV. THE SUPREME COURT'S REJECTION OF REFUGEE RIGHTS

The Supreme Court defined the impact of U.S. accession to the Refugee Protocol in its decisions in *Stevic*[160] and *Cardoza-Fonseca*.[161] The net impact of these key decisions was to conceive refugee protection in a way that does not comport with American obligations under international law. The Protocol defines a refugee in Article 1 as a person with a "well-founded fear of persecution," and makes that standard the basis for entitlement to all the rights enumerated in Articles 2 through 34, including to protection against *refoulement*.[162] Despite the intention of both the Executive and Congress to conform domestic law to international obligations, the Supreme Court in *Stevic* and *Cardoza-Fonseca* entrenched a system whereby being a "refugee" does not result in any entitlement to the very rights which the United States bound itself to grant by accession to the Protocol. As the Court bluntly opined, " . . . those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum."[163]

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could benefit from the provision were somehow apprehended by the INS and were making a claim from a defensive posture.

159. *See supra* notes 110-13, 146-48 and accompanying text. Note that Congress made it clear that the United States was bound to apply Articles 2 through 34 of the Protocol, and that § 243(h) was to be read as providing the protection of Article 33. Logically, therefore, § 243(h) should be read in reference to Article 1 of the Refugee Convention, which defines refugees entitled to the benefit of Article 33 by means of the "well-founded fear" of persecution standard. *See supra* notes 21-22, 64 and accompanying text.

160. 467 U.S. 407 (1984).

161. 480 U.S. 421 (1987).

162. *See supra* note 64-68; *infra* notes 203-07.

163. *Cardoza-Fonseca*, 480 U.S. at 444.

First, by interpreting the language of Article 33 in isolation from the rest of the Protocol and instead by reference to U.S. agency practice, the Court in *Stevic* found that there is no duty to grant protection against *refoulement* to persons who meet the refugee definition. The Court focused on the fact that Article 33 of the Refugee Convention requires states not to "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . . ."[164] as the basis for validating the traditional U.S. rule limiting protection against removal to persons able to demonstrate a *probability* of persecution in the destination state.[165] Even though protection against *refoulement* textually inheres in a "refugee" (without qualification based on level of attachment or otherwise), and refugees are persons able to show a "well-founded fear of being persecuted," the fact that Article 33 outlaws removal to territories where life or freedom *would* be threatened was deemed by the Court a sufficient basis to restrict Article 33 protection to super-refugees able to meet the United States' INA § 243(h) probability-based standard for withholding of deportation.

The judgment in *Cardoza-Fonseca*, while commendable for its recognition that persons able to show a "reasonable possibility" (rather than a more stringent probability standard) of persecution qualify as refugees,[166] reinforced even more profoundly than *Stevic* the separation of U.S. refugee law from the international regime. Even as it insisted upon respect for the international evidentiary test of "well-founded fear," the Court in *Cardoza-Fonseca* steadfastly refused to acknowledge the legal implications of being a refugee under international law. Instead of finding that a person who meets the definitional standard posited by the Court is entitled to the benefit of Articles 2 through 34 of the Refugee Convention, the Supreme Court determined that a refugee is entitled to nothing. A person able to show a well-founded fear of persecution for a Convention reason is authorized to seek *discretionary* protection through asylum from the Attorney General, but has no legal claim to protection of any kind. The *Cardoza-Fonseca* court even affirmed the holding in *Stevic* that protection against *refoulement,* which textually is granted to a person who is a "refugee," is actually to be withheld from refugees unless they are able to meet the probability-based super-refugee test of U.S. withholding law.[167]

By virtue of these two decisions, U.S. law guarantees only one refugee right (to protection against *refoulement*) to only a subset of refugees (those able to show a probability of persecution, rather than simply a well-founded fear of persecution). In the eyes of the Supreme Court, refugees are no more than supplicants, and even super-refugees are entitled to nothing more than

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164. Convention, *supra* note 10, at 176 (art. 33(1)).

165. *See supra* notes 99-100 and accompanying text (discussion of the standard of proof for withholding of deportation under U.S. law).

166. *Cardoza-Fonseca*, 480 U.S. at 440.

167. *Id.* at 423-24.

the bare bones of protection against removal. The negotiability of refugee rights suggested by this approach runs squarely counter to the obligations which the United States undertook by accession to the Protocol.[168]

This is not to say that the opinions in *Stevic* and *Cardoza-Fonseca* were the "original sins" that account for the muddled U.S. inland refugee determination system under which refugee status and refugee rights are not correlated. As described in Part III, Executive representations to Senate upon accession to the Protocol were inexact,[169] and Congress did not draft the Refugee Act with anything approaching maximal precision.[170] But the vigor with which the Supreme Court seems to have strived for an interpretation of the Refugee Act that is out of keeping with U.S. obligations under international law is profoundly disturbing. The Supreme Court gave detailed, and often exaggerated, attention to any interpretive canon capable of reinforcing the peculiarity of the American refugee system, and simultaneously gave short shrift to the much more powerful case for interpreting the Refugee Act in consonance with duties under the Protocol. This was not, in our view, simply a case of judicial error. Rather, the decisions in *Stevic* and *Cardoza-Fonseca* betray a determination to maximize the freedom of domestic tribunals operating under domestic law, and a concomitant disinterest in truly understanding and applying international law as *law* with dispositive effect.

A. *Respect for Congressional Intent*

The Supreme Court asserted that its understanding of refugee law was firmly rooted in respect for the intentions of the legislators who enacted the Refugee Act of 1980.[171] The Court in *Stevic* began its analysis with the bold statement that it was "plainly correct" that, by passing the Refugee Act, "Congress intended to adopt a standard for withholding of deportation claims by reference to pre-existing sources of law."[172] Similarly, the Court declared in *Cardoza-Fonseca* that the legislative history of the Refugee Act made it "perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for § 243(h) relief."[173]

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168. In *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), a more recent decision concerning *non-refoulement*, the Court perpetuated the mistaken logic of *Cardoza-Fonseca* that "refugees" are not *per se* entitled to Article 33 protection.

169. *See supra* notes 114-18 and accompanying text.

170. *See supra* notes 149-56 and accompanying text.

171. This is, of course, a sensible starting point. Resorting to the legislative history ". . . helps a court understand the context and purpose of a statute." Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992). More specifically, " . . . the failure to use appropriate legislative history as a basis for resolving a dispute over the meaning of an ambiguous statute can be seen as opting for judicial dominance on the interpretive arena." ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 33 (1997).

172. *Stevic*, 467 U.S. 407, 414 (1984)

173. *Cardoza-Fonseca*, 480 U.S. at 424.

But as the analysis of the congressional record set out in Part III suggests, there really was no basis for asserting that Congress gave any serious attention to the specific means by which U.S. law should be aligned with international refugee law. To the extent that Congress can truly be said to have turned its attention to this issue, all that is clear is that Congress intended the Refugee Act to bring U.S. law into compliance with its international obligations, and was not satisfied that prevailing administrative practice was sufficient to achieve that end. Yet the Supreme Court ignored these general indications of a congressional intention to reform U.S. asylum law in order to bring it into line with the international refugee regime. Instead, it found that Congress had intended the new legislation to leave undisturbed the traditional approach to protection under domestic U.S. law. The Supreme Court was able to reach this startling result by failing to conduct a fulsome examination of the congressional record during the debates on ratification of the Protocol, or upon adoption of the Refugee Act. In regard to two key issues, the Court moreover relied on decontextualized extracts from the drafting history that do not provide an accurate appraisal of the true history of the reform effort.

First, the Supreme Court invoked the Executive assurances that accession to the Protocol would require no changes to domestic law[174] as the basis for determining that pre-existing U.S. law and practice should govern U.S. implementation of duties under the Protocol. In fact, however, the statements of the Executive during the accession hearings simply made the point that international standards *could* be readily accommodated within the existing statutory structure, without the need for new legislation.[175] These statements imply a recognition that current practice did not, in all particulars, comport with international standards, but that changes could and would be made in the regulations to reflect the new obligations. And while Congress did not legislate a new, consolidated procedure for handling all inland refugee claims as would arguably have been most desirable, neither did it say that administrative practice *had* or *would* constitute compliance with the Protocol. Indeed, congressional efforts began almost immediately to amend U.S. law to more clearly conform to international law by including a definition of "refugee" that closely tracked the Protocol definition, and by limiting administrative discretion over both overseas admissions and the protection of refugees arriving in the United States.[176]

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174. "The President and the Senate believed that the Protocol was largely consistent with existing law . . . . It was also believed that apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language." *Stevic*, 467 U.S. at 417-18.

175. *See, e.g.*, S. EXEC. DOC. NO. 90-14, at 2 (1968) ("It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country."); S. EXEC. DOC. NO. 90-K, at 126 (1968) ("This article [33] is comparable to Sec. 243(h) of the [INA], and it can be implemented within the administrative discretion provided by existing regulations."). *See generally supra* notes 114-21 and accompanying text.

176. *See supra* notes 136-39 and accompanying text (discussion of congressional efforts in 1969-70).

Second, the Court took a key congressional statement out of context as support for the proposition that refugees arriving in the United States had no rights, but were simply the potential beneficiaries of Executive discretionary protection.[177] Because adoption of the Protocol's global refugee definition for purposes of overseas resettlement programs meant that the United States would no longer be able to limit its efforts to persons who originated in particular regions of the world, there had been concern in Congress that the proposed legislation might be overly ambitious. The House report rejected this concern, indicating that the House Judiciary Committee had

> . . . carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the [United States] and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the [United States]. The Committee is of the opinion that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and the practices that have been followed in recent years.[178]

The explicit language ("eligible to come to the [United States]," "will not guarantee resettlement in the [United States]") makes clear that this passage refers to the overseas admissions program. In the eyes of the Supreme Court, however, this observation became evidence of an intention to deny rights to refugees seeking protection *in the United States*,[179] though domestic asylum was not even under discussion by Congress when the remarks cited were made.

B. *Deference to the Board of Immigration Appeals*

While the Court made much of the importance of honoring congressional intentions in enacting the Refugee Act, its most serious preoccupation seems in fact to have been upholding relevant positions taken by the BIA. Particularly in *Stevic*, the Court appears simply to have been exercising an extreme form of *Chevron*[180]-derived deference to agency decision-makers.

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177. *See Stevic*, 467 U.S. at 417, 426.

178. H.R. REP. No. 96-608, at 10 (1979).

179. "The Congress distinguished between discretionary grants of refugee admission *or asylum* and the entitlement to a withholding of deportation if the § 243(h) standard was met." *Stevic*, 467 U.S. at 426 (emphasis added).

180. Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). The case essentially established a two-step process for judicial review of agency interpretations of law. The first step is to establish if congressional intent regarding the issue is clear; if so then the court and the agency must give effect to the unambiguously expressed intent. If the court does not find that Congress has directly addressed the precise issue at hand, however, the court must determine whether the agency's interpretation is a permissible construction of the statute. Interestingly, Justice Stevens delivered the opinion in this case, as he did in both *Stevic* and *Cardoza-Fonseca*.

For example, the Supreme Court drew heavily on *agency practice* after (and even before) accession to the Protocol as a means of discerning congressional intent in acceding to the Protocol and in drafting the Refugee Act. The Court relied on the finding of the BIA in *Matter of Dunar* that Congress intended that only persons able to meet the "clear probability of persecution" standard traditionally relied on by the United States[181] should be granted protection against *refoulement* under the Refugee Protocol.[182] Rather than reviewing the actual legislative history (which, as described above, does not support the Board's conclusions[183]), the Supreme Court assumed the Board's interpretation of history to be sound, and re-wrote Article 33 of the Refugee Convention to conform to U.S. administrative practice. The Court simply adopted the Board's view that because the amended § 243(h) made no mention of the standard of proof necessary for relief, or employed the term "refugee,"[184] Congress had not intended to change the prevailing U.S. approach.[185] In the result, Congress must have intended the "clear probability" standard to govern access to a right of non-removal from the United States, even after adoption of the Refugee Protocol's "well-founded fear" test.[186]

Similarly, the Court in *Stevic* was prepared to assume that the mandatory duty of *non-refoulement* could be implemented through the discretionary domestic vehicle of withholding of deportation because the BIA in *Dunar* had reached that conclusion.[187] Because the Board was satisfied that no claimant who had established a probability of persecution had ever been denied relief, the discretionary nature of § 243(h) could be reconciled to the mandatory requirement of Article 33 on a case-by-case basis.[188] Even when the Court recognized in *Cardoza-Fonseca* that accession to the Protocol required that § 243(h) be interpreted to impose a mandatory duty of non-return,[189] it was quite willing to assume that agency practice had in fact changed to "hono[r] the dictates" of the Convention.[190] The Court neither fully examined the requirements of the Protocol *as a whole*, nor seriously

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181. *Stevic*, 467 U.S. at 419-20.
182. *Id.* at 418.
183. *See supra* notes 110-13, 141-44 and accompanying text.
184. *See Stevic*, 467 U.S. at 421-22.
185. *Id.* at 428.
186. *Id.* at 430.
187. "The Board concluded that 'Article 33 has effected no substantial changes in the application of section 243(h), either by way of burden of proof, coverage, or manner of arriving at decisions.' " *Id.* at 418.
188. "The Board observed that the Attorney General had consistently granted withholding under § 243(h) when the required showing was made." *Id.* at 419 n.11.
189. In 1968, the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the [Convention] . . . . Article 33.1 of the Convention . . .which is the counterpart of § 243(h) of our statute, imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons.

INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987).
190. *Id.*

inquired whether the asserted compliance of § 243(h) with the dictates of Article 33 was accurate.

While there is no doubt that Congress should have legislated more clearly to conform domestic law to international law, the willingness of the Court to defer so completely to agency practice makes no sense. Congress was concerned to correct precisely the agency practice relied on by the Supreme Court.[191] It recognized that administrative and judicial decisions had held that § 243(h) provided the protection required by Article 33, yet still thought it necessary to amend the language of the section to conform with international law. Congress wanted the domestic provision to "clearly reflec[t] our legal obligations under international agreements."[192] It seems disingenuous in the extreme for the Court to have looked to agency practice as a source of guidance on either congressional intent or appropriate forms or standards of protection in view of the decade-long effort of Congress to codify legislation that would bring U.S. law more fully into compliance with the Refugee Protocol.

C. *Concern About Subjectivity*

The Court also seemed reluctant to accord even the right to protection against *refoulement* to "refugees" on the grounds that refugee status, based as it is on a "well-founded fear of being persecuted," sets an insufficiently concrete test to serve as the basis for the allocation of rights. Because "the reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien,"[193] it was thought to lack the objective imperative that could justify imposition of a duty on asylum states to provide protection. In contrast to the refugee definition's focus on the applicant's subjective beliefs,[194] the "would be threatened" language of § 243(h) requires objective evidence of risk, and therefore avoids the possibility that a government might be required to protect a person simply on the basis of his or her personalized emotional

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191. *See supra* notes 146-48 and accompanying text.

192. H.R. REP. NO. 96-608, *supra* note 141, at 18. In view of this legislative history, deference to the BIA was inappropriate on the basis of the Supreme Court's own reasoning:

> The INS argues that the BIA's construction of the Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent. This argument is unpersuasive.

Cardoza-Fonseca, 480 U.S. at 445.

193. *Stevic*, 467 U.S. at 430. It appears that the argument of counsel for Stevic played a part in encouraging this misunderstanding by the Court: "Respondent argues that the standards are not coterminous and that the well-founded-fear-of-persecution standard turns almost entirely on the alien's state of mind." *Id.* at 413.

194. "[T]he linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference." *Cardoza-Fonseca*, 480 U.S. at 431.

reaction to less than serious risks of harm. The Court therefore determined that it would be more reasonable to grant protection against *refoulement* only to the subset of refugees able to meet the U.S. withholding provision's more stringent definition of objective probability of persecution.

There is no historical basis, however, for the assertion that investigation of a well-founded fear of persecution requires consideration of the applicant's subjective mental state.[195] The better view is that, like the French language text, the word "fear" was used by the drafters of the Convention simply to denote a well-founded *forward-looking assessment* of risk. The test is therefore fundamentally objective.[196] Further, even those who continue to argue that the expression "well-founded fear" imports consideration of the applicant's subjective mental state do not suggest, as the Court seems to imply, that the test is not anchored in objective analysis.[197] To the contrary, the traditional understanding of the test is always expressed as requiring consideration of *both* subjective fear and objective risk.[198] Thus, if the Supreme Court's concern was not to impose a duty on states to protect persons whose fear was purely subjective, no restriction beyond the Convention definition itself, as incorporated in U.S. law via § 101(a)(42)(A), was required.[199]

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195. *See, e.g.*, Yusuf, [1991] Canadian Fed. Ct. App. Dec. No. A-1116-90 (unofficial translation):

> It would be difficult to conceive the circumstances in which one might hold that a person who is seeking refugee status is genuinely at risk of persecution, while still refusing the claim because the fear is not subjectively internalized .... The refugee definition was certainly not conceived in order to exclude courageous persons or those who are simply stupid, in order to benefit those who are more easily frightened or more intelligent. Moreover, it is repugnant to imagine that one might reject a claim to refugee status solely on the ground that the claimant, being a child of tender age or a person suffering from a mental disability, was incapable of experiencing fear in relation to an objectively well-established risk.

196. *See* HATHAWAY, *supra* note 45, at 66-75.

197. The UNHCR HANDBOOK, *supra* note 21, ¶ ¶ 37-38, states that

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee ... To the element of fear—the state of mind and a subjective condition—is added the qualification of 'well-founded.' This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.

But note the confusion of the Supreme Court on this point: "That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs ...." *Cardoza-Fonseca*, 480 U.S. at 431.

198. *See* UNHCR HANDBOOK, *supra* note 21, ¶ 38 ("The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.").

199. As observed in Justice Powell's dissenting opinion, "[T]he Court gives short shrift to the words 'well-founded,' that clearly require some objective basis for the alien's fear." *Cardoza-Fonseca*, 480 U.S. at 459. Moreover, even if the Convention really did predicate refugee status on a purely subjective test (which it does not), the Court offered no explanation of why it is that the United States should not grant the rights attached to such status by a treaty it freely chose to ratify and incorporate into domestic law. Article 1 of the Convention is not subject to reservations by states. The United States as a state party would therefore have no choice but to grant all Convention rights to persons so defined.

D. *'Plain Meaning' and Other Canons of Construction*

The Supreme Court's primary reliance on legislative history and the interpretations rendered by the BIA was buttressed by reliance on a number of traditional canons of statutory construction.[200] Of greatest importance, the duty to interpret the words of a statute on the basis of their ordinary meaning[201] was invoked by the Court in *Stevic* to construe the standard for withholding of deportation under § 243(h), which it assumed to be equivalent to the duty of *non-refoulement* under Article 33 of the Refugee Convention. The Court observed that the claimant must prove "a likelihood of persecution," since the provision "literally provides for withholding . . . only if the alien's life 'would' be threatened."[202] Thus, the Court found that refugees only acquire a right to protection from removal under either U.S. or international law when they face the probability of persecution in their home country. This attempt to give force to the plain meaning of § 243(h) is flawed, however, since the operative phrase is not "would," as the Court seemed to think, but "would be threatened." That is, even if "would" denotes probabil-

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200. In *Cardoza-Fonseca*, the Court relied on the principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 423, 432 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). Thus, the Court held that because the same Congress had enacted the § 208 asylum clause and the amended § 243(h) withholding of deportation provision, yet had defined a textually less exigent standard of proof in the case of the former, Congress must have intended to enact two different standards of proof to apply. A refugee (who could show a "well-founded fear" of persecution) was eligible to receive asylum, even though only a super-refugee (able to demonstrate a probability of harm) could claim withholding of deportation. There is, however, an alternative explanation. As previously observed, the term "refugee" had traditionally been used in the United States in a way that differed from its international legal meaning. *See supra* notes 154-55 and accompanying text. As David Martin has observed, "[a]lthough the two categories overlap in some important respects and are rarely kept distinct in the popular conception of 'refugees,' lumping the two together only generates unnecessary confusion." Martin, *supra* note 102, at 96. And in any event, it is not entirely accurate to suggest that the same Congress enacted the two provisions. Withholding of deportation had, of course, been available to the Executive long before the advent of the Refugee Act. While the same Congress that established § 208(a) did amend § 243(h), it is doubtful that enactment of a less than fully coordinated amendment can honestly be taken to signify an intention to establish two completely distinct protective mechanisms.

A second canon of interpretation invoked by the Court was that Congress does not by implication enact language it had earlier rejected. *Cardoza-Fonseca*, 480 U.S. at 442-43. Thus, contrary to its earlier holding in *Stevic*, the Court found in *Cardoza-Fonseca* that Congress had rejected the Senate's draft language for § 208 because it did not want to restrict eligibility only to those who could meet the higher standard of proof. In light of the legislative history of the Refugee Act, however, it is more plausible that the language of the two sections merely tracked the language of Articles 1 and 33 of the Refugee Convention. The policy argument the Court relied on in order to hold that § 208 requires a lower standard of proof than § 243(h) is misplaced, in any event, as that language pertained to the overseas admission procedure. *Id.* at 449-50 ("In enacting the Refugee Act of 1980 Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.' " (quoting H.R. REP. NO. 96-608, *supra* note 141, at 9, discussing the inclusion in the refugee definition persons with a well-founded fear of persecution who are still within their own countries)).

201. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . ." Caminetti v. United States, 242 U.S. 470, 485 (1917).

202. *Stevic*, 467 U.S. 407, 422 (1984). The possibility that the risks to "life or freedom" included in Article 33 of the Convention might be a narrower notion that the "persecution" standard in Article 1 was stated by the Court, but not relied upon. *Id.* at 428 n.22.

ity, the test posited under international law is a probability of a threat, not the probability of the harm itself.

Ironically, even as it sought to elucidate the "plain meaning" of § 243(h), the Supreme Court seems not to have taken account of the fact that the language of that domestic provision was drawn directly from Article 33 of the Convention, not the reverse. If one were truly determined to understand the meaning of words inserted by Congress into § 243(h), it would obviously have made most sense to consider the original source of those words, and the legal context from which they were extracted. Had the Supreme Court taken this approach to application of the "plain meaning" doctrine, it would have arrived at an understanding of "life or freedom would be threatened" that is the equivalent of the notion of a "well-founded fear of being persecuted," not with a probability of persecution.

This is because there is no basis to sustain the argument that the phrasing of Article 33 of the Refugee Convention was meant to restrict the duty of *non-refoulement* to a subset of Convention refugees. To the contrary, the beneficiary class of Article 33 is defined simply as "refugees" without qualification of any kind.[203] Apart from the restriction of rights based on a refugee's level of attachment described earlier,[204] there is moreover no right in the Refugee Convention that is reserved for only a subset of persons who meet the refugee definition of Article 1. If Article 33 were to have been an exception to that general approach, one would certainly have expected to find some reference in the *travaux préparatoires* to a need to delimit the class of beneficiaries. Yet over the course of lengthy and detailed discussion of Article 33, there is not one such remark.

The Supreme Court seems also not to have noticed that language comparable to that employed in Article 33 is also found in Article 31 of the Convention, pursuant to which states agree not to impose penalties for illegal entry or presence " . . . on refugees who . . . com[e] directly from a territory where their life or freedom *was* threatened in the sense of Article 1 . . . ."[205] In this context, Paul Weis has observed that

> [t]he words "where their life or freedom was threatened" may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees "escaping from persecution" and to the obligation not to turn back refugees "to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality, or political opinions." In the course of drafting the words "country of origin," "territories where their life or

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203. "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . . ." Convention, *supra* note 10, at 176 (art. 33(1)).

204. *See supra* notes 62-63 and accompanying text.

205. Convention, *supra* note 10, at 174 (art. 31(1)) (emphasis added).

> freedom was threatened" and "country in which he is persecuted" were used interchangeably. The reference to Article 1 of the Convention was introduced mainly to refer to the dateline of 1 January 1951 but it also indicated that there was no intention to introduce more restrictive criteria than that of "well-founded fear of persecution" used in Article 1(A)(ii).[206]

The "shorthand" language of Article 31 was therefore chosen simply in order to avoid the need to repeat the whole of the refugee definition contained in Article 1. While modestly more precise than the phraseology of Article 33 (because of the express allusion to Article 1 of the Convention), the language of Article 31 was actually chosen in response to a recommendation by UNHCR that Article 31 be framed in a way that mirrored the language of Article 33's duty of *non-refoulement*![207] It would therefore require an extraordinary leap of faith to believe that the drafters really did intend to restrict the class entitled to benefit from Article 33 in the way assumed by the Supreme Court in *Stevic*.

Perhaps most fundamentally, the Supreme Court's interpretation of the standard of proof required to benefit from protection against *refoulement* runs directly counter to the overriding purpose of the Refugee Convention. The goal of the Convention is " . . . to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement."[208] It pursues this objective by first defining a refugee in Article 1, and then enumerating the rights that follow from refugee status in Articles 2 through 34. If, as the Supreme Court suggests, a state party could legitimately (pursuant to the Court's understanding of Article 33) deny entry to all but the subset of refugees who face a probability (rather than a well-founded fear) of persecution, just how would a state in practical terms be in a position to guarantee the various enumerated rights to refugees (i.e. those who simply show a well-founded fear of persecution) whom it has no duty to admit? How, for example, would refugees attend public schools, work, or benefit from rationing schemes in countries from which they are excluded? And yet all of the duties set by the Convention (apart from Article 34) are clearly framed in the language of rights, and inhere in all persons able to show no more than a "well-founded fear of persecution" in addition to satisfaction of the stipulated level of attachment. It is, to say the least, counterintuitive to suggest that the real meaning of Article 33 authorizes governments to avoid many, perhaps most, of their freely assumed duties by the simple expedient of forcing all but a subset of "super-refugees" away from their borders. And if that had been their intention, why was so much

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206. PAUL WEIS, THE REFUGEE CONVENTION, 1951, at 303 (1995).
207. U.N. Doc. A/CONF.2/SR.14, at 5 (1951) (statement of Mr. van Heuven Goedhart of UNHCR).
208. S. EXEC. DOC. NO. 90-K, at 5 (1968).

time and attention given to the articulation of the refugee definition in Article 1, and virtually no attention to the "would be threatened" language of Article 33, assuming the latter test to be the real definition of access to most refugee rights?

In short, the Supreme Court's "plain meaning" construction of the domestic counterpart to Article 33 runs counter to the general approach of the Convention, under which rights inhere simply in "refugees," and are granted or withheld only on the basis of level of attachment. There is moreover not an iota of historical support for the Supreme Court's insistence that the drafters wanted to limit Article 33 protection to the minority of refugees able to show a probability of persecution (rather than a well-founded fear of persecution). To the contrary, the drafting record supports the view that the language relied upon by the Supreme Court was selected simply as a shorthand means of incorporating the refugee definition in Article 1. And finally, the Supreme Court's interpretation suggests that the whole treaty, although framed in the language of legal rights, does not really bind governments to grant rights at all, since state parties remain absolutely free to preclude the entry of most persons to whom those rights are theoretically owed.

The alternative analysis, of course, is that the Supreme Court really gave no serious attention at all to Article 33, relegating this fundamental international right to the rank of a troublesome (if malleable) upstart making an untimely and essentially unwelcome appearance on the grand stage of American law.

V. IN TRUTH, A STORY OF CONTEMPT AND CONFUSION

The Supreme Court's decisions in *Stevic* and *Cardoza-Fonseca* derive in part from a misreading of legislative history, and from contextually unwarranted deference to erroneous holdings of the BIA. But we believe that these judgments also bespeak two more important concerns. First, the Supreme Court was not willing to take international law seriously, even though there was absolutely no doubt that the legislation under consideration was intended to implement U.S. duties under a duly ratified international treaty. Second and more significantly, the Court appears to have been determined to avoid any finding that refugees could be the holders of rights. Perhaps because refugees as traditionally conceived under U.S. law are barely distinguishable from the broader category of immigrants, the Supreme Court steadfastly insisted that refugees remain only potential beneficiaries of administrative discretion. Taken together, these concerns amount to a rejection by the Court of substantive American participation in the international refugee law regime.

A. *Whatever Happened to* Charming Betsy?

For all of its apparent concern to observe relevant canons of statutory interpretation, it is extraordinary that the Supreme Court's decisions in *Stevic*

and *Cardoza-Fonseca* make no mention of the principle of construction enunciated in *Schooner Charming Betsy*.[209] In that case, Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[210] Specifically, a court ought to give effect to a congressional violation of international law only if convinced that the violation was intentional, and not unthinking or haphazard. Absent a clear statement of congressional intent to override international law or solid grounds to impute such an intention, a statute should be interpreted to avoid a violation of international law.[211]

Yet rather than seeking to reconcile the Refugee Act to international law, the Supreme Court's decisions in *Stevic* and *Cardoza-Fonseca* evince a determination to distance U.S. asylum law from its international progenitor. The Supreme Court's antipathy towards international refugee law as a source of obligation is perhaps most obvious in its extraordinary effort to avoid recognizing a duty to protect refugees from *refoulement*. The Court found it telling that even after passage of the Refugee Act, § 243(h) of the INA does not grant protection to a "refugee," but rather to "any alien" who would face persecution.[212] As a matter of plain language, the Court held that this failure of Congress to specify that withholding of deportation is a right that accrues to "refugees" must mean that it is not necessarily a right held by all refugees (but only by persons able to meet the specific requirements of § 243(h)).[213]

Yet Congress clearly expressed its intention that § 243(h) should conform to the requirements of Article 33 of the Refugee Convention,[214] which is a right that inheres in all Convention refugees.[215] Rather than seeking to understand the meaning of Article 33 of the Refugee Convention by resort to established rules of treaty interpretation, the Supreme Court was driven by an uncompromising determination to construe the duty of *non-refoulement* in accordance with prevailing American law. Its point of departure was therefore the language of § 243(h) of the INA. The Court acknowledged that Congress had amended the traditional test for withholding of deportation upon passage of the Refugee Act (from "would be subject to persecution" to "life or freedom would be threatened") so that " . . . U.S. statutory law clearly reflects our legal obligations under international agreements."[216] But because Article 33 contains language ("where his life or freedom would be threatened") capable of bearing the traditional U.S. insistence on a showing of a probability of persecution, this meaning was attributed to it. Indeed, the Court quickly abandoned any pretense of taking the Refugee Convention

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209. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
210. *Id.* at 118.
211. *See generally* Steinhardt, *infra* note 227, at 1167.
212. *See* INS v. Stevic, 467 U.S. 407, 422 (1984).
213. *Id.*
214. *See supra* notes 145-48 and accompanying text.
215. *See supra* notes 68, 203-208 and accompanying text.
216. *Stevic*, 467 U.S. at 426 n.20 (citing H.R. REP. No. 96-608, at 17-18 (1979)).

seriously as a source of obligations, confining its discussion of the standard of proof under *both* Article 33 and § 243(h) to an interpretation of the domestic statutory language alone: "Section 243(h), both prior to and after amendment, makes no mention of the term 'refugee'; rather, any *alien* within the United States is entitled to withholding if he meets the standard set forth."[217]

The Supreme Court seems never to have considered the possibility that Article 33, as part of an *international* treaty, was undoubtedly framed to achieve goals other than conformity with American domestic law. The Court in *Stevic* proceeded to overturn the "mistaken premise" of the Second Circuit that would have reinterpreted § 243(h) to grant withholding of deportation to all refugees, erroneously declaring that there was "no support for this conclusion in either the language of § 243(h), the structure of the amended Act, or the legislative history."[218] By the miracle of superimposition of American law onto the text of Article 33, the duty of *non-refoulement* was owed only to a subset of refugees, namely those who "would be threatened" if returned.[219] In essence, the Court held that since domestic law had always been in basic compliance with international law, and since the Refugee Act was enacted only to regularize a few discrepancies between international and domestic law, then *ipso facto* international law should be interpreted in accordance with American domestic standards.[220]

As serious as the Court's erroneous definition of the class of persons entitled to protection against return to the risk of persecution undoubtedly is, the more general failure to see the linkage between refugee status and substantive rights under the Convention is more profoundly disturbing. In *Stevic*, the Court at least recognized that "[t]he Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of [the Convention]."[221] Yet in *Cardoza-Fonseca*, the Court seemed quite willing to overlook the duty of the United States to ensure that refugees benefit from these rights, holding instead that " . . . a finding that an alien is a refugee does no

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217. *Stevic*, 467 U.S. at 422 (emphasis added).

218. *Id.* at 428.

219. *Id.* "In essence, *Stevic* permits prior non-conforming domestic law to operate as an unstated reservation to the Protocol." Fitzpatrick, *supra* note 14, at 7.

220. Subsequent cases demonstrate that courts have accepted the Supreme Court's characterization of domestic law as conforming to international law. *See, e.g.*, Marincas v. Lewis, 92 F.3d 195, 198 (3d Cir. 1996) ("[T]he Refugee Act brought the domestic laws of the U.S. into conformity with its treaty obligations under the [Protocol] . . . . Thus, the Refugee Act was enacted to fulfill our treaty obligations under the U.N. Protocol for the benefit of aliens . . . who claim to be fleeing persecution in their homelands."); Carvajal-Munoz v. INS, 743 F.2d 562, 572-73 (7th Cir. 1984) ("Despite some concerns that the 'clear probability' standard may have been changed by the United States' 1968 accession to the [Protocol] and by certain provisions of the Refugee Act, this standard has been reaffirmed as the proper one for determining the applicant's burden under section 243(h)."); Hernandez-Ortiz v. INS, 777 F.2d at 513 n.3 ("The [UNHCR] Handbook contains standards for interpreting the [Protocol], to which the United States acceded in 1968, and which informed Congress' actions when it passed the Refugee Act in 1980. That Act amended our immigration laws so as to bring United States law into conformity with international law.").

221. *Stevic*, 467 U.S. at 416.

more than establish that 'the alien may be granted asylum in the discretion of the Attorney General' . . . ."[222] Indeed, "those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum."[223] This conclusion is simply wrong. The explicit reference in *Stevic* to the catalogue of refugee rights in Articles 2 through 34 moreover makes it clear that the Court knew that refugees were not merely the objects of discretion. We believe that this is an important point, as there might otherwise be an inclination to dismiss the Court's holdings simply as uninformed in regard to international law.[224]

To the contrary, in both *Stevic* and *Cardoza-Fonseca*, the Supreme Court was fully briefed on relevant international law.[225] The Court had before it the *amicus curiae* briefs of UNHCR, in which the history and authoritative interpretations of international refugee law were developed and thoroughly explained.[226] And in any event, the ability of the Supreme Court to draw from international refugee law when so inclined is clear from the internationally derived understanding of "well-founded fear" which it adopted in *Cardoza-*

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222. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987).

223. *Id.* at 444.

224. *See, e.g.*, Helton, *supra* note 136, at 2346:

> [J]udicial reticence stems more from a general unfamiliarity with the law of international human rights and a parochial legal tradition suspicious of the international law making process—including its relation to the customary international law of human rights. In order to realize the mandate to protect the human rights of aliens and refugees, courts must become more knowledgeable about the substance of international legal doctrine. But just as importantly, courts must develop greater awareness of, and sensitivity to, the development and authority of international law. Such regard by the judiciary will assist the United States in attaining full compliance with the law of nations.

225. Interestingly, the Court was quite prepared to engage in analysis of the drafting history of Art. 32(1) of the Convention in order to demonstrate that Stevic was not "lawfully in the territory" of the United States and was therefore not entitled to the benefit of the Convention's protection against expulsion. *Stevic*, 467 U.S. at 417 n.10.

226. In its amicus brief for *Stevic*, the UNHCR stated that:

> to require of an applicant for refugee status or for withholding of deportation to prove that persecution is 'more likely than not' would result in a standard more stringent than the term 'well-founded fear' as that phrase is used in the 1951 Convention . . . . To ignore the element of fear and to require an applicant to show that he would most probably be persecuted is to apply a definition of 'refugee' which is not contained in or implied by the 1951 Convention or the 1967 Protocol, and which does not correctly reflect the obligations of a State Party under either of these instruments.

Brief for the Office of the United Nations High Commissioner for Refugees at 25-26, INS v. Stevic, 467 U.S. 407 (1984). UNHCR reiterated this basic point in its brief for *Cardoza-Fonseca*:

> [T]he term 'well-founded fear of being persecuted' means that an applicant for refugee status need only be able to show good reason why he or she fears persecution . . . . 'Good reason' for fear, rather than proof of a particular degree of probability of being persecuted, is all that is required by international law . . . . In using the term 'well-founded fear of being persecuted,' the framers of the 1951 Convention adopted a definition which corresponds to the practical realities of the refugee situation.

Brief for the Office of the United Nations High Commissioner for Refugees at 26-28, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

Fonseca.[227] The failure to inform its interpretations of the Refugee Act by drawing on the international refugee law being implemented is therefore more plausibly a matter of disinclination than of unawareness or ineptitude.

Ralph Steinhardt has suggested that the Supreme Court's decision in *Cardoza-Fonseca* "suggest[s] a broad endorsement of international principle in the interpretation of statutes . . . *Cardoza-Fonseca* reaffirms the propriety of consulting nonjurisdictional, international standards in the interpretation of domestic statutes."[228] At one level, this is clearly true. Even though the congressional intent to conform U.S. and international refugee law was not stated in the Refugee Act itself, but is clear only from its drafting history, the Court insisted that "well-founded fear" be defined to coincide with the *travaux préparatoires* and dominant international interpretations, even at the expense of the traditional U.S. standard of proof:

> Indeed, the definition of "refugee" that Congress adopted . . . is virtually identical to the one prescribed by . . . the Convention . . . . Not only did Congress adopt the Protocol's standard in the statute, but there were also many statements indicating Congress' intent that the new statutory definition of "refugee" be interpreted in conformance with the Protocol's definition . . . . It is thus appropriate to consider what the phrase "well-founded fear" means with relation to the Protocol.[229]

But the Court's commitment to implementation of international law is clearly selective.[230] Not only did the *Cardoza-Fonseca* court not follow the same internationalist approach when it came to addressing the status of Articles 2 through 34 of the Convention, but the Supreme Court's subsequent refugee caselaw, in particular the decision in *Sale v. Haitian Centers Council, Inc.*,[231] borders on outright hostility towards international law.[232]

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227. After reviewing the history of the drafting of the Convention, the Court concluded that:

> [t]he standard, as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee.'

Cardoza-Fonseca, 480 U.S. at 438.

228. Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1153-54 (1990).

229. *Cardoza-Fonseca*, 480 U.S. at 437.

230. Steinhardt sees the reluctance of the courts to rely on international law as part of a

> debate . . . about supremacy and politics: those who reject the determinative power of international law principles—or some substantial subclass of them—in domestic litigation argue that the coercive power of law can be justified only if it reflects the political will of those to whom it applies. By assertion, international law fails this test because it arises out of a relatively vague and varying diplomatic process among states.

Steinhardt, *supra* note 229, at 1107-08.

231. *Sale*, 509 U.S. 155 (permitting the return of refugees intercepted on the high seas without investigation as to their circumstances).

232. *See* JAMES C. HATHAWAY & JOHN A. DENT, REFUGEE RIGHTS: REPORT ON A COMPARATIVE SURVEY 10-12 (1995).

Had the Supreme Court's analysis of the Refugee Act been informed by the *Charming Betsy* principle, it is more likely that it would have at least seen § 243(h) as tied into the definition of "refugee" and therefore subject to a less strict standard of proof.[233] More generally, it would have been impossible for the Court not to have recognized that refugees are the holders of rights, rather than simply the potential beneficiaries of discretionary asylum. Instead, the Supreme Court seems to have relied on any interpretive principle and shred of evidence capable of effectively nullifying the overriding goal of Congress to bring U.S. law into conformity with international refugee law. It is difficult to contest Joan Fitzpatrick's rather depressing conclusion:

> This selective approach may not be entirely deliberate, but it suggests unease at the prospect that judicial enforcement of clear international norms might restrict the flexibility of the political branches. Such an attitude is fundamentally at odds with acceptance of international law as a constraint on policy choices and a limit on government freedom to deal as it pleases with individuals possessing rights under international agreements .... *Stevic* and *Cardoza-Fonseca*, by suggesting that Congress was insincere or ineffectual in bringing the nation fully into compliance with international refugee law, have had a corrosive effect.[234]

In other words, the Supreme Court was determined to save Congress from itself. The Court emphatically declared that "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol ...."[235] Equally pointedly, the Court rejected as "unpersuasive"[236] a government contention that it should defer to the BIA's reading of Congress' intent. Yet in fact, the decisions in *Stevic* and *Cardoza-Fonseca* adopt agency reconstructions of congressional history which relegate international refugee law to the sidelines.

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233. The lack of evidence for a different standard of proof under Articles 33 and 34 of the Convention is made in Justice Powell's dissenting opinion:

> In any event, the materials discussed by the Court shed little light on the question presented by this case. None of them states that the burden of proof for *non-refoulement* under Article 33.1 of the United Nations Protocol of 1967 - a remedy essentially identical to withholding of deportation under § 243(h) of the Act - is higher than the burden of proof for asylum under Article 34. The only thing the materials tend to establish is that a mathematical approach to the likelihood of persecution in asylum cases is arguably inconsistent with the sense of the drafters of the Protocol.

Cardoza-Fonseca, 480 U.S. at 464 (Powell, J., dissenting). While Justice Powell would have affirmed BIA practice on the burden of proof, his decision is nonetheless accurate as regards the absence of any support for a bifurcated burden of proof under international law.

234. Fitzpatrick, *supra* note 14, at 8-9.

235. *Cardoza-Fonseca*, 480 U.S. at 436.

236. *Id.* at 445.

B. *Refugees Are Immigrants, Aren't They?*

A second fundamental concern with the Supreme Court's reasoning is that it seems inextricably anchored in an understanding of refugees as no more than a sub-category of immigrants. That is, there is virtually nothing in the reasoning of the Court in either *Stevic* or *Cardoza-Fonseca* recognizing that, in contrast to other persons who may wish to enter the United States, refugees are uniquely entitled to insist that the United States protect them. Their status as refugees endows them with a right not to be returned to the risk of persecution, and to benefit from the full catalogue of civil and socioeconomic rights set out in the Refugee Convention.[237] Other than by formal reservation, it is not open to the United States, or any other state party, simply to decide that refugees will not receive the benefit of Articles 2 through 34.

The Government of the United States was aware that becoming a party to the Protocol meant that it was undertaking a duty to protect persons previously not entitled to enter this country, including by affording them at least temporary residence in the United States. This is clear not only from representations made to the Senate during the accession debate,[238] but from the fact that the United States made precisely two fairly minor reservations upon accession to the Protocol.[239] Because the United States clearly turned its attention to the issue of terms of accession, it must have been aware that neither the refugee definition in Article 1, nor the duty of *non-refoulement* set by Article 33, is subject to reservation.[240] There is, therefore, no basis upon which the United States can sustain an argument that it may return all but super-refugees able to meet the specifically American withholding of deportation standard, much less that it may elect to treat refugees as entitled to no more than protection in the discretion of the Attorney General. Yet the Supreme Court, echoing comparable assumptions by Congress and others, seems not to have fully understood the specificity of the rights of refugees. It saw refugees as immigrants, subject to many, if not all, of the usual legal strictures that the United States and other countries impose on the admission and reception of non-citizens generally.

In part, the assimilation of refugees to immigrants for purposes of rights allocation derives from the definitional confusion previously discussed.[241] Whereas "refugees" under traditional U.S. law were persons admitted on a discretionary basis from abroad, refugees under international law are persons with a well-founded fear of persecution who arrive at a state's territory, and who are entitled by law to protection. As Joan Fitzpatrick has written:

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237. *See generally supra* Part II.
238. *See supra* notes 111-13 and accompanying text.
239. *See supra* note 11.
240. *See* Convention, *supra* note 10, at 182 (art. 42(1)).
241. *See supra* notes 152-56 and accompanying text.

> Confusion arises because Congress chose to adopt the same textual definition of "refugee" under INA § 207 that it incorporated into INA § 208. Those entering under INA § 207 [and who have applied from abroad] are given the legal status of "refugee." Yet while every "asylee" under INA § 208 [who applied in the United States, or at its border] must prove that he or she meets the Convention definition of "refugee," fewer than 20 [percent] of the recent beneficiaries of INA § 207 meet that definition .... INA § 207 is a highly politicized humanitarian admissions program. Without denigrating humanitarianism, one may regret the misappropriation of the refugee concept. The obvious political nature of INA § 207 increases the danger that asylum will also fall outside the rule of law and lose its close congruence with international norms.[242]

Indeed, the Supreme Court in *Cardoza-Fonseca* fell into precisely this trap, construing the common textual definition of a "refugee" in § 101(a)(42) as one that "applies to all *asylum* relief . . . [including] to the old § 203(a)(7) [which governed resettlement from abroad]." [243]

The confusion is most clearly evident in the mistaken belief that the United States was required to re-work its overseas refugee resettlement programs in order to conform to the requirements of the Protocol. While it is true that Convention refugees brought to the United States remain refugees and hence entitled to refugee rights once here, there is no duty under international refugee law to reach out to persons not already inside, or at the frontiers of, one's own country. Such voluntary efforts are simply not compelled or regulated by the Convention and Protocol. The decisions in *Stevic* and *Cardoza-Fonseca*, however, suggest a perception on the part of the Court that U.S. accession to the Protocol had something to do with the admission of refugees from abroad.

For example, in *Stevic*, the Court insisted that U.S. law prior to the Refugee Act was in compliance with international law. This was so because "[o]ur definition of a 'refugee' under § 203(a)(7) [governing overseas resettlement] was of course consistent with the Protocol. Indeed, the relevant statutory language virtually mirrored the Protocol definition."[244] This conflation of overseas resettlement with the implementation of legal duties to refugees is even more clear in *Cardoza-Fonseca*, in which the Supreme Court observed that "Congress was told that the extant asylum procedure for refugees outside of the United States was acceptable under the Protocol, except for the fact that it made various unacceptable geographic and political

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242. Fitzpatrick, *supra* note 14, at 11-12.

243. *Cardoza-Fonseca*, 480 U.S. at 436 n.18 (emphasis added). "Prior to the 1980 amendments there was no statutory basis for granting *asylum* to aliens who applied from within the United States. *Asylum* for aliens applying for admission from foreign countries had, however, been the subject of a previous statutory provision . . . ." *Id.* at 433 (emphasis added).

244. INS v. Stevic, 467 U.S. 407, 428 n.22 (1984).

distinctions."[245] In fact, there was no reason to be concerned about whether U.S. overseas resettlement efforts were based on the Protocol's refugee definition. In the usual American way of thinking, however, a U.N. treaty about refugees must be addressing "refugees" as understood under U.S. law, namely those seeking resettlement.

It was a short step from the innocent, if legally unfounded, belief that refugee law governs overseas admissions to the less benign view that refugees arriving in the United States could, like other "refugees" resettled to the United States, be dealt with solely on the basis of administrative discretion. If the law was now to recognize a class of refugees seeking protection by coming directly to the United States, the status of new refugees would logically be assimilated to that of resettled "refugees."

The legal mechanism by which this synthesis was achieved was Article 34 of the Convention, pursuant to which state parties agree to "as far as possible facilitate the assimilation and naturalization of refugees."[246] While there is no apparent reason to see this one right, out of the whole catalogue of rights in the Convention, as uniquely applicable to refugees (of both kinds), that is precisely the view taken by the Court. The *Stevic* court simply proclaimed without any reasoning that "[t]wo of the substantive provisions of the Convention are germane to the issue before us . . . Article 33.1 . . . and Article 34 . . . ."[247] In *Cardoza-Fonseca*, it was equally baldly asserted that "[t]he [INA's] establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country in which they are in danger, mirrors the provisions of the [Protocol] . . . ."[248] This is so because "[s]ection 208(a) . . . corresponds to Article 34."[249]

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245. *Cardoza-Fonseca*, 480 U.S. 421 at 434-35. As this quotation suggests, the Executive was equally misinformed about the applicability of the Protocol to procedures by which refugees were resettled from abroad. Indeed, remarks of the Court suggest that the lawyers representing Stevic were also confused in this regard:

> Respondent understandably does not rely upon the specific textual changes in § 243(h) in support of his position that a well-founded fear of persecution entitles him to withholding of deportation. Instead, respondent points to the provision of the Refugee Act which eliminated the ideological and geographical restrictions on admission of refugees under § 203(a)(7) and adopted an expanded version of the United Nations Protocol definition of "refugee."

Stevic, 467 U.S. at 422.

246. Convention, *supra* note 10, at 176 (art. 34).

247. *Stevic*, 467 U.S. at 416-17. The notion that the Refugee Convention calls for a bifurcated system based on Articles 33 and 34 is also embraced by the Court in *Cardoza-Fonseca*:

> The Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol [r]elating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.

Cardoza-Fonseca, 480 U.S. at 424.

248. *Id.*

249. *Id.* at 441.

As a matter of international law, this is wrong. Refugees who are under a state's jurisdiction are entitled to all the rights stipulated in Articles 2 through 34, not just Article 34. And refugees who remain abroad, but who seek resettlement, are not entitled to assert any of the rights in the Convention in relation to the overseas state. But if refugees physically present in the United States are instead deemed part of a common class with persons to be resettled from abroad under discretionary initiatives (which they should not), and if the Protocol regulates overseas resettlement (which in fact it does not), then logically the only provision of the Protocol that can be safely applied to the combined group of "refugees" as a whole is the largely hortatory Article 34.

This failure to recognize refugees seeking protection in the United States as fundamentally distinct from the broader class of discretionary beneficiaries of resettlement has effectively disentitled refugees in the United States from the benefit of Articles 2-33 of the Convention. As the Court observed, "Article 34 merely call[s] on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 [is] precatory and not self-executing."[250] Thus, " . . . the Attorney General is not required to grant asylum to everyone who meets the definition of refugee,"[251] and even those granted asylum are not guaranteed protection against *refoulement*.[252]

In short, refugees do not get refugee rights. Refugees are simply a category of would-be immigrant, who like all would-be immigrants must seek permission to come in and be content with whatever entitlements the host state is prepared to offer. Whereas international refugee law is predicated on the extension of at least temporary membership rights to all refugees arriving at one's borders, the Supreme Court's vision rejects any such duty.[253]

VI. WHY THE SUPREME COURT ERROR MATTERS

Notwithstanding all of these indications that the Supreme Court fundamentally erred by failing to recognize the entitlements that flow from refugee status in *Stevic* and *Cardoza-Fonseca*, there has been a tendency to dismiss the problem as raising few practical risks.[254] Though technically discretionary, there is in fact what amounts to a presumption in U.S. law that those who

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250. *Stevic*, 467 U.S. at 428 n.22.

251. *Cardoza-Fonseca*, 480 U.S. at 428 n.5.

252. "Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a refugee . . . second, that the 'refugee' show that his or her life or freedom 'would be threatened' if deported." *Id.* at 440-41.

253. On the often devastating implications in Supreme Court jurisprudence of being deemed a "non-member" alien, see, for example, Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); Victor Romero, *Expanding the Circle of Membership by Reconstructing the 'Alien': Lessons from Social Psychology and the 'Promise Enforcement' Cases*, 32 MICH. J. LAW REFORM 1 (1998).

254. Fitzpatrick states:

> [T]he practical impact of the gap between Convention Article 33 and the U.S. provision on withholding of deportation is minor. Few asylum adjudicators are prepared to make an explicit finding that a claimant should be deported to a country in which he or she faces a well-founded fear

meet the Convention refugee definition should be granted asylum.[255] While asylum is not specifically predicated on the guarantees enumerated in Articles 2 through 34 of the Convention, it nonetheless delivers most of what the Convention demands. There is therefore a belief that there is no practical imperative to contest the admittedly legally inaccurate approach set in motion by the Court.

We take the view, in contrast, that present U.S. law cannot be relied upon dependably to deliver Convention rights to persons who meet the Convention's "well-founded fear of persecution" standard. This is most obviously true in the decision to deny protection against *refoulement* to such persons. Equally important, the failure of the Court clearly to link Convention refugee status with an entitlement to Convention rights has opened the door to a domestic legislative program that purports to withhold asylum (as defined in U.S. law) from persons who are Convention refugees (under international law).

Notwithstanding the presumption that refugees are to be granted asylum,[256] the INA interposes bars on access to asylum for reasons not authorized by the Convention. Indeed, the Attorney General is granted the continuing authority to define additional grounds for the refusal of asylum.[257] To the extent this prerogative is exercised, a gap may be created between Convention refugee status and eligibility for asylum under U.S. law. Because the Court's decisions in *Stevic* and *Cardoza-Fonseca* have inaccurately held that refugee status itself does not entitle an individual in the United States to claim Convention rights, refugees subject to one of the specifically U.S. ineligibility criteria are denied protection to which they are entitled as a matter of international law. Deborah Anker has similarly noted that "exclusion from protection is an area in which U.S. and international law diverge significantly," in that "U.S. law renders ineligible for asylum and withholding broader classes of persons than the Convention excludes from refugee status."[258]

Many of the U.S. ineligibility criteria mirror grounds for cessation of, or exclusion from, refugee status under Article 1(C)-(F) of the Refugee Convention.[259] Imposition of an eligibility bar on these terms clearly raises no concern. Other ineligibility criteria rely upon the right of states to expel certain particularly dangerous refugees under Articles 32 and 33(2) of the

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of persecution, simply because of negative discretionary factors combined with a failure to satisfy withholding's higher evidentiary threshold.

Fitpatrick, *supra* note 14, at 8-9.

255. *See In re* Pula, 19 I. & N. Dec. 467, 473 (BIA 1987).

256. *See supra* notes 33-33 and accompanying text.

257. *See* INA § 208(b)(2)(C), 8 U.S.C. § 1158(b)(2)(C) (1994 & 1997 Supp.).

258. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 415-16 (3rd ed. 1999).

259. For example, both U.S. law and the Refugee Convention would allow the denial of status to persons who engaged in the persecution of others or who were firmly resettled elsewhere.

Convention.[260] There is some concern here, since persons within the scope of these articles are Convention refugees, even though they may legitimately be removed from the United States. The decision to bar some such persons from even making a claim to asylum denies them recognition as refugees, which may adversely affect their ability to access UNHCR institutional protection, or make it more difficult for them to invoke refugee rights in relation to another state party in which their presence does not pose a comparable risk. But it cannot be said that the U.S. eligibility bars premised on these grounds raises the specter of non-compliance with duties under the Refugee Convention.

In contrast, reliance on at least two of the bars to asylum may lead adjudicators to act in contravention of treaty obligations. A particularly troubling deviation from international law is the U.S. provision that bars an applicant from being considered for asylum or withholding of deportation on the basis of "terrorist activity." The law covers those who have engaged in, or about whom there are reasonable grounds to believe they are engaged in, or who have incited, terrorist activity, as well as those acting as representatives of designated terrorist organizations.[261] The Refugee Convention, in contrast, requires much greater precision before exclusion from refugee status may be contemplated. States are required to show that the "terrorist" actions engaged in are properly deemed crimes against humanity, serious non-political crimes, or acts contrary to the principles and purposes of the United Nations.[262] Each of these standards has relatively clear international meaning, unlike the murky concept of "terrorism."[263] Because refugee status is uniformly defined in international law, it is simply not open to the United States to establish an additional ground of disqualification defined in purely domestic terms.

While many "terrorist" activities will in fact fall under one of the stipulated international standards,[264] the barring of "representatives of terrorist organizations" will not. At the very least, there is an obligation under international law to show why the particular person whose claim is under consideration represents a threat to American national security, in consequence of which removal may be lawful under Refugee Convention Articles 32 and 33(2). These articles do not sanction a denial of protective responsibility on the grounds of an applicant's formal status as a member of an organization, but only on the basis of his actual threats or actions. Because

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260. For example, U.S. provisions for the denial of protection to persons who pose a danger to the security of the United States are likely consistent with Articles 32 and 33(2).

261. *See* INA §§ 208(b)(2)(A)(v) & 241(b)(3)(B); 8 U.S.C. §§ 1158(b)(2)(A)(v) & 1251(b)(3)(B) (Supp. III 1998).

262. *See* Convention, *supra* note 10, at 156 (art. 1(F)).

263. *See generally* PETER J. VAN KRIEKEN, THE EXCLUSION CLAUSE (1999); JAMES C. HATHAWAY & COLIN J. HARVEY, FRAMING REFUGEE PROTECTION IN THE NEW WORLD DISORDER (forthcoming).

264. But the recent effort to bar six Iraqi opponents of President Sadam Hussein shows that the U.S. may exercise its domestic authority to bar asylum claims unlikely to fall under one of the exclusions contemplated by Article 1(F) of the Convention. *See* ANKER, *supra* note 258, at 443.

the most vital interests of refugees are involved, particularized *refoulement* under Article 33(2) is authorized only after a careful and balanced assessment of the security threat posed by the refugee. A restrictive approach is clearly called for,[265] with the state asserting the right to expel a refugee bearing the burden of persuasion.

A second and related concern is the U.S. statutory bar to relief for an applicant who, having been convicted of a "particularly serious crime, constitutes a danger to the community of the United States."[266] On the surface, this authority appears unobjectionable, as it essentially replicates Article 33(2) of the Refugee Convention, pursuant to which protection against *refoulement* may not be claimed by a refugee " . . . who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of [the receiving] country." However, recent amendments to the INA have unfortunately collapsed the international two-part test for permissible *refoulement* under Convention Article 33(2) into a single, categorical bar. Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal. The Convention drafters did not conceive of expulsion as punishment for such criminality, but instead only as a "last resort" where there is no alternative mechanism to protect the community in the country of asylum from an unacceptably high risk of harm.[267] The right to expel a refugee under Article 33(2) is therefore contingent not only on the fact of final conviction for a particularly serious crime, but also on a showing by the state of refuge that the continued presence of the refugee in its territory would be dangerous for its community. Thus, a state that wishes to avail itself of this highly exceptional authority must avoid categorical assumptions, and ground its decision to expel the refugee on a clear appraisal of the real risks to its community posed by the refugee's continued presence.

In the United States, however, there is now a regulatory bar to asylum and withholding of deportation[268] that avoids the necessity to engage in any such

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265. "Considering the serious consequences of exclusion for the person concerned . . .the interpretation of these exclusion clauses must be restrictive." UNHCR HANDBOOK, *supra* note 21, ¶ 149.

266. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (Supp. III 1998). "Since the passage of the Immigration Act of 1990, the United States has taken the position that it may define a set of crimes as 'particularly serious' and summarily deny both asylum and withholding of removal to any person convicted of such crimes. UNHCR has argued that such a *per se* bar to refugee protection is contrary to the case-by-case approach to refugee status determination which, in its view, the Convention and Protocol require." Busby, *supra* note 14, at 31.

267. The Swiss representative explained that his government

> wished to reserve the right in quite exceptional circumstances to expel an undesirable alien, even if he was unable to proceed to a country other than the one from which he had fled, since the Federal Government might easily find itself so placed that there was no other means of getting rid of an alien who had seriously compromised himself.

U.N. ESCOR Ad Hoc Comm. on Refugees & Stateless Persons, 2nd Sess., 40th mtg. at 32, U.N. Doc. E/AC.32/SR.40 (1950) (statement of Mr. Schürch).

268. *See* 8 C.F.R. § 208.16(c)(2) (1998).

appraisal of risk. The simple fact of a relevant conviction is a bar to consideration for asylum. The gravity of this departure from international legal standards has been heightened by the enactment of regulations which dictate the application of the bar whenever an individual has committed an "aggravated felony," now defined to include many minor or non-violent offenses, for example theft or burglary, illegal gambling, fraud or deceit, tax evasion, or falsely making or altering a passport.[269] Many of these crimes could not reasonably be argued even to meet Article 1(F)(b)'s "serious" standard, much less the "particularly serious" threshold set for *refoulement* under Article 33(2).[270]

Whether or not large numbers of refugees are presently barred from consideration for asylum by application of either of these domestic rules, the mere fact of their existence demonstrates the inaccuracy of the assumption that the domestic asylum process can be relied upon to deliver to Convention refugees all the rights due to them under international law. Relying on the Supreme Court's insistence that access to asylum is a strictly discretionary matter, the Attorney General now enjoys the right to define bars to asylum not predicated on a failure to meet the Convention refugee definition. In at least the two instances discussed above, eligibility bars operate in practice to sever the presumed linkage between satisfaction of the Convention refugee definition and access to the rights established by Articles 2 through 34 of the Refugee Convention.

While the United States would clearly be completely within its rights to deny asylum (in the sense of permanent admission) to refugees on a wide variety of domestically defined grounds, such denials breach international law where domestic asylum is the means by which the United States implements its duty to grant refugees the rights afforded them under the terms of the Refugee Convention. For asylum to be relied upon as the implicit mechanism for implementation of U.S. obligations under international law, every Convention refugee *must* also be granted asylum. This is not the case under American law.

VII. CONCLUSION

Why re-visit the Supreme Court's rulings in *Stevic* and *Cardoza-Fonseca*? In part, our concern is simply that these judgments are so legally flawed that

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269. The sentence actually imposed or that may be imposed determines whether an offense is an aggravated felony; time actually served is irrelevant. A sentence of one year or more for theft or burglary, for example, makes the crime an aggravated felony. An applicant who has been convicted of one or more aggravated felonies with an aggregate sentence of five or more years is considered to have committed a particularly serious crime for purposes of withholding of deportation. *See* REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 70 (1998) (particularly Appendix 7C).

270. "In the present context . . . a 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b) even if technically referred to as 'crimes' in the penal law of the country concerned." UNHCR HANDBOOK, *supra* note 21, ¶ 155.

they should not be allowed to stand. More importantly, because these decisions define the basic approach of the United States to implementation of international refugee law, American asylum jurisprudence has developed in something of a legal vacuum. We regret that U.S. refugee caselaw is of marginal influence abroad, and that American asylum decisions are rarely informed by the experience of other state parties to the Refugee Convention. But most critically, we argue the need to confront the errors in *Stevic* and *Cardoza-Fonseca* because failure to do so creates real risks for genuine refugees. While it was once possible to rely on a nearly automatic linkage between refugee status and access to asylum under U.S. law as a practical antidote to the Supreme Court's mistakes, that linkage is now severed. The authority of the Attorney General to set statutory bars on access to asylum for reasons not authorized by the Convention and Protocol means that it can no longer be assumed that the United States will, albeit in its own idiosyncratic way, ultimately live up to its international legal duties.

There is therefore a legal and ethical imperative to concede the Supreme Court's foundational errors, and to correct them. It is time for a clear recognition that refugees are refugees, that is, that there are no gradations of status or entitlement among them; and that all refugees under the authority of the United States are entitled to all Convention rights, not just those rights which the Attorney General may choose to extend. Within the contours of this clear international legal framework, the United States may validly devise whatever policies it views as best able to reconcile the needs of refugees to the legitimate interests of the American communities that will receive them. But refugee rights are not negotiable.