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THE DISCRETION LOOPHOLE: EXECUTIVE POWER, INTERNATIONAL REFUGEE LAW, AND THE EROSION OF ASYLUM PROTECTIONS IN THE UNITED STATES

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Since 2018, multiple presidential administrations have used the discretion provision – an obscure quirk of United States legislation—to justify wide-reaching changes in asylum policy that run counter to international law. The grant of asylum in the United States has long been at the discretion of the adjudicator, whereas under international law, states are required to grant asylum to those who meet the legal definition and do not trigger exclusion clauses. Although this may seem like a small technical detail, it has taken on outsized importance in recent years. With no realistic hope of Congressional action on immigration, United States presidents have started to rely on the discretion provision as a "loophole" for larger policy change, for instance, by directing adjudicators to use discretion to deny asylum for acts such as irregular entry and transit through a third country. This compounds the international law violations: not only is discretion out of step with international standards on fair adjudication, the United States is using it to justify policies that undermine fundamental refugee law norms on access to asylum.

The United States is challenged by changing displacement patterns and far higher numbers of asylum seekers than anticipated when domestic asylum legislation was written in 1980. However, using the discretion loophole to make sweeping

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policy changes amounts to stepping around Congress's mandated authority on immigration and going outside of the treaty-based international legal framework. While this may seem like a small issue in light of the complexity and turmoil in asylum and refugee protection, it inadvertently gives the executive scope to make broad policy changes without legislative oversight. To preserve the integrity of U.S. asylum law and ensure compliance with international obligations, Congress should close the discretion loophole, reasserting its role in addressing modern displacement challenges.

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INTRODUCTION

Since 2018, multiple presidential administrations have used the discretion provision[1]—an obscure quirk of United States asylum legislation—to justify wide-reaching changes in asylum policy that run counter to international law. In President Trump's first term, for example, he used the discretion provision to instruct adjudicators to deny asylum for those who transit through Mexico and enter the country irregularly.[2] President Biden relied in part on the discretion provision to justify strict limits on processing at the southern border.[3] And yet, international refugee law is relatively clear on these policy points, providing for acces to asylum, limiting states' capacity to require someone to seek asylum in a transit country[4] and largely prohibiting penalization for irregular entry.[5] Early indications from President Trump's second term suggest he is likely to turn to the discretion loophole again. Using the discretion loophole to make such sweeping policy changes amounts to stepping around Congress's mandated authority on immigration and going outside of the treaty-based international legal framework. In future legislative reform, Congress should seek to close this tiny lever that is used to make out-sized changes, and go through more accepted methods to modernize international refugee law to respond to present day challenges.

In comparison to historical trends, the challenges facing the United States are evident. The number of asylum seekers globally is far higher than a decade ago, with the United States as the world's largest recipient of new individual applications.[6] In 2023, annual arrivals at the southern border alone soared above 2 million people[7] with asylum seekers from places as far-flung as Yemen,

1. The United States' Immigration and Nationality Act provides that the adjudicator "may" grant asylum after full examination of the individual's claim for protection. Immigration and Nationality Act § 208(b)(1)(A), 8 U.S.C § 1158(b)(1)(A).

2. Matter of A-B-, 27 I&N Dec. 316, 345 n.12 (A.G. 2018); *see also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36283-84 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. pt. 208, 235) [hereinafter Omnibus Asylum Rule] (establishing three non-exhaustive factors for denial of asylum based on the discretion provision). For further discussion, see Part IV, *infra*.

3. Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024) (to be codified at 8 C.F.R. pt. 208, 235) [hereinafter STB Rule] (interim final rule); *see also* Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11708 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208) [hereinafter CLP Rule]. For further discussion, see Part IV, *infra*.

4. *See, e.g.*, U.N. High Comm'r for Refugees, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers (May 2013), https://perma.cc/PE6U-6YGA [hereinafter UNHCR Bilateral / Multilateral Transfer Note].

5. Convention Relating to the Status of Refugees, art. 31(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

6. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2023, 2 (June 2024) [hereinafter UNHCR Global Trends 2023], https://perma.cc/5E7K-RPFQ (noting 6.9 million asylum seekers globally, with 3.6 million new claims in 2023, some 1.2 million in the United States).

7. In fiscal years 2022 and 2023, the Border Patrol in the United States reported over two million apprehensions of people who crossed the southern border irregularly, surpassing

Venezuela, Afghanistan, and Ukraine transiting through Mexico to the United States.[8] The United States' resultant efforts to penalize irregular entry and transit echo similar moves to restrict entry or deter asylum seekers in other parts of the world in recent years,[9] with politicians demonstrating increasing reluctance to accept the answers proposed by the current international refugee law framework.[10]

In this pressing context, and in the absence of comprehensive legislative reform, both President Trump and President Biden turned to the quirky discretion provision for quick solutions. Congress introduced the discretion provision in asylum law in 1980, intending it as a tool for individual adjudication, not executive policy.[11] The law specifies that when judging an asylum claim, the Attorney General, the Secretary of Homeland Security, or their designates "may" grant

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the previous high point in 2000. Camilo Montoya-Galvez, *U.S. Border Patrol chief calls southern border a "national security threat," citing 140,000 migrants who evaded capture,* CBS NEWS: FACE THE NATION (updated Mar. 24, 2024), https://perma.cc/MY75-CY78; *cf.* Arnold H. Leibowitz, *The Refugee Act of 1980: Problems and Congressional Concerns,* 467 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 168-171 (1983). Leibowitz, special counsel to the Senate Subcommittee on Immigration and Refugee Policy when the American asylum law was drafted in 1980 noted that "it was assumed . . . that asylees would be few," *id*. at 168, and that "concern over numbers . . . is certain to generate renewed effort to reform asylum procedures," *id.* at 171.

8. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *Border Patrol Arrests: CBP Data through July 2022*, TRACREPORTS, https://perma.cc/M4PU-KE5W (archived Mar. 4, 2025).

9. *See, e.g.*, MATTHEW J. GIBNEY, THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES 2 (2004) ("All Western states have implemented over the last three decades a remarkable array of restrictive measures. . . . prevent[ing] or deter[ing] asylum seekers . . . [through] external measures such as visa regimes, carrier sanctions and airport liaison officers to internal measures like detention, dispersal regimes and restrictions on access to welfare and housing."); AGNÈS G. HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 2 (2009) ("[W]hile international cooperation in the refugee field traditionally focused on protection and assistance, the last two decades [prior to 2009] have been characterized by the emergence of transnational policies aimed at 'containing' refugee flows, above all on the European continent.").

10. *See, e.g.* WILLIAM MALEY, WHAT IS A REFUGEE? 27 (2016) (discussing contemporary Australian refugee policies and observing that "[t]he deeper threat to the 1951 Convention is that countries will profess loyalty to its provisions, but in practice either violate them or interpret them in a deliberately rigid or narrow fashion so that the rights of refugees are compromised."); *see also* EMMA HADDAD, THE REFUGEE IN INTERNATIONAL SOCIETY: BETWEEN SOVEREIGNS 192 (2008) (asking what happens to refugee protection when the concept of asylum clashes with the concept of sovereignty, and stating on the "one hand is the growing security agenda, an agenda that at times gives states a cover for contracting out of their obligations towards refugees; on the other is the sovereignty as responsibility discourse, evidenced in the intervention of states on behalf of refugees and others in need of assistance"); Matthey J. Gibney, '*A Thousand Little Guantanamos': Western States and Measures to Prevent The Arrival of Refugees*, *in* DISPLACEMENT, ASYLUM, MIGRATION: THE OXFORD AMNESTY LECTURES 2004, 139, 143 (Kate E. Tunstall ed., 2006) ("We have reached the *reductio ad absurdum* of the contemporary paradoxical attitude towards refugees. Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum.").

11. The legislative history of the 1980 Refugee Act with respect to discretion is discussed in Part III, *infra*.

asylum after a full examination of the case.[12] In other words, someone seeking protection might show that they meet the statutory standard of a refugee,[13] and nonetheless be denied at the adjudicator's discretion.[14] The individual might then be sent back to their home country where they would face persecution, or they might be allowed to remain in the United States under a lesser status, with no prospects of family reunification or naturalization.[15] Discretion as a policy tool then arises because the executive branch can direct its adjudicators to use certain factors for discretionary denials: for instance, to deny asylum for anyone who transited through Mexico.[16] In a stagnant policy environment where there has been no significant immigration legislation through Congress since 1996,[17] this tool has become increasingly tempting to presidents wishing to impact immigration policy. However, the discretion provision is essentially a loophole—it allows United States presidents to put forward wide-reaching policies that skirt around the domestic legislature and which can fall afoul of the obligations of the United States under international law.

By contrast, the international refugee law framework makes clear that discretion has no role in determining who needs protection. International law governing asylum adjudication is relatively uncomplicated on this point: if the individual meets the refugee definition in the international instruments,[18] and if they do not trigger any of the exclusion criteria,[19] then the state concerned must grant refugee status. The Universal Declaration of Human Rights establishes the

12. Immigration and Nationality Act § 208(b)(1)(A), 8 U.S.C § 1158(b)(1)(A).

13. *Id.* § 101(a)(42). This definition largely corresponds with that seen in international law. See Part I, *infra.*

14. Scholars have criticized the use of discretion in individual adjudication, arguing that it leaves the individual open to arbitrary decision-making. *See, e.g.*, Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN L. REV. 367, 406 (2020) ("[e]liminating discretion or establishing a clear standard can help reduce arbitrary and capricious discretionary decisions"); ANDREW SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP SCHRAG, THE END OF ASYLUM 127-128 (2021), (asserting a need for better appeals procedures for discretionary denials); James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable,* 14 GEO. IMMIGR. L.J. 481, 484 (2000) ("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.").

15. *See* Kate Aschenbrenner, *Discretionary (In)justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 611 (2012) (giving a detailed examination of impact on individuals of discretionary denials); *see also* Part I, *infra*.

16. *See, e.g.*, Matter of A-B-, 27 I&N Dec. 316, 345 n.12 (A.G. 2018). For detailed discussion, see Part IV, *infra*.

17. The last major immigration reform in the United States was in 1996, with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546. *See* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 20-27 (discussing the relatively stagnant nature of Congressional action on immigration in recent decades).

18. 1951 Convention, *supra* note 5, art. 1.A., as modified by the Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. *See* Part I, *infra*, for further discussion on the refugee definition.

19. 1951 Convention, *supra* note 5, arts. 1.D.-F.

individual right to seek asylum, and the 1951 Convention Relating to the Status of Refugees, supplemented by its 1967 Protocol Relating to the Status of Refugees, fleshes out the elements an individual must meet to qualify for protection.[20] Someone becomes a refugee at the moment they are forced to flee; adjudication is merely a declaration of that status, and there is no room for discretion.[21]

Politicians may argue that that the international refugee law framework, largely drafted after World War II, responds to a different set of displacement challenges and is not a good fit for the current context. However, this framework continues to answer questions that plague states today, such as irregular movement and transit through a third country. While the individual right to seek asylum is clear, the question of how responsibility for delivering on that right should be shared among states has long been debated.[22] Discussions over responsibility-sharing feed into states' efforts to limit obligations towards asylum seekers who do not arrive directly from their country of origin.[23] Yet the international refugee law framework—which, as established in the preamble to the 1951 Convention, requires international cooperation[24]—answers this question by delineating a set of obligations that states must fulfill before putting in place bilateral or multilateral agreements that permit asylum seekers to be returned to countries through which they transited.[25] The international legal approach to irregular entry is even

20. *See* Part II, *infra*.

21. U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 28, U.N. Doc. HCR/1P/4/ENG/REV.4 (Apr. 2019) [hereinafter UNHCR Handbook] ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . [before] his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one.").

22. Madeline Garlick, *The Sharing of Responsibilities for the International Protection of Refugees*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 463, 464 (Cathryn Costello et al. eds., 2021) ("The question of how responsibility for the international protection of refugees should be distributed amongst States has been debated at international level since the inception of the modern refugee protection regime. It is arguably a more pressing question today than at any other point in history.").

23. Hurwitz, *supra* note 9 (discussing asylum seekers' movement beyond their first country of refuge and asserting that because "secondary movements tend to be regarded as proof of the fraudulent or manifestly unfounded nature of an asylum claim," states have developed practices to limit their obligations to such asylum seekers).

24. 1951 Convention, *supra* note 5, pmbl. ("Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.")

25. UNHCR Bilateral / Multilateral Transfer Note, *supra* note 4; U.N. High Comm'r for Refugees, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries (Apr. 2018), https://perma.cc/VD2T-HZUP [hereinafter UNHCR Legal Considerations]; *see also* Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, Alejandro N. Mayorkas, Secretary of Homeland Security, et al., Petitioners v. Innovation Law Lab, et al., 141 S.Ct. 2842 (2021) (No. 19-1212) (providing detailed

clearer: Given that they are fleeing persecution, refugees cannot be in a position to comply with requirements for legal entry, and so Article 31(1) of the 1951 Convention restricts states' capacity to penalize irregular arrival.[26]

Despite relatively clear parameters in international law, both President Trump and President Biden have used the discretion loophole to introduce strikingly broad restrictions on asylum, operating through the executive branch rather than legislating with Congress.[27] For instance, in 2020, the Trump administration put forward a regulatory proposal known as the Omnibus Asylum Rule which used the discretion provision to instruct adjudicators to deny asylum for all irregular entry and / or lack of asylum claim in a transit country.[28] This regulatory proposal—ostensibly introduced to clarify and implement Congress's legislation[29]—was out of step with international law[30] and created conflict with parts of the domestic immigration code.[31] The Omnibus Asylum Rule did not go into effect before President Biden took office. However, President Biden then relied in part on the discretion provision for separate regulations addressing the

consideration of the application of the 2013 and 2018 guidance notes to transfer arrangements at the southern border).

26. 1951 Convention, *supra* note 5, art. 31(1) ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."). Detailed discussion of various aspects of Article 31(1), including terms such as "good cause," "coming directly," and "penalties" can be found in Cathryn Costello, Yulia Ioffe & Teresa Büchsel, *Article 31 of the 1951 Convention Relating to the Status of Refugees* 32-34 (U.N. High Comm'r for Refugees, Research Paper No. 34, 2017), https://perma.cc/86W6-T4E9 (noting that treating claims as inadmissible qualifies as a "penalty" for the purposes of Article 31(1)). *See also* Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs & Affirmance, E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242 (9th Cir. 2020) (No. 18-17274) (providing detailed discussion of American obligations under Article 31(1) in the context of attempts to introduce restrictions on access to asylum based on irregular entry).

27. *See* Part IV, *infra*.

28. Omnibus Asylum Rule, *supra* note 2, at 36283.

29. *Id.* at 36264. In the United States, Congress passes legislation (for instance, here, the Immigration and Nationality Act), and the executive branch agencies propose, finalize, and issue regulations to clarify the interpretation of that legislation and how it will be implemented. *See* CORNELL L. SCH., *Regulation*, LEGAL INFO. INST., https://perma.cc/FD3K-TBGK (archived Mar. 5, 2025).

30. U.N. High Comm'r for Refugees (UNHCR), Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (July 15, 2020), https://perma.cc/Y66A-BT5G [hereinafter UNHCR Comments on Omnibus Asylum Rule] (providing detailed analysis of the proposed rule's incompatibility with the United States' international legal obligations).

31. *See, e.g.*, 8 U.S.C.A § 1158 (providing that irregular entry does not preclude access to asylum).

southern border.[32] The first of these regulations restricted access to the asylum procedure for those who transited through Mexico or crossed the border irregularly,[33] and the second truncated access to asylum for irregular crossing if arrival numbers at the southern border went above a certain threshold.[34] Both regulations were criticized as violating fundamental norms of international refugee law.[35]

When the United States uses the discretion loophole in this manner to make asylum policy, it compounds the violations of international law. Not only is discretion itself out of step with international standards on asylum adjudication, but the United States has used the discretion provision to put in place policies that respond to irregular entry and transit in ways that violate international law. It amounts to lawmaking by loophole in a way that is both undemocratic (by applying executive fiat) and that diverges from the international refugee law framework that is binding on the United States. According to the United Nations High Commissioner for Refugees, the U.S. discretion provision violates international law as it "goes against the object and purpose of the 1951 Convention and its 1967 Protocol by failing to ensure the effective implementation of the right to seek and enjoy asylum."[36] At an international level, individual state action amounts to incoherence; not only will there be different legal frameworks in different countries, but we risk refugees being launched into orbit, shuttled from one country to another.[37]

The United States and countries around the world certainly face complex

32. CLP Rule, *supra* note 3, at 4; STB Rule, *supra* note 3, at 4.

33. CLP Rule, *supra* note 3, at 4.

34. STB Rule, *supra* note 3, at 4.

35. U.N. High Comm'r for Refugees, Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): "Circumvention of Lawful Pathways" (Mar. 20, 2023), https://perma.cc/ATU6-6G6U [hereinafter UNHCR Comments on CLP Rule]; U.N. High Comm'r for Refugees, Comments of the United Nations High Commissioner for Refugees on the Interim Final Rule from the U.S. Department of Homeland Security and U.S. Department of Justice: "Securing the Border" (July 8, 2024), https://perma.cc/M5LQ-3D6W [hereinafter UNHCR Comments on STB Rule].

36. UNHCR Comments on Omnibus Asylum Rule, *supra* note 30, at 56 (July 15 2020); *see also* Hathaway and Cusick, *supra* note 14, at 498 ("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 . . . first defin[ing] a "refugee" and then enumerate[ing] the rights that follow . . . .").

37. Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INTL. J. REF. L. 567, 572 (2003) (discussing "refugees who have escaped from persecution or from other trauma, only to be shuttled consecutively from one country to another."). Legomsky discusses state interests in containing secondary refugee movements and identifying orbit, alongside chain refoulement and human rights abuses in transit countries as countervailing issues faced by refugees. *Id.* at 569-573.

policy problems related to human mobility and protection[38]—with changes in global migration,[39] climate change,[40] and fierce debate around how to allocate responsibility for the world's displaced[41]—but this does not mean that the United States should make policy through a loophole. Instead, the United States should show principled leadership, working toward more coherent refugee policies that comply with the international framework and share responsibility for current and emergent issues in global forced displacement.[42] While irregular entry and transit at the scale of current global migration are thorny problems, the United States should seek to refine the guidance found in the current international legal framework[43] instead of turning to the discretion provision.

This article attempts to address a gap in the literature on how the discretion

38. Scholars have observed the need for protection for displacement beyond the refugee framework. For instance, Betts characterizes this as "crisis migration," covering a much wider group than the traditional refugee definition. Alexander Betts, *The Global Governance of Crisis Migration*, *in* HUMANITARIAN CRISES AND MIGRATION: CAUSES, CONSEQUENCES, AND RESPONSES 349 (Susan Martin et al. eds., 2014) (noting that crisis migration "highlights a range of emerging migration challenges . . . aris[ing] in the context of humanitarian crisis: displacement, including that which falls outside existing protection frameworks (Betts 2013a), trapped or stranded populations (Dowd 2008; Collyer 2010), mixed migration (Van Hear, Brubaker and Besa 2009; Koser and Martin 2011), and anticipatory movements.").

39. *Id.* at 351 ("In the aftermath of World War II, global governance was relatively straightforward. It generally involved a set of multilateral treaties and IOs created to oversee those treaties or to provide services to states within clearly delineated and distinct policy fields. Today, the character of global governance is very different. There has been a proliferation of institutions at the multilateral, regional, bilateral, and transnational levels, both formal and informal. New trans-boundary challenges have emerged that defy the boundaries of existing institutions, requiring forms of adaptation and coordination.").

40. McAdam observes, in the context of climate mobility and crisis migration, that "[c]urrent legal frameworks for assessing and responding to protection needs do not adequately address the time dimension of anticipatory, or pre-emptive, movement." Jane McAdam, *Conceptualizing Crisis Migration: A Theoretical Perspective*, *in* HUMANITARIAN CRISES AND MIGRATION: CAUSES, CONSEQUENCES, AND RESPONSES 28, 39 (Susan Martin et al. eds., 2014).

41. *See generally* GARLICK, *supra* note 22 (discussing the Global Compact on Refugees and other multilateral structures for responsibility-sharing).

42. States must go through the law-making process—messy as it may be—in collaboration with each other. *See, e.g.*, KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 49 (2017) ("In current debates over migration and refugees, many activists point to an ideal that is not embodied in the Refugee Convention. They argue for a radical reconceptualization and redesign of citizenship rules and institutions that are not well defined, but would involve a dramatic change in the current system of states as we know it. The comparison may still be explicit—activists can tell you the kind of world they envision—but it has not yet taken the form of refugee or migrant law.").

43. Faced with new, emergent challenges in global forced displacement, as Goodwin-Gill reminds us, the Convention can "continue to evolve," for "[w]hatever a few benighted politicians may claim, protection is not straightforward, but is the constantly evolving product of a dialectic involving legislative and executive power and the individuals to whom it is applied." Guy S. Goodwin-Gill, Emeritus Fellow, All Souls College (Oxford), Talk at the Landmark Chambers Dinner: The Protection of Refugees: Law, Discretion, and Justice 9-10 (Sept. 8, 2022) (written reflections available at https://perma.cc/9E72-X8EV).

provision has been used as a policy tool since 2018. While two US presidents have used the discretion loophole to make fundamental asylum policy changes, this quirky provision has not received as much attention as it should, given the capacity for widespread impact. Scholars, policy-makers, and advocates have focused on other "levers" in the immigration code that allow for executive branch action,[44] such as the levers that closed the border under COVID,[45] required asylum-seekers to wait in Mexico,[46] and limit access to protection in times of influx.[47] Meanwhile, the academic literature on the discretion provision mostly pre-dates the provision's use as a policy tool and largely focuses on the impact on individual rights.[48] This article seeks to focus more attention on the discretion provision and its wide-reaching ramifications for the future of asylum policy in the United States.

Part I provides a brief background on asylum adjudication in the United States, demonstrating how the discretion provision operates, how it impacts individual rights, and how it creates a loophole for executive-branch policymaking. Part II looks at the development of the international refugee law framework, noting that discretion plays no role in determining refugee status under international law, observing that debates over responsibility-sharing for global displacement are on-going, and asserting that the refugee law framework has evolved to provide answers to modern policy problems and can continue to evolve further. The ensuing debates around responsibility-sharing connect to states' concerns over irregular movement today—concerns that the United States has recently tried to

44. For example, in the run-up to the 2020 presidential election, more than 200 United States immigration and advocacy organizations produced a "blueprint" to transform the immigration system, focusing on many other levers for executive branch change but not mentioning discretion. IMMIGRATION HUB, AMERICA'S VOICE, ET. AL., 2021 IMMIGRATION ACTION PLAN: RESTORING HUMAN DIGNITY, RECOVERING THE ECONOMY, REINFORCING AMERICAN VALUES (2020), https://perma.cc/VX2Z-L4YA. *See also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 31-46 (providing an overview of changes to the asylum system since 2016 (including changes to substantive asylum law, new procedural obstacles within the asylum adjudication process, and barricades to accessing the asylum process) and summarizing some advocates' responses).

45. 42 U.S.C. § 264(a) ("[r]egulations to control communicable diseases").

46. 8 U.S.C. § 1225(b)(2)(C).

47. 8 U.S.C. § 1182(f).

48. *See, e.g.*, Dyllan Moreno Taxman, *Non-Refoulement, Withholding, and Private Persecution*, 82 LA. L. REV. 733 (2022); Wadhia, *supra* note 14; Aschenbrenner, *supra* note 15; Kevin R. Johnson & Serena Faye Salinas, *Judicial Remands of Immigration Cases: Lessons in Administrative Discretion from* INS v. Cardoza-Fonseca, 44 ARIZ. ST. L. J. 1041 (2012); Hathaway & Cusick, *supra* note 14; Sharon E. Jacks, *Bound by Past Policy: The Scope of Executive Discretion in Political Asylum Determinations,* 15 HAMLINE L. REV. 389 (1992); Arthur C. Helton, *Developments: Final Asylum Rules in the United States: New Opportunities and Challenges*, 2 INT'L J. REFUGEE L. 642 – 646 (1990); 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. REFUGEE L. 687 (1989); Deborah Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1 (1987).

resolve through the discretion provision. Part III lays out how the discretion provision came into place, examining relevant legislative history and caselaw from the 1980s, and asserting that legislators and jurists at the time did not foresee the use of the discretion provision for wide-reaching policy change.

Part IV of the article discusses efforts under both President Trump and President Biden to use the discretion provision to restrict asylum. It observes that the United States is bound to follow the 1951 Convention, and yet has used the discretion provision to propose policies that attack fundamental parts of the international refugee law framework such as non-penalization for irregular entry and transit. The article concludes by urging lawmakers and advocates to focus on the discretion loophole, an under-studied aspect of the immigration code that allows the executive to undermine fundamental norms. Lawmakers should close this loophole and instead work through Congress and with other countries to remedy fundamental tensions in international refugee law, moving us toward more principled conversations about the future of asylum in the United States and elsewhere.

I. BACKGROUND ON THE DISCRETION PROVISION AND ASYLUM ADJUDICATION IN THE UNITED STATES

When deciding asylum claims in the United States, the adjudicator uses a definition of a refugee that largely corresponds with international law, but then may deny protection based on discretion, even if the applicant meets the official standard.[49] This leads to three consequences: haphazard individual adjudication, divergence from international standards, and the capacity to create restrictive policies. While the United States has a legitimate interest in ascertaining who should be entitled to asylum, international and domestic statutory standards provide a sufficient framework, and there is no need for additional discretion.

The domestic definition of a refugee shows clear parallels to the international framework,[50] stating that:

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49. 8 U.S.C § 1101(a)(42); 8 U.S.C § 1158(b)(1)(A). The refugee definition is used for two pathways to protection in the United States: refugee resettlement and asylum (asylee status). This article focuses on asylum, not refugee resettlement.

50. The 1951 Convention defines a refugee, in relevant part, as someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1951 Convention, *supra* note 5, art. 1.A. The 1951 Convention included both temporal and geographic limitations on the refugee definition. *Id.*, art. 1 (describing its provisions "as a result of events occurring before 1 January 1951," and defining "the words 'events occurring before 1 January 1951' in article 1, section A" as "mean[ing] either (a) 'events occurring in

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[51]

Unlike international law, domestic law then adds discretion:

> The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures . . . under this section . . . .[52]

The United States uses the refugee definition both for resettlement and for asylum adjudication.[53] Resettlement occurs when someone is identified abroad as in need of protection, their case is adjudicated by U.S. authorities, and then after adjudication, that person is brought to the United States.[54] Asylum—which is the focus of this article—occurs when an individual comes to the United States themselves, and requests adjudication of their case once in the country. Under international law, asylum adjudication is non-discretionary.[55] However, in the United States, the ultimate grant of asylum is left to the adjudicator's discretion, even if the individual meets the statutory criteria.

First instance asylum claims in the United States are adjudicated by one of two executive branch entities: the Department of Homeland Security's Asylum Office or the Department of Justice's Executive Office for Immigration Review.[56] Both agencies hear all the relevant elements of the refugee claim, after

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Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951' . . . ."). The 1967 Protocol removed both limitations. 1967 Protocol, *supra* note 18, art. 1.2-.3.

51. 8 U.S.C § 1101(a)(42).

52. 8 U.S.C § 1158(b)(1)(A) (emphasis added).

53. The Immigration and Nationality Act covers the grant of refugee status, 8 U.S.C § 1157, and the grant of asylum (or asylee status), 8 U.S.C § 1158. *See, e.g.*, DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 46-53 (2019) (discussing the differences between the "two theaters" of refugee protection in the United States: resettlement and asylum).

54. For more on refugee resettlement to the United States, see, for example, JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 963-977 (2005). *See also* GARLICK, *supra* note 22 (giving an overview of the role of resettlement as a tool for sharing responsibilities for refugees among states).

55. *See* Part II, *infra*.

56. Wadhia, *supra* note 14, at 375-76 (giving an overview of units within the Departments of Homeland Security and Justice responsible for adjudication of immigration matters); *see* Collopy, *supra* note 53, at 627-712 (detailing the Asylum Office's jurisdiction and responsibility for certain claims); *id.* at 713-904 (detailing the Executive Office for Immigration

which the adjudicator has the statutory authority to deny based on discretion. The initial adjudicating agency responsible depends on the individual's posture prior to lodging a claim.[57] Neither agency gathers data on when and how asylum claims are denied for discretion,[58] which means we simply do not have detailed information on how often and in what manner it is used.

An asylum claim generally—whether under domestic law or according to international standards—involves examining both the elements that would include someone as a refugee and the elements that might dictate that they should be excluded from protection.[59] As a threshold matter, the adjudicator needs to assess the credibility of the claimant.[60] Then, the first set of elements, commonly called the inclusion criteria—involves inquiries into whether the individual has a well-founded fear of persecution[61] based on one of the five grounds[62] articulated in the refugee definition.

An asylum claim also involves examination of a second set of elements, known as the "exclusion criteria" under international law or as "bars" domestically.[63] For instance, the 1951 Convention specifies that someone who is found to have committed a crime against humanity or a war crime may be excluded from refugee status.[64] Congress has clearly articulated a number of bars, some of

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Review's jurisdiction and responsibility for other claims).

57. Wadhia, *supra* note 14, at 377.

58. Aschenbrenner, *supra* note 15, at 598 ("Unfortunately it is not possible to calculate the percentage of asylum cases decided on the basis of discretion with existing public information. While both agencies responsible for asylum claims, United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR), keep statistics on their asylum grant and denial rates (as well as referral rates for USCIS), neither appears to separate their denial statistics by the particular grounds for the denial.").

59. UNHCR Handbook, *supra* note 21, ¶¶ 28-31; *see also* DEBORAH E. ANKER & JEFFREY S. CHASE, LAW OF ASYLUM IN THE UNITED STATES (2024).

60. UNHCR Handbook, *supra* note 21, ¶¶ 195-202; ANKER & CHASE, *supra* note 59, § 3:19.

61. UNHCR Handbook, *supra* note 21, ¶¶ 37-65; ANKER & CHASE, *supra* note 59, §§ 2.3-.15. Under US law, the applicant may also show past persecution. *Id.* §§ 2.8-.16.

62. UNHCR Handbook, *supra* note 21, ¶¶ 66-86; ANKER & CHASE, *supra* note 59, at ch. 5. The United States diverges from international law with respect to the five grounds in various ways, including around the definition of particular social group, and the United States also requires a stronger "nexus" to the five grounds than needed under international law. *See, e.g.*, Karen Musalo, *Aligning United States Law with International Norms Would Remove Major Barriers to Protection in Gender Claims*, 36 INT'L J. REFUGEE L. 20, 22-25 (2024).

63. UNHCR Handbook, *supra* note 21, ¶¶ 140-63; ANKER & CHASE, *supra* note 59, at ch 6.

64. 1951 Convention, *supra* note 5, at art. 1.F.(a). The 1951 Convention specifies a set of exclusion criteria that read as follows:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) He has committed a serious non-political crime outside the country of refuge

which mirror international law and some of which go beyond international standards.[65] Exclusion from protection means the individual can be returned to a place where they would face harm, and so a balancing test is typically required to measure the severity of the exclusionary offence against the degree of persecution feared.[66]

Despite this well-established system that uses a balanced framework for excluding some people from protection, discretion in the United States relies on factors beyond exclusion clauses or bars. A Board of Immigration Appeals case from 1987, *Matter of Pula*, gives direction on possible discretionary factors.[67] Those factors have been developed through case law and agency guidance,[68] though in an explicitly non-exhaustive manner.[69] Factors include immigration issues (such as transit through other countries and manner of entry to the United

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prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

1951 Convention, *supra* note 5, art. 1.F. *See also* UNHCR Handbook, *supra* note 21, ¶¶ 140-63; U.N. High Comm'r for Refugees, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, ¶¶ 10-23, U.N. Doc. HCR/GIP/03/05 (Sept. 3, 2003) [hereinafter Guidelines on Exclusion Clauses] (giving detailed guidance on the exclusion clauses). For information on interpretation of Article 1(F), see Geoff Gilbert & Anna Magdalena Bentajou, *Exclusion*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 711, 711-27 (Cathryn Costello et al. eds., 2021).

65. ANKER & CHASE, *supra* note 59, at ch. 6. There are considerable discrepancies between international law on exclusion and the American regime for bars to asylum. *See, e.g.*, Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 10-15 (2008) (discussing the parallels and differences between the exclusion clauses and the U.S. bars to asylum); *cf.* Negusie v. Holder, 555 U.S. 511, 517-23 (2009) (discussing bars to asylum in the United States and reiterating that the Supreme Court has repeatedly recognized that the Refugee Act was intended to implement principles agreed to in the 1967 Protocol).

66. UNHCR Handbook, *supra* note 21, ¶ 156; *see also* Guidelines on Exclusion Clauses, *supra* note 64, ¶ 24; ANKER & CHASE, *supra* note 59, § 6.15. The Board of Immigration Appeals has acknowledged the need for similar balancing in the context of discretion, emphasizing that a discretionary denial should be balanced against the persecution risk and noting that the "danger of persecution should generally outweigh all but the most egregious" of discretionary factors. Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987). *But see* Aschenbrenner, *supra* note 15, at 620-22 (noting that past persecution, which can lead to an asylum grant in the United States, plays into discretionary factors).

67. Matter of Pula, 19 I&N Dec. at 467; *see* Wadhia, *supra* note 14, at 377 ("[D]iscretion in asylum has been undefined by a clear guideline, but nevertheless guided by precedential decisions by the Board.").

68. 9 U.S. CITIZENSHIP & IMMIGR. SERVICES, POLICY MANUAL, pt. A, at ch. 5 (2024) (chapter titled "Discretion"); *see also* ANKER & CHASE, *supra* note 59, § 6.43 (discussing standards guiding discretionary denials); Aschenbrenner, *supra* note 15, at 612-15 (2012) (giving a detailed discussion of factors guiding adjudicators in the exercise of discretion).

69. *Matter of Pula,* 19 I&N Dec. at 473-74; *see also* Zuh v. Mukasey, 547 F.3d 504, 510-11 (4th Cir. 2008) ("[C]ourts and IJs should consider, when relevant, the following non-exhaustive list of factors as part of the totality of the circumstances.").

States) and personal issues (such as fraud, ties to the United States, and employment history).[70]

Discretion in this context weighs only in favor of the government: that is, adjudicators use discretion only to deny asylum to someone who otherwise meets the criteria.[71] There is no mechanism by which a US adjudicator may grant asylum discretionarily, even if someone fails to prove one of the substantive aspects of their case. Additionally, the adjudicator's exercise of discretion is not particularly constrained by appeal at the administrative level.[72] Then, at the federal appellate level, the domestic immigration code explicitly provides that a discretionary judgment made by an adjudicator in accordance with section 208(a) "shall be conclusive unless manifestly contrary to the law and an abuse of discretion."[73]

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70. Aschenbrenner, *supra* note 15, at 612-13 (giving a detailed discussion of factors guiding adjudicators in the exercise of discretion). Even if factors identified in *Matter of Pula* or related policy guidance are present, the adjudicator can still choose to grant asylum. *See, e.g.*, Matter of Kasinga, 21 I&N Dec. 357, 368 (BIA 1996) ("The applicant purchased someone else's passport and used it to come to the United States. However, upon arrival, she did not attempt to use the false passport to enter. She told the immigration inspector the truth. . . . We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant. Therefore, we will grant asylum to the applicant."). Some discretionary denials hinge on adverse credibility determinations, blurring the line between the statutory definition of a refugee and the exercise of discretion. In *Perinpanathan v. INS*, for instance, the Eighth Circuit held that "the BIA properly denied petitioner asylum as a matter of discretion" because the "inadequate and contradictory nature" of his testimony supported a finding that the petitioner's testimony about his participation in a terrorist organization "lack[ed] credibility." 310 F.3d 594, 599 (8th Cir. 2002). In contrast, other circuit courts have reversed discretionary denials of asylum premised on adverse credibility. *See, e.g.*, Kalubi v. Ashcroft, 364 F.3d 1134, 1141-42 (9th Cir. 2004) ("[I]f an applicant's testimony on an issue is accepted for purposes of determining whether he is statutorily eligible for asylum, the same testimony must also be accepted for purposes of determining whether he is entitled to asylum as a discretionary matter."); Marouf v. Lynch, 811 F.3d 174, 189-90 (6th Cir. 2016) (noting the *Kalubi* decision, and asserting that "an Immigration Judge's determination that an applicant's testimony lacks credibility cannot form the basis of a discretionary denial of asylum if that testimony has been credited, as it has been here, for the purposes of determining asylum eligibility"); Huang v. Immigration and Naturalization Service, 436 F.3d 89, 99 (2d Cir. 2006) (overturning a discretionary denial in which the immigration judge had ruled that the applicant met the refugee definition, but was denied on discretion because he had embellished certain claims and testimony).

71. Aschenbrenner, *supra* note 15, at 609.

72. *Id.* at 609 (observing that the administrative review of discretionary determinations is "quite broad and unconstrained by deference to the adjudicator at the level below"). First, for appeals from asylum office denials on discretion, the immigration courts generally afford deference; an immigration judge is not bound by an asylum officer's discretionary denial, but may of course deny on the same grounds. Second, the Board of Immigration Appeals then reviews the immigration judge's discretionary determination *de novo*. 8 C.F.R. § 1003.1 ("The Board may review de novo all questions arising in appeals from decisions issued by DHS officers.").

73. 8 U.S.C. § 1252(b)(4)(D); *see* Aschenbrenner, *supra* note 15, at 609-10 (discussing federal circuit courts' application of this standard and arguing that it is applied inconsistently, and further discussing IIRIRA's stripping of review of discretion in other areas of immigration

If someone is denied asylum based on discretion (and unsuccessful on appeal), they may still qualify for other forms of protection in the United States. The most common of these is withholding of removal based on non-refoulement,[74] a lesser status under which the government "withholds" or refrains from executing a removal order but through which the individual has fewer rights than with asylum.[75] Withholding is non-discretionary: that is, if someone meets the criteria, the adjudicator must grant, but the standard of proof for withholding is "more likely than not" as opposed to the lower "well-founded fear" standard for asylum.[76] Consequently, those who would have met the lower threshold but fail to meet the more-likely-than-not threshold will be refouled. Those who are granted withholding of removal receive fewer rights in the United States than those granted asylum (for instance, no pathway to naturalization; no right to family reunification; and no protection from re-detention by immigration authorities).

Aschenbrenner gives specific case examples from practice that illustrate how withholding is not an adequate substitute for asylum. For instance, Aschenbrenner profiles a Russian asylum seeker who meets the lower threshold required for asylum, is denied based on discretion, fails to meet the higher threshold for withholding, and is removed to his home country. This person has been refouled, in violation of one of the most fundamental norms of refugee law.[77] In a second example, Aschenbrenner details the case of a Pakistani asylum seeker who, after a discretionary denial, meets the higher threshold for withholding and can remain in the United States, but cannot reunify with her family or become a national—rights that would have been available had she been granted asylum.[78] These two

law); *see also* Wu Zheng Huang v. INS, 436 F.3d 89, 96 n.9 (2d Cir. 2006) (explaining that 8 U.S.C. § 1252(b)(4)(D)'s reference to the Attorney General's discretionary authority to grant asylum should be understood to apply to 8 U.S.C. § 1158(b) after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA]).

74. 8 U.S.C § 1231(b)(3). Some individuals may also qualify for withholding of removal under the Convention Against Torture. *See* COLLOPY, *supra* note 53.

75. *See, e.g.*, STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 1081 (4th ed. 2005) (noting that in the early 2000s, practitioners were reporting a growing practice among immigration judges to "plea bargain", offering an applicant withholding of removal in exchange for a withdrawal of the application for asylum under section 208). Legomsky observes that "[t]hose kinds of offers can force some difficult personal decisions" with the applicant receiving basic protection from persecution, but no access to naturalization or family reunification. *Id.*

76. Taxman argues that in practice, adjudicators struggle to distinguish between these levels of proof in an administrative process that hears asylum and withholding claims at the same time. Taxman, *supra* note 48, at 739-40 ("[W]ithholding and asylum are so conflated in U.S. practice—and withholding analysis so often bootstrapped to asylum analysis in one sentence, if not completely neglected—that federal courts impermissibly apply standards for asylum, heightened under the AG's discretion, to withholding claims."); *see* Part III, *infra*.

77. Aschenbrenner, *supra* note 15, at 628.

78. *Id.* at 629 (giving a case study of an individual denied rights in the United States due to discretionary denial).

examples demonstrate the negative individual effects of what Franicevic, Kysel, and Shannan describe as the "discretion gap": a system in which people who would be granted asylum but—due to a discretionary denial—either fail to receive protection in the United States at all, or receive protection at a lesser standard.[79] This violates multiple areas of international law, including adequate due process, non-discrimination and access to basic rights, and non-refoulement.

While the discretion provision has clear negative impact on individuals attempting to exercise their right to seek asylum, it has further ramifications when used as a policy tool - the subject of the rest of this article. The executive branch can use it as a loophole to redefine asylum policy in far-reaching ways by giving adjudicators new criteria for discretionary denial. This article focuses on this ballooning problem, arguing that legislators in Washington should end the discretion provision at the next available opportunity. This would bring US law closer to compliance with international standards, which are discussed in the following section, and which prohibit the use of discretion in asylum adjudication.

II. 1948-1967 AND THE RIGHT TO SEEK ASYLUM IN INTERNATIONAL LAW

In the post-World-War II period, states established the individual's right to seek asylum, and specified parameters of how to determine that right—which does not permit discretionary decision making. International law governing asylum adjudication is relatively uncomplicated: if the individual meets the refugee definition in the international instruments,[80] and if they do not trigger any of the exclusion criteria,[81] then the state concerned must grant refugee status. Someone becomes a refugee at the moment they are forced to flee; adjudication is merely a declaration of that status.[82] Under this international framework, there is no room for the adjudicator to retain discretion as seen in the United States. States do have the capacity to exclude individuals not deserving of refugee status, but they must do so through a defined legal process with strict procedural guarantees, given the risk of harm in the event of wrong decisions.[83] There is no evidence that the delegates intended to create a system in which the state retains discretion to deny asylum even if the individual met the international criteria.

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79. Zora Franicevic et al., *Salvaging US Refugee Law in 2021: The Case for Tackling the Problem of Discretionary Asylum*, JUST SECURITY (Jan. 20, 2021), https://perma.cc/MS5N-RWTG.

80. 1951 Convention, *supra* note 5, art. 1.A.; 1967 Protocol, *supra* note 18, art. 1 (modifying Article 1.A. of the 1951 convention).

81. 1951 Convention, *supra* note 5, at art. 1.D.-F.

82. UNHCR Handbook, *supra* note 21, ¶ 28 ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. . . . [before] his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one.").

83. 1951 Convention art. 1.D.-F.; *see also* Guidelines on Exclusion Clauses*, supra* note 64, at ¶¶ 2, 32-36 (giving detailed information about how the exclusion clauses should be used).

The international refugee law framework was largely drafted at a different time, and there are points of tension that remain today, some of which are connected to modern debates on irregular entry and transit. While the individual right to seek asylum is clear, the question of which state is responsible for delivering that right has been debated since the refugee framework was drafted.[84] As Garlick asserted in 2021, the question of responsibility-sharing for global displacement "is arguably a more pressing question today than at any other point in history."[85] Responsibility-sharing touches many corners of refugee policy, among them third country transit.[86] Yet, the international refugee law framework does give some solutions for secondary movement, delineating conditions states must have in place in order to engage in multilateral or bilateral agreements to return asylum-seekers to countries they have passed through.[87] Even with these answers, states may still be struggling to craft appropriate policies in light of modern displacement patterns.[88] But these profound questions deserve principled answers from global law-makers; using the discretionary loophole to address these issues is at odds with the fundamental building blocks of the refugee framework.

A. The Universal Declaration of Human Rights and the Individual Right to Seek Asylum

The notion of an individual's right to seek asylum is relatively modern.[89]

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84. GARLICK, *supra* note 22, at 464 ("The question of how responsibility for the international protection of refugees should be distributed amongst States has been debated at international level since the inception of the modern refugee protection regime.")

85. *Id.*

86. *See, e.g.*, Legomsky, *supra* note 37, at 567-677 (giving a detailed discussion of the degree to which a refugee has legal freedom to choose the country that decides their asylum claim and proposing criteria for determining when international law and policy permit returns to third countries).

87. UNHCR Bilateral / Multilateral Transfer Note, *supra* note 4, at ¶¶ 3-6; UNHCR Legal Considerations, *supra* note 25, at ¶¶ 4-5; *see also* Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at 15-21, Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021) (No. 19-1212) (providing detailed consideration of the application of the 2013 and 2018 guidance notes to transfer arrangements at the southern border).

88. *See, e.g.*, MALEY, *supra* note 10, at 27 (discussing contemporary Australian refugee policies and observing that "[t]he deeper threat to the 1951 Convention is that countries will profess loyalty to its provisions, but in practice either violate them or interpret them in a deliberately rigid or narrow fashion so that the rights of refugees are compromised."); *see also* HADDAD, *supra* note 10, at 192 (asking what happens to refugee protection if the concept of asylum clashes with the concept of sovereignty, and stating that "[t]he post-Cold War era has left the refugee in a state of uncertainty. Refugee policy is now being reinterpreted in light of countervailing forces in contemporary world politics. On the one hand is the growing security agenda, an agenda that at times gives states a cover for contracting out of their obligations towards refugees; on the other is the sovereignty as responsibility discourse, evidenced in the intervention of states on behalf of refugees and others in need of assistance."); GIBNEY, *supra* note 9, at 143 (discussing western attitudes to criminalizing asylum).

89. *See, e.g.*, 2 ALTE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW

Prior to the end of the Second World War, as Einarsen points out, the issue of asylum was more an international legal issue between two states as opposed to between an individual and one or more states.[90] In 1948, the drafting of the Universal Declaration of Human Rights (UDHR) brought the individual's right to seek asylum to the forefront.[91] Article 14(1) of the UDHR states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[92] The language of Article 14—as well as Article 13 (on the right to leave a country) and Article 15 (on the right to a nationality)—reflect states' concerns for forced displacement during and after the war.[93] Even in that period, however, states were concerned about the breadth of the individual right to asylum. As Grahl-Madsen notes, delegates voted down proposals to include a right to be *granted* asylum, and Article 14(1) ultimately concerns instead the right to *seek* asylum.[94] Morsink asserts that, faced with large contemporaneous population movements in Europe and the Middle East, states were not willing to tie their hands by establishing a right to be granted asylum.[95]

80-102 (1972) (discussing the establishment of the right to seek asylum after World War II).

90. Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 37, 43 (Andreas Zimmerman ed., 2011). Einarsen observes that prior to World War II, the notion of the right to asylum spoke more to "whether one State had a right to grant asylum to a foreigner on its territory, in conflict with the interests of the foreigner's country of nationality." *Id.* at 43 (acknowledging further that this was a period with fewer barriers to seeking safety, such that "persecuted people before the 20th century often simply moved to new countries or even new continents without many immigration restrictions"). *See also* ALTE GRAHL-MADSEN, TERRITORIAL ASYLUM 2 (1980) (discussing that the "right to asylum" has been used in two ways, the right of a State to grant asylum, and the right of asylum for the individual).

91. Einarsen, *supra* note 90, at 47 ("the object and purpose of Art. 14 UDHR . . . was to establish the institution of individual asylum at the international level"); *see also* WILLIAM A. SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE *TRAVAUX PRÉPARATOIRES* 591-594 (2013) (noting that the *travaux préparatoires* to the UDHR acknowledge that the right to seek asylum appeared in a number of national constitutions at the time of the UDHR's creation—including those of Brazil, France, and Mexico—albeit in varying forms that do not fully resemble the article that ultimately appeared in the UDHR).

92. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948).

93. *See, e.g.*, JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 332-333 (1999) (discussing the Holocaust and displacement during World War II and in the immediate aftermath).

94. 2 GRAHL-MADSEN, *supra* note 89, at 11.

95. An earlier draft article including the right "to be granted asylum" was replaced with the phrase "to enjoy asylum." Morsink asserts that this was because delegates were concerned about the pressure on States receiving large numbers of refugees at the time, including States affected by the 1948 Arab-Israeli war. MORSINK, *supra* note 93, at 78 ("Under the U.K. proposal, the phrase 'and be granted' was replaced with the phrase 'and to enjoy,' once the right had been granted. The British proposal left open the question as to whether someone who flees persecution has a human right to asylum and protection given by other countries. Both of these amendments passed and the lesson learned from the Holocaust was lost in the disagreements about what to do about the half million refugees created by the 1948 Arab-Israeli war. That

The parameters of the individual's right to seek asylum—and how states should deliver it[96]—have been the subject of much debate in the ensuing decades.[97] Whereas many rights in the UDHR involved rights that required only one nation to implement, the rights in Articles 13, 14, and 15 require the involvement of multiple states, without a clear delineation of each state's responsibilities.[98] This left a fundamental tension in the refugee law framework: while an individual had a right to seek asylum, it remained necessary to specify which state was to ensure enjoyment of that right.[99] The right to seek asylum was fleshed out and made legally binding by the 1951 Convention,[100] which in its preamble calls for "international co-operation,"[101] but does not specify the form that shared responsibility should take.[102]

B. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: No Room for Adjudicatory Discretion

Amidst early drafting debates for the refugee framework, states sought to retain some controls limiting the right to seek asylum,[103] but did not look to

war caused four separate waves of refugees, the last of which, in October and November 1948, overlapped with the discussions and votes in the Third Committee on the right to asylum.").

96. *See, e.g.*, Anker, *supra* note 48, at 3 ("Asylum, however, contains a fundamental ambiguity. States generally have not recognized a duty to admit an alien and grant asylum status."); *see also* Einarsen, *supra* note 90, at 47 (observing that whereas Article 14(1) "does not secure prior (formal) admission to any particular country," it would "no doubt be out of line with the right . . . if a State actively denies a refugee protection from persecution").

97. *See, e.g.*, *id.* ("Like any human right, legally binding or not, it is supposed to be invoked by an individual when need be. However, the interpretation of Art. 14 UDHR has often been disputed, and so has its legal status in contemporary international law."); *see also* MORSINK, *supra* note 93, at 75-78 (discussing additional areas of debate, including concerns over the numbers of people who might be covered).

98. *See, e.g.*, *id.* at 72-73 ("For people to enjoy these rights various countries have to cooperate and hence give up a piece of their sovereignty. . . . These rights are, therefore, real test cases for any list of human rights, for in their case the question of the problem of sovereignty can no longer be hidden behind the veil of positive national law. As Cassin said in the Third Committee of the discussions about asylum, 'in case of the articles studied so far, the national society in which the individual was living was required to ensure the rights in question. The right to asylum, however, was a conception of an essentially international character: it was therefore necessary to specify who was to ensure the enjoyment of that right.'").

99. *Id.* at 74; *see also* GARLICK, *supra* note 22, at 463 ("The question of how responsibility for the international protection of refugees should be distributed amongst States has been debated at international level since the inception of the modern refugee protection regime.")

100. Einarsen, *supra* note 90, at 48 ("[T]he right 'to enjoy' asylum, read in conjunction with the UDHR as a whole, is basically an expression of the same principle that three years later was detailed, extended, and made legally binding by the 1951 Convention.")

101. 1951 Convention, *supra* note 5, pmbl.

102. GARLICK, *supra* note 22, at 464.

103. As Grahl-Madsen observes, however, international law at the time did acknowledge various other facets of the state's right to control the grant of asylum, including: the right to admit someone to its territory; the right to allow that person to remain; the right to refuse to extradite that person to another state; and the right not to prosecute that person. 2 GRAHL-

adjudicatory discretion as one of those controls. The 1951 Convention, its ensuing 1967 Protocol, interpretive sources of law such as the UNHCR Handbook, and the Statute of the Office of the United Nations High Commissioner for Refugees, make it eminently clear that the benefits of the refugee law framework extend to *anyone* who meets the refugee definition.[104] Grahl-Madsen notes the binding nature of the refugee definition under international law, observing that "for the purposes of the Convention, the term 'refugee' shall apply to *any* person who comes within the terms of the paragraph."[105] Scholars overwhelmingly agree on this point;[106] it leaves no room for states to deny asylum on a discretionary

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MADSEN, *supra* note 89, at 23.

104. *See, e.g.*, 1 ALTE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 119 (1966) ("Paragraph 6 A (i) of the UNHCR Statute provides that the competence of the High Commissioner shall extend to any person satisfying the requirements laid down in the said provision. Similarly Article I (A) (I) of the Refugee Convention stipulates that for the purposes of the Convention, the term 'refugee' shall apply to any person who comes within the terms of the paragraph. . . . Furthermore, Article I (A) (I) of the Convention means that all Contracting States are duty bound to accord the rights and benefits of the Convention on any such person, unless and until he falls under one of the exclusion or cessation clauses contained in Article I, sections C through F, of the Convention.").

105. *Id.* (emphasis added).

106. *See, e.g.*, HUGO STOREY, THE REFUGEE DEFINITION IN INTERNATIONAL LAW 2 (2023) ("Article 1A(2) states that the term 'refugee' shall apply to *any* person who" meets the refugee definition (emphasis added)); 1 GRAHL-MADSEN, *supra* note 104, at 332 ("Article I A of the Refugee Convention simply sets forth that 'for the purposes of the present Convention, the term "refugee" shall apply to any person who' satisfies the criteria laid down in the said Article."); NEHEMIAH ROBINSON, A COMMENTARY ON THE CONVENTION RELATING TO THE STATUS OF REFUGEES 9 (1953) ("As mentioned, the Convention differs from the international agreements which have so far been concluded, first of all, in its scope. The former agreements related to a strictly limited group of refugees, while the present Convention embraces all existing refugees, insofar as they were deemed to be worthy of international protection, and, as a rule, grants all of them the same status, regardless of their origin or the time when they became refugees. . . . To achieve the purpose of uniformity the Convention prescribes that it replaces all previous international agreements on the status of refugees between the parties to it. The Convention even explicitly prescribes that its provisions must be applied to refugees without distinction as to race, religion, and country of origin."). UN documents show clear intent to protect all who meet the definition. *See e.g.*, U.N. Secretary-General, Memorandum from the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/2 (Jan 3. 1950) ("It is desirable to draw up a convention relating to the international status of refugees which would apply in principle to all categories of refugees to whom it is proposed to give international status."), cited in 1 ALEX TAKKENBERG & CHRISTOPHER C. TAHBAZ, THE COLLECTED TRAVAUX PREPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES 121 (1989). This principle was true even for refugee definitions used prior to the 1951 Convention. *See, e.g.*, 1 GRAHL-MADSEN, *supra* note 104, at 74 (pointing to an earlier definition of a refugee that applied to all who qualify: "We may take our starting point in the Resolutions on the 'Statut juridique des apatrides et des réfugiés,' which were adopted by the Institute de Droit International at its Session at Brussels on 24 April 1936. Article 2 (2) of these Resolutions reads as follows: 'Dans les présentes Résolutions le terme "réfugié" désigne tout individu qui, en raison d'événements politiques survenus sur le territoire de l'Etat don't il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre Etat.").

basis.

The post-war refugee law framework does leave states with the capacity to exclude certain individuals—but states must do so through an established exclusion framework, as opposed to permitting their adjudicators to resort to discretion.[107] As discussed in Part I, several grounds can trigger exclusion in the international framework, including the commission of a crime against peace, war crime, or a crime against humanity, the commission of a serious non-political crime outside the country of refuge, or being guilty of acts contrary to the purposes and principles of the United Nations.[108] The notion of exclusion is a serious one, as the consequences of erroneous exclusion may be severe, and exclusion analysis should be balanced against the preceding inclusion analysis.[109] States party are not permitted to develop their own exclusion regimes outside of that put forward by international law, and adding to exclusion by giving adjudicators discretion is not allowed.[110]

The declaratory principle of refugee law underscores the incompatibility of discretion with the international framework. The declaratory principle holds that a person "does not become a refugee because of recognition, but is recognized because he is a refugee."[111] In other words, adjudication is not the moment when someone becomes a refugee—instead, the acquisition of refugeehood occurs with flight. Discretion undermines that principle: how could someone become a

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107. The 1951 Convention articulates exclusion grounds in Article 1.D.-F.; *see* Part III, *infra* (discussing Article 1 more in depth); *see also* 1 GRAHL-MADSEN, *supra* note 104, at 119 (observing that Article 1(A) "means that all Contracting States are duty bound to accord the rights and benefits of the Convention on any such person, unless and until he falls under one of the exclusion or cessation clauses contained in Article I, sections C through F").

108. 1951 Convention, *supra* note 5, art. 1.F.; *see also* Gilbert & Bentajou, *supra* note 64, at 711-727 (Cathryn Costello et al. eds., 2021) (giving a detailed discussion of the operation and function of the exclusion clauses in international law).

109. *See* Guidelines on Exclusion Clauses, *supra* note 64, ¶ 31 ("The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion . . . ."); *see also* U.N. High Comm'r for Refugees, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 99 (Sept. 4, 2003), https://perma.cc/94HH-HG5N (explaining that application of the exclusion clauses require both an evaluation of the crime, the applicant's role, and the nature of the persecution feared).

110. The use of discretion in the United States amounts to supplanting the exclusion regime with very different, and in some cases far smaller, concerns. U.S. authorities acknowledge that discretion can be used for factors less significant than the "bars" (or exclusion) factors articulated by Congress: for instance, the Board of Immigration Appeals has held that "factors which fall short of the grounds of mandatory denial may constitute discretionary considerations," In re H-, 21 I&N Dec. 337, 347 (B.I.A. 1996), and USCIS also notes that conduct falling short of a mandatory bar may be considered as an adverse factor, U.S. CITIZENSHIP & IMMIGR. SERVS., MANDATORY BARS TO ASYLUM AND DISCRETION, ASYLUM OFFICER BASIC TRAINING COURSE 26, 34 (2009), https://perma.cc/6B8D-DEDR.

111. UNHCR Handbook, *supra* note 21, ¶ 28 ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . [before] his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one.").

refugee at the moment of flight, but then no longer be a refugee at the discretion of an adjudicator some months or years later?

States—including the United States—revisited the definition of a refugee in the 1967 Protocol[112] and still, they did not add discretion. In discussions surrounding both the 1951 Convention and the 1967 Protocol, United States delegates (and others) expressed concern about the appropriate scope of the refugee definition.[113] On one hand, delegates were concerned that an overly narrow definition leads to *refoulement*, but on the other hand an overly broad definition leaves states unable to deliver on that right.[114] The 1967 Protocol did ultimately expand the definition of the refugee—removing the geographic and temporal limitations of the 1951 Convention—and yet, even in this context, the United States did not introduce conversations about using discretion to limit the right.

It is true that today states face a different set of challenges than when the international refugee framework was written, with more complex displacement patterns and increased numbers,[115] but the United States should not turn to the discretion loophole to answer these problems. The refugee law framework has shown resiliency, providing answers on thorny issues like irregular entry and transit, and, having already been modified in the 1960s, can be further refined. The 1951 Convention is clear on irregular entry: given that they are fleeing persecution, refugees cannot be in a position to comply with requirements for legal entry, and so Article 31(1) of the 1951 Convention restricts states' capacity to penalize irregular arrival.[116]

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112. The 1967 Protocol on the Status of Refugees, which the United States ratified in 1968, U.N.-U.S., Nov. 1, 1968, 19 U.S.T. 6223, binds States parties to the refugee definition articulated in Article 1 of the 1951 Convention on the Status of Refugees (with temporal and geographic limitations removed), 1967 Protocol, *supra* note 18, art. 1.2-.3.

113. *See, e.g.*, Einarsen, *supra* note 90, at 55, 59-60 (discussing U.S. delegates' opinions on the notion of universal refugee protection).

114. *See*, *e.g.*, Andrew E. Shacknove, *Who is a Refugee*, 95 ETHICS 274, 276 (1985) ("A proper conception of refugeehood is an important matter. . . . An overly narrow conception of 'refugee' will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable. . . . Conversely, an overly inclusive conception is also morally suspect and will, in addition, financially exhaust relief programs and impugn the credibility of the refugee's privileged position among host populations, whose support is crucial for the viability of international assistance programs."); *see also* Einarsen, *supra* note 90, at 50-52 (discussing substantive limitations to the refugee definition including IDPs, economic migrants, stateless people, and "accidental victims of natural disaster").

115. The number of asylum seekers globally is far higher than a decade ago, and the United States is the world's largest recipient of new individual applications. UNHCR Global Trends 2023, *supra* note 6, at 2 (noting 6.9 million asylum seekers globally, with 3.6 million new claims in 2023, some 1.2 million of them in the United States).

116. Article 31(1) of the 1951 Convention states in relevant part:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

More recently, UNHCR has clarified states' obligations on transit, delineating a set of criteria that states must fulfil before putting in place bilateral or multilateral agreements to that effect.[117] The refugee law framework will continue to evolve,[118] with on-going debates over irregular movement, transit, and responsibility-sharing, and states engaging in multilateral discussions in response to modern policy problems.[119] The United States should play a role in this evolution, based on an understanding of why discretion exists in domestic law, as we shall see in the next part.

III. THE 1980S AND THE EMERGENCE OF THE DISCRETION PROVISION IN THE UNITED STATES

The legislature introduced discretion somewhat inadvertently in 1980, and the Supreme Court has not directly examined its legality.[120] This quirk of the law creates an unintentionally broad opportunity for policy change. As far back as 1985, practitioner-scholar Arthur Helton warned of the potential for multiple levels of violations of international law, foreshadowing the efforts of presidential administrations several decades later:

> An over-broad use of discretion, particularly involving factors 'that Congress could not have intended to make relevant' would violate the Refugee Act. Similarly, a categorical rejection of asylum claims for those who have come to the United States in an irregular fashion would violate not only the Refugee Act, but also administrative law principles which mandate individualized justice.[121]

1951 Convention, *supra* note 5, art. 31(1). Detailed discussion of various aspects of Article 31(1), including "good cause," "coming directly," and "penalties" can be found in Costello, Ioffe & Büchsel, *supra* note 26, at 32-34 (noting that treating claims as inadmissible qualifies as a "penalty" for the purposes of Article 31(1)). *See also* Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs & Affirmance in *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (Nos. 18-17274, 18-17436) (providing detailed discussion of American obligations under Article 31(1) in the context of attempts to introduce restrictions on access to asylum based on irregular entry).

117. UNHCR Bilateral / Multilateral Transfer Note, *supra* note 4; UNHCR Legal Considerations, *supra* note 25; *see also* HURWITZ, *supra* note 9, at 1-21 (discussing safe third country agreements). The "assertion that the brief—and usually irregular—transit of an asylum seeker on a State's territory may as such be sufficient to establish the existence of a jurisdictional link between that State and the asylum seeker remains highly contentious." *Id.* at 6.

118. Goodwin-Gill, *supra* note 43, at 9-10 ("Whatever a few benighted politicians may claim, protection is not straightforward, but is the constantly evolving product of a dialectic involving legislative and executive power and the individuals to whom it is applied.").

119. *See, e.g.*, GARLICK, *supra* note 22, at 480 (discussing the Global Compact on Refugees and other multilateral mechanisms to encourage responsibility-sharing, and noting that not all states want to take part).

120. Hathaway & Cusick, *supra* note 14, at 484 ("The legacy of the foundational jurisprudence of the U.S. Supreme Court has been illegitimately to substitute access to discretion for entitlement to rights.").

121. Arthur C. Helton, *The Proper Role of Discretion in Political Asylum*

A. The 1980 Refugee Act and the Inadvertent Introduction of Discretion

The United States ratified the 1967 Protocol in 1968, and therefore bound itself to Articles 2-34 of the 1951 Convention.[122] However, the United States did not pass implementing legislation until 1980,[123] when the United States incorporated a unified definition of a refugee largely in line with international law.[124] Prior to the 1980 Refugee Act, the United States had granted protection by resettling refugees from abroad or withholding removal for those already here in an ad-hoc manner.[125] There was not a single, agreed-upon definition of a refugee,[126] and instead resettlement or withholding was given on a discretionary basis.[127]

The legislative history of the 1980 Refugee Act makes two things eminently clear. First, Congressional intent was clearly to bring domestic law in line with the Refugee Convention and Protocol. Second, drafters were primarily focused on resettlement—the procedure by which refugees are identified and brought to the United States[128]—and established domestic procedures "almost as an afterthought."[129] Two domestic procedures emerged from this process: first, withholding of removal (which existed before the Act, and which was made

Determinations, 22 SAN DIEGO L. REV. 999, 1011 (1985).

122. The 1967 Protocol on the Status of Refugees binds States party to the refugee definition articulated in Article 1 of the 1951 Convention on the Status of Refugees (with temporal and geographic limitations removed). 1967 Protocol, *supra* note 18, art. 1.

123. The United States maintains that unless a treaty is self-executing (written to operate without the aid of domestic legislation), Congress must pass legislation incorporating its provisions into domestic law. Medellín v. Texas, 552 U.S. 491, 507-10, 513-15 (2008); *see also* Alexander Orakhelashvili, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 59-65 (8th ed. 2019) (discussing the attitudes of national legal systems to international law and comparing different countries' approaches to incorporating treaty obligations).

124. 8 U.S.C. § 1101(a)(42)(A); *see supra* notes 50-53 and accompanying text; SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 2 ("This legislation would implement the United States' international legal obligations under the U.N. Refugee Convention, and it would put an end to ad hoc executive actions vis-à-vis refugee admissions, instead creating a transparent process that applied the substantive legal standards laid out in the treaty.").

125. 8 U.S.C. § 1253(h) (authorizing the Attorney General to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion); *see also* Aschenbrenner, *supra* note 15, at 604-05 (offering a discussion of the discretionary grant of withholding prior to the 1980 Refugee Act).

126. *See, e.g.*, SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 9-10 (discussing the definition of a refugee in the years leading up to the 1980 Refugee Act).

127. INS v. Stevic, 467 U.S. 407, 423 (1984); *see also* Aschenbrenner, *supra* note 15, at 604 ("Withholding of removal was understood to be discretionary.").

128. *See* Part I, *supra*.

129. Court Robinson & Bill Frelick, *Lives in the Balance: The Political and Humanitarian Impulses in US Refugee Policy*, 2 INT'L J. REFUGEE L 293, 293 (1990). At the beginning of the decade of the 1980s, the United States enacted a new, comprehensive law, the Refugee Act of 1980, with a stated objective "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States." *Id.* at 293. Almost as an afterthought, the Act also directed the Attorney-General to "establish a procedure" for aliens within the United States "to apply for asylum." *Id.*

mandatory therein[130]) and the new status of asylum. Asylum, as enacted in 1980, was explicitly discretionary: an individual "may be granted asylum in the discretion of the Attorney General."[131]

While it is clear that Congress saw the 1980 Refugee Act as protective, there is not a great deal of evidence on why they made asylum discretionary when withholding was mandatory.[132] Hathaway and Cusick argue that, because asylum and withholding were not the original point of the legislation, "neither of these legislative goals was carefully executed."[133] In their opinion, Congress "suffered from a fundamental confusion regarding the nature of U.S. obligations under the Refugee Protocol."[134] Hathaway and Cusick argue that, if Congress had better understood the international framework, they might have abandoned 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."[135] Instead, the Act emerged with a strange two-fold domestic system (neither side of which corresponds with international law), which, through the discretion provision, left the refugee framework vulnerable to trenchant policy attacks decades later.

B. *Stevic* and *Cardoza-Fonseca*: The Supreme Court Unintentionally Entrenches Discretion

In the 1980s, the Supreme Court decided two cases on withholding and asylum,[136] but neither directly addressed the compatibility of discretion with international law. Instead, both cases looked at the standards of proof required to for these forms of protection, incorporating discretion into the argument without

130. Drafters of the Refugee Act of 1980 ostensibly made withholding mandatory to correspond with Article 33 of the 1951 Convention, which provides that "[n]o 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 on account of his race, religion, nationality, membership of a particular social group, or political opinion." 1951 Convention, *supra* note 5, Article 33. Aschenbrenner, *supra* note 15, at 605 (arguing that withholding became mandatory to fulfil non-refoulement requirements).

131. Refugee Act of 1980 § 208(a), 8 U.S.C. § 1158(a).

132. Aschenbrenner, *supra* note 15, at 606.

133. Hathaway & Cusick, *supra* note 14, at 508.

134. Hathaway & Cusick, *supra* note 14, at 511. Because the legislation was originally about resettlement, and because resettlement is discretionary, Hathaway and Cusick assert that "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." *Id.* at 513.

135. *Id.* at 513 (noting that "[t]he inherent logic of a unified mechanism to implement a common legal duty appears never to have been seriously considered").

136. INS v. Stevic, 467 U.S. 407 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 11-12 (giving a comparison of the holdings in *Cardoza-Fonseca* and *Stevic*).

confronting the issue of discretion head-on.[137] Meanwhile, the executive branch issued standards for applying discretion.[138] These steps seem to have entrenched discretion in U.S. law without any facial examination of its compliance with the Convention.

In *Stevic*, the Court held that individuals must show a "clear probability" (i.e. more-likely-than-not) of persecution to obtain withholding.[139] Three years later, the Court decided in *Cardoza-Fonseca* that more-likely-than-not was too high a threshold to require for asylum, and instead held individuals must meet a lower standard of a one-in-ten chance of persecution to gain asylum.[140] The Court in *Cardoza-Fonseca* used the discretion provision to justify the more generous standard of proof for asylum.[141] Neither *Stevic* nor *Cardoza-Fonseca* looked specifically at the question of whether the discretion provision complies with the United States' international obligations, although *Cardoza-Fonseca* does discuss discretion and international law.[142]

The Supreme Court cases were welcomed by advocates, as the lower

137. In *Stevic*, the question presented was "whether a deportable alien must demonstrate a clear probability of persecution in order to obtain [withholding] relief under § 243(h) of the Immigration and Nationality Act of 1952." 467 U.S. at 409. *Cardoza-Fonseca* considers what standard of proof is appropriate for asylum, when compared to that for withholding. 480 U.S. at 423-424; *see* Robinson & Frelick, *supra* note 129, at 304-305 (comparing foreign policy discretion in resettlement and asylum); *see also* Arthur C. Helton, *Developments: Final Asylum Rules in the United States: New Opportunities and Challenges*, 2 INT'L J. REFUGEE L. 642, 643 (1990) (noting that interim rules were criticized for inviting too much reliance on foreign policy considerations in asylum adjudication); SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 10 (characterizing the two central legal issues of the first decade of implementation as: "how much proof is required, and the extent to which foreign affairs can affect refugee recognition"); *cf.* INS v. Doherty, 502 U.S. 314 (1992) (considering whether foreign policy can be a relevant factor in the exercise of discretion in asylum cases).

138. *See, e.g.*, Matter of Pula, 19 I&N Dec. 467 (BIA 1987) (discussed in Part I, *supra*).

139. *Stevic*, 467 U.S. at 414; *cf.* Hathaway & Cusick, *supra* note 14, at 485-486 ("In the Supreme Court's view, *non-refoulement* is owed "only to a subset of super-refugees able to show a [486] *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" (correctly defined by the Supreme Court to require only a "reasonable possibility" of persecution) are not rights-holders at all. They may simply appeal to the Attorney General to grant asylum in her discretion."). *But see* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 744-745 (1998) (asserting that *Stevic*, as "the first of the cases to address the meaning of the 1980 Refugee Act, set the Court's highly literalist pattern," and observing that "[t]he Supreme Court's interpretation would permit a person to be found a refugee under the Protocol but nevertheless 'refouled' if she did not face a *probability* of persecution in the country of origin," an outcome that was not intended by the drafters of the Convention or Protocol).

140. *Cardoza-Fonseca*, 480 U.S. at 431-32, 439-41. UNHCR submitted an amicus brief which argued that the concept of well-founded fear in the 1951 Convention does not require a more-likely-than-not standard of proof. Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondent at 20-23, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (No. 85-782).

141. *Cardoza-Fonseca*, 480 U.S. at 440-48.

142. *Id.* at 436-41.

threshold for asylum seemed a positive step toward protection.[143] Advocates for international law likewise welcomed the Supreme Court's explicit acknowledgement of the Protocol, as well as the use of the Convention's *travaux préparatoires* and the UNHCR Handbook.[144] However, some scholars noted the entrenchment of discretion with concern.[145] Steinbock criticizes the Court in *Stevic*[146] and *Cardoza-Fonseca*[147] for selective and overly literalist interpretations of the plain meaning of the Convention, while Hathaway and Cusick note that the Court, in misinterpreting Article 33, "held that there is an obligation to avoid *refoulement* but it is not a duty owed to refugees *qua* refugees."[148]

One key flaw in the Court's reasoning in *Cardoza-Fonseca* can be traced to Justice Stevens' conviction that asylum adjudication corresponds with Article 34 of the Convention, which provides that the contracting States "shall as far as possible facilitate the assimilation and naturalization of refugees."[149] In aligning asylum adjudication with Article 34, Justice Stevens asserts that "[l]ike § 208(a), the provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible."[150] While Justice Stevens is correct that Article 34 is precatory (and that states are not obliged to allow all refugees to naturalize), he is incorrect in aligning Article 34 with asylum adjudication itself, which is governed by Article 1.[151] This misconception is not trivial: as Hathaway and Cusick state, by relying on Article 34, "the Court reduced the duty to protect refugees to no more than an obligation to consider an act of charity," adding that "[s]omehow, Articles 2 through 32 of the Refugee Convention disappeared into thin air."[152]

Ultimately, *Stevic* and *Cardoza-Fonseca* were not the right vehicles to untangle Congress's misunderstanding of international law and discretion that was translated into domestic law in the 1980 Refugee Act. The notion of discretion

143. *See, e.g.*, Anker & Blum, *supra* note 48, at 68 (noting that *Cardoza-Fonseca* "was hailed . . . as tremendously significant. It not only appeared to ease the burden for asylum claimants, but in finding that both statutory language and international law constrained administrative action, the decision represented a rare assertion of judicial authority in the immigration area.").

144. Steinbock, *supra* note 139, at 747 ("This explicit reference to the Protocol, as well as to the Refugee Convention's *travaux préparatoires* and the UNHCR Handbook, have earned the decision general applause for its seeming reliance on international law in the interpretation of American statutory norms.").

145. *See, e.g.*, Anker & Blum, *supra* note 48, at 70-72 (reflecting concern about the entrenchment of discretion).

146. Steinbock, *supra* note 139, at 742-45. Steinbock observes that "[t]he Court's plain meaning approach to the relevant statutory language in *Stevic* is remarkably selective." *Id.* at 745.

147. Steinbock, *supra* note 139, at 747-48.

148. Hathaway and Cusick, *supra* note 14, at 486.

149. 1951 Convention, *supra* note 5, art. 34.

150. *Cardoza-Fonseca*, 480 U.S. at 441.

151. 1951 Convention, *supra* note 5, art. 1.

152. Hathaway & Cusick, *supra* note 14, at 486.

as a valid principle in asylum adjudication stayed in place.

C. Paving the Way for Discretion To Be Used as a Policy Tool

Since 1980, there have only been a handful of legislative changes to asylum, and none of them fundamentally altered the discretionary nature of asylum.[153] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) made changes to the asylum legislation, including introducing a pre-screening mechanism known as expedited removal and adding a one-year filing deadline.[154] The specific word "discretion" in section 208 of the Immigration and Nationality Act (INA) was removed, with the language indicating that an individual "may be granted asylum in the discretion of the Attorney General" changed to "[t]he Attorney General may grant asylum" to someone who meets the refugee definition.[155] This change is merely linguistic, and indeed, the 1996 reforms seem not to have brought about any change in the practice of discretionary denials of asylum. However, federal courts have questioned the use of discretion where it overlaps with a bar to asylum established in IIRIRA, arguing that the 1996 Act indicates Congressional intent and discretion steps around that impermissibly.[156]

Ultimately, the discretion provision is a flaw in the U.S. asylum system that is ripe for exploitation. It seems to have come about as a side-effect of including asylum as an afterthought in a bill intended to regularize resettlement procedure. While the Supreme Court examined that asylum framework, they did not address

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153. For an overview of the changes to U.S. asylum law since 1980, *see* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 15-29.

154. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, §§ 302(a), 604(a), 110 Stat. 3009-546, 579, 690-94 (codified as amended at 8 U.S.C. §§ 1225, 1158(a)(2)(B)) [hereinafter IIRIRA]; SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 20-24 (discussing various areas of negative changes for asylum seekers in IIRIRA, including the one-year filing deadline, expedited removal, the safe third country provision, new limitations on asylum seekers' ability to seek judicial review, and expanded detention). Subsequent legislative changes to immigration and asylum laws (such as the Homeland Security Act of 2002 and the Real ID Act of 2005) did not alter the discretionary nature of asylum. *Id.* at 24-25 (discussing changes to asylum brought about by those two acts). The Homeland Security Act created the Department of Homeland Security, at which point the Asylum Office (which hears affirmative asylum cases) was incorporated under that Department, whereas the Executive Office for Immigration Review (which hears defensive asylum cases) remained under the Department of Justice. *Id.* At this point, both the Attorney General and the Secretary of Homeland Security (and their adjudicating designates) were given discretionary authority to grant asylum in section 208. *Id.*

155. § 604(a), 110 Stat. at 690-94 (codified as amended at 8 U.S.C. § 1158). The amendments to the provisions concerning the Attorney General's ability to grant asylum are codified at 8 U.S.C. § 1158(b)(1)(A). Aschenbrenner argues that this change was incidental, noting that because IIRIRA was overwhelmingly intended as a restrictive law, "it is abundantly clear that Congress did not intend to remove any barriers for asylum seekers" and that "[t]he removal of this phrase may have been an oversight." Aschenbrenner, *supra* note 15, at 606-07.

156. *Id.* at 618-620 (summarizing relevant caselaw).

head-on the incompatability of discretion with international standards. The provision became entrenched in law, with the executive branch defining non-binding adjudicatory guidelines. All of this puts the United States out of step with international standards on adjudicating asylum. But worse—it leaves open a loophole that the executive can use to promulgate restrictive asylum policies on topics broader than what is covered by the discretion provision itself. This sets up the United States to conflict with fundamental parts of the refugee law framework, as we shall see in the next section.

IV. USING THE DISCRETION LOOPHOLE TO MAKE PROFOUND CHANGES IN ASYLUM POLICY

Since 2018, two U.S. presidents have relied on the discretion provision as a lever for wide-ranging policy changes, particularly around irregular entry and transit. These changes violate fundamental norms of international refugee law, compounding the faults that already existed by employing discretion in individual adjudication. The United States is obliged to interpret its obligations under the 1951 Convention and its 1967 Protocol in good faith. By using the discretion provision to put forward policies at odds with fundamental aspects of that treaty framework, the United States violates those obligations. This amounts to making profound changes to the law outside of the United States' own domestic legislative process, and outside of the normal pattern of forming international law between states. Instead of using the discretion loophole to resolve modern-day problems, the United States should take a leadership role in modernizing international law.

A. United States Obligations under the 1967 Protocol on the Status of Refugees

By any mainstream reading of international law obligations, as party to the 1967 Protocol, the United States is not permitted to use discretion as a factor in asylum adjudication or rely on it to twist fundamental aspects of the refugee law framework.[157] As UNHCR has articulated:

> The US discretion provision, which effectively says that a person may meet the definition of a refugee but nonetheless not be granted asylum in the United States, goes against the object and purpose of the 1951

157. *See, e.g.*, Hathaway & Cusick, *supra* note 14, at 498 ("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 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.").

> Convention and its 1967 Protocol by failing to ensure the effective implementation of the right to seek and enjoy asylum.[158]

Articles 31 and 32 of the Vienna Convention on the Law of Treaties provide the relevant framework for examining U.S. obligations.[159] Article 31(1) specifies that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"[160] while Article 32 provides supplementary means of interpretation to refine the analysis under Article 31.[161] In the refugee law context, this necessitates examination of the plain meaning of the text, the object and purpose of the treaty, and intentions of the parties (through, for example, travaux préparatoires).[162]

On the plain meaning, Article 1 of the 1951 Convention is structured such that any individual who meets the definition *shall* be granted asylum, and there is nothing in a textual analysis of the Convention or Protocol that allows for U.S. discretion.[163] We turn, then, to the object and purpose of the treaty, for, as McAdam summarizes, states must ensure that the interpretation given to a treaty is in accordance with the ordinary meaning of its terms in their context and "in

158. UNHCR Comments on Omnibus Asylum Rule, *supra* note 30, at 56.

159. *See, e.g.*, Jane McAdam, *Interpretation of the 1951 Convention*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 75, 81-82 (Andreas Zimmerman, Felix Machts & Jonas Dörschner eds., 2011) (discussing three main schools of treaty interpretation, and arguing that the Vienna Convention on the Law of Treaties reflects all three approaches, but that some courts privilege the treaty text). "Since the principles contained in Arts. 31 and 32 VCLT are said to reflect the position in customary international law, the VCLT is used by courts as a convenient framework for interpreting treaties pre-dating the conclusion of that instrument, including the 1951 Convention and the 1967 Protocol." *Id.* at 82. The United States is a signatory to the VCLT. For an official online list of signatories and ratifying parties to the VCLT, see *Depositary: Status of Treaties, Chapter XXIII 1*, UN TREATY COLLECTION, https://perma.cc/9WKT-W9RE (last updated May 27, 2025 at 03:15:32 EDT).

160. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 [hereinafter VCLT].

161. VCLT, *supra* note 160, art. 32.

162. McAdam, *supra* note 159, at 81-82; *see also* Einarsen, *supra* note 90, at 48-49 ("The preparatory work (*travaux préparatoires*) of the 1951 Convention and the circumstances of its conclusion are a legal source and a supplementary means of interpretation, *cf.* Art. 32 VCLT. . . . [it] is generally an important means of understanding and interpretation.").

163. Hathaway & Cusick, *supra* note 14, at 488 ("[T]he 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. . . . On the plain meaning of the text, refugees are the holders of rights exercisable in relation to states parties to the treaty."). Hathaway and Cusick proceed to state: "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." *Id.* at 538. *But see* Steinbock, *supra* note 139, at 737 (discussing *Stevic* and *Cardoza-Fonseca* and noting that "[p]urely textual approaches [to interpreting the 1951 definition] employed in the United States can have distorting effects and fail to resolve some critical questions"). For more on the U.S. Supreme Court's interpretation of the refugee definition, see Part III, *infra*.

light of the treaty's object and purpose."[164] Even if the United States were able to construe Article 1 of the 1951 Refugee Convention as discretionary—which, as discussed in Section II, is implausible as to the ordinary meaning of the text—Article 31 of the VCLT "precludes a literal construction that would be inconsistent with the context in which the words appear."[165] The object and purpose of the Convention and its Protocol is inherently humanitarian,[166] and the United States approach to discretion threatens to undermine that humanitarian spirit. The Preamble of the Convention endeavors "to assure refugees the widest possible exercise of these fundamental rights and freedoms."[167] The 1967 Protocol, in its preambular material, notes that "new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention."[168] Discretionary adjudication—which, as discussed above in Section I, leaves some refugees at risk of *refoulement* and others without access to full rights—goes against the humanitarian spirit of the Convention and the Protocol's clear purpose of expanding that protection to a carefully defined set of people. [169]

Analysis of the plain meaning, combined with consideration of object and purpose, indicate that discretion is inappropriate; further examination of the *travaux préparatoires* confirms that interpretation.[170] The United States participated in the drafting of both the Convention and the Protocol, weighing questions that could have been relevant to discretion, such as international burden-sharing

164. McAdam, *supra* note 159, at 83, 93 (discussing the Land Island and Maritime Frontier Dispute and observing that international law requires that the meaning of the text of the treaty itself should be juxtaposed with that treaty's context, object, and purpose). McAdam further expounds on the requirements of Article 31 VCLT in the context of refugee law, noting that the text to be interpreted includes the preamble and annexes (art. 31.2), takes into account subsequent agreements between parties (art 31.3), and considers any subsequent practice in the application of the treaty (art 31.3). *Id.* at 82-83.

165. *Id.* at 86. *See also* Steinbock, *supra* note 139, at 737 (asserting that "[p]urely textual approaches [to interpreting the 1951 definition] employed in the United States can have distorting effects and fail to resolve some critical questions").

166. *See, e.g.*, Chaloka Beyani, *Introduction*, *in* PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS xvii (1995). ("[T]he Convention is based on humanitarian ideals embellished in the concept of human rights.").

167. 1951 Convention, *supra* note 5, pmbl; *see also* Steinbock, *supra* note 139, at 737 ("After considering several possible formulations of the definition's object and purpose, the Article proposes that the purposes center around principles of nondiscrimination, condemnation of collective guilt, and protection of freedom of thought and expression.").

168. 1967 Protocol, *supra* note 18, pmbl.

169. *Cf.* Beyani, *supra* note 166, at xvii (arguing that the problem with narrow approaches "to the meaning of persecution is that the institution of asylum as a whole faces constraints which threaten the humanitarian spirit of the Convention").

170. It may be relevant to turn to *travaux préparatoires* "to confirm the meaning of a treaty provision that has been ascertained in accordance with the procedure set out in Art. 31 VCLT." McAdam, *supra* note 159, at 100.

and the breadth of the refugee definition.[171] And yet there is no indication that the United States made a forceful argument for the concept of discretion in this setting.[172] While, as discussed in Section III, Congress erroneously believed that discretion was appropriate in the asylum system,[173] Congress's implementing (mis)steps do not change U.S. obligations under international law. The key factor here is that the United States, with full knowledge of the content of the treaty, bound themselves to the international framework through ratification of the 1967 Protocol. In that act of discretion—choosing to sign on to the Protocol—they took away the capacity to use discretion in adjudication or policy-making.[174]

The United States delegates who participated in the Convention's drafting showed concern about an overly-broad definition, but did *not* argue for discretion as a limiting mechanism.[175] One of the Americans, Louis Henkin, argued that an overly broad definition that would be like a 'blank cheque,' "on the pragmatic ground that certain refugee groups of the world were too large."[176] A second American delegate, George Warren, later reiterated the United States' concerns about a universal definition, supporting the initial scheme to limit the Convention

171. *See, e.g.*, PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR PAUL WEIS 26 (1995) (observing that the American delegate felt "it went without saying that there should be international cooperation to alleviate the burden falling on certain countries because their geographical situation was such that an inordinately large number of refugees fled to them, but the inclusion of the text by the French representative in the Preamble to what was to be a binding international instrument would not be appropriate. The US delegation was of the opinion that the substance of the text might be incorporated in a General Assembly resolution, where it would be more proper and effective."); *see also* Hathaway & Cusick, *supra* note 14, at 498 ("The United States played an important role in drafting the Refugee Convention and in elaborating on the rights of refugees provided therein.").

172. The United States only made two reservations to the Protocol at the time of accession: one on the rights of taxation and one on the duty to extend social security benefits to refugees. OHCHR ratification record. *See* Hathaway & Cusick, *supra* note 14, at 482-83 (discussing the "modest" scope of U.S. reservations to the 1967 Protocol).

173. *Id.* at 507-12.

174. Orakhelashvili, *supra* note 123, at 255 (discussing the procedures by which states consent to be bound by a treaty); *see also* Goodwin-Gill, *supra* note 43, at 3-4 ("When they ratify treaties, States become bound to implement its obligations in good faith. Here, they have 'choice of means' and thus discretion as to how to go about implementation. For example, they may choose to legislate and by incorporating the treaty into domestic law, so go some way to fulfilling their international obligations by allowing challenges to implementation in the courts. Alternatively, they may elect to make the necessary changes administratively, setting up bodies or identifying officials competent to determine eligibility for treaty benefits, with or without the possibility for individuals to seek review. Or sometimes, they may just do nothing. . . . For States parties to the 1951 Convention and the 1967 Protocol, the outer limits of that discretion are nevertheless confined by the principle of effectiveness of obligations, and the measures adopted will be judged by the international standard of reasonable efficacy and efficient implementation, and against the goal of achieving the required result.").

175. Einarsen, *supra* note 90, at 50 (examining the limits to the scope of the refugee definition).

176. *Id.* at 55 (discussing Henkin's participation in the Ad Hoc Committee on Statelessness and Related Problems).

only to refugees in Europe.[177] The United States ultimately supported and ratified the framework, even with its broadened geographic scope under the 1967 Protocol.[178]

While there are certainly valid debates on appropriate responsibility-sharing mechanisms in a period with unprecedented levels of forced displacement, the United States cannot argue that discretion is an appropriate mechanism to respond to newly emerging issues.[179] The Convention drafters, including the United States delegation, very much considered sharing responsibilities for refugees across multiple states,[180] and ultimately the concept was articulated in the preamble.[181] The United States, in ratifying the international refugee law framework, bound itself to certain obligations, and cannot use discretion to backtrack on those obligations even if it feels itself to be carrying a heavy burden.

B. United States Policy Initiatives Relying on the Discretion Loophole

Starting in 2018, successive administrations have relied on the discretion provision as part of a wider effort to narrow the protection regime in the United States.[182] With no real prospect of immigration reform moving through the

177. U.N. GAOR, 6th Sess., 19th plen. mtg. at 28, U.N. Doc. A/CONF.2/SR.19 (Nov. 26, 1951).

178. Einarsen, *supra* note 90, at 60-61. Einarsen notes that the final definition is not overly broad and does not cover, for example, internally displaced persons, stateless people, or "accidental victims of natural disasters." *Id.* at 50, 52.

179. Orakhelashvili, *supra* note 123, at 269 ("As treaties are binding pursuant to Article 26 VCLT, a State cannot release itself from its treaty obligations whenever it feels like it. It is highly important to understand that any treaty duly concluded and entered into force remains in force and binding for its parties, unless it has been validly terminated, or unless its provisions are superseded by those of another treaty.").

180. *See e.g.* WEIS, *supra* note 171, at 26 (detailing discussions from the American delegation with respect to international cooperation). Weis goes on to note that in the discussions around the Preamble of the 1951 Refugee Convention, "[i]t is clear from the debate that not only international cooperation in the field of protection but also in the field of assistance, help for States on which the refugee problem places too heavy a burden, was meant." *Id.* at 34.

181. 1951 Convention, *supra* note 5, pmbl. ("Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."). Einarsen acknowledges that at the time of drafting, binding obligations were "considered a requirement for effective international cooperation as well as more equal commitments and sharing of responsibility with regard to refugee problems." Einarsen, *supra* note 90, at 40.

182. After making immigration a key aspect of his presidential campaign in 2016, President Trump came to office with clear intent to narrow protection and appointed a series of attorneys general who shared that vision. For a detailed discussion, see SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 1-2. ("Beginning in 2018, Trump and his attorneys general [p2] systematically demolished the system of humanitarian protections for asylum seekers, twisting statutory language beyond recognition through adjudicatory rulings, procedural changes, regulations of dubious legality, new fees, and even changes in forms and how they are processed.").

legislature, the executive branch instead used existing legislative provisions (or "levers") to put forward broad changes to asylum and refugee policy.[183] President Trump used section 212(f) of the INA to order a travel ban in 2017,[184] section 235(b)(2)(C) of the INA in 2019 to require certain asylum seekers to wait in Mexico pending adjudication,[185] and public health laws to close the border to asylum seekers following the COVID-19 outbreak.[186] President Biden also relied on various "levers," including section 212(f) of the INA, to restrict asylum.[187] Both administrations also used the discretion provision, section 208(b)(1)(A) of the INA, for further policy change, as detailed in the rest of this section. The discretionary principle itself as the "lever" for change has been underestimated. The audacious scope of policy change relying on this one small provision creates reason to be wary of this unusual form of law-making for the future of refugee policy.

C. Matter of A-B- (2018)

The first Trump-era policy change that explicitly used the discretion provision was in 2018, when then-Attorney General Sessions included a shot across the bow in the controversial administrative case, *Matter of A-B-*.[188] This case focused primarily on the definition of particular social group and the availability of asylum for victims of gang violence and domestic violence, issues not inherently related to discretion.[189] Nonetheless, in a footnote, the Attorney General went out of his way to "remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not

183. *See, e.g.*, CTR. FOR IMMIGR. STUD., A PEN AND A PHONE: 79 IMMIGRATION ACTIONS THE NEXT PRESIDENT CAN TAKE (2016) (giving a detailed overview of right-leaning policy changes on immigration that could be undertaken by the executive branch without requiring new legislation from Congress).

184. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (superseded by Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) and then Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017)).

185. *See, e.g.*, *Migrant Protection Protocols*, U.S. DEP'T HOMELAND SEC., https://perma.cc/VGN5-QECW (archived May 27, 2025); Memorandum from Kirstjen Nielsen, Sec'y, U.S. Dep't Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., and Ronald D. Vitiello, Deputy Dir. & Senior Official Performing the Duties of Dir., U.S. Immigr. & Customs Enf't (Jan. 25, 2019), https://perma.cc/HQL8-PU73; *Featured Issue: Migrant Protection Protocols*, AM. IMMIGR. LAWS.' ASS'N (Oct. 7, 2022), https://perma.cc/SE2U-7ZWT.

186. *See, e.g*, Taylor Levy & Amy Grenier, *Practice Pointer: Title 42 and Asylum Processing at the Southern Border*, AM. IMMIGR. LAWS.' ASS'N (Jan. 13, 2023), https://perma.cc/D3GJ-RA2Q.

187. STB Rule, *supra* note 3, at 48717.

188. *Matter of A-B-*, 27 I&N Dec. 316; Wadhia, *supra* note 14, at 384 ("The politics of discretion in asylum cases have been central in the Trump Administration and showcased in the highly controversial policy published by former Attorney General Jeff Sessions, in which he encouraged his employees to expand discretionary denials.").

189. 27 I&N Dec. at 320-23, 335-36, 343-45.

be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA," highlighting discretionary factors related to "circumvention of orderly refugee procedures" and the availability of asylum in transit countries.[190] This footnote did not further the main premise of *A-B-*, but rather seized on an opening for wider policy-making on irregular entry and transit.

In *A-B-*'s implementation guidance to USCIS asylum officers, the administration included a section expanding on footnote 12, noting that "asylum is a *discretionary* form of relief".[191] The guidance reiterated the *Matter of Pula* discretionary factors,[192] mentioning "whether the alien passed through any other countries" and "unlawful entry."[193] This amounted to a renewed attempt to penalize two behaviors that had long been targets of the administration: transit through a third country (typically, Mexico) and irregular crossing of the southern border. Courts had already struck down previous attempts to penalize irregular entry and transit (which used other levers),[194] noting there is clear statutory language permitting access to asylum for those who cross irregularly.[195]

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190. *Id.* at 345 n.12 ("Asylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion. 8 U.S.C. §§ 1158(b)(1), 1229a(c)(4)(A)(ii); *see also Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004). Neither the immigration judge nor the Board addressed the issue of discretion regarding the respondent's asylum application, and I decline to do so in the first instance. Nevertheless, I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA. Relevant discretionary factors include, *inter alia*, the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and her living conditions, safety, and potential for long-term residency there. *See Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987).").

191. Policy Memorandum, U.S. Citizenship & Immigr. Servs., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* 7 (July 11, 2018), https://perma.cc/7XD7-8KH2.

192. *Id.* at 7-8.

193. *Id.* at 8 ("An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities."); *see also* Wadhia, *supra* note 14, at 384-85 ("The implication by the former Attorney General is that noncitizens come to the U.S. border and seek asylum without being genuine refugees. . . . "The statutory requirements for asylum are rigid enough to exclude those in the latter category, who lack a genuine claim to asylum. The foregoing language is also controversial because it presumes bad motive by the asylum seeker and attempts to normalize denials for asylum seekers who arrive at a place other than a port of entry.").

194. In *East Bay Sanctuary Covenant v. Trump*, the Ninth Circuit struck down the Asylum Proclamation, which had specified that irregular crossers would not have access to asylum procedures. 932 F.3d 742, 773-75 (9th Cir. 2020); *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 59 (discussing the *East Bay* litigation).

195. "Any alien who is physically present in the United States or who arrives in the

Like many of the Trump administration's attempts to promulgate anti-asylum policies, *Matter of A-B-* was challenged in federal court[196] and ultimately withdrawn by the Biden administration. Without formal tracking of how adjudicators use the discretion provision, there is no specific way to know whether adjudicators relied on the *A-B-* footnote or ensuing instructions; asylum grant rates dropped precipitously during the Trump administration but there were many contributing factors.[197] Nonetheless, the use of discretion in this context demonstrates the capacity to put forward broad policies using a seemingly-small provision.

D. The Omnibus Asylum Rule (2020)

In June 2020, the Trump Administration issued a sweeping notice of proposed rulemaking, known as the Omnibus Asylum Rule, that relied on several different levers in the immigration code to redefine virtually every aspect of asylum law.[198] In addition to introducing new rules, the NPRM restated numerous policies that the administration had introduced through other mechanisms earlier in the presidential term, some of which were struck down by the courts as violations of the immigration laws.[199] Because the Omnibus Asylum Rule explored new levers, including the discretion provision, to present the same policies, the administration hoped to survive court challenges.

The Omnibus Asylum Rule relied on the discretion provision to introduce twelve new negative factors for adjudicators to consider when determining

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United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title." 8 U.S.C. §1158(a)(1).

196. *Grace v. Barr,* 965 F.3d 883 (D.C. Cir. 2020); *see Our Work: Grace v. Barr*, CTR. FOR GENDER & REFUGEE STUD., https://perma.cc/7SNP-D87R (archived Mar. 7, 2025) (giving an overview of why *Matter of A-B-* was challenged through *Grace*); *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 34 (discussing the *Grace* litigation and its impact on asylum adjudication, as well as litigation against Trump administration policies generally).

197. During the Trump administration, denial rates for asylum claims rose generally, as compared to the last year of the Obama administration. *See* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 46 (citing a rate of 55 % denial during the last year of the Obama administration as compared to a denial rate of 72% during the last fiscal year of the Trump administration). There are not disaggregated statistics indicating what portion of this is attributable to changed exercise in discretion.

198. Omnibus Aslyum Rule, *supra* note 2. See UNHCR Comments on Omnibus Asylum Rule, *supra* note 30, at 52-65, for detailed research and citations (section titled "Factors for Consideration in Discretionary Determinations").

199. For instance, the rule proposed redefining particular social group along the lines of *Matter of A-B-*. Omnibus Asylum Rule, *supra* note 2, at 36278-79. *See* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 89-90 (discussing the breadth of changes to the asylum system during this presidency, proposed through various mechanisms including executive order, agency policy, and regulation), 88-96 (comparing these changes and mechanisms to the Omnibus Asylum Rule).

whether to grant asylum.[200] Under the proposed rule, the adjudicator must consider these "three factors, if relevant, during every asylum adjudication"[201]: (1) unlawful entry into the United States unless "made in immediate flight from persecution in a contiguous country"; (2) failure to apply for protection in a transit country; and (3) the use of fraudulent documents to enter the United States (unless the individual arrives directly from his or her country of origin). The proposed Rule states that if "one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination," although the adjudicator may consider "other relevant facts and circumstances" in deciding to grant asylum anyway.[202]

These three factors amounted to capacity to apply new bars to asylum.[203] Unlike the exclusion grounds set by treaty[204] or the bars regulated by Congress,[205] these new bars would have been set by executive regulation—an unusual way to make law on a topic of such profound import.[206]

The Omnibus Asylum Rule included nine more discretionary factors that would ordinarily have resulted in the denial of asylum, but unlike the first three factors, the asylum seeker would have been able to overcome these with extreme or unusual hardship.[207] These nine factors were: (1) 14 days or more in a transit country before arriving in the US; (2) transit through more than one country; (3) certain criminal histories (including those where convictions were vacated or expunged); (4) more than one year of unlawful presence in the United States prior to filing an asylum application; (5) failure to file tax returns in a timely fashion;

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200. Omnibus Asylum Rule, *supra* note 2, at 36283 (proposing three mandatory discretionary factors and nine additional "adverse factors").

201. *Id.*

202. *Id.*

203. *Cf.* Wadhia, *supra* note 14, at 381-382 (arguing that additional factors for discretionary denials related to the criminal history of the asylum seeker amount to creating additional bars to asylum outside of Congress's intended framework, given that "Congress has already limited who may qualify for asylum, and has created statutory bars for those convicted of 'particularly serious crimes' or who committed 'serious nonpolitical crimes' outside the United States"). Because the factors in the Omnibus Asylum Rule were mandatory (in that the adjudicator must deny asylum), it amounted to overturning *Matter of Pula. See* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 93.

204. *See* Part II, *supra*.

205. *See* Part I, *supra*.

206. Wadhia, *supra* note 14, at 381-82. Wadhia asserts that Congress expanded INA's statutory bars in 1996 "to include factors that were once discretionary or irrelevant to adjudication," such as firm resettlement and the one-year bar. *Id.* at 381. Wadhia argues that "[t]hese changes illustrate that when Congress wishes to impose changes or restrictions on domestic asylum, it has and will do so," and making law through discretion usurps Congress's role. *Id.*

207. Omnibus Asylum Rule, *supra* note 2, at 36283-84 (giving examples of extraordinary circumstances "such as those involving national security or foreign policy considerations," adding that if one of the nine adverse factors is present, the adjudicator can grant asylum if the applicant shows "by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship").

(6) two or more previous asylum applications denied; (7) withdrawal or abandonment of a previous asylum application; (8) failure to attend asylum interview with DHS; (9) failure to file motion to re-open within one year of changed country conditions.[208]

When the Omnibus Asylum Rule was proposed, it was met with widespread criticism from many asylum advocates[209] and from UNHCR.[210] UNHCR's comments show concern not just for the broad use of the discretion provision, but the way that these twelve negative factors would have played out in the course of adjudication as altered by other parts of the proposed rule.[211] For instance, if a claim that triggered one of these twelve new bars were deemed "frivolous" as "clearly foreclosed by applicable law,"[212] the claimant would be subject to certain penalties.[213] As UNHCR noted at the time, there was considerable risk of *refoulement* and there would have been no check on the "serious possible consequences of denying protection to an asylum-seeker."[214]

The Omnibus Asylum Rule—had it gone into effect—would have used the discretion provision to create compounding layers of incompatibility with international law. Not only does the discretion provision itself deviate from international standards,[215] but the policies imposed through that lever would have contravened "fundamental principles guaranteed under the 1951 Convention, including non-discrimination, non-penalization for irregular entry or presence, and non-refoulement." [216] In addition, UNHCR notes that the rule made no exceptions for child asylum seekers, subjecting this vulnerable group to these new bars in further contravention of international standards.[217]

E. Regulations on "Circumvention of Lawful Pathways" (2023) and "Securing the Border" (2024)

President Biden used executive power on immigration prolifically during his administration, making wide-ranging changes[218] that included rescinding *Matter*

208. *Id.* at 36283-85.

209. *See, e.g.*, *Human Rights First Decries New Rules to Limit Asylum Eligibility*, HUM. RTS. FIRST (Oct. 21, 2020), https://perma.cc/DVX7-XU8C ("In issuing these new categorical bars to asylum, the administration is violating U.S. immigration law and vastly exceeding the limited authority Congress provided to the Attorney General to determine discretionary factors that may be considered in asylum cases.").

210. UNHCR Comments on Omnibus Asylum Rules, *supra* note 30.

211. *Id.* at 54.

212. Omnibus Asylum Rule, *supra* note 2, at 36295 (proposing to revise 8 C.F.R. § 208.20(c)(4)); *see also id.* at 36304 (proposing to revise 8 C.F.R. § 1208.20(c)(4)).

213. UNHCR Comments on Omnibus Asylum Rules, *supra* note 30, at 54.

214. *Id.* at 54-55.

215. *See* Part II, *supra*.

216. *Id.* at 55.

217. *Id.* at 55.

218. President Biden used executive power to make hundreds of changes to immigration

of A-B- in 2021,[219] and introducing two regulations that relied on the discretion provision for significant changes to access to asylum at the southern border.[220] As global restrictions on movement connected to the COVID-19 pandemic had started to lift, the number of arrivals at the southern border soared to record numbers.[221] In response to border pressure, President Biden put forward the "Circumvention of Lawful Pathways" (CLP) regulation in 2023 and the "Securing the Border" (STB) regulation in 2024. The CLP regulation made people who had transited through Mexico and/or crossed the border irregularly presumptively ineligible for asylum.[222] The STB regulation further penalizes irregular entry, barring access to asylum for most people arriving between ports of entry when daily apprehensions have surpassed a certain threshold.[223]

Both the CLP regulation and the STB regulation rely in part on the discretion provision to rationalize restrictions on asylum. In the discussion material for the CLP regulation, the government argued that the INA conferred the authority to impose conditions on asylum because "asylum is a form of discretionary relief under section 208,"[224] and that the "Attorney General and the Secretary [of Homeland Security] have long exercised discretion . . . to create new rules governing the granting of asylum."[225] Likewise, the STB regulation's discussion material asserts that discretion gives the Attorney General and the Secretary "authority to adopt this additional limitation on asylum eligibility."[226] Like the earlier restrictions proposed under the Trump presidency, these measures from

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and asylum processing in the first three years of his administration. *See, e.g.*, Muzaffar Chishti, Kathleen Bush-Joseph, & Colleen Putzel-Kavanaugh, *Biden at the Three-Year Mark: The Most Active Immigration Presidency Yet is Mired in Border Crisis Narrative*, MIGRATION POL'Y INST. (Jan. 19, 2024), https://perma.cc/EZT6-87PF.

219. *Matter of A-B-* (III), 28 I&N Dec. 307, 309 (A.G. 2021) (rescinding *Matter of A-B-I* and *Matter of A-B- II)*.

220. CLP Rule, *supra* note 3; STB Rule, *supra* note 3.

221. *See, e.g.*, John Gramlich, *Migrant encounters at U.S.-Mexico border have fallen sharply in 2024*, PEW RSCH. CTR. (Oct. 1, 2024), https://perma.cc/S3X4-AV5R (showing a sharp increase in migrant encounters at the southern border between late 2020 and the end of 2023).

222. CLP Rule, *supra* note 3; *see also Fact Sheet: Circumvention of Lawful Pathways Final Rule*, U.S. DEP'T OF HOMELAND SEC., https://perma.cc/TX78-YZ3J (last updated Jan. 20, 2025).

223. STB Rule, *supra* note 3; *see also Fact Sheet: DHS Continues to Strengthen Border Security, Reduce Irregular Migration, and Mobilize International Partnerships*, U.S. DEP'T OF HOMELAND SEC., https://perma.cc/RH7X-6Q46 (last updated Jan. 20, 2025).

224. CLP Rule, *supra* note 3, at 11733.

225. *Id.* at 11734. The government further asserts that the proposed rule still permits protection under withholding of removal or CAT, stating incorrectly that "[u]nder both the INA and international law, providing asylum to individuals who do not meet the standards for withholding or CAT is discretionary rather than mandatory." *Id.* at 11737 n.212 (referring to *Cardoza-Fonseca* and the contestable argument that asylum corresponds with Article 34 of the Convention and is therefore precatory); *cf.* Part III, *supra*.

226. STB Rule, *supra* note 3, at 48733. The government goes on to elaborate on the discretionary authority, referring to the establishment of the discretion provision in 1980. *Id.* at 48733-34.

President Biden met with pushback. UNHCR raised concerns that the STB regulation might "significantly impact the ability of individuals with possible international protection needs to access U.S. asylum procedures and a full merits determination . . . in accordance with international norms and standards."[227] Noting that the STB regulation is "premised on the concept that asylum is discretionary," UNHCR asserted that this is "deeply at odds with international law."[228] Likewise, UNHCR criticized the CLP regulation as "premised on discretionary factors articulated in INA Section 208, and yet asylum is non-discretionary under international law."[229]

F. Compounded Incompatibility with International Law

Policy made through the discretion provision effectively compounds the inconsistencies between domestic legislation and international law. As used since 2018, the discretion provision is essentially a policy loophole—it allows U.S. presidents to put forward wide-reaching changes that otherwise would require domestic legislation and which fall afoul of the United States' international obligations. The existence of the discretion provision itself is already out of step with international law—as seen in Part II, international law dictates that anyone who meets the definition of a refugee should be afforded the protections of that status, and this should not be subject to adjudicatory discretion. The use of discretion as a policy tool further compounds the international law violations, as successive presidents have used that loophole to put forward policies that are themselves at odds with international law.

Take, for example, irregular entry. Typically, somewhere between 80-95% of asylum seekers reaching the southern border every year arrive "irregularly"—that is, away from an official entry point.[230] International law maintains a fundamental principle of non-penalization for irregular entry or presence, recognizing that seeking asylum can necessitate arrival through irregular means.[231] Article 31(1) of the 1951 Convention prohibits states from imposing penalties on asylum seekers on "on account of their illegal entry or presence . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[232] Yet, as seen above, successive United States presidential

227. UNHCR Comments on STB Rule, *supra* note 35, at 2.

228. *Id.* at 24

229. UNHCR Comments on CLP Rule, *supra* note 35, at 4.

230. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 8.

231. 1951 Convention, *supra* note 5, art. 31.

232. *Id.*, art. 31(1). The reference to "penalties" in Article 31(1) is not limited to criminal penalties, and encompasses the imposition of a bar to asylum as seen in the Omnibus Asylum Rule, or for that matter, in any of the other recent mechanisms proposed by American administrations. *See, e.g.*, UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas of "International" Zones at Airports*, ¶ 8 (Jan. 2019), https://perma.cc/TD79-5GZA. See Costello, Ioffe & Büchsel, *supra* note 26, at 32-34, for detailed discussion of various aspects of Article 31(1), including terms such as

administrations have tried to penalize irregular entry using the discretion provision.

A second example of compounded incompatibility with international law is the imposition of penalties for transiting through a third country. It is certainly true that countries have, for many years, grappled with how to share responsibility for onward movement of refugees and asylum seekers: on the one hand, countries directly proximate to refugee-producing areas take on most of the responsibility for hosting those displaced, while on the other, countries far from refugee-producing areas argue that individuals who make it to their shores could have found refuge somewhere along the way.[233] The question of how to share responsibility for global displacement has plagued states since the development of the modern international refugee law system,[234] and discussions over transit are one manifestation of this debate.[235] The United States has used discretion as a tool to address this conundrum: the Omnibus Asylum Rule and the CLP regulation, for example, use discretion to penalize asylum-seekers who have transited through Mexico. It may well be possible that new standards for transit are needed, but they should be developed through international law, and not through the executive branch's use of an obscure corner of the United States' immigration code. The use of the discretion provision to establish policies at odds with international law amounts to undermining U.S. commitments through a small administrative loophole; instead, the United States should seek to work with other countries to make principled policy.

CONCLUSION: FUTURE DIRECTION OF PRINCIPLED AND EFFECTIVE POLICY-MAKING

The discretion provision is essentially a loophole – it allows United States presidents to put forward wide-reaching policies that otherwise would require legislative change and which fall afoul of the country's obligations under international law. There is no question that states across the world are facing complex policy problems related to human mobility.[236] Many politicians – and their

"good cause," "coming directly," and "penalties." *See also* UNHCR Comments on Omnibus Asylum Rule, *supra* note 30, at 58 (giving specific consideration of penalties in the context of the United States).

233. *See, e.g.*, Legomsky, *supra* note 37, at 570-71, 591-92 (including a discussion on onward movement).

234. GARLICK, *supra* note 22, at 463 ("The question of how responsibility for the international protection of refugees should be distributed amongst States has been debated at international level since the inception of the modern refugee protection regime. It is arguably a more pressing question today than at any other point in history.").

235. HURWITZ, *supra* note 9, at 3 (discussing asylum seekers' movement beyond their first country of refuge and asserting that because "secondary movements tend to be regarded as proof of the fraudulent or manifestly unfounded nature of an asylum claim," states have developed practices to limit their obligations to such asylum seekers).

236. Scholars have pointed to migration policy problems significantly beyond the refugee framework. As an example, Betts characterizes this phenomenon as "crisis migration,"

electorates – are seeking more restrictive approaches, and demonstrate increasing reluctance to accept the answers proposed by the current international refugee law framework.[237] Beyani succinctly observes that "[a]s the causes of forced migration beyond state borders have become more complex and intense, the standard of a well-founded fear of persecution by itself is inadequate to providing sanctuary to the mass number of refugees in flight for their lives and safety all over the world."[238] But—even in the absence of an international framework that answers current needs—law-making through a small administrative quirk like the discretionary principle is not the answer. Rather than use the discretion loophole to make out-sized changes, the United States should take a leadership role in modernizing international law to respond to present day challenges.

The United States is bound by the international refugee law framework, but that framework is not static.[239] Faced with new, emergent challenges in global forced displacement, as Goodwin-Gill reminds us, the Convention can "continue to evolve."[240] In this context, "the paramountcy of protection, as required by the Convention and by general international law, ought to prevail."[241] International law is structured so that treaties are binding until validly terminated, or unless superseded by another treaty.[242] The refugee framework will continue to have the 1951 Convention as a central pillar but may also rely on evolution of other

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covering a much wider group than the traditional refugee definition. Betts, *supra* note 38, at 349. Betts goes on to discuss the increasing complexity in governance of migration. *Id.* at 351. McAdam likewise observes, in the context of climate mobility and crisis migration, that "[c]urrent legal frameworks for assessing and responding to protection needs do not adequately address the time dimension of anticipatory, or pre-emptive, movement." McAdam, *supra* note 40, at 39.

237. *See, e.g.*, MALEY, *supra* note 10, at 27 (discussing contemporary Australian refugee policies and observing that "[t]he deeper threat to the 1951 Convention is that countries will profess loyalty to its provisions, but in practice either violate them or interpret them in a deliberately rigid or narrow fashion so that the rights of refugees are compromised"); *see also* HADDAD, *supra* note 10, at 192 (asking what happens to refugee protection if the concept of asylum clashes with the concept of sovereignty); Gibney, *supra* note 10, at 143 ("We have reached the *reductio ad absurdum* of the contemporary paradoxical attitude towards refugees. Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum.").

238. Beyani, *supra* note 166, at xvii.

239. McAdam notes that treaties such as the 1951 Convention are living instruments, and "[t]here is a risk that placing too great a reliance on the original intent of the drafters may lead to the 'petrification' of a particular interpretation that fails to take into account subsequent developments in international law (as required by Art. 31, para. 3 VCLT)." McAdam, *supra* note 159, at 103.

240. Goodwin-Gill, *supra* note 43, at 9-10.

241. *Id.* at 9.

242. Orakhelashvili, *supra* note 123, at 269 ("As treaties are binding pursuant to Article 26 VCLT, a State cannot release itself from its treaty obligations whenever it feels like it. It is highly important to understand that any treaty duly concluded and entered into force remains in force and binding for its parties, unless it has been validly terminated, or unless its provisions are superseded by those of another treaty.").

bodies of law such as the human rights framework.[243] Such evolution helps tackle long-held thorny issues such as responsibility sharing as well as newly emerging problems like mobility due to climate change.[244]

The United States—historically a supporter of developing the refugee law framework in the post-war period—could encourage countries to return to the table and reexamine various aspects of the international refugee law framework. In fact, the United States did so in multilateral efforts to re-examine responsibility-sharing through the New York Declaration and the Global Compact on Refugees.[245] The key is that states must go through the law-making process—messy as it may be—in collaboration with each other.[246] Individual state action—especially through executive fiat as seen in the use of the discretion provision—amounts to chaos. Not only do we risk incoherent legal frameworks between different countries, but we risk refugees being launched into orbit, as Legomsky puts it: "refugees who have escaped from persecution or from other trauma, only to be shuttled consecutively from one country to another."[247]

Legislators and advocates in the United States have clear options. First, law makers should immediately rescind policy changes grounded in discretion. Congress should eliminate the discretion provision (which would provide more predictable adjudication for individuals),[248] minimize non-compliance with

243. "Clearly, the concept of persecution cannot have remained unaffected by subsequent developments in the law relating to human rights. Any meaning that has to be given to the concept of persecution must take into account the existing general human rights standards." Beyani, *supra* note 166, at xvii.

244. Jane McAdam, Climate Change, Forced Migration, and International Law, 7 (2012) ("When the law is faced with a novel challenge, it may be brought to bear in a number of different ways. Existing legal principles might be elongated, adapted, or particularized to respond to new circumstances, whether through creative interpretation or extrapolation by analogy.")

245. GARLICK, *supra* note 22, at 464-482 (discussing the Global Compact on Refugees and other multilateral structures for responsibility-sharing).

246. *See* KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 49 (2019) ("In current debates over migration and refugees, many activists point to an ideal that is not embodied in the Refugee Convention. They argue for a radical reconceptualization and redesign of citizenship rules and institutions that are not well defined, but would involve a dramatic change in the current system of states as we know it. The comparison may still be explicit—activists can tell you the kind of world they envision—but it has not yet taken the form of refugee or migrant law.").

247. Legomsky, *supra* note 37, at 572.

248. *See, e.g.*, Wadhia, *supra* note 14, at 406 (arguing that, with reference to asylum as well as other areas of administrative adjudication of immigration cases in the United States, "[e]liminating discretion or establishing a clear standard can help reduce arbitrary and capricious discretionary decisions"); *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 14, at 127-128 (discussing the necessity for robust judicial review, arguing that federal courts should be able to review discretionary determinations, using the abuse-of-discretion standard, and making recommendations for narrowing discretion on these grounds). Franicevic, Kysel, and Shannan agree, arguing for the repeal and amendment of 8 U.S.C. § 1252(b)(4)(D) to eliminate the Circuit Courts of Appeals' deferential standard of review in discretionary asylum matters. Franicevic et al., *supra* note 79, at 9-11.

international standards; and put the United States in a position to contribute to principled, coherent international law-making in the future. United States law makers could achieve these goals in several ways. First, Congress could pass legislation changing section 208(b)(1)(A) of the INA from "may" grant asylum to "shall" grant asylum.[249] Once discretion is eliminated, Franicevic, Kysel, and Shannan suggest legislators could also remove the distinction between withholding and asylum.[250] Second, the executive branch could pass a regulation eliminating discretion.[251] While this is not as robust a solution as legislation, it would require a future administration to change the regulation through the public comment process. And an absolute minimum, US policy makers should implement a data collection system that tracks the number of asylum cases denied on discretionary grounds, such that we would have current and future understanding of the scope of the problem.[252]

The United States, faced with complex and changing policy problems around human mobility and protection,[253] is not alone in seeking new policies to limit asylum.[254] Some of the underlying tensions in the refugee law framework, including those discussed in this article around responsibility-sharing, are very much enmeshed in these debates. Transit and irregular entry at the scale of current global migration create real policy issues for the United States and other countries. However, using the discretion provision—which was established somewhat inadvertently and not intended for large policy change—is not the answer. Instead of compounding violations of the international refugee framework through the discretion loophole, the United States should seek to participate in modernization of international refugee law. And crucially, Congress must, in

249. *See* 8 U.S.C. §1158(b)(1)(A); Franicevic et al., *supra* note 79, at 5. Wadhia argues that, in the asylum context as well as in other areas of domestic immigration law, the statute is already rigorous and clear for the adjudicator and discretion is not needed. Wadhia, *supra* note 14, at 413 (noting that "one option is for Congress to eliminate discretion in cases where the statutory criteria are already rigorous and reflective of Congress's policy goals" and that a "statutory grant without discretion would still require adjudicators to refer to statutes, regulations, and caselaw to determine whether a person qualifies"). Wadhia also asserts that a "second option is for Congress or the Executive Branch to craft a regulation that creates a rebuttable presumption of discretion in favor of the noncitizen." *Id.* at 414. While this may resolve concerns around due process and fair adjudication, it would not prevent future administrations from using the discretion provision to make new policy, so is not considered for this article.

250. Franicevic et al., *supra* note 79, at 11 (arguing that all of those protected under the Convention should receive asylum).

251. Wadhia, *supra* note 14, at 414 ("The Executive Branch may also explore a final solution of providing more clarity for discretion in waivers and remedies that include this component.").

252. *Id*. at 10.

253. Scholars have observed the need for protection for displacement beyond the refugee framework. For instance, Betts characterizes this as "crisis migration," covering a much wider group than the traditional refugee definition. Betts, *supra* note 38, at 349.

254. *See, e.g.*, SASHA POLAKOW-SURANSKY, GO BACK TO WHERE YOU CAME FROM: THE BACKLASH AGAINST IMMIGRATION AND THE FATE OF WESTERN DEMOCRACY 289-92 (2017), (discussing right-wing political movements in rich countries that advocate to restrict asylum).

future legislation, close the discretion loophole such that the executive branch cannot make broad policy based on a tiny quirk.