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Multiple Nationality and Refugees

Jon Bauer

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ARTICLES

Multiple Nationality and Refugees

*Jon Bauer**

ABSTRACT

Persons with more than one nationality (“multiple nationals”) who flee persecution in their home country may have compelling reasons to seek asylum elsewhere rather than go to a second country of nationality where they have no ties or face serious hardships. The 1951 U.N. Convention Relating to the Status of Refugees, however, expressly makes them ineligible for refugee status unless they have a well-founded fear of being persecuted in all their countries of nationality. The U.S. Refugee Act omits this exclusionary language but nonetheless has been read by immigration agencies as if it incorporated the Convention’s approach. This Article challenges the view that multiple nationals should not be considered refugees. It argues that asylum should be denied only when it would be reasonable, under all the circumstances, to expect the person to resettle in a second country of nationality after taking into account factors

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such as family ties, social and cultural constraints, and any hardships the person would face.

The Refugee Act's text and historical context establish that Congress intended to allow multiple nationals to qualify as refugees if they face persecution in any one of their countries of nationality. Drawing on archival research as well as a close examination of legislative and administrative history, this Article shows that the Refugee Act's drafters meant to preserve a longstanding U.S. policy of accepting refugees with more than one nationality as long as they had not "firmly resettled" in another country of nationality before coming to the United States—a policy especially salient to the Act's proponents because it allowed for the continued admission of Soviet Jews as refugees even though Israel welcomed them as citizens.

This Article also argues that other refugee-receiving countries should reconsider their stance toward multiple national asylum-seekers. The Convention's approach to multiple nationality has become increasingly anomalous in light of the wide international acceptance of the principle that persons who could avoid persecution by going elsewhere—by relocating to a different part of their home country, or seeking asylum in some third country—should not be denied refugee status unless it is reasonable, under all the circumstances to expect them to do so. The Article concludes by discussing how the UNHCR and European Union are well-positioned to play a leading role in developing a new norm for the treatment of multiple nationals who seek refuge from persecution.

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I. INTRODUCTION

Consider these situations:

1. Fatemeh is 30-year old citizen of Iran. Upon learning that she is about to be arrested because of her on-line advocacy for democratic reforms, she flees the country. She travels to Los Angeles, where her aunt, uncle and cousins live, and applies for asylum in the United States. Fatemeh is a dual national; she inherited French citizenship from her mother, a French citizen who married an Iranian man and moved to Teheran before Fatemeh was born. She has never been to France. No family members currently live there, and she has no other ties to the country. She is fluent in English and Farsi but does not speak French.
2. Maria is a citizen of Bosnia-Herzegovina, where she was born. She belongs to a Catholic family of Croatian descent that has lived in Bosnia for more than a century. During the Balkan war of the 1990s, when Maria was a child, her father secured Croatian passports and citizenship papers for all of his family in case they had to flee Bosnia. (Croatia's citizenship law allowed ethnic Croats living anywhere in the world to become citizens.¹) The family remained in Bosnia throughout the war. Later, when Maria was in her twenties, she became involved in a relationship with a Muslim man who was psychologically and physically abusive. He would beat her and call her a "Catholic whore" while forcing her to perform sex acts, and he threatened to kill her if she left him. The authorities in Bosnia provided no protection to

1. See Francesco Ragazzi & Igor Štiks, *Croatian Citizenship: From Ethnic Engineering to Inclusiveness*, in *CITIZENSHIP POLICIES IN THE NEW EUROPE* 339, 347–52 (Rainer Bauböck et al. eds., 2009) (“[M]embers of the Croatian ‘diaspora’ . . . have been able to obtain Croatian citizenship quite easily and maintain their other citizenship.”).

victims of domestic violence. Maria finally escaped her situation by coming to the United States to work as an *au pair*. Her abuser continued to threaten her by phone and email. Fearing for her safety if she returns home, she applies for asylum. Although her citizenship papers enable her to enter and live in Croatia, she cannot imagine living there. After having experienced the relative tolerance and pluralism of the United States, she is frightened and repulsed by the idea of returning to the region where she endured her traumatic experiences, and where the ethnic and religious hatreds that played out in her own persecution play a central role in politics and culture.

3. A North Korean man fleeing political repression crosses the border to China. The Chinese authorities return him to North Korea, where he is detained and tortured. He escapes again, and this time an uncle procures a fake passport for him, which he uses to travel to Australia, where he applies for refugee protection. Under South Korea's Constitution, all of Korea is considered one country and citizens of the North are recognized as citizens of the South.² He does not want to go to South Korea, however, because of the social stigma and employment discrimination North Korean defectors have experienced there. In addition, he fears that his relatives in the North would be harmed; North Korea has a history of retaliating against the families of those who defect to the South.

Under the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol, on which most countries' refugee protection laws are based,³ none of these applicants can qualify as a refugee.⁴ Although they have a well-founded fear of being

2. See *infra* note 174 and accompanying text (discussing South Korea's nationality laws).

3. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Convention] (establishing the legal status and defining the rights of refugees displaced prior to January 1, 1951); see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Protocol] (expanding the protections established under the Convention to people made refugees after January 1, 1951). About three-quarters of the world's countries have agreed to abide by its obligations. See U.N. Treaty Collection, Status: Protocol Relating to the Status of Refugees, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Oct. 10, 2014) [<http://perma.cc/K5J8-5D2C>] (archived Sept. 28, 2014) (listing 146 state parties).

4. The scenario of the Iranian applicant is drawn from the training manual for U.S. asylum officers, which uses a similar example to explain that dual nationals will not be considered eligible for asylum unless they can establish a well-founded fear of persecution in both countries of nationality. See *infra* note 140. The Bosnian woman's case was handled by students in a law school clinical program the author directs. The client would have been found ineligible for asylum were it not for the fact

persecuted in the country of nationality that was their home, they are also nationals of another country. Their connections to that second country of nationality are minimal, and they have compelling reasons for seeking refuge elsewhere. The Convention's definition of refugee, however, expressly excludes persons with more than one nationality unless the individual can show that he or she would be exposed to a well-founded fear of persecution in *all* countries of nationality.⁵ In the United States, despite a statutory refugee definition that differs in wording from the Convention's and is most naturally read to allow a person who has fled from any one country of his or her nationality due to persecution to qualify for asylum,⁶ administrative agencies have followed the Convention's approach.⁷

The prevailing view that multiple nationals forced from their homes by persecution should be required to go to a second country of nationality—no matter how tenuous the individual's links to that country, what hardships they would face there, or how strong their ties to the place where they wish to seek asylum—rests on the idea that the sole purpose of refugee status is to ensure safety from persecution. In this view, international protection is unneeded if national protection is available. As a U.S. administrative appeals

her abuser had once followed her to Croatia when she went on a beach vacation there, enabling a sympathetic asylum officer to conclude that she would not be safe from her persecutor if she lived in Croatia. The facts of the third case are drawn from decisions of Australian refugee tribunals, which have found North Koreans ineligible for refugee protection because they are citizens of South Korea and would not be persecuted there. *See RRT Case No. 0910048*, [2010] RRTA 911, Australia: Refugee Review Tribunal, 20 Oct. 2010 (invalidating North Korean national's protection visa due to his South Korean citizenship); *RRT Case No. 0909449*, [2010] RRTA 763, Australia: Refugee Review Tribunal, 7 Sept. 2010 (same); *RRT Case No. N03/47934*, [2004] RRTA 148, Australia: Refugee Review Tribunal, 19 Feb. 2004, (declining to grant protection visa for same reason); *see also NBLC v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 149 FCR 151 (Austl.) (dismissing appeal of North Korean seeking refugee protection in Australia because he did not have a well-founded fear of persecution in South Korea).

5. *See* Convention, *supra* note 3, art. 1A(2) (requiring, *inter alia*, that a refugee be "outside the country of his nationality" and unable or unwilling to avail himself of its protection owing to a well-founded fear of persecution, and adding that if a person has more than one nationality "the term 'the country of his nationality' shall mean each of the countries of which he is a national," and "a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national"); *see also* Protocol, *supra* note 3, art. I, at 268 (applying same standards to those made refugees after January 1, 1951).

6. *See* Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2014) [hereinafter INA] (defining the term "refugee" to include "any person who is outside any country of such person's nationality. . . , and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution . . . ," and omitting the Convention's provisions on persons with more than one nationality; *infra* Part IV.A (discussing why the statutory text strongly supports an "any one country" interpretation).

7. *See infra* Part IV.B (discussing agency interpretations).

board put it in a recent decision denying a multiple national's asylum claim, the core purpose of asylum is "to protect [refugees] with nowhere else to turn," not provide "a broader choice of safe homelands."⁸

This Article challenges the view that refugee status should be unavailable to multiple nationals merely because they could avoid persecution in a second country of nationality. The international refugee regime serves as more than a last-resort surrogate for national protection. It is also meant to restore a measure of self-determination to the lives of those forced to flee their homes. Persons displaced by persecution have suffered a loss of membership in the political and social community in which they lived. When a refugee cannot safely return home (which, when feasible, is the best way to restore community membership), asylum provides a mechanism for integrating the individual into a new community. Allowing refugees some agency in choosing their destination, rather than forcing them to go to a country of nominal nationality where they lack genuine ties and would face significant barriers to successful integration, serves these autonomy-restoring and integration-promoting goals.⁹

With respect to U.S. asylum law, this Article contends that the governing statutory language, which differs significantly from the Convention's refugee definition (the U.S. definition omits the Convention's exclusionary clause about multiple nationals and states that a person outside *any* country of his or her nationality and unable or unwilling to return to *that* country because of persecution qualifies), is properly read to allow multiple nationals who suffered or reasonably fear persecution in any one country of their nationality to be granted asylum.¹⁰ The text of the statute supports my proposed reading, but ascertaining *why* Congress would want to depart from the Convention's approach to multiple nationals' asylum claims is more complex. One key Congressional purpose in enacting the Refugee Act of 1980 was to bring U.S. law into compliance with the Convention.¹¹ If that were all, it might make sense to assume that the

8. *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (citation omitted) (internal quotation marks omitted) (interpreting the U.S. refugee definition as adopting the Convention's approach toward multiple nationality, despite its textual differences).

9. See *infra* Part V (discussing the conceptual underpinnings for the approach advocated in this Article).

10. See *infra* Part IV.A (analyzing the statutory text).

11. Commentators have justly criticized U.S. decisions that disregard internationally-accepted interpretations of the Convention when construing identically-worded provisions in the statute. See, e.g., Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1121 (2011) ("[A]bsent clear statutory language to the contrary, a construction that is incompatible with international law on the Convention is inconsistent with clear congressional intent to conform domestic refugee law with the

wording differences were inadvertent and Congress really meant to incorporate the Convention's approach. Through a close examination of the Refugee Act's legislative history and historical context, this Article uncovers strong evidence that the law's Congressional architects intended to preserve a longstanding approach in U.S. refugee law and policy that viewed multiple nationality as no barrier to refugee status so long as the individual did not actually resettle in another country before seeking haven in the United States.¹² Adopting the Convention's approach to multiple nationality also would have called into question the highly popular policy of according refugee status to all Soviet Jews who wished to come, despite the fact that Israel recognized them as nationals—a result that Congress clearly would not have intended.¹³

During the Refugee Act's first decade, its implementation by the Executive Branch reflected an understanding that multiple nationals were not excluded from asylum merely because they could avoid persecution in a second country of nationality.¹⁴ More recently, the immigration agencies have taken a contrary view, but those decisions rest on an unreasonable interpretation of the statutory language and are not entitled to judicial deference.¹⁵ This does not mean multiple

nation's obligations under the Protocol . . ."); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 6–8 (1997) (decrying an “unnecessary and potentially harmful gap between U.S. and international refugee law” created by the Supreme Court).

12. See *infra* Part IV.C.3. These conclusions are based on an examination of several decades of legislative history and executive branch practice leading up to the passage of the Refugee Act, documents in the archives of the Jimmy Carter Library and Hebrew Immigrant Aid Society, and the work of historians of refugee policy. In discussing the Refugee Act's history, this Article also calls attention to the central role played by Joshua Eilberg, who chaired the House Judiciary Committee's immigration subcommittee during most of the 1970s. Eilberg's contributions to U.S. refugee law are often overlooked. He was somewhat more conservative than better-known proponents of the Refugee Act like Senator Edward Kennedy and Representatives Peter Rodino and Elizabeth Holtzman. A scandal forced his departure from Congress before the Refugee Act was passed, but he, more than anyone else, gave shape to the refugee definition that became part of U.S. law.

13. See *infra* Part IV.C.4 (discussing the U.S. policy of accepting Soviet Jews as refugees). There is also evidence that the drafters of the U.S. refugee definition wanted to ensure that persons fleeing persecution in Northern Ireland would be eligible to seek asylum in the United States despite the fact that both the Republic of Ireland and the UK considered them citizens. See *infra* text accompanying notes 278–89 (describing statements made in committee and on the House floor and subsequent drafting changes that reflect an intent to include Northern Irish refugees).

14. See *infra* text accompanying notes 362–69 (discussing Executive Branch statements and regulations which reflected an understanding that multiple nationals qualified as refugees as long as they had not firmly resettled in a second country of nationality).

15. See *infra* Part IV.B. (concluding that the agencies' approach to multiple nationality is inconsistent with the statutory language and runs counter to agency regulations, prior decisions, and Congress's treatment of multiple nationals' eligibility for humanitarian relief in subsequent legislation).

nationality can never be considered when assessing an asylum application. Under U.S. law, a grant of asylum is discretionary. Asylum could be denied as a matter of discretion in situations where, under all the circumstances, it would be reasonable to expect the applicant to resettle in another country of nationality, considering factors such as family ties, social affinities, and hardships the person would face.¹⁶

This Article also addresses how multiple nationals' asylum claims should be treated in countries that apply the Convention's definition of a refugee. The approach I propose clearly goes beyond what the text of the Convention requires. It is, however, consistent with the original vision set forth in the post-World War II UN resolutions that laid the foundations of the international refugee regime, which provided that refugees with "valid objections" and "reasons other than personal convenience" for not returning to a country of nationality would not be required to do so.¹⁷ In drafting the Refugee Convention, states seeking to cabin their obligations added a multiple nationality clause that foreclosed refugee status whenever another state would recognize the person as a national and protect them from persecution.¹⁸ However, that approach has become increasingly anomalous in light of the progressive interpretation of the Refugee Convention by the UN High Commissioner for Refugees (UNHCR) and state parties.¹⁹ It has become a well-accepted principle of refugee law that asylum claims should not be rejected merely because a person could safely relocate to a different region within his or her country of origin, or another country where asylum could have been sought, unless it would be reasonable under all the circumstances to expect the individual to do so.²⁰ Family ties, former residence, and social and cultural constraints are all considered when

16. See *infra* Part IV.D (discussing the discretionary nature of asylum and appropriate criteria for the exercise of discretion).

17. See *infra* text accompanying notes 53–55 (citing and discussing several pre-Convention UN documents relating to refugees).

18. See *infra* text accompanying note 52 (quoting the Convention's language); *infra* text accompanying notes 57–58 (discussing the drafting history).

19. See *infra* Part V.B (discussing UNHCR and state interpretations that have extended refugee protection to persons who could escape persecution within their home country or by going to another country, if their reasons for not doing so are sufficiently strong).

20. See, e.g., 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*, ¶ 91, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992) [hereinafter *UNHCR Handbook*] ("[A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."); see also *infra* text accompanying notes 403–405 (discussing international acceptance of this principle and UNHCR's similar stance that asylum should not be denied merely because it could have been sought in another country).

assessing whether expecting relocation elsewhere would be reasonable.²¹ There is no good reason why the same principles should not extend to persons who are nationals of another country where they lack significant ties or face substantial barriers to successful integration.²²

This Article proceeds in the following Parts. Part II explores the factors that have given rise to the increasing prevalence of multiple nationality and the problems that arise when multiple nationals seek asylum. Part III examines the Refugee Convention's approach and how refugee tribunals have responded to its frequently harsh results. Part IV turns to an in-depth examination of the U.S. Refugee Act, and concludes that both the statute's text and history show that Congress intended to allow multiple nationals fleeing persecution in any one country of their nationality to be eligible for a discretionary grant of asylum. It also considers the standards that should govern the exercise of that discretion.

Part V turns to the question of how refugee-receiving countries that have traditionally applied the Convention's restrictive definition should respond to the claims of multiple nationals. It argues that the underlying purposes of refugee protection and widely accepted interpretations of the Convention that have evolved in analogous areas support the development of state practice allowing multiple nationals who face persecution in the country that was their home to qualify for refugee status, unless it would be reasonable, under all the circumstances, to expect them to relocate to a second country of nationality. It also considers the potential role of the UNHCR and European Union in fostering a more inclusive approach toward multiple nationals' refugee claims.

II. THE RISE OF MULTIPLE NATIONALITY AND ITS IMPLICATIONS FOR REFUGEES

The number of people with more than one nationality²³ has grown immensely in recent decades.²⁴ A confluence of factors has

21. See, e.g., 8 C.F.R. § [1]208.13(b)(3) (2013) (requiring adjudicators to consider, when assessing reasonableness, a broad range of factors including "social and cultural constraints, such as age, gender, health, and social and familial ties"); see also *infra* text accompanying notes 403 and 406–07 (discussing UNHCR guidance calling for consideration of similar factors).

22. See *infra* Part V (explaining why allowing multiple nationals to qualify for asylum in appropriate circumstances is consistent with the core purposes that underlie the international refugee protection regime).

23. The term "nationality" overlaps but is not synonymous with "citizenship." "Nationality" refers to the relationship between a state and an individual that creates certain reciprocal rights and duties recognized by international law. "Citizenship" refers to rights of political participation conferred by a country's own laws. A person

contributed to this trend. Every country has the power to determine under its own laws who its nationals are, and there is no uniformity in the rules governing how nationality is conferred. Some states' regimes are based primarily on the principle of *jus soli* (birth in the territory of the state), others on *jus sanguinis* (birth to a citizen parent, whether in or outside the state's territory); many combine elements of the two.²⁵ States also set their own rules concerning naturalization (acquisition of nationality through marriage, residence, or other factors) and loss of nationality.²⁶ When people move across borders, or marry or have children with a person of differing nationality, opportunities for multiple nationality increase. A person who settles in a new country may naturalize without losing a prior nationality, and his or her descendants may be nationals of both countries. If country A assigns its nationality by *jus soli* and country B by *jus sanguinis*, a child born in country A to parents who are nationals of B will be a national of both.²⁷ Globalization and the increased speed and ease of international travel and communication have vastly multiplied the opportunities for the intersection of national laws to produce multiple nationals.²⁸

A parallel trend has been the increasingly tolerant or even encouraging stance that states and the international community have

may be a country's national without being a citizen, as is the case for residents of some U.S.-administered islands in the Pacific. See ALFRED M. BOLL, MULTIPLE NATIONALITY AND INTERNATIONAL LAW 57–75 (2007) (discussing the history behind and distinctions between the terms). For purposes of this Article, the distinction rarely matters, and the terms will be used interchangeably. I will generally refer to "multiple" rather than "dual" nationality. Dual nationality is the most common form, but some people have three or more nationalities.

24. See T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 63, 79 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (estimating that multiple nationals number in the tens of millions worldwide).

25. See Ivan Shearer & Brian Opeskin, *Nationality and Statelessness*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 93, 98–99 (Brian Opeskin et al. eds., 2012) (discussing *jus soli* and *jus sanguinis* as alternative criteria employed by states in attributing their nationality and citing a 2001 study of 25 countries finding that more than half made use of both approaches).

26. See generally *id.* at 96–102 (describing the means by which people may acquire or lose nationality).

27. Or of three countries, if the parents are nationals of two different *jus sanguinis* countries. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1418 (1997) (noting this was often the case for children born in America to immigrant parents).

28. See David A. Martin, *Introduction: The Trend Toward Dual Nationality*, in RIGHTS AND DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS 3, 4–5 (David A. Martin & Kay Hailbronner eds., 2003) (noting that by UN estimates upwards of 185 million people live outside their countries of nationality, resulting in an increasing number of children being born with multiple nationalities); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 67–68 (2008) (concluding that dramatic growth in the number of multiple nationals in the last decade "is predicated on enhanced mobility, a defining feature of globalization").

taken toward multiple nationality. During the nineteenth century and continuing into the middle decades of the twentieth, national laws and international agreements generally looked upon multiple nationality with distrust, viewing it a source of potential friction between states and divided loyalties in individuals.²⁹ States often sought to limit it by requiring people to abandon previous nationalities when they naturalized, forcing women to give up their old nationality and take on their husband's when they married or ascribing only the father's nationality to the children, and/or requiring dual national children to elect one or the other nationality upon reaching the age of majority. In most countries, these sorts of restrictions have fallen away over time, reflecting the emergence of an international consensus against gender-discriminatory laws and the growing realization that multiple nationality no longer poses serious dangers to state interests.³⁰ Emigrant-producing countries see benefit in allowing their diasporas to keep their nationality in

29. See Rey Koslowski, *Challenges of International Cooperation in a World of Increasing Dual Nationality*, in RIGHTS AND DUTIES OF DUAL NATIONALS, *supra* note 28, at 157–60 (describing how international tensions arising from dual citizenship, including the War of 1812, which was triggered by Great Britain's impressment of British-born American citizens into its navy, led to a proliferation of bilateral treaties and the development of international norms disfavoring dual nationality); Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111, 112–15 (2010) ("It is perhaps because dual nationality was at one time so threatening to world order and so immune to legal resolution that it became the object of fierce condemnation."). A 1930 Convention on nationality laws declared that "every person should have a nationality and should have one nationality only." Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89, 93 (entered into force July 1, 1937). As recently as 1974, the German Constitutional Court stated that "multiple nationality is regarded, both domestically and internationally, as an evil that should be avoided or eliminated" so that states may "set clear boundaries for their sovereignty" and be "secure in the duty of loyalty of their citizens." Aleinikoff & Klusmeyer, *supra* note 24, at 70–71 (quoting Opinion of German Federal Constitutional Court, May 21, 1974, 254–55). See also *Rogers v. Bellei*, 401 U.S. 815, 831–36 (1971) (upholding law limiting the ability of some U.S. citizens born abroad to keep their citizenship on the ground that Congress was legitimately concerned with the potential for divided loyalties and entanglements with foreign governments stemming from dual nationality).

30. See Koslowski, *supra* note 29, at 160–63 (noting that increased international migration, the demise of patriarchal citizenship laws, and declines in interstate conflict and military conscription have contributed to a trend toward increasing toleration of dual nationality); Martin, *supra* note 28, at 4–11 (discussing factors that have led to decline in legal restrictions on multiple nationality); David A. Martin, *New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace*, 14 GEO. IMMIGR. L.J. 1, 3–14 (1999) (reviewing the arguments in support of eliminating restrictions on multiple nationality); Spiro, *supra* note 27, at 1453–64 (discussing the trend toward toleration of multiple nationality and asserting that the risks posed by divided loyalties have diminished due to changes in the nature of the global system).

order to encourage affective ties, remittances, and investment.³¹ Nationality has even been offered as a form of reparation for historic wrongs, as in Spain's recent decision to allow Sephardic Jews whose ancestors were expelled in 1492 to become Spanish citizens without giving up their citizenship elsewhere.³²

The growth of multiple nationality to a large degree reflects the reality that more and more people have genuine and important links to more than one country. A person's second country of nationality may be a former home, a place where many relatives and friends still live, and a country to which the person feels closely bound by ties of language and culture. In such cases, the legal fact of nationality corresponds well with the definition given by the International Court of Justice in the oft-quoted *Nottebohm* case: "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."³³

But the increasing ease with which multiple nationality can be acquired and retained also means that there are more and more cases in which nationality does not correspond with affective ties, social links, participation, or even familiarity.³⁴ Many people hold a second citizenship in a country where they have never lived and have no real

31. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 28–34 (2006) (noting that emigrant-sending states have strong incentives to allow emigrants to keep their citizenship because their economies depend on remittances and capital inflows, while for many emigrants continued citizenship satisfies a psychological need for continued involvement with their homeland); Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2 LAW & ETHICS HUM. RTS. 128, 152–58 (2008) (describing a trend in Europe toward liberalizing the ability of expatriates and their descendants to maintain citizenship, and providing examples of laws passed in the Netherlands, Spain, Portugal, France, and Italy); Martin, *supra* note 28, at 7–8 (discussing factors that led many emigration countries by the 1990s to change their policies so that emigrants would not lose their original citizenship when they naturalized elsewhere).

32. See Raphael Minder, *Spain: Citizenship Process Eased for Sephardic Jews*, N.Y. TIMES, Nov. 23, 2012, at A8 (reporting Spain's announcement that it will grant automatic citizenship to Jews of Sephardic descent with no requirement of residence in Spain); see also Raphael Minder, *Many of Spain's Sephardic Jews Still Waiting for Citizenship*, May 20, 2013, at A5 (reporting that the policy, when put in effect, will allow Sephardic Jews to obtain Spanish citizenship without renouncing their current citizenship). Germany's Basic Law of 1949 similarly gives Jews and others stripped of their nationality between 1933 and 1945 for political, racial or religious reasons—and their descendants—the right to reclaim German nationality upon request, without any requirement of residence or abandoning another nationality. See Hans Von Mangoldt, *The Right of Return in German Nationality Law*, 13 TEL AVIV. U. STUD. L. 29, 40–43 (1997) (discussing the application of article 116, paragraph 2 of the Basic Law).

33. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6).

34. Cf. Linda Bosniak, *Denationalizing Citizenship*, in CITIZENSHIP TODAY, *supra* note 24, at 237, 240–41 (discussing how citizenship can be understood to include not only formal legal membership but also "active engagement in the life of a polity" and "an experience of identity and solidarity").

connections. Some countries confer nationality on descendants of citizens in perpetuity, and others for two or three generations.³⁵ In *jus sanguinis* systems, as Ayelet Shachar notes, “the offspring of an emigrant parent gains automatic citizenship in the parent’s country of origin, even where the family has severed all effective ties to the society that they have left behind.”³⁶ *Jus soli* can also result in citizenship without real connection. A child born in a country during a short-term visit by parents may hold that country’s citizenship even if he or she never returns there or establishes any ties with that country.³⁷

Nor is the possession of a second nationality necessarily based on an individual’s consent or choice; frequently it is assigned automatically at birth or conferred non-consensually during childhood as a result of a parent naturalizing.³⁸ Territorial disputes or state succession can result in entire populations acquiring dual citizenship through no doing of their own, as with South Korea’s conferral of citizenship on North Koreans,³⁹ or Portugal’s law providing that those born in its colonies before they gained independence in the 1970s kept their Portuguese citizenship.⁴⁰ Once a person has acquired a second citizenship, there is little incentive to abandon it, and some states make renunciation difficult or impossible.⁴¹

35. See SPIRO, *supra* note 28, at 25 (noting that Ireland, Greece and Italy “extend citizenship to any person enjoying one grandparent citizen, even if the intermediate generation—the person’s parent—had never set foot in the country”); Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY, *supra* note 24, at 17, 20 (listing *jus sanguinis* provisions of twenty-five countries, most lacking generational limits).

36. AYALET SHACHAR, THE BIRTHRIGHT LOTTERY 122 (2009); see also Martin, *supra* note 30, at 32–33 (arguing that states should limit *jus sanguinis* citizenship transmission in order to avoid the persistence of dual nationality “long after the family has lost real connection with the home society”).

37. See SHACHAR, *supra* note 36, at 116 (“[T]he ‘precious good of life-long citizenship [is bestowed] on mere transients and passers-by.”) (citation omitted).

38. As was the case with the Bosnian-Croatian dual national whose case is described at the beginning of this Article. Cf. Peter H. Schuck, *Plural Citizenships*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE 61, 70 (Randall Hansen & Patrick Weil eds., 2002) (arguing that the consensuality of a person’s acquisition of dual nationality should affect the consequences that flow from it).

39. See *infra* note 174 (discussing South Korea’s nationality laws).

40. See Ryszard Piotrowicz, *Refugee Status and Multiple Nationality in the Indonesian Archipelago: Is There a Timor Gap?*, 8 INT’L J. REFUGEE L. 319, 324–25 (1996) (quoting and discussing Portuguese nationality laws).

41. See, e.g., Kay Hailbronner, *Rights and Duties of Dual Nationals: Changing Concepts and Attitudes*, in RIGHTS AND DUTIES OF DUAL NATIONALS, *supra* note 28, at 19, 25 (noting that Iranian law “makes it practically impossible to lose or surrender nationality”); Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 239, 264–65 (1999) (discussing the difficulty of renouncing Israeli nationality, which requires Israel’s consent).

Inevitably, some multiple nationals are forced to flee their former homes due to persecution. Their multiple nationality does provide them with one benefit mono-nationals do not have: another country is obliged to let them enter its territory and live there.⁴² But if this translates into an obligation on the part of the asylum-seeker to go to a country of nationality where he or she has no real ties or would face serious hardships, the multiple national is worse off than other asylum-seekers, who can exercise some control over where to seek asylum. As long as they can get to the country they wish to resettle in, that country will generally be responsible for hearing their asylum claim.⁴³

The question of how to handle cases like the ones described at the beginning of this Article exposes a tension between two underlying purposes of refugee protection. One purpose is humanitarian, to effectively meet refugees' needs and alleviate their suffering.⁴⁴ Providing some agency to those who have been uprooted

42. See Shearer & Opeskin, *supra* note 25, at 120–21 (noting that it is an established principle of international law that states must allow their own nationals entry and cannot deport them); AM. SOC'Y OF INT'L LAW, *THE MOVEMENT OF PERSONS ACROSS BORDERS* 39, 85 (Louis B. Sohn & Thomas Buergenthal eds., 1992) (same). The principle is not always honored in practice. See, e.g., Andrew Jacobs, *No Exit: China Uses Passports as Political Cudgel*, N.Y. TIMES, Feb. 23, 2013, at A1, A6 (describing cases of China denying passport renewal and/or refusing entry to citizens living abroad).

43. The Refugee Convention does not require that asylum be sought in the first country arrived at; it contemplates that a refugee may pass through other countries before reaching her intended destination and seeking asylum. Under Article 1E, only those who actually have "taken residence" in a country and been recognized by its authorities as having rights equivalent to those of nationals are barred from claiming refugee status elsewhere. James Hathaway has noted that this framework "effectively allows most refugees to choose for themselves the country in which they will claim refugee status." JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 46 (1991); see also GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 265 (3d ed. 2007) ("International law does not impose a duty on the asylum seeker to lodge a protection claim at any *particular* stage of flight."). It is, however, increasingly common for countries to enter into "readmission agreements" allowing for the return of an asylum-seeker to a "safe country" the person passed through in which asylum could have been sought, or diversion to another country willing to consider the asylum claim. See Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 575–78 (2003) (describing the recent proliferation of "safe third country" restrictions and readmission agreements). However, the principle that family ties and other connections and the asylum-seeker's intentions should be considered before requiring an individual to seek asylum elsewhere has gained wide (although not universal) acceptance. See *infra* notes 376, 403, 436 and accompanying text (discussing U.S., UNHCR, and European Union decisions or directives endorsing this principle).

44. See Convention, *supra* note 3, pmbl. ¶¶ 1–2 (invoking the United Nations' "profound concern for refugees" and desire to assure them "the widest possible exercise of . . . fundamental rights and freedoms"); GOODWIN-GILL & MCADAM, *supra* note 43, at 10 (noting that the Convention's "first point of reference is the individual . . . as a rights-holder," and its refugee definition begins with the individual's fear of

from their homes and allowing them a degree of choice in where to seek asylum, especially when being forced to go elsewhere would inflict further suffering and make it difficult to build a new life, is consistent with this purpose. But refugee protection also rests on the notion that states are responsible for protecting their own nationals and have a sovereign right to refuse non-nationals admission to their territory. Refugee law provides a backstop, a form of “surrogate or substitute protection” that comes into play only when national protection is unavailable.⁴⁵ From this state-centered perspective, it seems unreasonable to ask one country to provide refuge if another country has a preexisting duty to do the job.

As the next two Parts of this Article will show, the drafters of the Refugee Convention privileged state-centered over humanitarian concerns by inserting a clause that expressly excludes multiple nationals from the definition of a refugee unless they can show that none of their countries of nationality will protect them from persecution. The U.S. refugee definition, however, is worded decidedly differently, and both its text and its history warrant a broader interpretation. Part V will return to the question of the international refugee regime’s underlying purposes, and argue that the goals of refugee protection are best served by requiring multiple nationals to seek refuge in a second country of nationality only when it is reasonable, under all the circumstances, to expect them to do so.

III. MULTIPLE NATIONALITY UNDER THE REFUGEE CONVENTION

The 1951 UN Convention Relating to the Status of Refugees requires states to adhere to certain minimum standards of treatment toward people who meet the definition of a “refugee.”⁴⁶ The bedrock obligation is Article 33’s prohibition against expelling or returning a refugee “in any manner whatsoever” to a place where the person’s life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion (the duty of *non-refoulement*).⁴⁷ But satisfaction of the refugee definition confers more than protection against *non-refoulement*. The

persecution and only secondarily turns to the availability of state protection); Kristen Walker, *Defending the 1951 Convention Definition of Refugee*, 17 GEO. IMMIGR. L.J. 583, 587–96 (2003) (discussing the strong role humanitarian concern for meeting refugees’ needs played in the Convention’s drafting).

45. HATHAWAY, *supra* note 43, at 135; *see also id.* at 124; *UNHCR Handbook*, *supra* note 20, at ¶ 106 (“Whenever available, national protection takes precedence over international protection.”).

46. *See* Convention, *supra* note 3, art. 1A (defining “refugee”).

47. *Id.* art. 33(1). The duty does not apply to persons reasonably regarded as a danger to the country’s security or who have been convicted of a “particularly serious crime” that makes them a “danger to the community.” *Id.* art. 33(2).

Convention requires states to grant an array of social and economic rights to refugees present in their territories,⁴⁸ and Article 34 provides that states “shall as far as possible facilitate the assimilation and naturalization of refugees.”⁴⁹ While the “as far as possible” language effectively makes this provision non-binding, in many developed countries meeting the refugee definition makes an individual at least presumptively eligible for an asylum grant that provides a path to permanent residence.⁵⁰

The refugee definition set out in Article 1A(2)⁵¹ applies to any person 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 . . . is unable, or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.⁵²

The second paragraph unequivocally denies refugee status to multiple nationals unless they can show that their unwillingness to return to each country of nationality is justified by a well-founded fear of persecution.

48. See *id.* arts. 2–31 (detailing refugee rights in areas such as freedom of religion and association, education, housing, employment, and travel). Some rights are limited to refugees “lawfully” in a country’s territory; others extend to all refugees present in the country.

49. *Id.* art. 34.

50. See, e.g., 8 U.S.C. §§ 1158(b)(1)(A), 1159(b), 1427 (2014) (providing that those who satisfy the refugee definition are eligible for asylum then permanent residence and citizenship); Immigration and Refugee Protection Act, S.C. 2001, c. 27, §§ 20–21 (Can.) (providing that persons determined to be Convention refugees may become permanent residents); OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM 65, 73, 121–22 (2007) (describing EU Directives that make persons meeting the refugee definition eligible to remain as refugees and subsequently qualify for long-term resident status).

51. See Convention, *supra* note 3, art. 1A. Article 1A(1) included within the definition all those who had already been classified as refugees under previous international arrangements, such as the Constitution of the International Refugee Organization, the UN agency that assisted refugees from 1946 until 1951, when its functions were taken over by UNHCR.

52. *Id.* art. 1A(2). The Convention also contained language limiting the definition’s scope to those made refugees by events occurring before 1951, and allowed contracting states to narrow it further by covering only those displaced by events in Europe. See *id.* arts. 1A(2) and 1B. The 1967 UN Protocol eliminated these temporal and geographic restrictions. Protocol, *supra* note 3, art. 1.

The Convention's refugee definition was the result of considerable debate and compromise, and the approach ultimately taken toward multiple nationals was far from inevitable. As originally envisioned by the UN General Assembly in a 1946 resolution setting forth general principles for a refugee protection regime, displaced persons who "expressed valid objections to returning to their countries of origin" would not be compelled to do so.⁵³ The Constitution of the UN's first refugee agency, the International Refugee Organization, defined refugees within the agency's concern as persons outside their country of nationality or former habitual residence who had "valid objections to returning to those countries," which could include not just risk of persecution but also "objections of a political nature, . . . compelling family reasons arising out of previous persecution, or, compelling reasons of infirmity or illness."⁵⁴ The General Assembly's 1950 statute creating the office of the UN High Commissioner for Refugees similarly gave the UNHCR a mandate to assist persons who had fled persecution who were unwilling to seek the protection of a country of nationality either because of a well-founded fear of being persecuted "or for reasons other than personal convenience."⁵⁵ These formulations provided some scope for considering multiple nationals refugees, even if they could avoid persecution in one such country, if they had sufficiently strong reasons not to seek refuge there.⁵⁶

The Convention's multiple nationality provision had its origins in language proposed by a British delegate who objected to treating persons with "dual or even plural nationality" as refugees if

53. G.A. Res. 8 (I), U.N. Doc. A/RES/8(I) (Feb. 12, 1946); see also LOUISE W. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS: ITS HISTORY AND WORK, 1946-1952*, 29-33 (1956) (discussing the origins of this resolution in the Western powers' resistance to Soviet demands for the speedy repatriation of refugees).

54. Constitution of the International Refugee Organization annex I, pt. I, §§ A(1)-A (2), C(1), *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3 [hereinafter IRO Constitution].

55. Statute of the Office of the United Nations High Comm'r for Refugees, G.A. Res. 428 (V), ¶ 6(A)(ii), U.N. Doc. A/RES/428(V) (Dec. 14, 1950) [hereinafter UNHCR Statute]; see 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 407-09 (1966) (discussing the broad range of factors that could constitute "reasons other than personal convenience"); Richard Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45, 52 (1977) (discussing the UNHCR Statute's broader coverage than the Convention in this regard).

56. The UNHCR Statute states that the High Commissioner's competence does not extend to a person with more than one nationality "unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national." UNHCR Statute, *supra* note 55, ¶ 7. Because the preceding paragraph contains the "for reasons other than personal convenience" provision, UNHCR's mandate can be read to include dual nationals who fear persecution in one country and have other good reasons for not seeking protection in the other.

protection could be found in one of those countries.⁵⁷ That view prevailed in the Economic and Social Council and at the Conference of Plenipotentiaries that finalized the Convention. It reflected the desire of many states to limit their obligations toward refugees, which can also be seen in the decisions to restrict coverage to those displaced by pre-1951 events and to abandon the “valid objections to returning” approach in favor of limiting refugee status to those who would still face persecution if they returned.⁵⁸

The UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status*, which has wide international acceptance as a guide to interpreting the Convention, explains that the second paragraph of Article 1A(2) rests on the principle that, “Wherever available, national protection takes precedence over international protection.”⁵⁹ As a corollary, it cautions that “possession of a nationality in the legal sense” does not necessarily show “the availability of protection by the country concerned”; a nationality may be “ineffective” if it “does not entail the protection normally granted to nationals”—i.e., the right to enter and remain in the country without being persecuted or subjected to *refoulement*.⁶⁰

Many refugee-receiving countries have embraced the Convention’s multiple nationality provision, either applying it directly or incorporating it into their domestic laws.⁶¹ Canada’s

57. United Kingdom Proposed Text to be Substituted for Article I of the Draft Convention in E/1618, ECOSOC Social Committee, U.N. Doc. E/AC.7/L.63 (Aug. 1, 1950); see also ECOSOC Social Comm., Summary Record of Meeting, U.N. Doc. E/AC.7/SR.160 (Aug 2, 1950), at 6–7 (comments of Mr. Fearnley of the UK); see NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 54 (1953) (discussing origins of the Convention’s multiple nationality provision in the UK proposal).

58. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 153–54 (1990) (discussing countries’ reluctance to provide a “blank check” for future refugees of unknown origin); Andreas Zimmermann & Claudia Mahler, *Article 1A, para. 2, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 281, 310–11 (Andreas Zimmermann ed., 2011) (noting that the Conference of Plenipotentiaries removed the phrase “or for reasons other than personal convenience” from the refugee definition). A remnant of the old approach remained in a provision that allowed those already recognized as refugees under the IRO Constitution or other pre-1951 refugee arrangements to keep their status even if they no longer had reason to fear persecution if they had “compelling reasons arising out of previous persecution” for refusing to return to their country of former residence. See Convention, *supra* note 3, art. 1C(6).

59. UNHCR *Handbook*, *supra* note 20, ¶ 106.

60. *Id.* ¶ 107. The *Handbook* adds that before a nationality is deemed ineffective, an applicant generally should be required to show that he or she requested and was refused protection. *Id.*

61. See, e.g., Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 96 (Can.) (defining a “Convention refugee” as a person who by reason of well-founded fear of persecution “is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those

Supreme Court described it as the natural outgrowth of “the rationale underlying international refugee protection . . . to serve as ‘surrogate’ shelter coming into play only upon failure of national support.”⁶² “If a person has a nationality of a country where he is not at risk of persecution,” reasoned a UK refugee tribunal, “he ought not to be of any international concern.”⁶³

The Convention’s multiple nationals clause affords no room for considering the reasonableness of asking an asylum-seeker to go to another country. Whether the person has ever set foot in that country, speaks its language, would have any family or social ties, would face economic hardship or a lack of political freedom, or exercised any choice in acquiring the nationality are all deemed irrelevant. Refugee tribunals troubled by the harsh results this can produce in individual cases have struggled to find ways to limit the sweep of the exclusion. Courts have shown particular angst in situations where nationality has been conferred on broad classes based on tenuous links. When Indonesia annexed East Timor and repressed its populace, many East Timorese (now Indonesian citizens) sought refuge in Australia, but having been born in a Portuguese colony they also held the citizenship of a hated colonial power half a world away.⁶⁴ Under Israel’s Law of Return, virtually any Jew in the world can acquire Israeli nationality simply by expressing a desire to immigrate and setting foot on Israeli soil.⁶⁵ And, as described in one of the scenarios at the beginning of this Article, South Korea recognizes all North Koreans as citizens.

Does this mean that there can be no such thing as a Jewish, North Korean, or East Timorese refugee? Some tribunals have not shied away from this conclusion. A Canadian court, for example, ruled against a Jewish citizen of Azerbaijan who fled religious persecution and sought asylum in Canada, where her daughter lived.⁶⁶ She had no relatives or friends in Israel, but the court found that since Israeli citizenship was open to her “by simple demand” she

countries”); *Migration Act 1958*, (Cth) s 36(3) (Austl.) (amended 1999) (“Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in . . . any country apart from Australia, including countries of which the non-citizen is a national”); *KK & ors v. Sec’y of State for the Home Dep’t*, [2011] UKUT 92 (I.A.C.), ¶¶ 2–3, *aff’d sub nom. Sec’y of State for the Home Dep’t v. SP (North Korea) & ors*, [2012] EWCA Civ. 114 (C.A. 2012) (directly applying Convention’s multiple nationals provision); Refugee Status Appeals Authority of New Zealand, *Refugee Appeal No. 2067/94*, 9–13 (July 4, 1996) (same).

62. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 709, 752.

63. *KK & ors*, [2011] UKUT 92, ¶ 3.

64. *See* Piotrowicz, *supra* note 40, at 320, 332 (noting that many East Timorese with Portuguese nationality “regard Portugal as an oppressor State”).

65. *See* Shachar, *supra* note 41, at 234–36 (describing the broad citizenship rights conferred by the Law of Return).

66. *Grygorian v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1608, ¶¶ 1–4.

could not be considered a Convention refugee; “any other more liberal result or less stringent obligation would violate the underlying rationale of refugee law as a remedy of last resort.”⁶⁷ But others have recoiled from the “exquisite irony,” as an Australian jurist put it, of finding that a Convention adopted in the shadow of the Holocaust would have meant from its very outset that Jews could not be refugees.⁶⁸

Efforts to find coherent limiting principles, however, have not been very successful. One approach, which UNHCR has endorsed, is to draw a bright line between a nationality currently held and a potential nationality, which would not count even if available by right.⁶⁹ While textually defensible—the Convention’s multiple nationality provision refers to “countries of which [a person] is a national”⁷⁰—this approach yields some arbitrary and irrational results. It saves Jews from exclusion (under Israeli law they do not

67. *Id.* ¶¶ 8–15; see also *MZXL T & Anor v Minister for Immigration & Anor* [2007] FMCA 799, ¶¶ 1–14 (Austl.) (describing decision of Australia’s Refugee Review Tribunal that denied a protection visa to a woman gang-raped by anti-Semites in Russia who had never been to Israel, spoke no Hebrew, and was married to an Australian man, on the ground that as a Jew she had a right to Israeli nationality); *NAEN v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 6, ¶¶ 1–3 (Austl.) (upholding denial of protection visa to a Jewish woman from Russia and her Christian husband because both could obtain citizenship under the Law of Return). Australian tribunals denied the claims of several East Timorese asylum seekers because of their Portuguese nationality. See Ryszard Piotrowicz, Lay Kon Tji v. Minister for Immigration & Ethnic Affairs: *The Function and Meaning of Effective Nationality*, 11 INT’L J. REFUGEE L. 544 n.2 (1999) (listing Refugee Review Tribunal decisions). For decisions holding that North Koreans whom South Korea would recognize as citizens are ineligible for refugee status, see, for example, *X (Re)*, 2013 CanLII 76469, ¶¶ 66–67 (CA IRB) (Can.) (holding that North Koreans cannot be granted refugee status without establishing a well-founded fear of persecution in South Korea), and *supra* note 4 (citing Australian cases).

68. *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6, ¶ 30 (Austl.); see also *id.* ¶¶ 95–98 (Kirby, J., concurring) (observing that it would be “astonishing” if the Law of Return had the effect of eliminating international protection obligations toward Jews, given that the Convention was in part a response to the international community’s failure to provide refuge to Jews fleeing Nazi persecution). The High Court of Australia, while rejecting the view that Jews with prospective citizenship rights in Israel cannot qualify as refugees, acknowledged that § 36(3) of the Migration Act (quoted *supra* note 61), which was not yet in effect when the case was filed, might require a different result in future cases. *Id.* ¶¶ 10, 58–60, 87–88.

69. In comments on the EU’s 2004 directive establishing uniform minimum standards for refugee qualification, UNHCR objected to a provision allowing adjudicators to consider whether an applicant “could reasonably be expected to avail himself of the protection of another country where he could assert citizenship” on the ground that the Convention’s multiple nationals clause creates no obligation to claim a nationality not already held. *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, at 14–15, OJ L 304/12 (Sept. 30, 2004) (comment on Article 4(3)(e)) [hereinafter *UNHCR Comments on QD*].

70. Convention, *supra* note 3, art. 1A(2) (emphasis added).

become citizens unless and until they arrive in Israel), but not North Koreans or East Timorese (because the nationality laws of South Korea and Portugal already treat them as citizens). People who are nominally citizens of a country where they lack any genuine ties would be denied refugee status, while others who have real and close ties with a country in which they have a right to citizenship upon request could qualify as refugees, merely because they refuse to apply. Unsurprisingly, refugee tribunals in a number of countries have concluded that the surrogate state protection principle requires treating a nationality available by right no differently than a currently held nationality.⁷¹

Another limiting strategy is to adopt the standard of the International Court of Justice's *Nottebohm* decision, which stated that only a nationality that reflects a "genuine connection" and "social fact of attachment" between the individual and the country concerned is valid under international law.⁷² Although a few refugee tribunals have endorsed this approach,⁷³ most have rejected it. *Nottebohm's* test for effective nationality has generally been understood as limited to its context of determining when a state can exercise diplomatic protection and assert a claim on behalf of its national against another state.⁷⁴ Nationality serves a very different function in the

71. See *KK & ors*, [2011] UKUT 92, ¶ 82 (concluding that for purposes of the Refugee Convention, "if [a person] is entitled to nationality, subject only his making an application for it, he is . . . to be regarded as a national of the country concerned"); *Canada (Minister of Citizenship and Immigration) v. Williams*, [2005] FCA 126, ¶¶ 19–34 (Can.) (holding that "if it is within the control of the applicant to acquire the citizenship of another country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied"); see also *supra* note 61 (quoting Australian statute requiring the applicant to take all possible steps to take advantage of a right to citizenship elsewhere).

72. *Nottebohm Case*, 1955 I.C.J. at 22–23, discussed *supra* text accompanying note 33. The ICJ held that only a "real and effective" nationality provides a basis for one state to assert a claim on behalf of its national against another state, with effectiveness to be determined by factors such as "the habitual residence of the individual concerned . . . [.] the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."

73. See *Katkova v. Canada (Minister of Citizenship and Immigration)*, [1997] 40 Imm. L.R. (2d) 216 (Can.) (holding that a Russian Jew who never lived in Israel and had no immediate family there should not have been denied refugee status in Canada, even though Israel would recognize her as a national); see also *Matter of Fatoumata Toure*, No. A24 876 244, 1990 Immig. Rptr. LEXIS 1435, at *21, *29 (BIA June 26, 1990) (relying in part on *Nottebohm* to hold that a passport issued by an Ivory Coast diplomat to a Guinean woman with few real ties to Ivory Coast did not confer effective nationality).

74. See *Shearer & Opeskin*, *supra* note 25, at 97–98 (stating that *Nottebohm* now has limited value as authority and can be understood as merely restricting, in certain circumstances, a state's right to provide diplomatic protection to a national with whom it lacks genuine ties); *BOLL*, *supra* note 23, at 110–13, 279 (discussing *Nottebohm's* limited scope).

Convention's multiple nationality provision, where it is a marker for the availability of protection against persecution.⁷⁵ In any event, the links of ancestry or birthplace which underlie *jus sanguinis* and *jus soli* citizenship have been uniformly found sufficient to meet any effectiveness requirement that may exist under international law.⁷⁶ Applying *Notttebohm's* standard thus does nothing to help most asylum-seekers who lack real ties to their second country of nationality. If they are descended from distant ancestors who emigrated, or were born in a country but left it during infancy, or are still considered citizens by a former colonial power, they are out of luck.

Another strategy sometimes used to avoid harsh outcomes is to seize on any discretionary or contingent element in a country's nationality laws as a basis for finding that national protection is not assured. Some refugee judges have reasoned that because Israel's Law of Return confers a right to nationality on "every Jew who has expressed his desire to settle in Israel," Jews lacking a genuine desire to live in Israel have no entitlement to its nationality.⁷⁷ That approach is hard to square with the Convention refugee definition's exclusion of those who fail to seek a country of nationality's protection for any reason other than a well-founded fear of persecution.⁷⁸ (It also

75. See *KK & ors*, [2011] UKUT 92, ¶¶ 62–67, 90 (concluding that when assessing whether a person meets the refugee definition, "there is no separate concept of 'effective' nationality; the issue is the availability of protection in the country in question"); *Jong Kim Koe v Minister for Immigration & Multicultural Affairs*, (1997) 74 FCR 508, 143 ALR 695, 1997 AUSTL FEDCT LEXIS 179, at *17–20, *28–34 (holding that for purposes of the Refugee Convention, the issue is whether a country that recognizes the person as a national will provide protection, and not its effectiveness under *Nottebohm*); see also *supra* text accompanying note 60 (discussing similar view taken by the UNHCR *Handbook*).

76. See *Lay Kon Tji v Minister for Immigration and Ethnic Affairs*, (1998) 158 ALR 681, 1998 AUSTL FEDCT LEXIS 909, at *26, *20–27 (discussing international law authorities); see also *Piotrowicz*, *supra* note 40, at 327–29 (discussing the range of acceptable links under international law).

77. *MZXLT*, [2007] FMCA 799, ¶¶ 62–67 (Austl.); *Katkova*, [1997] 40 Imm. L.R. (2d) 216; see also *Lay Kon Tji*, 1998 AUSTL FEDCT LEXIS 909, at *37–*47 (relying on evidence that Portugal would recognize as nationals only East Timorese who expressed a desire for Portuguese nationality as basis for finding that Portuguese nationality was not effective for those who lacked such a desire, and thus did not preclude refugee protection in Australia).

78. See *Convention*, *supra* note 3, art. 1A(2) ("[A] person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."); see also Andrew Wolman, *North Korean Asylum Seekers and Dual Nationality*, 24 INT'L J. REFUGEE L. 793, 812 (2012) ("The Refugee Convention . . . at no point implies that individuals should be considered refugees if they lack the desire to go to their country of nationality."); *MA (Ethiopia) v. Sec'y of State for the Home Dep't*, [2009] EWCA (Civ) 289, [83] (Eng.) ("[R]efugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable

presupposes the existence of other options—presumably an asylum-seeker *would* have a genuine desire to go to Israel if the only other choice were returning to the country of persecution.) A provision that allows Israel’s immigration minister to deny entrance if a person has a “criminal past” or poses a danger to public health or security has also been cited as reason to treat Israeli nationality as discretionary rather than available by right.⁷⁹ But it is unclear why, in the absence of any facts suggesting that one of these exceptions would apply, a person who satisfies the main standard for claiming citizenship should not be viewed as entitled to it.⁸⁰

None of this is to fault courts for trying to find ways to avoid requiring people to go to a nominal country of nationality in situations where it seems unfair and unreasonable to do so. But it is an inevitable byproduct of the Convention’s stance toward multiple nationals that, as a Justice of Australia’s High Court put it, many are left “hostage to arrangements . . . made affecting their nationality by countries with which they may have no real connection.”⁸¹

IV. MULTIPLE NATIONALITY UNDER THE U.S. REFUGEE ACT

The Refugee Act of 1980 adopted a refugee definition modeled on but not identical to the Convention definition.⁸² A person who satisfies the statutory definition may be admitted as a refugee from abroad through the refugee resettlement program, or, if already present in the United States or at its borders, may be granted asylum.⁸³ Both forms of relief are discretionary.⁸⁴

steps to obtain recognition and evidence of her nationality.”); *see also* cases cited *supra* note 71.

79. *Katkova*, [1997] 40 Imm. L.R. (2d) 216 (reasoning that because Israel retains discretionary authority to deny citizenship in certain circumstances, a Jewish applicant should not be denied Convention refugee status on the ground that she holds an entitlement to Israeli nationality); *see also* *KK & ors*, [2011] UKUT, ¶ 80 (*dicta*) (endorsing *Katkova*’s reasoning).

80. *Cf.* UNHCR *Handbook*, *supra* note 20, ¶ 107 (stating that as a general rule there should be a request for and refusal of protection before it is established that a nationality is ineffective).

81. *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 6, ¶ 93 (Austl.) (Kirby, J., concurring).

82. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102–03 (codified as amended at 8 U.S.C. § 1101(a)(42) (2014)).

83. 8 U.S.C. §§ 1157(c), 1158(b)(1)(A) (2014).

84. 8 U.S.C. §§ 1157(c)(1), 1158(b)(1)(A) (2014); *see* *Matter of Salim*, 18 I. & N. Dec. 311, 314 (BIA 1982) (discussing asylum’s discretionary nature under the Refugee Act). Providing the opportunity to be considered for refugee admission or asylum was enough to satisfy the requirement of Article 34 of the Refugee Convention that countries “as far as possible facilitate” the assimilation of refugees. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (explaining that Article 34 “is precatory [and] does not require the implementing authority actually to grant asylum to all who are eligible”).

To bring U.S. law into conformity with the Convention's obligation of *non-refoulement*, the Refugee Act beefed up an already-existing provision that gave the Attorney General discretion to withhold deportation to a country where an individual would face persecution.⁸⁵ The Act made such withholding mandatory when a person's "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion"—language drawn directly from Article 33 of the Convention.⁸⁶ Unlike asylum and refugee admission, withholding of removal confers no path to permanent residence;⁸⁷ it merely guarantees that for as long as the likelihood of persecution remains, the person will not be deported to the country where the risk exists. If any other country is willing to accept the person, he or she can be deported there.⁸⁸ Thus, multiple nationals who could be safe in one of their countries of nationality are not eligible for withholding of removal. What turns on whether the refugee definition covers them is whether they may be considered for a discretionary grant of asylum or refugee admission.

Although the U.S. refugee definition closely resembles the Convention's, there are a number of textual differences. While the Convention requires that a refugee be "outside the country of his nationality," the Refugee Act added a subsection allowing the President to designate persons still inside their home countries as refugees.⁸⁹ The U.S. definition also goes beyond the Convention by allowing those unwilling to return to a country either "because of persecution or a well-founded fear of persecution" to qualify, whereas the Convention definition covers only those with a current well-founded fear.⁹⁰ These differences in wording have long been understood as significant departures from the Convention that evince

85. 8 U.S.C. § 1253(h) (1976).

86. Refugee Act of 1980 § 203(e), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1231(b)(3)(A) (2014)). See H.R. REP. NO. 96-781, at 20 (1980) (Conf. Rep.) (explaining that the withholding of deportation language was adopted "with the understanding that that it is based directly upon the language of the Protocol").

87. Cf. 8 U.S.C. § 1159 (2014) (permitting refugees and asylees to adjust their status to permanent residents after one year).

88. See 8 U.S.C. § 1231(b)(1), (2) (2014) (authorizing the removal of an alien to any country of his or her citizenship or nationality, or, if push comes to shove, to any country whose government will accept the person); Matter of Lam, 18 I. & N. Dec. 15, 18 (BIA 1981) (explaining that "withholding of deportation is country-specific, barring deportation only to a single place" and does not bar removal to "any other place to which an alien may be deported").

89. 8 U.S.C. § 1101(a)(42)(B) (2014).

90. Compare *id.* at § 1101(a)(42)(A), with Convention, *supra* note 3, art. 1A(2) (containing no reference to past persecution as a basis for refugee status).

Congressional intent to provide a broader scope of coverage under U.S. law.⁹¹

Some other minor wording differences are most plausibly read as reflecting the drafters' stylistic preferences rather than any intent to diverge from the international definition's substance. For example, the U.S. definition refers to persecution "on account of" one of the five protected grounds, while the Convention speaks of persecution "for reasons of" those grounds. It is hard to imagine any difference in meaning was intended.⁹²

In contrast, the differences concerning nationality are fairly striking. First of all, the U.S. definition completely omits the second paragraph of the Convention definition, which defines "the country of his nationality" to mean "each of the countries of which [the person] is a national" and declares multiple nationals ineligible for refugee status unless they have well-founded fear-based reasons for not going to each such country.⁹³ Second, the U.S. definition changes "*the* country of his nationality," the phrase used in the Convention, to "*any* country of such person's nationality." In full, the main clause of the U.S. definition reads:

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, . . .⁹⁴

Under the approach to statutory interpretation espoused by the U.S. Supreme Court,⁹⁵ the starting point for construction is the

91. See H.R. REP. NO. 96-608, at 9 (1979); see also S. REP. NO. 96-256, at 4 (1979) (acknowledging that the U.S. refugee definition's in-country provision covers persons not considered refugees under the Convention); Matter of L-S-, 25 I. & N. Dec. 705, 710 n.5 (BIA 2012) (explaining that the U.S. refugee definition's language makes clear that "the experience of past persecution itself" renders a person a refugee).

92. The Convention itself seems to use the terms interchangeably; Article 33 refers to threats to life or freedom "on account of" any of the five protected grounds. Convention, *supra* note 3, art. 33. The U.S. definition also changes the Convention's phrase "owing to" to "because of" when expressing the idea that persecution must be the cause of the individual's unwillingness to return, rewords "membership of a particular social group" to read "membership in" and changes the Convention's reference to a stateless person's country of "former habitual residence" to the country where the person "last habitually resided." Compare *id.* art. 1A(2), with 8 U.S.C. § 1101(a)(42)(A) (2014).

93. See *supra* text accompanying note 52 (quoting the second paragraph of Article 1A(2)).

94. 8 U.S.C. § 1101(a)(42)(A) (2014) (emphasis added).

95. See generally LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2011) (summarizing the Supreme Court's statutory construction jurisprudence).

statute's language. If the "plain meaning" of the text points clearly in one direction, that generally ends the inquiry.⁹⁶ When statutory language is ambiguous, courts will defer to an authoritative interpretation issued by an administrative agency charged with the law's implementation, provided that the administrative interpretation is reasonable.⁹⁷ In the absence of a reasonable administrative construction that warrants deference, courts will consider the statute's language, structure, purpose and legislative history to determine what reading best furthers Congressional intent.⁹⁸

A. The Statutory Text

The U.S. refugee definition's use of the phrase "*any* country of such person's nationality" clearly contemplates that a person may have more than one nationality. Considered in isolation, that phrase could be referring to one country of which a person is a national (no matter which one), or to *all* such countries. In common usage "*any*" can take on either meaning. Its dictionary definitions include "one or some of whatever kind or sort" (as in "any plan is better than no plan"); "one or more: not none" (e.g., "I can't find any stamps"); and "all" (e.g., "give me any letters you find").⁹⁹ In linguistic terms, "*any*" is a "function word" whose primary role is to do something to the semantic structure of a sentence rather than to stand for something in itself. Thus, the meaning of a phrase using "*any*" is heavily dependent on its grammatical surroundings.¹⁰⁰ And in statutory construction, it is axiomatic that "language must be read in context since a phrase gathers meaning from the words around it."¹⁰¹

96. See, e.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous . . . judicial inquiry is complete") (citations omitted) (internal quotation marks omitted).

97. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (setting standards for judicial deference to agency decisions).

98. See, e.g., *Comm'r v. Engle*, 464 U.S. 206, 214-24 (1984) (employing these tools to interpret a statute after finding that the agency's construction was unreasonable).

99. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 97 (1986). The Supreme Court has said that "[r]ead naturally, the word 'any' has an expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997), but this tells us little, since all of the senses in which the word can be used are expansive in their own ways. As the Supreme Court noted in another case, "'any' can and does mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004).

100. See Jill C. Anderson, *When Words Fail Us* (forthcoming, on file with author).

101. *Gen. Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004).

The wording of the rest of the U.S. refugee definition strongly suggests that “any” is being used in the sense of “one, no matter which,” not “all.” The same sentence goes on to require that a person “outside any country of such person’s nationality” be unable or unwilling to return to and seek the protection of “*that* country,” in the singular. It does not say “each such country” or something along those lines, which is what one would expect to see if “any” meant “all.”¹⁰² The grammar of the sentence signifies that what a multiple national needs to show is the existence of a country of nationality to which he or she is unable or unwilling to return because of persecution, not that this would be true for *all* her countries of nationality.¹⁰³

Another change from the Convention’s wording made by the Refugee Act’s drafters lends further support to the “any one country” interpretation. The U.S. definition refers to the inability or unwillingness of a person outside any country of his or her nationality (or last habitual residence, if stateless) “to *return to*, and . . . avail himself or herself of the protection of, that country” The Convention, in contrast, omits “return to” and speaks only of a national’s inability or unwillingness to avail himself of the country of

102. The Convention definition also uses the phrase “that country,” but the phrase there refers back to “the country of his nationality,” which is then explicitly defined to mean “each of the countries of which he is a national,” and is further clarified by language stating that a multiple national does not qualify as a refugee if he lacks valid, well-founded fear based reasons for not returning to “one of the countries of which he is a national.” Convention, *supra* note 3, art. 1A(2).

103. The Dictionary Act states that “unless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1 (2014). However, the Supreme Court has declined to apply this presumption when Congress uses the singular in a setting where one would expect to see a plural had a plural meaning been intended. See *United States v. Hayes*, 555 U.S. 415, 421–22 (2009) (reasoning that because Congress used the singular word “element” in a statute, while referring to “elements” in other provisions, it meant to describe only one required element). The Court noted: “On the rare occasions when we have relied on [the Dictionary Act] rule, doing so was ‘necessary to carry out the evident intent of the statute.’” *Id.* at 422 n.5 (quoting *First Nat’l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924)). Here, both the grammatical structure of the sentence and other aspects of the statute’s wording point toward a singular meaning. See *infra* text accompanying notes 103–117.

Had Congress adopted the Convention’s phrasing (“outside *the* country of his nationality”), there would be a stronger case for applying the singular-includes-the-plural presumption, because that wording leaves unclear what is to be done if the person has more than one country of nationality. When “the country” becomes “the countries,” the next phrase, which refers to the person’s inability or unwillingness to return to “that country,” can correspondingly be transformed into “those countries.” But the language Congress instead employed (“outside *any* country of such person’s nationality”) already contemplates the existence of more than one country of nationality. The subsequent use of the singular (such person’s inability or unwillingness to return to “*that* country”) indicates that “any” is referring to one of those countries, not all of them. And as will be discussed in Part IV.C, legislative history provides no “evident intent” that would require reading the singular to include the plural; on balance, it supports the “any one country” interpretation.

nationality's protection.¹⁰⁴ (The phrase "return to" is used in the Convention only when referring to the "former habitual residence" of a stateless person.) To avail oneself of a country's protection is something that can be accomplished whether or not a person has previously been there. To "return to" a country, in contrast, is something that can only occur if the person was previously located in that country and left. The U.S. definition's requirement that the person establish an inability or unwillingness to "return to" any country of nationality thus only makes sense if "any country" is referring to the country in which the person was persecuted or faced a well-founded fear of persecution—which generally would be the place where the person previously lived.¹⁰⁵ If it meant *all* countries of a person's nationality, it frequently would include countries a person never resided in or even visited, which, by definition, a person could not "return to."

A reading of the refugee definition that would allow claims by multiple nationals facing persecution in any one country of their nationality is bolstered by Congress's decision to entirely omit the sentence in the Convention's refugee definition that requires multiple nationals to establish a well-founded fear of persecution with respect to each such country. When Congress incorporates language from a treaty into domestic legislation, it is generally presumed that it intends to adopt the internationally-accepted meaning of that treaty language.¹⁰⁶ But when Congress consciously borrows language from a treaty, but omits a significant provision, it is reasonable to assume that Congress meant something by the omission.¹⁰⁷ The absence of the Convention's multiple nationality clause from the U.S. definition, together with the wording changes discussed previously, suggest that

104. The legislative history shows that Representative Joshua Eilberg, the Chair of the House Judiciary Committee's subcommittee on immigration, viewed this wording change as meaningful. *See infra* text accompanying notes 213–15.

105. The Board of Immigration Appeals noted in a non-precedential decision that "[t]he Act's use of the phrase 'return to' suggests that a country of nationality was contemplated as a country of origin, or at least the person's usual place of abode." *Matter of Fatoumata Toure*, No. A24 876 244, 1990 Immig. Rptr. LEXIS 1435, *17 (BIA June 26, 1990). *See infra* text accompanying notes 130–39 (discussing *Toure*).

106. *See Yusupov v. AG of the United States*, 518 F.3d 185, 204 n.32 (3d Cir. 2008) (stating that Congress's use of language essentially identical to a provision appearing in the Convention and Protocol provided "one of the strongest indicators that Congress intended to incorporate the understanding of the Protocol developed under international law into the U.S. statutory scheme").

107. A similar, oft-cited principle of statutory construction, which the Supreme Court has applied when interpreting the Refugee Act, provides that when Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 421 U.S. 421, 432 (1987) (internal quotations and citations omitted).

Congress meant to take a different approach than the Convention on this issue.¹⁰⁸

The contrast in wording between the Refugee Act's provisions on withholding of removal and asylum also supports this interpretation. The withholding section requires the applicant to establish a risk of persecution in each specific country of potential removal in order to avoid deportation to that country.¹⁰⁹ The asylum provisions do not limit relief to the country or countries where a risk of persecution has been shown; if an applicant faces persecution in "any country of such person's nationality," the U.S. government "may grant asylum."¹¹⁰ The regulations echo this statutory difference by requiring immigration judges to advise an alien who expresses a fear of harm in "any of the countries to which the alien might be removed" of the right to "apply for asylum in the United States or withholding of removal to those countries."¹¹¹

The only textual clue that arguably cuts in favor of construing the U.S. definition as if it contained the Convention's multiple nationality language is a section in the asylum statute, added by Congress in 1996, that provides for termination of asylum if, *inter alia*, "the alien has acquired a new nationality and enjoys the

108. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.), Canada's Supreme Court, interpreting a statutory refugee definition that tracked Article 1A(2) but omitted its multiple nationality provision, nonetheless read the statute to incorporate the Convention's approach, citing the surrogate state protection rationale for refugee protection and the statutory construction principle that that "words in the singular include the plural." *Id.* at 751–55. The Canadian statute, however, signaled by its use of the phrase "Convention refugee" (which does not appear in the U.S. refugee definition) that congruence with the Convention definition was intended, and it lacked the U.S. definition's other textual departures from the Convention discussed above (such as the change from "the country" to "any country"). Subsequent to *Ward*, Canada amended the definition of "Convention refugee" in its immigration law to expressly provide that applicants must be "outside each of their countries of nationality" and unable or due to a well-founded fear "unwilling to avail themselves of the protection of each of those countries." Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 96 (Can.).

109. See 8 U.S.C. § 1231(b)(3)(A) (2014) ("The Attorney General may not remove an alien to a country if . . . the alien's life or freedom would be threatened in that country . . ."); see also *supra* text accompanying notes 82–86.

110. 8 U.S.C. § 1158(b)(1)(A) (2014); 8 U.S.C. § 1101(a)(42)(A) (defining "refugee").

111. 8 C.F.R. § 1240.11(c)(1) (2013); see also C.F.R. §§ 1240.33(a)(1), 1240.49(c)(2). Relying on these regulations, a Court of Appeals held that eligibility for asylum was established when an applicant demonstrated a well-founded fear of persecution in a country of his nationality; he was not required to prove that he would also be at risk of persecution in another country that had been designated as the country to which he would be deported. *Andriasian v. INS*, 180 F.3d 1033, 1042 n.14 (9th Cir. 1999).

protection of the country of his or her new nationality.”¹¹² This language was taken *verbatim* from a Convention clause on cessation of refugee status which echoes the Convention refugee definition’s approach to multiple nationality.¹¹³ This later addition, however, sheds little light on what Congress meant when it enacted the U.S. refugee definition in 1980, or even what the 1996 Congress understood the refugee definition to mean. The Refugee Act of 1980 provided that asylum could be terminated only if the person was “no longer a refugee within the meaning of [the statutory definition] owing to a change in circumstances in the alien’s country of nationality.”¹¹⁴ That formulation suggests that in using the phrase “country of nationality,” the 1980 Congress had in mind only the specific country in which the applicant had experienced or feared persecution. When Congress added additional grounds for asylum termination in 1996, it did not amend the refugee definition, and there is little reason to think that Congress meant clarify or change its meaning.¹¹⁵ The acquisition of a new nationality by a person granted asylum but not yet a U.S. permanent resident would be a rare event,¹¹⁶ and unlike an asylum applicant’s possession of a second nationality (typically acquired at birth or in childhood), it would almost never occur without a voluntary act.¹¹⁷ Congress could have reasonably viewed those choosing to pledge allegiance to another country after being granted asylum in the United States as less

112. 8 U.S.C. § 1158(c)(2)(E) (2014) (originally enacted as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, § 604(a), div. C, 110 Stat. 3009-546, 693).

113. Convention, *supra* note 3, art. 1C(3); see HATHAWAY, *supra* note 43, at 210 (noting Article 1C(3)’s “substantive symmetry” with the multiple nationality provision of Article 1A(2)’s refugee definition).

114. Refugee Act of 1980 § 208(b), 94 Stat. 102, 105 (codified at 8 U.S.C. § 1158(b) (1982)) (language concerning stateless persons omitted).

115. See H.R. REP. NO. 104-469 Part I, at 81, 260 (1996) (setting forth the new termination of asylum language with no discussion of its purpose or implications for the definition of refugee).

116. Asylees become eligible for permanent resident status one year after the asylum grant. See *supra* note 87.

117. An asylum-seeker who married a person of a different nationality might acquire the spouse’s nationality without applying for it, by operation of the laws of that country. By 1996, however, this would have been unusual. The widely-adopted 1957 Convention on the Nationality of Married Women obliged state parties to not automatically confer nationality on a woman marrying one of its nationals, a duty reaffirmed in 1981 by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW art. 9(1), Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention on the Nationality of Married Women art. 1, Feb. 20, 1957, 309 U.N.T.S. 65 (entered into force Aug. 11, 1958); see Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 713 (2011) (noting that the Convention on the Nationality of Married Women was widely adopted, although sex-discriminatory nationality practices have persisted).

deserving of continuing protection than persons who were multiple nationals to begin with.

The language of the U.S. refugee definition, in the eyes of a textually-inclined court, could be dispositive; taken as a whole, it points toward the “any one country” interpretation. Several Courts of Appeals, without directly confronting the issue of whether a multiple national facing persecution in only one of those countries is eligible for asylum, have noted that the “plain language” of the statute calls for assessing whether the applicant satisfies the terms of the refugee definition with respect to “one test country,” regardless of what the situation might be with respect to other countries.¹¹⁸

Arguably, there is some degree of ambiguity; perhaps Congress meant “any country” to mean “every country” and the tension between that reading and the rest of the section’s wording was merely the result of sloppy drafting.¹¹⁹ Courts sometimes depart from a “plain meaning” approach in situations where reading a statute to mean what it says would produce results that seem arbitrary or clearly at odds with the statute’s purpose.¹²⁰ If there were no good

118. See *Tesfamichael v. U.S. Attorney General*, 469 F.3d 109, 112–15 (5th Cir. 2006) (reading the phrase “that country” in the refugee definition to mean that asylum eligibility must be determined with reference to “one ‘test country’”). The U.S. Court of Appeals for the Second Circuit similarly relied on the “plain language” of the statute to hold that an individual can satisfy the refugee definition by showing she has a well-founded fear of persecution in a country of which she is a national, even if she was born and raised in another country, could be removed to that country, and would not face persecution there. *Dhoumo v. Bd. of Immigration Appeals*, 416 F.3d 172, 174–75 (2d Cir. 2005); accord, *Wangchuck v. Dep’t of Homeland Security*, 448 F.3d 524, 528–29 (2d Cir. 2006). The facts of these cases did not require the courts to opine on the dual national situation, but their reading of the statutory language would support the idea that satisfying the statutory test with respect to “one test country” of nationality is sufficient.

The case that came closest to addressing the issue was *Palavra v. INS*, 287 F.3d 690 (8th Cir. 2002), involving a Bosnian family denied asylum because they possessed Croatian passports and did not fear persecution in Croatia. The court held that the agency had impermissibly ignored evidence that the applicants were not in fact Croatian nationals, and therefore found it unnecessary to rule on their separate argument that even if dual nationals, they satisfied the refugee definition because they faced persecution in one of their countries of nationality. *Id.* at 692–94. A dissenting judge would have upheld the agency on the ground that dual nationals are ineligible for asylum unless they show a risk of persecution in both countries, but gave no reasoning to justify that conclusion. *Id.* at 694–95 (Hansen, J., dissenting).

119. The existence of some ambiguity does not always lead courts to seek meaning from sources beyond the statutory text. In one recent decision, the Supreme Court rejected a “literally possible” reading of statutory language when “all of the textual clues” cut against it. *Samantar v. Yousuf*, 560 U.S. 305, 314–16 (2010); see also *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 525 (2009) (stating that presence of some ambiguity in statutory language does not preclude rejecting an administrative interpretation as contrary to the statute).

120. See, e.g., *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013) (stating that courts must follow the plain meaning of statutory language “at least where the disposition required by the text is not absurd”).

explanation as to *why* Congress would want to deviate from the Convention approach, reading the Convention meaning into the U.S. statutory language despite the textual differences might be appropriate. As will be discussed in Part IV.C, the Refugee Act's legislative history in fact provides strong indications that Congress meant to preserve past practices which had allowed multiple nationals fleeing persecution in their former homes to come to the United States as refugees even if they could have found safety in another country of nationality. Courts, however, sometimes give decisive weight to administrative interpretations of statutory language without considering legislative history. I will therefore first examine whether the immigration agencies' reading of the refugee definition warrants deference.

B. Administrative Interpretations

Under the framework developed by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,¹²¹ if Congress has not unambiguously expressed its intent with respect to a particular issue, controlling weight will be given to an interpretation made by an agency entrusted with the statute's enforcement, provided the agency's interpretation is reasonable.¹²² Only agency interpretations resulting from formal processes through which Congress has authorized the agency "to speak with the force of law," such as notice-and-comment rulemaking or precedential adjudication, are entitled to *Chevron* deference.¹²³ The INA authorizes the Attorney General to issue regulations and make "controlling" rulings "with respect to all questions of law" arising under the immigration statutes; thus, immigration regulations and

121. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

122. *Id.* at 842–45. Some Supreme Court decisions refuse to look beyond the statute's language and structure in assessing whether Congress has unambiguously expressed its intentions, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), while others also examine legislative history in making this assessment, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432–43 (1987). The Refugee Act's legislative history, considered in conjunction with its language and structure, could bolster a court's conclusion that the statute unambiguously allows a person facing persecution in any one country of his or her nationality to qualify as a "refugee." For purposes of this section, however, I will assume that the statute is ambiguous.

123. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); see also *Christensen v. Harris County*, 529 U.S. 576, 586–87 (2000) (indicating that documents which lack the force of law, like opinion letters, should not receive *Chevron* deference). Less authoritative agency pronouncements are examined under the standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which holds that an agency's interpretation of the law is "entitled to respect," but only to the extent it has "power to persuade based on factors such as "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.* at 140.

precedential decisions issued by the Board of Immigration Appeals (BIA), the administrative review board created by the Attorney General to decide appeals, are reviewed under *Chevron's* standard.¹²⁴

No agency regulations directly address the meaning of the phrase “any country of such person’s nationality” in the refugee definition.¹²⁵ Starting in 1990 a series of informal agency pronouncements declared, with little supporting reasoning, that the U.S. definition incorporates the Convention’s approach to multiple nationality.¹²⁶ In 2013, the BIA issued a precedential decision to this effect,¹²⁷ but its logic is severely flawed. It fails to adequately account for the statutory language and misconstrues legislative history. Most importantly, it cannot be reconciled with longstanding regulations issued by the Attorney General, which treat multiple nationals as eligible for refugee admission or asylum unless they have actually gone to and “firmly resettled” in another country before coming to the United States.¹²⁸ Congress has endorsed the regulations’ approach in subsequent legislation.¹²⁹ The BIA’s interpretation ignores all this, and cannot qualify as a reasonable interpretation that deserves *Chevron* deference.

The BIA first addressed the multiple nationality issue in a 1990 non-precedential decision involving a Guinean citizen who fled to the United States after a coup removed her uncle from the presidency. An Ivory Coast diplomat issued her a passport that on its face appeared to confer that country’s nationality.¹³⁰ The BIA held that the word “any” in the U.S. refugee definition refers to all countries of a person’s nationality, but apart from noting that the Convention and UNHCR

124. 8 U.S.C. § 1103(a)(1), (g) (2014). The Attorney General has delegated to the BIA the authority to issue controlling legal rulings when deciding appeals and authorized the BIA to designate selected decisions as precedents binding on immigration judges and agency personnel in all matters concerning the same issue. 8 C.F.R. § 1003.1(d)(1), (d)(3)(ii), (g) (2013). Accordingly, courts give *Chevron* deference to interpretations of the immigration laws that take the form of regulations or precedential BIA decisions, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999), but apply *Skidmore's* standards when deciding whether to accept interpretations contained in non-precedential BIA decisions or in manuals or guidelines issued by the immigration agencies. See *Arobelidze v. Holder*, 653 F.3d 513, 519–20 (7th Cir. 2011) (noting that non-precedential statements by the Board are “less formal” agency statements not entitled to *Chevron* deference).

125. The regulations provide that asylum and refugee applicants must satisfy the Act’s refugee definition, but do not define or interpret the definition’s “outside any country of . . . nationality” language. See 8 C.F.R. § 207.1(a) (2013) (eligibility criteria for refugee admission); 8 C.F.R. § [1]208.13(a) (2013) (asylum eligibility standards).

126. See *infra* text accompanying notes 130–43.

127. *Matter of B-R*, 26 I. & N. Dec. 119 (BIA 2013); see *infra* text accompanying notes 144–54.

128. See *infra* text accompanying notes 155–68.

129. See *infra* text accompanying notes 169–86.

130. *Matter of Fatoumata Toure*, No. A24 876 244, 1990 Immig. Rptr. LEXIS 1435, at *6–7 (BIA June 26, 1990).

take this approach it gave no reasons for reading the statutory language this way.¹³¹ Nonetheless, the BIA found that the Refugee Act's use of the phrase "return to"¹³² and its declared statutory purpose of aiding persons "subject to persecution in their homelands"¹³³ "compel an interpretation of the phrase 'any country of such person's nationality' consonant with notions of home or place of habitual residence."¹³⁴ It therefore rejected a formalistic approach to nationality that would "require the deportation of an asylum applicant to a country to which she has little or no connection merely because she has been designated as a 'national' under that country's laws."¹³⁵

But the BIA stressed that this did not mean a person must have lived in a country in order to be considered its national, but only that there must be "a sufficient and genuine connection . . . such that the applicant may rightfully be said to owe permanent allegiance to that country."¹³⁶ It equated this with *Nottebohm's* test for effective nationality under international law.¹³⁷ As we have seen, this standard does nothing for the vast majority of multiple nationals seeking asylum, given that any link of ancestry or place of birth, no matter how attenuated, is considered effective for international law purposes.¹³⁸ The Guinean applicant was saved from deportation only because the BIA was able to find that her Ivory Coast passport was a mere "passport of convenience," conferred as a favor, that signified no permanent allegiance on her part and no permanent obligation by the Ivory Coast to provide her with sanctuary.¹³⁹

This decision, if convoluted in its reasoning, at least grappled with some of the relevant considerations. The same cannot be said for the training manual for asylum officers, which since the mid-1990s has instructed that "[a] dual citizen must establish persecution or a well-founded fear of persecution in both countries of nationality to be eligible for asylum . . . even if the applicant never resided in, or

131. See *id.* at *10–11 (stating that the statute's use of the word "any" indicates that asylum is not warranted if "an individual has a second country of nationality to which she can safely return").

132. *Id.* at *17–18; see *supra* text accompanying notes 104–05.

133. *Id.* at *18 (emphasis added) (quoting Refugee Act of 1980, § 101(a), 94 Stat. 102).

134. *Id.* at *21.

135. *Id.* The BIA noted that U.S. courts generally determine a person's nationality by applying the municipal law of the country in question, but found "there are good reasons for tempering the determination of nationality with a careful examination of the purpose of the nationality provision in the definition of refugee . . ." *Id.* at *15–16.

136. *Id.* at *21.

137. *Id.* at *21, *29.

138. See *supra* text accompanying notes 33–34 and 72–76.

139. *Toure*, 1990 Immig. Rptr. LEXIS 1435, at *22–26.

established personal ties to, a country of citizenship.”¹⁴⁰ As rationale, it erroneously asserts that the statutory refugee definition “provides that the applicant must be unable or unwilling to return to ‘any country of such person’s nationality’”¹⁴¹ (What the law actually says is that a person must be *outside* “any country of such person’s nationality” and unable or unwilling to return to “that country.”)¹⁴² The manual cites the Convention and UNHCR Handbook as support for this approach, but takes no account of how the U.S. definition is worded differently than the Convention’s.¹⁴³

It was not until May 2013 that the BIA addressed the question of multiple nationality in a precedential decision. The case, *Matter of B-R*,¹⁴⁴ involved a citizen of Venezuela who fled to the United States after being attacked and threatened by pro-Chavez groups. Because his father had been born in Spain, he also held Spanish citizenship.¹⁴⁵ The BIA held that to be eligible for asylum an applicant with more than one nationality must establish a well-founded fear of persecution in all such countries.¹⁴⁶ It acknowledged that the statute’s phrase “any country” could be taken “to mean that he need only fear returning to *one* of the countries in which he has nationality or citizenship.”¹⁴⁷ The BIA ignored all of the textual considerations that cut in favor of that reading.¹⁴⁸ Instead, it rested its conclusion on

140. U.S. CITIZENSHIP & IMMIGRATION SERVICES [USCIS], ASYLUM DIVISION, ASYLUM OFFICER BASIC TRAINING COURSE, ELIGIBILITY PART I: DEFINITIONS; PAST PERSECUTION 10–11 (Mar. 6, 2009) [hereinafter AOBTC]; USCIS, REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE, RAI0 COMBINED TRAINING COURSE, REFUGEE DEFINITION TRAINING MODULE 15–16 (Mar. 29, 2013) [hereinafter RAI0 Training]. Similar guidance has appeared in agency training manuals since 1995. See Immigration and Naturalization Service, *Basic Law Manual: U.S. Law and INS Refugee/Asylum Adjudications* § III.B.1(b), reprinted in CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE (Matthew Bender rev. ed., 1996) (Special Supp. 1995).

141. AOBTC, *supra* note 140, at 10; RAI0 Training, *supra* note 140, at 15.

142. See *supra* text accompanying note 94 (quoting the statute).

143. AOBTC, *supra* note 140, at 10–11; RAI0 Training, *supra* note 140, at 15 n.34.

144. *Matter of B-R*, 26 I. & N. Dec. 119, 121 (BIA 2013).

145. *Id.* at 119–20.

146. *Id.* at 122.

147. *Id.* at 120.

148. See *supra* text accompanying notes 99–111. The BIA claimed to find textual support for its interpretation in the statutory provision making acquisition of a new nationality a ground for terminating asylum. *Id.* at 122. However, as discussed previously, that 1996 amendment sheds little light on the refugee definition’s meaning. See *supra* text accompanying notes 112–17. The BIA also referenced an INA provision authorizing an alien’s removal “to a country of which the alien is a . . . national.” *Id.* at 122 (quoting 8 U.S.C. § 1231(b)(2)(D) (2006)). That provision is irrelevant because it applies only to persons who have been denied asylum or other relief and ordered removed. The fact that Congress would allow multiple nationals who fail to establish eligibility for asylum to be deported to any country that will take them reveals nothing

the Refugee Act's legislative history. Citing a Senate report statement that the Act's refugee definition eliminated the geographical and ideological restrictions that had previously limited refugee status to persons fleeing Communist and Middle Eastern countries,¹⁴⁹ the BIA concluded that "the most reasonable reading of the word 'any' in the 'refugee' definition is to allow aliens from any country to qualify as a refugee, not just those from the Middle East or Communist countries."¹⁵⁰

As a textual matter, that reading makes little sense. To be sure, "any" can be read to have a broadening effect on the word "country," implying that any country will do. But as used in the sentence, "any" modifies the phrase "country of such person's nationality." The BIA's interpretation has the strange effect of taking "any" to mean "one or more, no matter which" when read as part of the phrase "any country," but then having it switch its meaning to "every" when read as part of the phrase "any country of such person's nationality."

The BIA's "any country" explanation also fails to provide a plausible account of Congress's motivations. The Convention refugee definition clearly is not limited to persons fleeing Communist or Middle Eastern countries. Had Congress simply adopted the Convention's wording, there would have been no ambiguity whatsoever that persons fleeing persecution anywhere in the world are covered.¹⁵¹ Why would Congress unnecessarily depart from the Convention's wording in order to demonstrate that it was following the Convention's approach?¹⁵²

about Congress's intent as to whether having more than one nationality renders a person ineligible for asylum.

149. *Matter of B-R*, 26 I. & N. Dec. at 121-22 (citing S. REP. No. 96-256, at 4, 15 (1979)). The BIA mischaracterized the Senate Report by claiming that it "clarifies that the phrase 'any country' in section 101(a)(42) of the Act referred to the elimination of the geographical and ideological restrictions in the former [law]." The Senate Report simply stated that the new refugee definition eliminated those restrictions; it did not say or suggest that the phrase "any country" was used to refer to this change. S. REP. No. 96-256, at 15-16.

150. *Matter of B-R*, 26 I. & N. Dec. at 121.

151. In fact, the Refugee Act's legislative history frequently speaks of bringing U.S. law into compliance with the Convention by eliminating the current geographic and ideological restrictions. See 125 CONG. REC. 4798, 4799-800, 23232 (1979) (remarks of Reps. Rodino and Holtzman and Sen. Kennedy) (discussing, in consecutive sentences, how the bill removes geographical and ideological restrictions in the current law and basically conforms to the Convention's refugee definition); *Admission of Refugees Into the United States Part II: Hearings on Indochina Refugees and U.S. Refugee Policy Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on Judiciary*, 95th Cong. 235 (1977-78) (remarks of Rep. Eilberg) [hereinafter 1978 House Hearings] (same).

152. The BIA pointed to the Senate report's statement that the new definition "basically conforms" to the Convention. *Matter of B-R*, 26 I. & N. Dec. at 121 (citing S. REP. NO. 96-256, at 14-15 (1979)). But a desire to "basically" conform to the Convention is not inconsistent with providing broader coverage where Congress chose different wording, and the legislative history shows that Congress understood that the

The BIA also reasoned that the statute's "firm resettlement"¹⁵³ bar shows that asylum's core purpose "is not to provide applicants with a broader choice of safe homelands, but rather, to protect refugees with nowhere else to turn."¹⁵⁴ The BIA here ignored the clear import to the contrary of the Attorney General's regulations on "firm resettlement,"¹⁵⁵ which have the force of law and are binding on the BIA.¹⁵⁶ By statute, someone who meets the definition of a "refugee" is nonetheless barred from asylum or refugee admission if "firmly resettled" in another country.¹⁵⁷ From the earliest days of the Refugee Act, the regulations implementing this provision have been drafted in a way that clearly indicates that the possession of a second citizenship in a safe country does not preclude asylum eligibility unless the person actually travels to that country before coming to the United States.¹⁵⁸ The current version of the regulation provides

statutory definition went beyond the Convention's minimum requirements. *See infra* Part IV.C.1.

153. 8 U.S.C. §1158(b)(2)(A)(vi) (2014) (providing that asylum is not available if "the alien was firmly resettled in another country prior to arriving in the United States").

154. *Matter of B-R-*, 26 I. & N. Dec. at 122 (quoting *Tchitchui v. Holder*, 657 F.3d 132, 137 (2d Cir. 2011)) (internal quotation marks omitted). The BIA also pointed to the "safe third country" bar to asylum as evidence of Congressional intent to protect only those who would face persecution in all countries they could go to. *Id.* (citing 8 U.S.C. § 1158(a)(2)(A) (2012)) (precluding those who may be removed pursuant to a bilateral or multilateral agreement to a safe country from applying for asylum unless the Attorney General finds it is in the public interest for the person to receive asylum). This provision was added in 1996, long after Congress's enactment of the refugee definition. IIRIRA, *supra* note 112, § 604(a), 110 Stat. 3009-546, 690-91. The United States has entered into only one such agreement, with Canada; it generally provides that asylum-seekers entering from Canada will be returned to have their asylum claims heard there unless they have family members in the United States. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 6:44 (2014) (detailing terms of the agreement). Given these limitations, and the fact that Congress expressly preserved the Attorney General's discretion to grant asylum, the "safe third country" provision sheds little light on Congress's intentions in enacting the refugee definition.

155. 8 C.F.R. § [1]208.15 (2013).

156. *See* 8 C.F.R. § 1003.1(d)(1) (2013) ("The Board shall resolve the questions before it in a manner that is . . . consistent with the Act and regulations.").

157. 8 U.S.C. §§ 1157(c)(1), 1158(b)(2)(A)(vi) (2014). The Refugee Act made firm resettlement a bar to refugee admission, but omitted any reference to it in its asylum provisions. Refugee Act, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103, 105. Nonetheless, the House-Senate Conference Report treated the "determination of whether a refugee is 'firmly resettled'" as part of the "refugee" definition and directed the Attorney General to issue regulations defining firm resettlement. H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.). Those regulations made firm resettlement a bar to asylum as well as refugee admission. *See infra* note 158. In 1996, Congress amended the statutory asylum provisions to expressly include firm resettlement as an asylum bar. IIRIRA, *supra* note 112, § 604(a), 110 Stat. 3009-546, -691.

158. 8 C.F.R. §§ 207.1(b), 208.8(f)(1)(ii), and 208.14 (1981). The 1980 interim regulations issued by the Attorney General provided that an alien would be considered firmly resettled "if he was offered resident status, citizenship, or some other type of permanent resettlement by another nation and travelled to and entered that nation . . ." *Id.* (emphasis added). The asylum portion of the regulations technically

that “[a]n alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement”¹⁵⁹ And even if the person enters a country with rights of citizenship or is granted citizenship while there, the firm resettlement bar is inapplicable if the person can show that he or she stayed only as long as needed to arrange onward travel, and did not establish significant ties in that country.¹⁶⁰

Decisions of the BIA and federal courts interpreting the firm resettlement bar have recognized that individuals holding a second citizenship in a safe country are not automatically ineligible for asylum. In *Matter of Soleimani*,¹⁶¹ a precedential decision issued in 1989, the BIA addressed the situation of a Jewish asylum applicant who fled persecution in Iran and then lived in Israel for ten months before coming to the United States. The BIA found the evidence insufficient to prove that Israel offered her citizenship, since the government had failed to introduce the specific provisions of the Law of Return. But it went on to hold that even if Israel did confer citizenship, she merited a grant of asylum.¹⁶² Applying the standards of the firm resettlement doctrine, the BIA concluded that her stay in Israel did not “constitute a termination of the original flight in search of refuge” because she displayed no intent to remain in Israel permanently and traveled onward to the United States within a reasonable time.¹⁶³ None of this would be relevant if acquisition of Israeli citizenship would have meant that she failed to meet the definition of a “refugee” and was thus ineligible for asylum.

applied only to determinations made by INS District Directors, not immigration judges, but the BIA decided in a series of early cases that similar firm resettlement standards should be considered by immigration judges when deciding whether to grant asylum. See *Matter of Lam*, 18 I. & N. Dec. 15, 18–19 (BIA 1981) (holding that asylum will not be granted if an alien was firmly resettled); *Matter of Soleimani*, 20 I. & N. Dec. 99, 104–05 (BIA 1989) (clarifying that firm resettlement was not a mandatory bar under the regulations but nonetheless “would normally preclude a grant of asylum as a matter of discretion”). In 1990, the regulations were amended to make firm resettlement a mandatory ground for denial of an asylum application, whether by an immigration judge or an asylum officer. See 8 C.F.R. §§ 208.14(c)(2), 208.15 (1991).

159. 8 C.F.R. § [1]208.15 (2013) (emphasis added).

160. The regulations excuse an alien from the firm resettlement bar if he or she shows, *inter alia*, “[t]hat his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country.” *Id.*

161. 20 I. & N. Dec. 99 (BIA 1989).

162. *Id.* at 106.

163. *Id.* at 106–07. The BIA considered the facts that she was recuperating from an illness, did not seek out permanent status or government benefits (although she did attend school and study Hebrew), and had stronger family ties in the United States than in Israel.

In the more recent case of *She v. Holder*,¹⁶⁴ the asylum applicant, after fleeing Burma, lived in Taiwan for eighteen months and obtained Taiwanese citizenship. An immigration judge held that she was ineligible for asylum because she was a citizen of a country to which she could safely return.¹⁶⁵ Instead of upholding that reasoning, the BIA and a federal appeals court found that the applicant's eligibility for asylum hinged on whether she was firmly resettled before arriving in the United States.¹⁶⁶ The Court of Appeals, in vacating the BIA's denial of asylum on firm resettlement grounds and remanding the case for further consideration, emphasized that the acquisition of citizenship does not necessarily establish firm resettlement under the regulatory standards.¹⁶⁷

If the mere fact of holding citizenship in a safe country meant that an individual could not satisfy the refugee definition—the essential prerequisite for asylum consideration—a firm resettlement doctrine that allows grants of asylum in situations where the applicant not only holds citizenship but has actually spent time in that country would make no sense. The BIA's reading of the refugee definition in *Matter of B-R* cannot stand as a “reasonable” agency interpretation worthy of *Chevron* deference because it is fundamentally inconsistent with the Attorney General's binding regulations and prior decisions—and does not even attempt to address or explain that inconsistency.¹⁶⁸

The BIA interpretation also fails to take into account that twice since the Refugee Act's passage, Congress has made amendments to the INA that apply the firm resettlement test, rather than a threshold exclusion from eligibility, to the claims of individuals who could be safe in a second country of nationality.¹⁶⁹ In 1990, Congress

164. *She v. Holder*, 629 F.3d 958 (9th Cir. 2010).

165. *Id.* at 960–61.

166. *Id.* at 961–62.

167. *Id.* at 962–64 and 963 n.3; *see also* *Rife v. Ashcroft*, 374 F.3d 606, 611–12 (8th Cir. 2004) (holding that Azerbaijani citizens who fled to Israel, where they were granted citizenship and lived three years before coming to the United States, were ineligible for asylum because they had firmly resettled, an approach that would have been unnecessary if their acquisition of Israeli citizenship had meant they were not “refugees” within the meaning of the U.S. refugee definition); *Yasin v. Holder*, 530 Fed. Appx. 466 (6th Cir. 2013) (upholding denial of asylum to a dual national because he had firmly resettled in his second country of nationality and had failed to show a well-founded fear of persecution in *either one* of his countries of nationality).

168. *Cf. Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582, 603–07 (3d Cir. 2011) (holding that BIA's failure to account for inconsistency with its own precedents rendered a statutory interpretation unreasonable and unworthy of *Chevron* deference); *see also* *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41–42 (1983) (holding that if an agency abandons a prior rule's approach it must provide reasoned analysis for the change).

169. *See* EIG, *supra* note 95, at 47–50 (stating that although “subsequent legislative history,” such as later statements by a legislator or legislative committee

filled a gap in the coverage of the refugee definition by allowing the Attorney General to confer “temporary protected status” (TPS) on nationals of designated countries who would face danger if returned to their home states due to natural disaster or ongoing armed conflict.¹⁷⁰ All of the statutory bars to asylum eligibility, including firm resettlement, were made applicable to TPS, but with respect to nationality, the statute requires only a showing that the applicant “is a national of” one of the designated states.¹⁷¹ The immigration agencies have recognized that under the plain statutory language, a national of a designated country is eligible, even the person also holds the nationality of another country and could be safe there, provided the person did not firmly resettle in that second country of nationality before coming to the United States.¹⁷² If Congress had taken the view that the possession of a safe nationality made a person ineligible for asylum, it is hard to understand why it would not have placed that limitation on TPS eligibility as well.

More recently, Congress intervened to reject an agency interpretation that denied access to asylum on dual citizenship grounds. In 2002, a number of North Koreans seeking asylum at U.S. consulates in China were told by State Department staff that their only option was to go to South Korea.¹⁷³ South Korea’s Constitution regards the entire Korean peninsula as one country and its laws confer citizenship on anyone with Korean parentage.¹⁷⁴ For this

about what an earlier law was intended to mean, is generally given little weight by courts, subsequent *legislation* that clarifies the intent of an earlier statute is often weighed heavily in statutory construction).

170. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, 5030-31 (codified as amended at 8 U.S.C. § 1254a(a)(1) and (b)(1) (2014)); see H.R. REP. NO. 101-245, at 8–9 (1989) (explaining that TPS addresses the plight of persons who face danger in their home countries for reasons other than persecution and therefore fall outside the refugee definition).

171. 8 U.S.C. § 1254a(a)(1) and (c)(2)(B)(ii) (2014). The incorporation by reference of the asylum bars was added in 1996 by IIRIRA, *supra* note 112, § 308(g)(7)(E)(i), 110 Stat. 3009-546, -624.

172. 8 C.F.R. § 244.2 (2013); U.S. Citizenship and Immigration Services, Questions and Answers: Designation of Syria for Temporary Protected Status, Mar. 29, 2012, at 2 (stating that an applicant who is both a national of Syria and a national of another country will satisfy the nationality requirement for TPS, but will be ineligible if the individual firmly resettled in that other country).

173. See Elisabeth Rosenthal, *North Korean Migrants Pull U.S. Into a Diplomatic Mess*, N.Y. TIMES, May 11, 2002, at 4 (discussing a “recent spate” of North Koreans entering U.S. consulates in China and seeking asylum in the United States); H.R. REP. NO. 108-478(I), at 16 (2004) (noting reports that State Department officials denied North Koreans’ requests for asylum and pressured them to resettle in South Korea instead).

174. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-691, HUMANITARIAN ASSISTANCE: STATUS OF NORTH KOREAN REFUGEE RESETTLEMENT AND ASYLUM IN THE UNITED STATES 25 (2010) (noting that “the South Korean Constitution considers all Koreans on the Korean Peninsula, including North Koreans, to be citizens of South Korea”); Wolman, *supra* note 78, at 798 (explaining that North Korean escapees are

reason the State Department—reading the U.S. refugee definition as following the Convention approach to multiple nationals—considered them not to be refugees under U.S. law.¹⁷⁵ Members of Congress responded by introducing bills to overturn this interpretation, which were enacted as part of the North Korean Human Rights Act of 2004.¹⁷⁶

Section 302 of the NKHRA declares that nationals of North Korea shall not be considered nationals of South Korea when determining asylum or refugee eligibility.¹⁷⁷ This was not presented as an exception to the Refugee Act's standards; the NKHRA states that its purpose is "to *clarify* that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy" in South Korea.¹⁷⁸ The statute states that it does not apply to "former North Korean nationals who have availed themselves of those rights,"¹⁷⁹ thus making clear that those who actually go to South Korea may be barred on firm resettlement grounds.¹⁸⁰

automatically South Korean nationals under provisions of South Korea's Constitution and Nationality Act).

175. See Andrew Salmon, *Measure Would Let Refugees Seek Asylum: North Riled by U.S. Bill on Koreans*, N.Y. TIMES (Oct. 6, 2004) (quoting U.S. diplomat's statement that South Korean citizenship makes North Koreans ineligible for asylum); *Senate Omnibus Appropriations Bill Passes with NSEERS Funding Cut; New Bills Introduced*, 80 INTERPRETER RELEASES 153 (2003) ("The State Department currently believes it is barred from granting refugee status to any escapees from North Korea because those escapees are automatically granted citizenship by South Korea, and thus are not considered to be refugees under U.S. law . . .").

176. North Korean Human Rights Act of 2004 [hereinafter NKHRA], § 302, Pub. L. No. 108-333, 118 Stat. 1287, 1295–96; see articles cited *supra* note 175 and *infra* note 184.

177. NKHRA, *supra* note 176, § 302(b).

178. *Id.* § 302(a) (emphasis added). The legislative history explains the purpose of this provision:

[It] [c]larifies that North Koreans are eligible to apply for U.S. refugee and asylum consideration (as anyone else is), and are not presumptively disqualified by any prospective claim to citizenship they may have under the South Korean Constitution. This does not change U.S. law but makes it clearer, explicitly endorsing the approach of U.S. Immigration Courts in proceedings involving North Koreans, in which their asylum claims were adjudicated with reference to the actual circumstances they faced inside North Korea. It is meant to put to rest the erroneous opinion (proposed by some State Department personnel) that, because North Koreans may be able to claim citizenship if and when they relocate to South Korea, they must be regarded as South Koreans for U.S. refugee and asylum purposes, irrespective of whether they are able or willing to relocate to South Korea.

H.R. REP. NO. 108-478(I), at 22 (2004).

179. NKHRA, *supra* note 176, § 302(a).

180. See *Matter of K-R-Y- & K-C-S-*, 24 I. & N. Dec. 133, 135–37 (BIA 2007) (holding that the NKHRA left the firm resettlement bar to asylum undisturbed and finding that that two North Korean applicants who had lived for extended periods in South Korea were firmly resettled and ineligible for asylum).

Congress's clarification of U.S. law with respect to North Korea is hard to square with an interpretation of the U.S. refugee definition that requires people with dual nationality to show a well-founded fear of persecution in both countries. One possible reading of the legislative history is that Congress took issue only with the State Department's interpretation of South Korean nationality law and believed that North Koreans are not citizens of the South unless they actually go there and are given citizenship papers.¹⁸¹ The statutory language, however, which "clarifies" that North Koreans are not ineligible for refugee status or asylum "on account of *any* legal right of citizenship they may enjoy under the Constitution of the Republic of Korea,"¹⁸² is broad enough to make it clear that the Act applies even if under South Korean law North Koreans are already citizens.¹⁸³ Congress's more basic concern was that turning aside the claims of people facing horrendous persecution in their country of residence due to the "legal technicality"¹⁸⁴ that another country also deemed them citizens was contrary to the American tradition of "generous, humanitarian solicitude toward displaced and persecuted people."¹⁸⁵ The North Korea controversy exposed the tension between the administrative interpretation of the refugee definition and the more generous view of dual nationality implicit in the firm resettlement standards. In rejecting the former and endorsing the latter, Congress took the view that the U.S. refugee definition should not be read to exclude individuals with more than one country of nationality merely because they could safely go to one such country.¹⁸⁶

In conclusion, no deference is due to administrative interpretations that read the U.S. refugee definition as if it contained the Convention's multiple nationality language. They are not reasonable interpretations because they fail to account for the statute's wording and contradict the approach taken in the regulations on firm resettlement, which Congress has repeatedly endorsed. The next section of this article will show that interpreting

181. See *id.* at 136 (BIA statement suggesting they took this view: "[T]he legislative history confirms our interpretation that North Koreans cannot be denied asylum based on their right under the South Korean Constitution to apply for and become a citizen of South Korea." (emphasis added)).

182. NKHRA, *supra* note 176, § 302(a) (emphasis added); see *supra* text accompanying notes 177-78.

183. As is in fact the case. See *supra* note 174.

184. See *U.S. Senator Introduces Bill to Grant Asylum to N.K. Refugees*, YONHAP ENGLISH NEWS, Oct. 19, 2002 (quoting statement of Senator Sam Brownback: "[T]he moral obligation that we have for refugees everywhere seeking basic human liberties should not be laid aside because of that legal technicality . . .").

185. H.R. REP. NO. 108-478(I), at 16 (2004).

186. NKHRA, *supra* note 176, § 302(a); see *supra* text accompanying notes 177-78 and 182-85.

the refugee definition to allow multiple nationals facing persecution in any one country of their nationality to qualify is consistent with Congress's purposes in enacting the 1980 Refugee Act.

C. Legislative History

The Refugee Act of 1980 was the culmination of a decade of legislative efforts to bring U.S. immigration law into compliance with the UN Protocol, which the United States had ratified in 1968, by eliminating the INA's restriction of refugee status to those fleeing Communist countries or the Middle East.¹⁸⁷ During the same period, Congressional frustration was mounting over the *ad hoc* and reactive nature of U.S. refugee policy,¹⁸⁸ which since the end of World War II had dealt with refugee crises through a mixture of periodic special legislation¹⁸⁹ and Executive branch use of its "parole" authority.¹⁹⁰ Bills introduced as early as 1969 sought to broaden the definition of a refugee and provide a regular, ongoing process for refugee admission.¹⁹¹ The House Judiciary Committee held hearings on immigration bills containing refugee reforms in the early 1970s;¹⁹² one secured House passage in 1973, but none made it into law.¹⁹³

187. INA § 203(a)(7) (codified at 8 U.S.C. § 1153(a)(7) (1976)).

188. See, e.g., *1978 House Hearings*, *supra* note 151, at 215 (Rep. Joshua Eilberg stating that the goal of his Refugee Act was to eliminate "[t]he present system of ad hoc piece-meal measures" and "haphazard, stop-gap parole programs and replace them with an orderly and workable refugee policy").

189. See H.R. REP. NO. 96-608, at 2-4 (1979) (describing pre-1980 refugee legislation).

190. INA § 212(d)(5) (codified at 8 U.S.C. § 1182(d)(5) (1976)). The INA gave the Attorney General discretionary authority to temporarily parole otherwise inadmissible aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *Id.* Parole was used to admit large numbers of Hungarians after the 1956 Soviet invasion, Cubans in the 1960s, and Indochinese and Soviet Jews in the 1970s. It was also resorted to at various points for Chinese refugees from Hong Kong, post-World War II refugees lingering in European refugee camps, Czechs fleeing the 1968 Soviet invasion, and persons of Asian descent expelled from Uganda. See H.R. REP. NO. 96-608, at 3-4 (1979). Many in Congress viewed these group-based paroles as an abuse of the parole statute and a usurpation of Congress's responsibility to set policy on immigration and refugees. See David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. YEARBOOK INT'L LEGAL STUD. 91, 93-94 (1982) (citing statements in committee reports and hearings casting doubt on the legal foundation for large-scale refugee paroles).

191. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143-44 (1981).

192. See *Immigration: Hearings on H.R. 9112, 15092 and 17370 to Amend the Immigration and Nationality Act and for Other Purposes Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 91st Cong. (1970) [hereinafter *1970 House Hearings*]; *Western Hemisphere Immigration: Hearings on H.R. 981 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 93rd Cong. (1973) [hereinafter *1973 House Hearings*]; *Western Hemisphere Immigration: Hearings on H.R. 367, 981 and 10323 Before Subcomm. on Immigration, Citizenship and Int'l Law of the H. Comm. on the*

The Indochinese refugee crisis triggered by the fall of Saigon in 1975, which coincided with a rapid surge in Soviet Jewish emigration, gave reform efforts renewed urgency.¹⁹⁴ In 1976, Joshua Eilberg, who chaired the House Judiciary Committee's immigration subcommittee, introduced a stand-alone Refugee Act.¹⁹⁵ In 1977-78, that committee devoted seven days of hearings to the refugee crisis and Eilberg's bill.¹⁹⁶ Senator Edward Kennedy, a longstanding proponent of refugee reform, introduced his own version in 1978, when he was about to become chair of the Senate Judiciary Committee.¹⁹⁷ Early in 1979, the key Congressional players and the Carter Administration worked out a compromise bill,¹⁹⁸ which was introduced in the Senate by Kennedy and in the House by Peter Rodino (chair of the House Judiciary Committee) and Elizabeth Holtzman (who became chair of the immigration subcommittee when Eilberg, enmeshed in a corruption scandal, failed to win reelection in 1978).¹⁹⁹ The Senate and House Judiciary Committees held hearings²⁰⁰ and made

Judiciary, 94th Cong. (1975-76) [hereinafter *1975-6 House Hearings*]; see also Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 20-30 (1981) (describing the history of early refugee reform proposals).

193. A 1973 Western Hemisphere immigration bill that included a revised refugee definition and new parole procedures was passed by the House but died in the Senate. H.R. 981, §§ 5-6, 93rd Cong. (1973); see H.R. 93-461, at 2-3, 9-12, 17-19 (1973) (reprinting bill and discussing refugee provisions); 119 CONG. REC. 31477-78 (1973) (House passage); Anker & Posner, *supra* note 192, at 28 (discussing Senate Judiciary Committee's failure to act on the bill).

194. From 1975 to 1979, the Ford and Carter Administrations repeatedly invoked the parole power to admit over 300,000 Indochinese refugees. During the same period, Jewish emigration from the Soviet Union outstripped the available refugee visas and led to further group-based paroles. See Martin, *supra* note 190, at 92-93; David W. Haines, *Refugees and the Refugee Program*, in REFUGEES IN THE UNITED STATES: A REFERENCE HANDBOOK 3, 5-6 (David W. Haines ed., 1985).

195. H.R. 14386, 94th Cong. (1976); see also H.R. 3056, 95th Cong. (1977); H.R. 7175, 95th Cong. (1977) (subsequent versions of Eilberg's bill).

196. *Admission of Refugees Into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 95th Cong. (1977) [hereinafter *1977 House Hearings*]; *1978 House Hearings*, *supra* note 151.

197. See S. 2751, 95th Cong. (1978); see also Kennedy, *supra* note 191, at 144.

198. See Kennedy, *supra* note 191, at 144. The bill was the result of intensive consultations between Executive Branch officials and House and Senate Judiciary Committee staffers between November 1978 and February 1979. *Id.*

199. See S. 643, 96th Cong. (1979), 125 CONG. REC. 4881-86 (1979); H.R. 2816, 96th Cong. (1979), 125 CONG. REC. 4798-4802 (1979); see also Eilberg *Pleads Guilty; Bargain Sets Penalty at Probation and Fine*, N.Y. TIMES, Feb. 25, 1979, at 1, 16 (discussing Eilberg's indictment two weeks before the election).

200. See *The Refugee Act of 1979, S. 643: Hearing Before the S. Comm. on Judiciary*, 96th Cong. (1979) [hereinafter *1979 Senate Hearing*]; *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on Judiciary*, 96th Cong. (1979) [hereinafter *1979 House Judiciary Hearings*]. Hearings were also held before the House Foreign Affairs Committee. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of*

amendments.²⁰¹ By year's end, the Refugee Act was debated on the House and Senate floors and approved, in different versions, by both bodies.²⁰² A conference committee worked out the differences, and the Act won final passage and was signed into law in March 1980.²⁰³ Its main provisions included the new refugee definition, an increase in annual refugee admissions to 50,000 per year (up from 17,400 in the prior law), a procedure for the President, in consultation with Congress, to set a higher level or go beyond the cap in situations of unanticipated emergency, the creation of an ongoing structure and funding mechanism for resettlement assistance, and the establishment of a statutory procedure for persons in the United States or arriving at its borders to apply for asylum.²⁰⁴

The Refugee Act emerged against a backdrop of not only widespread sympathy for the plight of Indochinese "boat people" and Soviet Jews, but also great concern about the sheer number of refugee arrivals and the costs of resettlement. Its legislative history features extensive debate about how many refugees the United States could absorb and whether other countries were doing their "fair share."²⁰⁵ Given these Congressional concerns, it may seem odd to attribute to Congress the intent to accord refugee status to multiple nationals excluded under the UN definition. These are, after all, people who could go to another country that would be obliged to take them. Statements in the Refugee Act's legislative history emphasizing that the U.S. refugee definition is based on the Convention's and designed to bring the United States into compliance with its treaty obligations²⁰⁶ might also be taken as reason to disregard wording differences and assume that Congress intended to incorporate the Convention's approach to multiple nationality.

But there are countervailing themes in the legislative history that provide strong reason to believe that Congress meant to provide a broader scope of coverage when it departed from the Convention's

the H. Comm. on Foreign Affairs, 96th Cong. (1979) [hereinafter 1979 House Foreign Affairs Hearings].

201. *See generally* S. REP. NO. 96-256 (1979); H.R. REP. NO. 96-608 (1979); *see also* Anker & Posner, *supra* note 192, at 50–56 (discussing amendments incorporated into the House and Senate reports).

202. 125 CONG. REC. 23224-54 (1979) (Senate); 125 CONG. REC. 35812-27, 37198-247 (House); *see* Kennedy, *supra* note 191, at 148 (noting that "the House bill differed on a number of substantive points from the Senate bill").

203. S. REP. NO. 96-590 (1980) (Conf. Rep.); H.R. REP. NO. 96-781 (1980) (Conf. Rep.); *see* Kennedy, *supra* note 191, at 141, 148–52 (describing the Conference Committee's actions, final passage, and signing).

204. *See generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The 50,000 limit was put in place only for fiscal years 1980-1982; after that, the Act provided that the number would be set annually by the President in consultation with Congress. *Id.* § 201(b).

205. Kennedy, *supra* note 191, at 145–48; *see infra* Part IV.C.2.

206. *See infra* notes 210, 224–25.

wording.²⁰⁷ The bill's main sponsors repeatedly acknowledged that the new U.S. definition was not identical to the Convention's and signaled that they viewed the differences as meaningful. Objections to the definition's broad scope were overcome with the argument that refugee admission remained discretionary and an expansive definition would provide maximum flexibility to select refugees of concern. Most importantly, the legislative history contains strong indications that the new refugee definition was meant to build on and broaden the definition of refugee in prior U.S. law in a way that would ensure compliance with the Convention but also preserve eligibility for those who had been welcomed as refugees in the past. Under the conception of a refugee that had become well-established during the three decades leading up to the Refugee Act's adoption, the fact that an individual could have sought refuge in another country, even a second country of nationality, was not seen as a bar. The legislative history includes significant evidence that Joshua Eilberg, who drafted the relevant language in the Act's refugee definition, wanted this to continue to be the case. Congress's strong support for maintaining the U.S. policy of admitting as refugees all Soviet Jews who wanted to come, despite the fact that they left the USSR with Israeli immigrant visas which entitled them to citizenship,²⁰⁸ provides additional grounds for concluding that Congress did not want the possession of a second nationality to stand as an obstacle to refugee status.

1. Congressional Awareness of Differences from the Convention

As the Supreme Court noted in its first decision construing the Refugee Act's refugee definition, *INS v. Cardoza-Fonseca*,²⁰⁹ it is "clear from the legislative history . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the . . . United Nations [Convention and] Protocol . . ." ²¹⁰ But the key proponents of the legislation, when describing the new refugee definition, were careful to acknowledge that although the Convention definition was a model and the source of much of the language, the U.S. definition was not identical. They understood that the differences had implications for who would qualify as a refugee.

207. Each of the themes summarized in this paragraph are discussed below in Parts IV.C.1 to 4.

208. This policy even extended to Soviet Jews who entered Israel as citizens, spent some time living there, and then changed their minds and decided they preferred to go to the United States. See *infra* text accompanying notes 313-17 and 344-51.

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

210. *Id.* at 436-37; see S. REP. NO. 96-256, at 4 (1979) (stating that "the new definition will bring United States law into conformity with our international treaty obligations" under the Convention and Protocol).

When Joshua Eilberg opened the 1977 House hearings, he described his bill's refugee definition (which stayed in the Refugee Act virtually unchanged thereafter)²¹¹ as being "[w]ith slight modifications . . . almost identical" to the Convention definition.²¹² Later, Eilberg elaborated on one of these wording changes—the requirement that a person be unable or unwilling *both* to "return to" and "to avail himself of the protection" of a country²¹³—explaining that it was deliberate and intended to signify a difference from the Convention's approach.²¹⁴ This attentiveness to slight differences in the drafting makes it reasonable to assume that other modifications—including the change to "any country" of nationality—were meant to signify something.²¹⁵

The Act's proponents were also conscious of the implications of omitting language contained in the Convention. Elizabeth Holtzman, presiding over the House Judiciary Committee's 1979 hearings, expressed concern that the absence from the U.S. refugee definition of a Convention clause that excludes persons who committed crimes against humanity²¹⁶ could result in persecutors qualifying as refugees.²¹⁷ The committee responded by adding language stating that the term "refugee" did not include persons who participated in

211. The refugee definition in Eilberg's 1977 bill was essentially identical to subsection A of the definition as enacted in the 1980 Refugee Act. Compare H.R. 3056, 95th Cong. § 2(a) (1977), reprinted in *1977 House Hearings*, *supra* note 196, at 2–3 (containing the phrase "outside any country of his nationality" and omitting the Convention's multiple nationality provision), with 8 U.S.C. § 1101(a)(42)(A) (1982) (using identical wording except language made gender-neutral). Eilberg's first version of the Refugee Act, filed in 1976, and Kennedy's initial Senate version omitted the Convention's multiple nationals provision but used the Convention's phrase "outside the country of his nationality." H.R. 14386, § 2(a), 94th Cong. (1976); S. 2751, § 2(a), 95th Cong. (1978). Kennedy adopted Eilberg's revised wording of 1977 in the bill he brought before the Senate Judiciary Committee in 1979. S. 643, § 201(a) (1979), reprinted in *1979 Senate Hearing*, *supra* note 200, at 73–74.

212. See *1977 House Hearings*, *supra* note 196, at 14; see also *1973 House Hearings*, *supra* note 192, at 327 (describing the bill's refugee definition as a "broadened definition of refugee, close to but not identical with the U.N. protocol").

213. The Convention, in contrast, uses "return to" only in connection with a stateless person's country of former residence. Convention, *supra* note 3, art. 1A(2). As discussed previously, this wording change has implications for persons with multiple nationalities: the use of "return to" suggests that "any country" of nationality does not mean *all* countries of nationality, which would include countries where the individual never lived and thus could not "return to." See *supra* text accompanying notes 104–05.

214. *1977 House Hearings*, *supra* note 196, at 64 (noting, in a colloquy with a State Department witness, that his bill's definition "requires that both conditions be met . . . whereas the U.N. Protocol . . . indicat[es] that only one of the conditions is required to be met").

215. In the hearings he presided over, Eilberg stressed that the refugee definition in his bill was one that "we have struggled long and hard in coming up with." *1978 House Hearings*, *supra* note 151, at 235.

216. Convention, *supra* note 3, art. 1F(a).

217. *1979 House Judiciary Hearings*, *supra* note 200, at 71.

persecution.²¹⁸ Neither she nor anyone else raised concerns about the omission of the Convention's multiple nationality clause, which could support a similar inference that those not excluded are covered.

In March 1979, when introducing the Refugee Act on the floor of Congress, Kennedy, Holtzman, and Rodino were careful to describe its refugee definition not as identical to, but rather as "essentially," "basically," or "substantially" conforming to the Convention.²¹⁹ Similar qualifying language can be found in the Committee reports and subsequent floor debates²²⁰ and in numerous statements made by Administration officials.²²¹

Congress's goal of bringing U.S. law into compliance with treaty requirements was not seen as precluding more generous protections; the Convention definition was regarded as a floor but not a ceiling. The Refugee Act's definition added a second subsection that has no counterpart in the Convention, authorizing the President to designate persons still within their country of nationality as refugees.²²² The

218. H.R. REP. NO. 96-608, at 10, 38 (1979).

219. 125 CONG. REC. 4798 (1979) (statement of Rep. Rodino describing the new refugee definition as "bringing us closer to conforming to the definition we subscribed to in the U.N. Protocol"); *id.* at 4800 (quoting Rep. Holtzman saying "[t]he new definition essentially conforms"); *id.* at 4883-84 (State Department memo and section-by-section analysis entered into record by Sen. Kennedy using the phrases "in substantial conformity" and "basically conforms"). These qualifications could not have been referring to the subsection of the U.S. refugee definition that went beyond the Convention by covering persons still within their own countries, which was not yet in the bill.

220. *See* H.R. REP. NO. 96-608, at 9 (1979) (stating that "[t]he first part of the new definition essentially conforms to that used under the [Convention and Protocol]"); 125 CONG. REC. 35814 (1979) (quoting Rep. Holtzman describing the definition similarly in summarizing the bill at the outset of House debate); *id.* at 23232 (quoting Sen. Kennedy, at the start of Senate debate, describing the new refugee definition as one that "basically conforms" to the Convention definition). *But see* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.) (stating that the House and Senate bills "incorporated" the Convention definition as well as additional coverage for internally displaced persons).

221. *See 1979 House Judiciary Hearings, supra* note 200, at 40 (quoting Dick Clark, U.S. Coordinator for Refugee Affairs, stating that the bill "essentially adopts" the Protocol's refugee definition); *1979 Senate Hearing, supra* note 193, at 11 (same); *1979 House Foreign Affairs Hearings, supra* note 200, at 69 (quoting Clark stating that the new definition "comes much closer" to the UN definition); *1978 House Hearings, supra* note 151, at 217-18 (quoting INS Commissioner Leonel Castillo stating that the expanded refugee definition in Eilberg's H.R. 7175 "will conform substantially" to the Convention). *But see 1979 House Foreign Affairs Hearings, supra* note 193, at 71-72 (quoting Justice Department official Doris Meissner saying that the bill "simply incorporated" the UN definition and the State Department's David Martin stating that the United States will continue to use the UN standard in asylum cases).

222. 8 U.S.C. § 1101(a)(42)(B) (2014). The bill passed by the Senate also extended refugee status to another group not covered by the Convention, those displaced by military or civil disturbance. S. REP. NO. 96-256, at 4, 20 (1979); 125 CONG. REC. 23252 (1979). That provision was dropped in Conference. H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.).

legislative history expressly acknowledges that such persons would not be covered under the UN definition.²²³

The House-Senate Conference Report does contain a statement expressing Congress's intent that provisions "based directly on the language of the Protocol" be "construed consistent with the Protocol."²²⁴ However, this was said not in reference to the refugee definition, but to provisions barring eligibility for withholding of deportation that are modeled on the Convention's exceptions to the obligation of *non-refoulement*.²²⁵ To interpret those statutory bars in a way that would allow the deportation of an individual to a country where he or she would face persecution would be a clear violation of U.S. treaty obligations under the Protocol. There is no inconsistency with the Protocol's requirements in interpreting language in the U.S. refugee definition that differs from the treaty's wording to confer broader coverage.²²⁶ This is clear from the Convention's drafting

223. See H.R. REP. NO. 96-608, at 9 (1979); S. REP. NO. 96-256, at 4 (1979).

224. H.R. REP. NO. 96-781, at 20 (1980) (Conf. Rep.).

225. See *id.* (explaining that while the Senate bill made withholding unavailable if deportation would be allowed under the UN Convention and Protocol, the Conference adopted the House version listing four specific bars to withholding, with the understanding that those four bars are "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol"). The Supreme Court's statement in *INS v. Cardoza-Fonseca*, 480 U.S. at 437, that the Conference Report called for the *refugee definition* to be construed consistently with the Protocol, was incorrect. It makes sense, of course, to read the U.S. refugee definition consistently with the UN definition when the wording is the same (as was the case with the phrase "well-founded fear" at issue in *Cardoza-Fonseca*), but it does not follow that Congress meant to incorporate the Convention's meaning when it chose different language.

The Senate report includes one statement which, if read out of context, could be misinterpreted to mean that the U.S. definition was meant to be coextensive with the Convention's. In discussing the Senate bill's asylum provisions, the report states, "[A]sylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol . . ." S. REP. NO. 96-256, at 9 (1979). The Senate bill, however, made asylum available only if the individual's deportation would be barred under the bill's section on withholding of deportation, which required a showing that the person's life or freedom would be threatened in the country of proposed removal—the standard of Article 33 of the Convention. See *id.* at 16, 26, 29. What the Senate Report was saying was that only those refugees who qualified for *non-refoulement* under Article 33 would be eligible for asylum. Elsewhere, the report expressly acknowledged that the bill's definition of "refugee" was broader than the Convention's. See *id.* at 4 ("The new definition has been amended . . . to include 'displaced persons' who are not technically covered by the United Nations Convention."). The Senate's limitation of asylum to those who could meet the withholding of deportation standard did not remain in the final bill, which made anyone satisfying the refugee definition eligible for a discretionary grant of asylum. 8 U.S.C. § 1158(a) (1982); see *Cardoza-Fonseca*, 480 U.S. at 435 n.17 (noting that this provision of the Senate bill was rejected by Congress).

226. See 1979 *House Judiciary Hearings*, *supra* note 200, at 180 (quoting witness Hurst Hannum of Amnesty International, responding to a question about whether it is "contradictory" for U.S. law to define "refugee" differently than the Convention: "[T]he international obligation sets a minimum level for our concerns. . . . [Broader coverage] should not cause any problem.").

history; the 1951 UN Conference of Plenipotentiaries accompanied the Convention with a unanimously-adopted Final Act urging nations to treat it as “an example exceeding its contractual scope” and to as far as possible grant those “who would not be covered by the terms of the Convention, the treatment for which it provides.”²²⁷

2. “Floodgate” and Fair Share Concerns

Congress’s concern with controlling a refugee flow that had come to seem overwhelming²²⁸ might seem to cut against the idea that it would have been willing to go beyond its treaty obligations by conferring eligibility on multiple nationals. However, the Refugee Act’s Congressional supporters emphatically and consistently made the case that a broad refugee definition would not open the floodgates, since eligibility conferred no right to admission, but rather would serve U.S. interests by providing maximum flexibility in

227. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2–25, 1951, *Final Act*, § IV.E, July 28, 1951, U.N. Doc. A/Conf.2/108/Rev.1 (Nov. 26, 1952); see Plender, *supra* note 55, at 59 (noting that the Convention’s drafters assumed that states were free to grant refugee status to those not qualifying under the Convention). There is, however, some indication in the Convention’s drafting history that delegates believed that granting refugee status to internally-displaced persons still inside their country of nationality would be an impermissible infringement of state sovereignty under international law. See ECOSOC Social Comm., Summary Record of Meeting, U.N. Doc. E/AC.7/SR.172, at 4 (Aug. 12, 1950) (remarks of Mr. Rochefort of France); see also Matthew T. Clyde Pace, *What You Are Depends on Where You’re Standing: How Expanding Refugee Protections to the Internally Displaced Through the Refugee Act of 1980 Violates International Law*, 74 U. PITT. L. REV. 107 (2012) (arguing that the Refugee Act violates international law by expanding the definition of “refugee” to include internally displaced groups). Whether this conclusion remains valid in light of the post-1951 evolution of international law, which increasingly recognizes the legitimacy of states acting to protect against violations of fundamental human rights in other countries, is open to doubt. See HATHAWAY, *supra* note 43, at 32 (suggesting that the legitimate reach of refugee law to deal with the problems of internally displaced persons has expanded over time because of increasing recognition of the international community’s authority over human rights). In any event, non-intervention principles clearly pose no barrier to granting refugee status to a person with more than one nationality who is not inside any of those countries.

228. In 1979, the crucial year in Congressional deliberations, over 200,000 refugees arrived in the United States, exceeding by more than a factor of ten the 17,400 refugee visas then authorized by law. See Kennedy, *supra* note 191, at 145–46 (noting that the large influx created political pressures both for and against the Refugee Act). The influx strained resettlement resources and sparked community tensions. In September 1979, Congressional supporters stressed “[w]e have to get this bill through while we can” because “a great negative wave will get there at any moment [T]he backlash on this problem is unbelievable.” 1979 House Foreign Affairs Hearings, *supra* note 200, at 56, 58 (remarks of Subcomm. Chair Dante Fascell and Rep. Joel Pritchard).

deciding whom to let in.²²⁹ Viewed through this lens, it is not implausible that Congress would want to provide for discretionary authority to grant admission or asylum, in appropriate circumstances, to people fleeing persecution who could go elsewhere but have good reasons for seeking refuge in the United States.

The fact that 13 or 14 million people around the world could meet the criteria of the expanded refugee definition was brought up repeatedly during Congressional deliberations.²³⁰ The carefully-scripted response of the bill's proponents was that satisfying the refugee definition resulted in no automatic right to admission.²³¹ The entrance of refugees would be subject to numerical limits and the requirement that those admitted "be of special humanitarian concern to the United States"²³² based on factors such as "the extent of persecution [suffered], . . . family ties, historical, cultural or religious ties, the likelihood of finding sanctuary elsewhere, and previous contact with the United States government."²³³ Asylum was also made discretionary, so that meeting the refugee definition would be no guarantee of a right to remain permanently.²³⁴

229. See, e.g., 125 CONG. REC. 35814 (1979) (remarks of Rep. Holtzman: "[T]his expanded definition will in no way open the floodgates to hordes of refugees. . . . This expanded definition will simply give our Government the flexibility to admit refugees of special humanitarian concern . . .").

230. See, e.g., H.R. REP. 96-608, at 61 (1979) (minority views of Reps. Hyde and Sawyer); 125 CONG. REC. 35814, 37225-26 (1979) (remarks of Reps. Holtzman, Fish, and Collins).

231. See 1979 House Foreign Affairs Hearings, *supra* note 200, at 69-70 (exchange between Rep. Fascell and U.S. Refugee Coordinator Clark agreeing that meeting the criteria of the definition does not entitle a person to entry); 1979 Senate Hearing, *supra* note 200, at 22 (Kennedy-Clark exchange); H.R. REP. 96-608, at 10 (1979); 125 CONG. REC. 35814 (1979) (Rep. Holtzman stating that "[m]erely . . . com[ing] within the new definition does not guarantee resettlement in the United States"); *id.* 23232 (similar statement by Sen. Kennedy).

232. 8 U.S.C. § 1157(c)(1) (2014).

233. H.R. REP. NO. 96-608, at 13 (1979). The Senate Report acknowledged that U.S. "foreign policy interests" would also play a role in deciding whom to admit. S. REP. NO. 96-256, at 6 (1979).

234. See 8 U.S.C. § 1158(a) (1982) (providing that an alien meeting the refugee definition "may be granted asylum in the discretion of the Attorney General"). Congress gave asylum much less attention than refugee admissions from abroad. No one anticipated the mass arrivals that would begin with the Mariel boatlift from Cuba just a few weeks after the Refugee Act was signed into law, soon to be followed by a surge in asylum-seekers from Central America. The Refugee Act set a cap of 5,000 on the number of asylees to be granted permanent resident status each year, which seemed ample in comparison with the annual flow of asylum cases during the late 1970s. 8 U.S.C. § 1159(b) (1982); see Doris Meissner, *Reflections on the Refugee Act of 1980*, in *THE NEW ASYLUM SEEKERS* 57, 60 (David A. Martin ed., 1988) ("Providing for political asylum in the Refugee Act was almost an afterthought . . . an annual number of 5,000 was authorized . . . [t]he number was arbitrary but was seen as most generous and highly unlikely to be needed . . ."); NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, *THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY* 141-42

In discussing the Act's extension of the refugee definition beyond the Convention's to cover individuals still within their own countries, the committee reports reframe the large potential pool as a policy advantage rather than a risk. The change was viewed as "essential . . . to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world,"²³⁵ thus "insur[ing] maximum flexibility in responding to the needs of the homeless who are of concern to the United States."²³⁶ When the refugee definition is viewed as menu from which the United States can pick and choose, there is no intrinsic reason why Congress would not have wanted multiple nationals to be eligible for consideration. Their ability to find refuge elsewhere might be one factor to weigh against them, but other factors such as family ties or cultural/political affinities with the United States could militate in favor of admission.²³⁷

Many in Congress were also concerned that the United States should not take in large numbers of refugees unless other countries were prepared to do the same.²³⁸ From a pure burden-sharing perspective, accepting someone if they have another country of nationality to go to might not make much sense. But the debates in Congress also reflected strongly-expressed views that humanitarian considerations and the United States' historical role as a nation of refugees require a generous response regardless of what other countries are willing to do.²³⁹ Objections to the Refugee Act premised

(1987) ("Five thousand was a very generous number, since fewer than one thousand refugees received asylum each year.").

235. H.R. REP. NO. 96-608, at 9 (1979).

236. S. REP. NO. 96-256, at 4 (1979); *see also* 125 CONG. REC. 35814 (1979) (remarks of Rep. Holtzman describing the broadened refugee definition as providing "flexibility to admit refugees of special humanitarian concern").

237. Regulations issued shortly after the Refugee Act's passage authorized consideration of an applicant's ability to go elsewhere as part of the discretionary balance: "Among other grounds, the district director may deny a request for asylum . . . in the exercise of discretion if . . . there is an outstanding offer of resettlement by a third nation where the applicant will not be subject to persecution and the applicant's resettlement in a third nation is in the public interest." Dep't of Justice, INS, Refugee and Asylum Procedures, 45 Fed. Reg. 37,392, 37,395 (June 2, 1980) (codified at 8 C.F.R. § 208.8(f)(2) (1981)). The "public interest" proviso provided ample room to consider countervailing factors that might make it unreasonable to expect the person to go to another country, or ways in which granting asylum might serve the interests and values of the United States. In 1990, the regulations were amended to eliminate any reference to the factors to be considered in exercising discretion. *See* 8 C.F.R. § 208.14(a) (1991) (giving adjudicators discretion to grant or deny asylum but containing no reference to standards for exercising it).

238. *See, e.g.*, 125 CONG. REC. 23235, 35813, 35818, 37201, 37224, 37226 (1979) (remarks of Sen. Kennedy and Reps. Lott, Sensenbrenner, Butler, Sawyer, and Collins).

239. *See, e.g.*, 125 CONG. REC. 37226-27 (1979) (quoting Rep. Buchanan, who responded to "fair share" arguments by "remind[ing] my colleagues this day that this is a Nation of immigrants"); *see also infra* text accompanying notes 299-304. Moreover, as will be discussed in Part IV.C.4, there was strong support in Congress for the U.S.

on the idea that other countries weren't doing their "fair share" were in any event largely assuaged in July 1979 when a UN Conference in Geneva led to a vast increase in other countries' commitments to accept Indochinese refugees and contribute money to the resettlement effort.²⁴⁰ As long as a person's ability to resettle elsewhere may be considered as one factor in the exercise of discretion, there is no reason to think that this strand in Congressional sentiment would rule out Congress's willingness to confer eligibility on multiple nationals.

3. Continuity with the Approach of Prior U.S. Law to Refugees of Multiple Nationality

The Refugee Act's legislative history emphasizes that the new refugee definition was meant to build on the conception of a refugee already established in U.S. law, eliminating Cold War-era restrictions while maintaining eligibility for all who had been previously considered refugees. The Supreme Court in *Cardoza-Fonseca*, reviewing the Act's history, concluded that "Congress in no way wished to modify the standard that had been used under § 203(a)(7)," but sought only to eliminate the old definition's "unacceptable geographic and political distinctions" while otherwise leaving the standard as broad as it had been before.²⁴¹

Congress viewed the new refugee definition as an amendment and expansion of the old one. The House Judiciary Committee's report begins with a statement that the Act "amends the definition of refugee to eliminate current discrimination on the basis of outmoded geographical and ideological considerations."²⁴² Similar characterizations can be found throughout the legislative history.²⁴³

policy of accepting all Soviet Jewish refugees who wanted to come to the United States even though Israel was eager to have them as citizens.

240. Strom Thurmond, the ranking Republican on the Senate Judiciary Committee, who had previously taken steps to block the Refugee Act in the Senate, changed his position and endorsed it as a direct result of the Geneva Conference. See 125 CONG. REC. 23237-38 (remarks of Sen Thurmond referencing the encouraging international response to the world refugee problem in connection with his decision not to oppose the bill); Kennedy, *supra* note 191, at 147 (describing the Geneva Conference's impact in securing Congressional support).

241. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 434-36 (1987) (concluding that Congress intended no change in pre-Refugee Act U.S. jurisprudence requiring less than a probability of persecution to establish refugee status).

242. H.R. REP. NO. 96-608, at 1 (1979); see also *id.* at 9 (stating the new definition "eliminates the . . . restrictions now applicable . . . under section 203(a)(7) . . . which is limited to those fleeing communist countries or the Middle East").

243. The Senate Report states that the bill "repeals the current immigration law's discriminatory treatment of refugees," "eliminat[ing] the geographical and ideological restrictions now applicable . . . under section 203(a)(7)." S. REP. NO. 96-256, at 1, 4 (1979). During the hearings and floor debates, the refugee definition was repeatedly described as an expansion of § 203(a)(7)'s definition that would eliminate its

At the same time, Congress wanted to ensure that refugees who had been eligible under the old definition and past parole practices would remain so. The House report stressed that the new definition merely "regularizes and formalizes the policies and practices that have been followed in recent years,"²⁴⁴ and the Senate report declared that the bill "places into law what we do for refugees now by custom."²⁴⁵ Amendments added in committee to extend coverage to persons still inside their own countries were explained as being needed to maintain the U.S.'s ability to respond as it had done in the past when Cuban dissidents and evacuees from the fall of Saigon were brought directly from their home countries to the United States.²⁴⁶

Section 203(a)(7), which governed refugee admissions from 1965 to 1980, authorized an annual quota of "conditional entrant" visas for applicants who could show that,

because of persecution or fear of persecution on account of race, religion, or political opinion they have fled from any Communist or Communist-dominated country or area, or from any country within the general area of the Middle East, and are unable or unwilling to return to such country or area on account of race, religion, or political opinion²⁴⁷

This standard was carried forward essentially unchanged from a definition of "refugee-escapee" that had appeared in a 1957 amendment to the Refugee Relief Act of 1953,²⁴⁸ and was similar to the 1953 Act's "refugee" and "escapee" definitions.²⁴⁹

limitation to those fleeing Communist and Middle Eastern countries. *See, e.g., 1979 Senate Hearing, supra* note 200, at 9 (statement of U.S. Refugee Coordinator Dick Clark); *id.* at 19 (statement of Associate Attorney General Michael Egan); *1978 House Hearings, supra* note 151, at 235 (Rep. Eilberg describing purpose of his bill's refugee definition); 125 CONG. REC. 4798, 4800, 23232 (1979) (remarks of Reps. Rodino and Holtzman and Sen. Kennedy).

244. H.R. REP. NO. 96-608, at 10 (1979).

245. S. REP. NO. 96-256, at 1 (1979).

246. *See 1979 House Judiciary Hearings, supra* note 200, at 24, 66-67 (Rep. Holtzman expressing concern that without such amendment the refugee definition would not "include persons who are in the country of their origin, such as Cuba or Vietnam"); H.R. REP. NO. 96-608, at 9-10 (1979); S. REP. NO. 96-256, at 4 (1979) (explaining purpose of the committee amendments); *see also* Martin, *supra* note 190, at 101-02 (describing the addition of the in-country provision as an effort to deal with the fact that "[h]istorically, some of the largest groups resettled as refugees by the United States had moved directly from their home countries" and would not have qualified as refugees under the UN definition).

247. INA § 203(a)(7) (codified at 8 U.S.C. § 1153(a)(7) (1976)) (internal section designations omitted).

248. *See* Act of Sept. 11, 1957, § 15(c)(1), Pub. L. 85-316, 71 Stat. 639, 643 (defining "refugee-escapee" as "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion."). The Fair Share Law of 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504, incorporated the 1957 Act's definition of "refugee-escapee," but added an additional requirement that the person

The pre-1980 U.S. refugee definition was broader than the Convention definition in two significant ways. First, it applied to persons who fled their countries and were unwilling or unable to return "because of persecution or fear of persecution," as compared with the Convention's "owing to a well-founded fear of being persecuted."²⁵⁰ Thus, people who had been subjected to past persecution could be granted refugee status in the United States even if they no longer had reason to fear further persecution if they returned home, and therefore would not have qualified as Convention refugees.²⁵¹ The language of the 1980 Refugee Act evinces a clear Congressional intent to carry this approach forward, by using the phrase "because of persecution or a well-founded fear of persecution" in place of the Convention's sole focus on the latter.

The second difference is somewhat more subtle, but significant in its implications for individuals with multiple nationality. Under the pre-1980 U.S. definition, the defining feature of refugee status was flight from persecution in a former home country. As the Senate Judiciary Committee explained in 1957, the term refugee was "carefully defined . . . so as to include any alien who was forced to flee

fall within the UNHCR's mandate. The Fair Share Law was enacted for the specific purpose of helping UNHCR close out the remaining refugee camps in Europe, and its restriction to those within UNHCR's mandate was congruent with that goal. It was not intended to change the underlying definition of a "refugee" for purposes of U.S. law. See *Shen v. Esperdy*, 428 F.2d 293, 300 (2d Cir. 1970) ("[T]he specialized purpose of the Fair Share Law—participation in the World Refugee Year in order to close out the D.P. camps of Europe—cuts against any interpretation of this enactment as a pervasive declaration of immigration policy."). The legislative history of the 1965 Act, which repealed the Fair Share Law and replaced it with § 203(a)(7), shows that Congress viewed the elimination of the restriction to those within UNHCR's mandate as a restoration of underlying U.S. definition that would "again permit the United States to determine who is or who is not a refugee." H.R. REP. NO. 89-745, at 15 (1965); see *Shen*, 428 F.2d at 300-01 (citing further legislative history indicating that this was Congress's goal).

249. The Refugee Relief Act of 1953, § 2(b), 67 Stat. 400 [hereinafter RRA], defined "escapee" as "any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the [Soviet Union] or other Communist, Communist-dominated or Communist-occupied area of Europe . . . and who cannot return thereto because of fear of persecution on account of race, religion, or political opinion." It defined "refugee" as a person "who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance . . ." *Id.* § 2(a). The first major U.S. refugee statute, the Displaced Persons Act of 1948, had defined its operative term, "displaced person," by incorporating by reference those identified in the Constitution of the International Refugee Organization as refugees or displaced persons of concern to the IRO. § 2(b), 62 Stat. 1009.

250. Compare 8 U.S.C. § 1153(a)(7) (1976) ("because of persecution or fear of persecution"), with Convention, *supra* note 3, art. 1A(2) ("owing to well-founded fear of being persecuted").

251. The Convention allowed only certain "statutory refugees" (those recognized pre-1951) to maintain refugee status based on past persecution alone. See *supra* notes 51 and 58.

from [covered areas] . . . and who is unable to return to the place from which he fled because of persecution or fear of persecution" ²⁵² Under the Convention, the issue is not flight and an inability to return home; instead, the focus is on whether a country of nationality can provide protection. The implications of this state protection approach are drawn out in the Convention definition's paragraph excluding multiple nationals from refugee status unless they have reason to fear persecution in every country of which they are nationals.²⁵³ In contrast, the flight-from-home focus of the U.S. definition gave rise to a "firm resettlement" jurisprudence which did not preclude granting refugee status merely because an individual could have safely relocated to a second country of nationality, but did not actually do so.²⁵⁴

The U.S. Supreme Court, in its most significant pre-1980 refugee decision, *Rosenberg v. Yee Chien Woo*,²⁵⁵ characterized the "central theme" of refugee legislation from 1948 forward as "the creation of a haven for the world's homeless people," as reflected in the statutory focus on flight from home, and the concomitant notion of "firm resettlement" as a factor that "must [be] take[n] into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution."²⁵⁶ The first fully-articulated refugee definition in U.S. law, in the Refugee Relief Act of 1953, had expressly included a requirement that the person "has not been firmly resettled."²⁵⁷ Although the "firmly resettled" language did

252. S. REP. NO. 85-1057, at 6 (1957).

253. See Convention, *supra* note 3, art. 1A(2) (excluding those who could avail themselves of the protection of one of their countries of nationality without a well-founded fear of being persecuted); *supra* Part III.

254. Section 203(a)(7) of the 1965 Act did include one nationality-focused provision: a requirement that a person seeking refugee admission from abroad not be a national of the country in which the application was made. 8 U.S.C. § 1153(a)(7)(A)(iii) (1976). That limitation must be understood in the context of the regulations in effect at the time, which allowed applications for refugee visas to be submitted only at INS offices in seven countries: Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. 8 C.F.R. § 235.9 (1970). It did not foreclose refugee applications from persons who held or acquired the nationality of any other country, nor did it apply to persons who sought refugee status after arriving in the United States. See *Shen v. Esperdy*, 428 F.2d 293, 298 (2d Cir. 1970) (concluding that the provision was relevant only to aliens who were nationals of one of the seven listed countries and submitted a refugee application in that country). The Supreme Court, in *Rosenberg v. Yee Chien Woo*, endorsed *Shen's* analysis and found that the "not a national" provision did not displace flight from home and the absence of firm resettlement as the central considerations in determining refugee status. 402 U.S. 49, 54, 57 (1971).

255. 402 U.S. 49 (1971).

256. *Id.* at 55-56. For discussion of the firm resettlement doctrine's development, see Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT'L L. REV. 47 (2004).

257. RRA, *supra* note 249, § 2(a), 67 Stat. 400. The Displaced Persons Act of 1948 had similarly limited those eligible for certain displaced persons visas to those

not appear in the 1957, 1960 and 1965 statutes, the Supreme Court endorsed INS interpretations that kept the doctrine alive, reasoning that subsequent statutes continued to reflect a policy of providing refuge to “homeless persons” who have not “found shelter in another nation and . . . begun to build new lives.”²⁵⁸ As long as a person’s “aim to reach these shores has [not] in any sense been abandoned” by putting down roots in another country after fleeing from persecution, the person would not be considered “firmly resettled” and would continue to qualify as a refugee.²⁵⁹

Under the firm resettlement framework, it was well-established that holding or acquiring citizenship in a safe country did not stand as a bar to refugee status as long the individual did not establish a protracted and stable residence in that country after fleeing from his or her homeland. The House-Senate Conference Report on the Refugee Relief Act of 1953 states that “the term ‘firm resettlement’ . . . is not designed automatically to exclude aliens from the refugee category solely on the ground that they have been collectively, by law or edict, granted full or limited citizenship rights and privileges in any area of their present residence.”²⁶⁰ In a frequently-cited 1966 precedential opinion that addressed the continued application of the firm resettlement doctrine under the 1965 Immigration Act, the INS denied refugee status an applicant who was a citizen of both Communist China and Taiwan—but only because after he fled China he had lived in Taiwan for 13 years, and therefore was found to have been firmly resettled and no longer in flight from persecution.²⁶¹ In a subsequent decision, the INS Regional

who “on January 1, 1948, had not been firmly resettled.” § 2(c)(1), 62 Stat. 1009. The 1948 Act’s general definition of the term “displaced person” also incorporated the concept of firm resettlement by referring to those deemed of concern by the International Refugee Organization. *Id.* § 2(b). Under the IRO Constitution, displaced persons ceased to be of concern when they acquired a new nationality or had otherwise “become firmly established.” IRO Constitution, *supra* note 54, annex I, pt. I, § D. *See* Matter of A-G-G-, 25 I. & N. Dec. 486, 489–90 (BIA 2011) (detailing the IRO Constitution’s treatment of displaced persons who had become “firmly established”); *Yee Chien Woo*, 402 U.S. at 54 n.3 (noting that the 1948 Act incorporated a firm resettlement test through its reference to the IRO Constitution).

258. *Yee Chien Woo*, 402 U.S. at 55–56.

259. *Id.* at 57 n.6.

260. H.R. CONF. REP. NO. 83-1069, at 10 (1953). This did not preclude considering a person’s voluntary decision to acquire citizenship in a country of residence as a factor probative of firm resettlement. Under INS guidelines issued in 1978 acceptance of a status conferring permanent residence rights could be considered in determining whether a refugee had firmly resettled, but in itself would not lead to a firm resettlement finding unless one or more of the other listed factors was also present (e.g., residence of more than a year, voluntarily serving in the military, taking employment of a permanent nature). INS, Guidelines for Firm Resettlement, *reprinted in U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong. 34–35 (1980).

261. Matter of Sun, 12 I. & N. Dec. 36, 38–39 (Reg. Comm’r BIA 1966). Several subsequent administrative decisions cited *Sun* as the leading case on firm

Commissioner found that a young woman who fled with her family from Communist China to Hong Kong had not been firmly resettled and was eligible to be classified as a refugee in the United States, despite the fact that she had acquired citizenship in Hong Kong and lived there for six or seven years before coming to the United States as a student.²⁶²

Pre-1980 practice, as reflected in Executive Branch use of parole to admit groups of refugees and Congressional allocation of visas through refugee legislation, also had frequently provided for the entry of refugees who were citizens of a country that would not persecute them. Most of the 209,000 individuals admitted to the United States as refugees during the three-year term of the Refugee Relief Act of 1953 were nationals of the non-Communist European countries in which they were living,²⁶³ including large numbers of ethnic German expellees from Eastern Europe residing in West Germany (which had granted them the rights of nationals under its Basic Law),²⁶⁴ internal refugees in Italy and Greece,²⁶⁵ and Dutch nationals expelled from Indonesia who were living in overcrowded conditions in the Netherlands.²⁶⁶ Statutes enacted in 1957 and 1958 extended refugee

resettlement. *Matter of Chai*, 12 I. & N. Dec. 81, 82 (BIA 1967); *Matter of Hung*, 12 I. & N. Dec. 178, 180 (BIA 1967); *Matter of Ng*, 12 I. & N. Dec. 411, 411-12 (BIA 1967); see also *Matter of A-G-G-*, 25 I. & N. Dec. 486, 490-91 (BIA 2011) (discussing *Sun* as exemplar of firm resettlement doctrine during the period from 1957 to 1990).

262. *Hung*, 12 I. & N. Dec. at 181 (determining that the applicant was not firmly resettled because she was a minor during her time in Hong Kong, her parents had subsequently been paroled into the United States, and she no longer had "any close family ties or equities in Hong Kong"). In the initial decision that the Regional Director overturned, an INS District Director, while denying her application for refugee status on firm resettlement grounds, had acknowledged that "[a]n applicant's nationality *per se* is not a basis for finding an applicant ineligible." *Id.* at 178.

263. See GIL LOESCHER & JOHN A. SCANLON, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR* 45-46 (1986) (discussing the numbers and origins of entrants under the 1953 Act).

264. See RRA, *supra* note 249, §§ 2(c), 4(a)(1), 67 Stat. 400 (allocating 55,000 visas to German expellees residing in West Germany, West Berlin or Austria); H.R. REP. NO. 83-974, at 11 (1953) (discussing how West Germany had taken in millions of German ethnics expelled from countries falling under Communist domination). Under section 116 of Germany's Basic Law, these expellees would have been considered German nationals as soon as they entered German territory—or at least would have been so recognized by early 1955, when clarifying legislation was enacted. See Von Mangoldt, *supra* note 32, at 33-36 (discussing automatic acquisition of nationality under the Basic Law).

265. RRA, *supra* note 249, § 4(a)(5) and (7); see H.R. REP. NO. 83-974, at 13-14 (1953) (discussing Greece's "internal refugee problem" necessitating resettlement for many of its "own citizens" and the need to relieve "surplus population" in Italy).

266. RRA, *supra* note 249, § 4(a)(9); see H.R. REP. NO. 83-974, at 15 (1953) (discussing plight of Dutch Indonesians whose families lived in Indonesia for generations "return[ing] to a country badly devastated by the war, and already seriously overcrowded"). Visa allocations for the Dutch Indonesians were extended by subsequent legislation, and by 1962 the United States had taken in over 30,000 of the 300,000 who had left Indonesia for the Netherlands. See Richard Feree Smith, *Refugees*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 47 (1966) (chronicling the

admissions for some of these groups.²⁶⁷ The 1958 law added visas for residents of the Azores uprooted by a volcanic eruption, although they were Portuguese nationals and could have gone to Portugal.²⁶⁸ Taking in these groups was seen by Congress and the State Department as fully consistent with “our traditional policy of aiding refugees who have been forced by circumstances beyond their control to flee their homes.”²⁶⁹

The U.S. stance toward refugees fleeing the Communist regime in China is also instructive. They were a problematic case under the UN’s refugee definition, given that they were nationals of the UN-recognized Republic of China in Taiwan and arguably could avail themselves of that government’s protection.²⁷⁰ Despite a massive refugee crisis as escapees from the mainland crowded into Hong Kong, the UN took the position that they did not fall under the UNHCR’s mandate because national protection was available.²⁷¹ That did not stop the United States from using both refugee

movement of Dutch Indonesians from Indonesia to the Netherlands to the United States).

267. See Act of Sept. 2, 1958, Pub. L. 85-892, 72 Stat. 1712, 1712-13 (extending visa allotments for specified groups); Act of Sept. 11, 1957, § 15, Pub. L. 85-316, 71 Stat. 639, 643 (same); S. REP. NO. 85-1057, at 6 (1957).

268. Act of Sept. 2, 1958, 72 Stat. 1712, 1712-13; H.R. REP. NO. 85-2558, at 2-6 (1958).

269. H.R. REP. NO. 85-2558, at 8-9 (1958) (reprinting State Department letter expressing support for the Senate-passed bill aiding “refugees from the Azores Islands” and requesting the House to add relief for the “Dutch refugees from Indonesia”).

270. The protection available from the Nationalist government was more theoretical than real; despite the fact that it viewed them as citizens, it allowed very few to enter, and did not agree until 1962 that it would accept all who wished to come. See *Decision Shunned on China Refugees*; *U.N. Agency to Study Problem but No One Will Take Red Victims Now in Hong Kong*, N.Y. TIMES, Apr. 30, 1953 (discussing the plight of Chinese refugees stranded in Hong Kong and Taiwan’s refusal to take them); *Taiwan Offers to Accept Refugees from Red China*, N.Y. TIMES, May 22, 1962, at 1 (reporting Taiwan’s 1962 decision to finally accept the refugees).

271. A report commissioned by UNHCR questioned whether the Chinese could be considered refugees from a legal point of view, given that Nationalist China recognized them as citizens. In 1957, the UN General Assembly issued a resolution empowering the High Commissioner to use his “good offices” to raise money to assist the refugees, without regard to whether the UNHCR Statute applied to their situation. See GIL LOESCHER, *THE UNHCR AND WORLD POLITICS* 92-95 (2001) (discussing UN responses to the Hong Kong refugee problem); *Refugee Chinese Puzzle for U.N.: Large Hong Kong Group Has Complex Legal Status That Blocks Aid Program*, N.Y. TIMES, Mar. 8, 1955, at 3 (summarizing report that found the UN could not concede the Hong Kong Chinese needed UNCHR protection given that they were nationals of the UN-recognized Chinese government in Taiwan); Kathleen Teltsch, *U.N. to Consider China Refugees*; *U.S. to Present Problem of 700,000 now in Hong Kong to Assembly in Fall*, N.Y. TIMES, July 23, 1957, at 10 (describing the lack of legal refugee status and the 1957 push for a UN resolution to authorize UNCHR assistance). Three years later, a General Assembly resolution explicitly stated that the Chinese refugees were among those “who do not come within the immediate competence of the United Nations.” See 1 LOUISE W. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES* 436 (1975) (quoting and discussing UN General Assembly Res. 1499[XV] of Dec. 5, 1960).

legislation and parole to admit Chinese refugees.²⁷² As long as they could show that they fled from persecution in their former home and were not firmly resettled, their possession of another nationality was deemed irrelevant.²⁷³

To be sure, there were other situations in which the United States declined to take groups of refugees on the ground that they were nationals of a country that would accept them. In 1972, when Ugandans of Asian descent were stripped of citizenship and expelled by Idi Amin, the United States granted parole to 1,000 left stateless, leaving it to Britain to take those with British passports.²⁷⁴ In the mid-1970s, when hundreds of thousands of Portuguese nationals fled Angola and Mozambique as those former colonies gained independence, the United States provided financial aid and planes for an airlift to Portugal but did not take any of the refugees.²⁷⁵ But these were understood to be discretionary decisions based on

272. The Refugee Relief Act of 1953 included allocations of 3,000 visas for "Far Eastern" refugees and an additional 2,000 specifically set aside for Chinese refugees. RRA, *supra* note 249, § 4(a)(12)-(13), 67 Stat. 400, 402. Later, persons fleeing Communist China could qualify for visas set aside for "refugee-escapees" under the 1957 Act and for refugee admission or adjustment of status under § 203(a)(7) of the 1965 Act. The parole authority was used to admit more than 15,000 Chinese refugees residing in Hong Kong between 1962 and 1965. *See 1977 House Hearings*, *supra* note 196, at 22 (providing a table listing the approximate numbers of refugees accepted by the United States under various programs).

273. *See* cases discussed *supra* notes 261-62 and accompanying text.

274. *See 1973 House Hearings*, *supra* note 192, at 94 (discussing the Attorney General's 1972 authorization of parole for "up to 1,000 stateless Ugandan Asians"); Kathleen Teltsch, *Refugee-Aid Unit Bids U.S. Take More Ugandan Asians*, N.Y. TIMES, Jan. 8, 1973 (noting that 27,000 Ugandan Asians who held British passports were admitted by Britain, while those left stateless had been resettled in the United States or remained in UN refugee camps).

275. *See* David Binder, *\$85 Million Aid to Go to Lisbon*, N.Y. TIMES, Oct. 11, 1975 (reporting U.S. announcement of economic aid package and airlift); *U.S. Linking Airlift of Angola Refugees To Shifts in Lisbon*, N.Y. TIMES, Aug. 27, 1975 (discussing U.S. willingness to offer aid provided that Portugal's new government did not align itself with Communism and press reports asserting that resettling some of the refugees in the United States was under discussion). U.S. officials were highly suspicious of the revolutionary regime in Portugal. This may have contributed to the United States' decision not to relieve Portugal's burden by taking in some of the refugees. Absorbing nearly a million returnees caused hardship and unrest in Portugal and inserted a new right-wing element into Portuguese politics. *See* Marvine Howe, *Refugees Are a Major Factor in Portuguese Election*, N.Y. TIMES, Apr. 22, 1976 (discussing the returnees' right-wing orientation and the prospect that their votes could bring about "a decisive shift" in a country that had been heavily Socialist); Marvine Howe, *The Ex-Colonizers: Still Not at Home*, N.Y. TIMES, Mar. 7, 1976 (discussing the economic hardship caused by the mass influx into "Western Europe's poorest country"). U.S. leaders may well have desired these results. *Cf.* Mario Del Pero, *Which Chile, Allende?* *Henry Kissinger and the Portuguese Revolution*, 11 COLD WAR HISTORY 625 (2011) (discussing the Secretary of State's hostility toward, and efforts to undermine or isolate, Portugal's government).

humanitarian, resource and foreign policy considerations.²⁷⁶ During the same time period, refugee status was routinely being granted to Soviet Jews who could easily acquire (and in some cases already had) Israeli nationality.²⁷⁷

An exchange during a 1973 committee hearing, and the drafting changes that followed, provide strong indications that Joshua Eilberg, Chair of the House immigration subcommittee, agreed with the traditional U.S. approach of allowing multiple nationals to qualify as refugees and wanted to preserve it in the new refugee definition he was developing. John Collins of the American Irish National Immigration Committee complained that the U.S. government routinely rejected asylum applications from Catholics facing persecution in Northern Ireland.²⁷⁸ Eilberg then asked Collins for his reaction to a State Department letter opposing a bill that would have authorized visas for persons fleeing persecution in Northern Ireland²⁷⁹ on the ground that they were nationals of both the Republic of Ireland and the UK and could relocate anywhere in those countries.²⁸⁰ Collins responded, “[T]hat is a shoving off of responsibility,” and pointed out that with respect to “a number of other nationalities” the State Department “do[es] not say well you can go to X space, Y space, Z country, so why are you coming here to us?”²⁸¹ Eilberg expressed sympathy with Collins’s viewpoint and indicated that he believed that those genuinely fearing persecution in Northern Ireland would be eligible for asylum under the bill then before the committee, which contained a refugee definition similar in structure to section 203(a)(7) of the 1965 Act but without its

276. See 1977 House Hearings, *supra* note 196, at 51 (Rep. Eilberg asking State Department witness whether the United States had taken any of the “Angolan refugees who have fled”; response explains that only financial assistance has been provided but does not dispute that they could be admitted as refugees); see also 1978 House Hearings, *supra* note 151, at 268 (State Department witness explaining that the exodus from Angola and Mozambique was not deemed a refugee emergency because Portugal was able to resettle them); *supra* text accompanying note 233 (discussing criteria traditionally used to determine whether refugees should be deemed of “special concern” and accepted for resettlement).

277. Because of the political salience of this issue to the Refugee Act’s drafters, it will be discussed separately, *infra* Part IV.C.4.

278. 1973 House Hearings, *supra* note 192, at 323–29. Collins attributed this to the executive branch’s desire not to “embarrass Great Britain.” *Id.* at 326.

279. Applicants from Northern Ireland were ineligible for refugee admission under INA § 203(a)(7) because they were not fleeing a Communist or Middle Eastern country. See *id.* at 326.

280. *Id.* at 329–30 (quoting State Department letter).

281. *Id.* at 330. The transcript quotes Collins as stating “they take the same attitude with regard to a number of other nationalities,” but when read in conjunction with Collins’ next sentence, which is quoted above, it is clear he meant that the same reasoning was *not* being employed to reject applicants of other nationalities. *Id.*

geographic and ideological restrictions.²⁸² He asked for documentation of cases of deserving Northern Irish asylum applicants for the committee to consider as it continued to work on a revised refugee definition for U.S. law.²⁸³

The immigration bill that emerged from Eilberg's committee three months later included a refugee provision based on the Convention definition,²⁸⁴ but structured in a way that allowed persons with more than one nationality to qualify. H.R. 981 would have amended section 203(a)(7) to cover

aliens who are outside the country of which they are nationals, or in the case of persons having no nationality, are outside the country in which they last habitually resided, who . . . (A) are unable or unwilling to return to the country of their nationality or last habitual residence because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion, (B) are not nationals of the countries in which their application for conditional entry is made, and (C) are not firmly resettled in any country; . . .²⁸⁵

In order to satisfy the first part of the definition, the applicant would already have to be outside the country of nationality where he or she suffered or feared persecution. Clause (B) could only be referring to persons who had a second nationality as well. Under clause (B), a multiple national would be disqualified only if he or she went to that second country of nationality and applied for admission to the United States from there, while clause (C) would come into play only if the person had firmly resettled in that (or any other) country. One of the representatives who spoke in support of the bill on the House floor expressly stated that "residents of Northern Ireland" facing persecution in their homeland would be eligible under this definition.²⁸⁶

After H.R. 981 failed to win Senate passage, Eilberg included an identical refugee provision in his 1975 immigration bill.²⁸⁷ When he began to pursue separate refugee legislation, his proposed Refugee Act of 1976 contained a refugee definition substantially identical to

282. *Id.*; see also *id.* at 327-28 (Eilberg calling attention to refugee definition in bill and getting Collins to agree that it would take care of some of the cases he is concerned with); *id.* at 15 (reprinting the refugee definition in the version of H.R. 981 then under consideration).

283. *Id.* at 330.

284. H.R. 981, 93d Cong. § 5 (1973); see H.R. REP. NO. 93-461 (1973) (report by Eilberg for House Judiciary Committee sending bill to House floor); *supra* note 193 (discussing House passage of the bill).

285. H.R. 981, § 5, reprinted in H.R. REP. NO. 93-461, at 2 (1973).

286. 119 CONG. REC. 31366 (remarks of Rep. Biaggi, who also gave Soviet Jews as an example of eligible refugees).

287. H.R. 367, § 5, 94th Cong. (1975), reprinted in 1975-6 House Hearings, *supra* note 196, at 14, 17.

the first part of H.R. 981's definition, but without clauses (B) and (C).²⁸⁸ Without those additional clauses, the use of the Convention's phrase, "outside the country of his nationality," might have been interpreted to incorporate the Convention's definition of that phrase to mean all countries of which a person is a national. Although Eilberg never stated his reasons for changing "the country" to "any country" in his 1977 version of the Refugee Act,²⁸⁹ this background suggests that the change was meant to clarify that under U.S. law, unlike the Convention, being outside any one country of nationality where the individual would face persecution is enough.

The Refugee Act's legislative history contains no further discussions of the multiple nationality issue, but it does contain many indications that Congress meant to carry forward the prior conception of a refugee in U.S. law as a person uprooted from home who has not yet become firmly settled in a new one. The Act begins with the statement, "The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their *homelands* . . ."²⁹⁰ The refugee definition's requirement that the individual be unwilling or unable to "return to" the country of nationality indicates that the country Congress had in mind is the one the person previously lived in and fled.²⁹¹ When referring to the "outside any country of . . . nationality" element of the definition, legislators and Executive Branch officials routinely used phrases like "home country," "country of origin" or "his or her country," reflecting an assumption that the country in question is the person's former home.²⁹² The Act's proponents repeatedly characterized the law's basic purpose as providing a haven for the "homeless" or "uprooted."²⁹³

288. H.R. 14386, § 2(a), 94th Cong. (1976).

289. H.R. 3056, § 2(a), 95th Cong. (1977), reprinted in *1977 House Hearings*, *supra* note 196, at 2-3. The language relating to nationality remained unchanged in subsequent versions through the Act's 1980 passage. See *supra* note 211.

290. Refugee Act of 1980, § 101(a), 94 Stat. 102 (emphasis added); see *supra* text accompanying notes 132-35 (discussing BIA's consideration of that language).

291. See *supra* text accompanying notes 104-05.

292. See, e.g., *1979 House Judiciary Hearings*, *supra* note 200, at 67 (U.S. Refugee Coordinator Dick Clark stating that the bill's definition "provide[s] that a refugee is someone outside his or her country of origin, and would be subject to persecution upon return"); *1977 House Hearings*, *supra* note 196, at 30 (Rep. Eilberg using the phrase "unwilling to return to his home country" in describing what a person must prove to satisfy the refugee definition); H.R. REP. NO. 96-608, at 9 (1979) (using the phrase "outside . . . [his or her] country") (brackets in original); 125 CONG. REC. 37201 (1979) (Rep. Fascell interchangeably using "home country," "country of residence," and "country of nationality").

293. See, e.g., *1979 Senate Hearing*, *supra* note 200, at 1 (introductory statement by Sen. Kennedy); *1979 House Judiciary Hearings*, *supra* note 200, at 1 (Rep. Holtzman's introductory statement); *1977 House Hearings*, *supra* note 196, at 18, 21 (testimony of State Department's James Carlin); S. REP. NO. 96-256, at 1 (1979) ("It

The Refugee Act expressly required a determination that a person had not been “firmly resettled in any foreign country” as a prerequisite to refugee admission or the grant of permanent residence to an asylee.²⁹⁴ While the no-firm-resettlement requirement was set forth separately from the refugee definition, the House-Senate Conference Report treated it as part of the definition of a “refugee.”²⁹⁵ The legislative history reflects close attention by the relevant Congressional committees to the firm resettlement standard and how it was being applied during the years preceding the Refugee Act’s enactment.²⁹⁶ The Conference Report directed the Attorney General to issue regulations to govern firm resettlement,²⁹⁷ and those regulations, issued just a few months later, followed settled practice by not treating the possession of another country’s citizenship as an eligibility bar unless the person actually traveled to and resided in that country after fleeing persecution.²⁹⁸ Reading the refugee definition to exclude anyone who could safely live in a second country of citizenship would produce the anomalous result that persons viewed as eligible for refugee admission or asylum under the firm

reflects one of the oldest themes in America’s history—welcoming homeless refugees to our shores.”); H.R. REP. NO. 96-608, at 2 (1979); 125 CONG. REC. 23232 (1979) (Kennedy remarks presenting bill).

294. 8 U.S.C. §§ 1157(c)(1), 1159(b)(4) (1982); *see also* S. REP. NO. 96-256, at 9, 15 (1979) (stating that refugee applicants must show they have not become firmly resettled); H.R. REP. NO. 96-608, at 17–18 (1979) (also noting the “not firmly resettled” requirement for asylees adjusting their status to permanent resident). The Refugee Act did not expressly make firm resettlement a bar to an initial grant of asylum, which appears to have been an oversight. The regulations issued by the Attorney General shortly after the Act’s enactment prohibited INS District Directors from granting asylum to an applicant who had been firmly resettled, and Congress later added it to the statute as an asylum bar. *See supra* notes 157–58 (discussing the regulations and statutory change).

295. *See* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.) (discussing under the heading “Definition of ‘Refugee’” the “determination of whether a refugee is ‘firmly resettled’ under the statutory definition”); *see also* Arnold H. Liebowitz, *The Refugee Act of 1980: Problems and Congressional Concerns*, 467 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 167 (1983) (special counsel to U.S. Senate immigration subcommittee describing the firm resettlement standard as part of the statute’s definition of refugee).

296. *See 1979 House Judiciary Hearings, supra* note 193, at 70 (Rep. Holtzman raising with the State Department whether a definition of firm resettlement is needed); *1977 House Hearings, supra* note 196, at 94–95 (information provided by INS to Rep. Eilberg regarding the denial of requests for asylum from Chinese nationals who fled to Hong Kong and resided there for a substantial period of time); *1973 House Hearings, supra* note 196, at 98–99, 105–06, 254–55, 260, 268–69 (discussing firm resettlement as a question of fact in the context of the Hong Kong refugees); *1970 House Hearings, supra* note 192, at 188, 190 (discussing whether to amend the INA’s refugee section to add an explicit firm resettlement provision and the definition of firm resettlement). As discussed in the next section, it was well-known to Congress that Soviet Jews were being found to have not been firmly resettled and were being admitted as refugees even when they had gone to Israel first and lived there as citizens for some months.

297. H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.).

298. *See* discussion of the administrative standards *supra* note 158 and *infra* text accompanying notes 363–69.

resettlement standard would not even meet the threshold test of being a refugee under the statutory definition. It is unlikely that Congress intended that outcome, given that it chose a phrase, "any country," that differs from the Convention and can be interpreted consistently with the traditional U.S. firm resettlement doctrine.

A more general theme concerning the underlying purpose of refugee admission, which was often invoked as the Refugee Act made its way through Congress, can also help to explain why Congress would want to retain aspects of prior U.S. law which, unlike the Convention, allowed people who could avail themselves of the protection of another country of nationality to enter as refugees, and also allowed refugee status to be predicated on past persecution alone, even if future persecution was unlikely. The United States' self-image as a country founded by refugees seeking freedom from political and religious persecution, a country that welcomes refugees in order to shame and undermine oppressive regimes, reward victims of tyranny who deserve a better life, reaffirm its identity as a haven for the oppressed, and be enriched by those who share a commitment to freedom, is deeply rooted in the national political consciousness. The ideal has often not been lived up to in practice, but its rhetorical power runs deep.²⁹⁹ Joseph Califano, President Carter's Secretary of Health, Education and Welfare, expressed these notions vividly when he testified in support of the Refugee Act:

There are relatively few moments in our national life when . . . what we choose to do about a political problem expresses what we really are as a nation . . . By our choice on this issue, we will reveal to the world—and more importantly, to ourselves—whether we truly live by our ideals, or simply carve them on our monuments. In this case, the words etched in

299. The image of the United States as a haven for refugees has deep roots in the nation's political discourse. Thomas Paine's revolutionary war pamphlet described the new nation as an "asylum for mankind" ready to "receive the fugitive" from "[e]very spot of the old world . . . overrun with oppression." THOMAS PAINE, *Common Sense* (1776), in *THE GREAT WORKS OF THOMAS PAINE* 35 (1877). George Washington declared "[t]he bosom of America is open to receive . . . the oppressed and persecuted of all [n]ations." Address of December 2, 1784, 27 *THE WRITINGS OF GEORGE WASHINGTON* 254 (1938). Andrew Jackson's Nullification Proclamation described the United States as "the asylum where the wretched and the oppressed find a refuge and support." JON MEACHUM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 228 (2008) (quoting proclamation of December 10, 1832). The Supreme Court opened a seminal First Amendment decision with a paean to a country whose cities are populated by "children of those who sought refuge in the new world from the cruelty and oppression of the old, where men have been . . . driven into exile in countless numbers for their political and religious beliefs." *Schneiderman v. United States*, 320 U.S. 118, 120 (1943). Ronald Reagan invoked the arrival of Indochinese and Caribbean "boat people" and Iron Curtain refugees in his nomination acceptance speech and asked: "Can we doubt that only a Divine Providence placed this . . . island of freedom here as a refuge for all those people yearning to breathe free?" Ronald W. Reagan, Presidential Nomination Acceptance Speech (July 17, 1980), quoted in *BOSTON GLOBE NEWSPAPER*, July 18, 1980, at 10.

stone are . . . those heartstopping words . . . on the base of the Statute of Liberty about the "tired, poor, huddled masses yearning to breathe free." . . . When we help refugees . . . , the gift is not so much to them as to ourselves. . . . [Today's refugees] are seeking the same thing our parents and grandparents and ancestors were seeking: The clear air of liberty And just as our parents and grandparents enriched the United States, these new refugees are enriching this Nation.³⁰⁰

When asked during the hearings how he would define the U.S.'s refugee policy, Attorney General Griffin Bell responded similarly: "[O]ur policy is . . . based on the historical fact that our country began as a haven."³⁰¹ The Congressional reports on the Refugee Act emphasize its grounding in "one of the oldest themes in America's history—welcoming homeless refugees to our shores"³⁰² and "this country's tradition of welcoming the oppressed of other nations."³⁰³ Kennedy, writing shortly after the Act's passage, believed that "America's immigrant heritage, more than any other factor, was responsible for successful Congressional action" in the face of mounting concerns about refugee numbers and costs.³⁰⁴

The pre-1980 refugee definition, with its focus on flight from persecution, past or feared, and its very un-Convention-like lack of attention to the availability of national protection, resonated with the idea that those oppressed in countries not part of the "free world" should be welcomed to highlight the lack of freedom in those regimes, enrich the United States with people who identify with its values, and reward those who have suffered for their beliefs. Congress, in the Refugee Act, recognized that the ideological and geographic restrictions of the old definition were inconsistent with the human rights justifications traditionally offered for U.S. refugee policies, but left the old framework otherwise largely intact and unquestioned. This played out both on the level of general standards (e.g., keeping past persecution in the refugee definition, maintaining the firm

300. 1979 House Judiciary Hearings, *supra* note 200, at 223, 226. Subcommittee chair Elizabeth Holtzman thanked Califano for this "very eloquent and important testimony." *Id.* at 226.

301. *Id.* at 26.

302. S. REP. NO. 96-256, at 1 (1979).

303. H.R. REP. NO. 96-608, at 17 (1979); *see also id.* at 2 (quoting Elizabeth Holtzman opening the 1979 Refugee Act hearings by invoking "our country's humanitarian tradition of extending a welcome to the world's homeless"). In both the Senate and House reports, conforming to American tradition is mentioned before and given stronger emphasis than conforming to the Convention.

304. Kennedy, *supra* note 191, at 148. The country's refugee heritage was a prominent theme in the House and Senate floor debates. *See, e.g.*, 125 CONG. REC. 23239 (1979) (Sen. Boschwitz stating that the United States "is the only country that is a country of refugees [It] has been energized and given substance by people who came to our country to start anew."); *id.* at 35816 (Rep. Fish: "Most of us in this Chamber trace our ancestry to . . . earlier refugees. We have before us an opportunity to reaffirm America's historic proud role as haven for the oppressed and the persecuted.").

resettlement framework) and in Congress's strong support for the ongoing U.S. policy of taking in as refugees all who managed to escape the Soviet Union, especially Soviet Jews. As discussed in the next section, if the Refugee Act had incorporated the strict Convention approach to national protection, the ability of the United States to continue to grant refugee status to all Soviet Jews who wanted to come would have been in doubt—a result that the Refugee Act's drafters and Congress as a whole would not have supported.

4. The Case of Soviet Jews

During the period when the Refugee Act was being drafted and considered by Congress, Soviet Jews were the most politically popular of refugees.³⁰⁵ Starting in the 1960s, the American Jewish community built a highly effective advocacy movement on their behalf, using mass public demonstrations and letter-writing campaigns to pressure the USSR to liberalize its exit policies and convince the U.S. government to make the issue a high priority in Soviet-US relations.³⁰⁶ The movement found a receptive audience in Congress, where its message resonated with traditional anti-Communist sentiment and lingering guilt at the U.S.'s failure to admit Jewish refugees during the Holocaust.³⁰⁷ In 1974 Congress passed the Jackson-Vanik Amendment tying trade concessions to liberalized Soviet emigration policies.³⁰⁸ The number of Jews allowed to leave rose from about 15,000 a year in 1975-1977 to nearly 29,000 in 1978 and over 51,000 in 1979.³⁰⁹

The Jews who left the USSR traveled with Israeli immigrant visas issued with Israel's authorization by the Dutch embassy in Moscow.³¹⁰ Under Israel's nationality laws, they were entitled to

305. So much so that when foreign policy officials asked President Carter to adopt an Indochinese refugee policy distinct from the overall refugee bill, the Justice Department strongly objected on the ground that there would be "less opposition to admitting Indochinese refugees if linked to a more comprehensive policy including the admission of Soviet Jews." Draft Memorandum from Zbigniew Brzezinski and Stu Eizenstat, to the President (Feb. 27, 1978), Domestic Policy Staff—Annie Gutierrez's Files (Civil Rights and Justice), "Refugee Policy [O/A 8110][1]," Box 31, Jimmy Carter Library (recounting Justice Department concerns).

306. See FRED. A. LAZIN, *THE STRUGGLE FOR SOVIET JEWRY IN AMERICAN JEWISH POLITICS* 28-30 (2005) (describing the origins, goals, and tactics of the American Jewish Conference on Soviet Jewry).

307. See *id.* at 41-45, 295 (discussing the movement's activities and the sources of its political appeal); LOESCHER & SCANLON, *supra* note 263, at 88-95 (describing its influence on U.S. policy).

308. See LOESCHER & SCANLON, *supra* note 263, at 91-94; LAZIN, *supra* note 306, at 45-50 (both discussing the Jackson-Vanik amendment).

309. LAZIN, *supra* note 306, at 311.

310. See *id.* at 31; PETRUS BUWALDA, *THEY DID NOT DWELL ALONE: JEWISH EMIGRATION FROM THE SOVIET UNION, 1967-1990*, at 54-55, 76 (1997) (describing the

Israeli citizenship, effective as soon as they set foot on Israeli soil.³¹¹ But by 1977, a majority of Soviet Jews arriving in Vienna (the transit point for the trip to Israel) refused to go on to Israel and instead sought admission to the United States; in 1979 the proportion reached nearly two-thirds.³¹² In addition to these dropouts (or *noshrim*, the Hebrew word), there were several thousand Soviet Jews during the 1970s who, after initially going to Israel, decided to leave. These *yordim*, as they were called, went to Rome, where they applied for refugee admission to the United States.³¹³

It was clearly-announced U.S. policy that all Jews leaving the Soviet Union qualified as refugees, and the United States would accept all who wished to come.³¹⁴ In the second half of the 1970s,

process of obtaining visas at the Netherlands embassy in Moscow). Only small numbers who had first-degree relatives in the United States were allowed to travel on U.S. visas. Those seeking to come to the United States as refugees had to leave the USSR first because § 203(a)(7) required that application be made in a non-Communist country. After 1980, the Refugee Act allowed for the possibility of in-country processing, but that provision was never invoked, probably because U.S. officials realized that the USSR would not be willing to grant exit visas to people labeled refugees. See BUWALDA, *supra*, at 57–59 (explaining why Soviet Jews generally could not leave with U.S. visas).

311. See The Law of Return, §§ 1-2, 4 LSI 114 (1950) (Isr.), amended by 24 LSI 28, available at http://www.jewishvirtuallibrary.org/jsource/Immigration/Text_of_Law_of_Return.html [<http://perma.cc/M5ST-KKUW>] (archived Aug. 31, 2014) (granting every Jew the right to settle in Israel); Nationality Law, § 2(b)(2), 6 LSI 50 (1952) (Isr.), available at <http://www.israellawresourcecenter.org/israellaws/fulltext/nationalitylaw.htm> [<http://perma.cc/FW42-RAXR>] (archived Aug. 31, 2014) (regarding acquisition of nationality); Shachar, *supra* note 41, at 236; Claude Klein, *The Right of Return in Israeli Law*, 13 TEL. AVIV U. STUD. L. 53, 60–61 (1997) (both discussing automatic conferral of nationality upon arrival).

312. LAZIN, *supra* note 306, at 80, 310; COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS, U.S. ASSISTANCE PROVIDED FOR RESETTLING SOVIET REFUGEES, NO. ID-76-85 (1977) [hereinafter COMPTROLLER GENERAL REPORT], at 3, 31 (listing and discussing changes in the annual percentage of departing Soviet Jews who declined to go to Israel). In Vienna, the Jewish émigrés were received by representatives of the Israel-affiliated Jewish Agency, which tried to persuade them to continue on to Israel. Those who insisted on “dropping out” were turned over to the Hebrew Immigrant Aid Society (HIAS), which moved them to Rome, where the United States processed their applications for entry. LAZIN, *supra* note 306, at 80–82; see also BUWALDA, *supra* note 310, at 59–60; Rita J. Simon, *Soviet Jews*, in HAINES, *supra* note 194, at 181, 185 (both discussing HIAS’ role).

313. See LAZIN, *supra* note 306, at 88; COMPTROLLER GENERAL REPORT, *supra* note 312, at 34–35 (both discussing the situation of Soviet Jews who left Israel and sought resettlement in the United States.).

314. See Gregg A. Beyer, *The Evolving United States Response to Soviet Jewish Emigration*, 3 INT’L J. REFUGEE L. 30, 32–33 (1991) (discussing the U.S. “open door” policy); LAZIN, *supra* note 306, at 84, 186 (explaining that until the late 1980s it was U.S. policy to accept all Soviet Jews as refugees and provide them with “freedom of choice” as to their destination); S. COMM. OF THE HOUSE COMM. ON THE JUDICIARY, 94TH CONG., REP. ON ITS TRIP TO THE SOVIET UNION: EMIGRATION OF SOVIET JEWS 3–4 (Comm. Print 1976) [hereinafter EMIGRATION OF SOVIET JEWS] (explaining that since 1971 the United States maintained an “open door” policy for persons leaving the USSR who expressed a desire to go the United States, using refugee visas up to the available limits and parole when needed).

most of the 17,400 refugee visas available each year under INA section 203(a)(7) were set aside for Soviet émigrés, and when visas ran out parole was used to let in the rest.³¹⁵ *Yordim* were also accepted as refugees, despite their acquisition of Israeli citizenship, unless it was determined that an applicant's stay in Israel amounted to firm resettlement.³¹⁶ Those who had been in Israel for less than a year were usually deemed not firmly resettled and eligible for admission.³¹⁷

As the proportion of Soviet Jews dropping out in Vienna grew, a heated dispute arose between Israel and the American Jewish community over the treatment of Soviet Jews as refugees. The debate was particularly intense during the years from 1976-1981, just as the Refugee Act was making its way through Congress.³¹⁸ Israel was

315. See LOESCHER & SCANLON, *supra* note 263, at 94, 125, 154; LAZIN, *supra* note 306, at 83-84, 130-31 (both describing set-asides of refugee visas and repeated resorts to parole to meet the demand for admission).

316. EMIGRATION OF SOVIET JEWS, *supra* note 314, at 4. In a January 1975 legal opinion, the INS General Counsel instructed agency staff that acquisition of Israeli nationality under the Law of Return did not in itself disqualify a person from refugee status under § 203(a)(7), and the involuntary acquisition of Israeli nationality, in the absence of any overt act signifying acceptance, would not be considered evidence of firm resettlement. If an individual had applied for admission to Israel as an immigrant, an initial presumption of firm resettlement would apply, but that presumption could be rebutted if the person presented evidence showing that, under all the circumstances, he or she was not in fact firmly resettled. Opinion from Sam Bernsen, INS General Counsel, Conditional Entry Eligibility of Soviet Jews Who Initially Emigrated to Israel (Jan. 6, 1975) [hereinafter INS General Counsel Opinion], at 1, 6-8, copy in HIAS Files, "USSR Nerida and Neshrim," Box 1141; see also COMPTROLLER GENERAL REPORT, *supra* note 312, at 34, 46 (discussing the legal opinion). Part of INS counsel's reasoning was that U.S. law does not recognize the involuntary acquisition of a nationality, INS General Counsel Opinion, *supra*, at 4-6, but the opinion also made it clear that "with or without acquisition of Israeli nationality," the decisive question was whether the individual became firmly resettled in Israel. *Id.* at 1, 6-7.

317. The State Department considered all Soviet Jews who spent less than a year in Israel not firmly resettled, and provided them with refugee assistance in Rome. COMPTROLLER GENERAL REPORT, *supra* note 312, at 35-36 (describing the State Department policy). INS, which adjudicated their applications for admission, applied a case-by-case firm resettlement standard and sometimes denied applications even when the person had been in Israel less than a year. See *id.* at 35 (describing INS' rejection of fifty-one such cases even though the State Department had granted refugee assistance). However, INS guidelines stated that "[r]esidence of less than one year in a third country would not ordinarily create a presumption of resettlement," Guidelines For Firm Resettlement, *supra* note 260, and it was the impression of American Jewish resettlement agencies that most *yordim* who had spent less than a year in Israel were being admitted. Memorandum from Philip Bernstein to Ralph Goldman and Joan Wolchansky, Council of Jewish Federations, Inc., Re: Statement on Soviet Jewish Emigration at 5 (May 29, 1979), copy in HIAS Files, "Noshrim - Statements, Telexes, Press Releases, 'Papers,' etc.," Box 1024.

318. See GAL BECKERMAN, WHEN THEY COME FOR US, WE'LL BE GONE: THE EPIC STRUGGLE TO SAVE SOVIET JEWRY 356-63 (2010); LAZIN, *supra* note 306, at 2, 79-178; Stephen F. Windmueller, *The "Noshrim" War*, in A SECOND EXODUS: THE AMERICAN MOVEMENT TO FREE SOVIET JEWS 161-72 (Murray Friedman and Albert D. Chernin

desperate to increase its Jewish population and wanted to be the only available destination for those who lacked family-based grounds for immigrating to the United States. It urged the U.S. government to stop admitting Soviet Jews as refugees and put pressure on the American-based Jewish organizations aiding the dropouts in Europe, the Hebrew Immigrant Aid Society (HIAS) and the Joint Distribution Committee (JDC), to curtail their activities.³¹⁹ Israel's bulldog on the issue, Arye Leon Dulzin of the Jewish Agency, took every opportunity to argue that Soviet Jews were not genuine refugees.³²⁰ As he put it, "A refugee means someone who has nowhere to go. But today all Soviet Jewish emigrants have Israeli visas—and Israel is ready to absorb them and assist them."³²¹

The American Jewish community overwhelmingly favored "freedom of choice" for Jews departing the Soviet Union and supported the U.S. policy of accepting all those who did not wish to resettle in Israel. They resisted Israeli demands that HIAS and the JDC stop helping the dropouts.³²² A commitment to liberal principles, the belief that Jews in the USSR were in danger and should be encouraged to leave, and revulsion at the prospect of turning away

eds., 1999); DAVID A. HARRIS, *THE CONTROVERSY OVER REFUGEE STATUS OF SOVIET JEWISH EMIGRES* 3 and *passim* (1987); WILLIAM W. ORBACH, *THE AMERICAN MOVEMENT TO AID SOVIET JEWS* 75–76 (1979) (all discussing the dispute over Soviet Jewish *noshrim*).

319. See generally sources cited *supra* note 318 (discussing the dispute between Israel and American Jewish organizations); see also David Landau, *Special Interview: Dulzin Cites Need to End Dropout of Soviet Jews*, JTA DAILY NEWS BULLETIN, June 18, 1979 (reporting on Dulzin's desire to redirect Soviet Jewish emigrants to Israel).

320. See David Landau, *Israeli and U.S. Jewish Leaders Reach No Conclusions on Drop-out Issue*, JTA DAILY NEWS BULLETIN, June 29, 1979 (noting Dulzin's frequent references to the dropout problem as a "calamity" for Israel). The Jewish Agency is Israel's quasi-official migration agency.

321. Landau, *supra* note 319 (quoting Dulzin); for similar Dulzin statements, see Murray Zuckoff, *Dulzin Tells CJF Assembly Israelis, Diaspora Jewry Bound to "Agenda of Common Concerns"*, JTA DAILY NEWS BULLETIN, Nov. 19, 1979 ("A refugee is someone who is compelled to leave his country and has no place to go [T]oday there are no Jewish refugees."); David Landau, *Behind the Headlines: Dulzin Not Against Aiding Soviet Jews Who Reach the U.S.*, JTA DAILY NEWS BULLETIN, July 11, 1979 ("No Jew leaving the Soviet Union can be considered a refugee since Israel is ready to receive him with open arms.").

322. See LAZIN, *supra* note 306, at 95–96 (noting that the American Jewish community supported freedom of choice); see generally sources cited *supra* note 318; see also Landau, *supra* note 320 (discussing statements made by American Jewish leaders "that they would oppose measures to restrict the work of HIAS and the JDC on grounds that every Jew deserves the right of free choice as to where he wants to live"); David Landau, *Fisher Says U.S. Jews Will Not End Aid to Soviet Jewish "Drop-Outs"*, JTA DAILY NEWS BULLETIN, June 29, 1978 (reporting statement by the Jewish Agency's chair that he and "most American Jewish leaders" opposed Israeli demands for an end to aid for the "drop outs"). In 1973, HIAS and the JDC gave in to Israeli pressure to suspend assistance to émigrés from Israel (the *yordim*), but by 1977 HIAS had resumed helping them apply for refugee admission to the United States. See LAZIN, *supra* note 306, at 88–90, 133 (describing HIAS's involvement with the *yordim*).

refugees as the United States had in the 1930s all played a role in their position.³²³

The positions of the two sides were framed in legal terms as well as on moral and policy grounds. Dulzin and his allies argued that Jews leaving with Israeli visas effectively already held Israeli nationality and were under Israel's protection, and therefore could not satisfy the UN's definition of a refugee.³²⁴ They distributed copies of an internal UNHCR legal opinion supporting this view.³²⁵ When the Refugee Act was enacted, Israeli officials publicly urged that it not be interpreted to confer refugee status on Soviet Jews holding Israeli visas.³²⁶ HIAS argued in response that the mere possession of an Israeli visa did not make the dropouts Israeli nationals and thus they remained refugees within the meaning of the Convention,³²⁷ as

323. See LAZIN, *supra* note 306, at 2–3, 95–96 (discussing the impact of memories of the American government turning away refugees trying to flee Hitler's Germany, as well as liberal values and attachment to the communal tradition of rescuing Jews in danger, as factors underlying American Jews' strong commitment to freedom of choice); see also Gil Sedan, *Meeting in Washington May 16 to Deal With Soviet Dropout Problem*, JTA DAILY NEWS BULLETIN, Apr. 17, 1980 (quoting Howard Squadron, President of the American Jewish Congress, stating: "What they (the Israelis) are asking us to do is to repudiate the values we have always stood for and fought for."); SCA Says All Soviet Jews Should Be Aided Regardless of Their Destination, JTA DAILY NEWS BULLETIN, Dec. 31, 1976 (describing Synagogue Council of America's resolution that the Jewish community has a "sacred obligation" to assist Soviet Jews who wish to come to the United States).

324. See Yitzhak Shargil, *U.S. Refugee Act Seen as Having Negative Effect on Soviet Jewish Emigration to Israel*, JTA DAILY NEWS BULLETIN, Apr. 4, 1980 ("Dulzin said . . . Jews leaving the USSR are not political refugees because they . . . are already citizens of Israel under the Law of Return"); Sarah Honig, *Olim Could Be "Refugees" in U.S.*, JERUSALEM POST, Mar. 30, 1980, at 6 (quoting Dulzin statement that "a Jew who leaves the Soviet Union . . . is *a priori* a citizen of Israel"); Arye Dulzin, Memorandum Relating to the Legal Definition of the Term "Refugee," sent to Gaynor Jacobson, HIAS (Mar. 27, 1980), copy in HIAS Files, Box 1227, Noshrim Correspondence 1980-81 folder, at 2–3 (analyzing the Convention refugee definition and arguing that it does not apply to visa holders to whom Israel has extended national protection); see also *infra* text accompanying note 360 (discussing Israeli attempt to convince Rep. Joshua Eilberg that Soviet Jews were not refugees).

325. See Landau, *supra* note 321 (discussing Jewish Agency official's citation of the 1973 UNHCR opinion as support for the argument that Soviet Jewish emigrants do not qualify for refugee status); *infra* note 333 and accompanying text (discussing the UNHCR opinion).

326. See *Begin Chides U.S. on Soviet Jews*, N.Y. TIMES, Apr. 3, 1980 (quoting Israeli Prime Minister Menachem Begin's statement that the new Refugee Act, while "noble and humanitarian, . . . it should not apply to Jews with Israeli visas in their travel document," and that he was considering raising the issue with President Carter); Gil Sedan, *supra* note 323 (Dulzin urging that the law not be applied "to Soviet Jews who have Israeli visas and certainly not to would be yordim from Israel"); Shargil, *supra* note 324 (Dulzin urging Begin to "explain to the U.S. President that Soviet emigrants cannot be considered political refugees since they all have exit visas to Israel").

327. See Letter from Gaynor Jacobson to Arye Leon Dulzin, at 1–2 (Mar. 4, 1980), copy in HIAS Files, "Noshrim Correspondence 1980-81," Box 1227 (explaining HIAS's interpretation of the Convention).

support, it brandished a legal opinion by former UNHCR legal director Paul Weis.³²⁸ But at the same time, HIAS argued that U.S. law provided—and the new Refugee Act would maintain—a standard more generous than the Convention's. In a widely-distributed March 1980 letter to Dulzin, HIAS's Gaynor Jacobson wrote, "As a matter of U.S. law, . . . a refugee continues to be a refugee as long as he does not acquire a new nationality and has [not] been firmly resettled in the country of his new nationality"; thus, the letter argued, all the dropouts, as well as *yordim* who spent less than a year in Israel and were not firmly resettled, would continue to be eligible.³²⁹

If Congress had adopted the Convention's approach to nationality, it would have been throwing the existing policy toward Soviet Jews into doubt. The dropouts' status under the Convention was murky. As a starting point, their nationality vis-à-vis the country they were leaving was unclear. Because they were forced to surrender their Soviet nationality, they could be classified as stateless. But Atle

328. David Landau, *Differing View of Jewish "Refugees,"* JTA DAILY NEWS BULLETIN, July 12, 1979 (stating that an "authoritative source" had provided a lengthy 1974 legal opinion by Paul Weis concluding that "Jews from Eastern Europe who are assisted by HIAS are not ordinary emigrants but are to be regarded as refugees"). In 1979, HIAS sent a copy of the Weis opinion to Hamilton Fish, an ally on the House Judiciary Committee, to help him respond to concerns raised by "one or two . . . [House] colleagues" who had questioned the Soviet Jews' refugee status. Letter from Gaynor Jacobson to Rep. Hamilton Fish (Dec. 11, 1979), *copy in* HIAS Files, "Noshrim Correspondence," Box 1024. The Weis legal opinion actually had nothing to say on the question of whether Soviet Jewish emigrants were Israeli nationals and therefore not Convention refugees. Weis prepared the opinion to help HIAS respond to a letter from the British Inspector of Taxes contending that HIAS's migration assistance activities were not charitable in nature because the Jews were emigrating voluntarily rather than "being driven from their country of residence by outright official persecution." Weis therefore focused his opinion on showing that Jews in Iron Curtain countries faced persecutory conditions and were fleeing for that reason; he carefully avoided raising the question of whether the availability of national protection in Israel affected their refugee status. *See* Paul Weis, untitled draft of legal opinion (Mar. 26, 1974), *available in* Paul Weis Archive, Bodleian Social Science Library, University of Oxford, Ref. No. PW/PR/PMSC/17 (giving his opinion on whether Jewish individuals from Eastern Europe assisted by HIAS should be regarded as emigrants or refugees).

329. Letter from Jacobson to Dulzin, *supra* note 327, at 2–3. Israeli officials, in their responses to HIAS's March 1980 letter, essentially conceded the legal point that dropouts and *yordim* could satisfy the U.S. refugee definition, and shifted to arguing on policy grounds that the U.S. government and resettlement agencies should, as a matter of discretion, refuse to admit them or provide them with aid. *See* Letter from Arye Dulzin to Gaynor Jacobson (Mar. 27, 1980); Letter from Yehuda Avner, Adviser to Prime Minister Menachim Begin, to Gaynor Jacobson, HIAS (Mar. 12, 1980), *copies in* HIAS Files, "Noshrim Correspondence 1980-81," Box 1227; *see also* Honig, *supra* note 324, at 6 (discussing the understanding of Israeli officials that the new U.S. Refugee Act would confer refugee status on Soviet Jews who went to Israel but were not firmly resettled). *But see* Sedan, *supra* note 323 (reporting that a background paper prepared for the American Jewish Committee said that Soviet Jews who went to Israel and automatically became Israeli citizens would not qualify under the new refugee definition).

Grahl-Madsen, the leading refugee scholar of the time, took the view that when loss of nationality results from persecution or flight, a person should still be considered to have their former nationality for purposes of Article 1A(2).³³⁰ The more crucial issue was whether they should be classified as Israeli nationals given that they traveled with Israeli immigrant visas that entitled them to citizenship upon arrival. If so, they could not qualify as refugees under the Convention, either because they were dual nationals who did not have a well-founded fear of persecution in *both* countries, or because they were no longer stateless but were now nationals of a country that would not persecute them. On the other side, arguments could be made that the dropouts did not acquire Israeli nationality unless and until they actually arrived in Israel,³³¹ or that the absence of other ways to leave the Soviet Union made their acquisition of Israeli nationality involuntary and therefore invalid.³³² The uncertainty of the situation is reflected in reports of conflicting views within UNHCR. A 1973 legal opinion prepared by UNHCR staff had taken the view that the Soviet Jews in Vienna were under Israeli national protection and were dual nationals ineligible for refugee status unless they could show a risk of persecution in both the Soviet Union and Israel.³³³ But Paul Weis, the former director of the UNHCR's legal division,

330. GRAHL-MADSEN, *supra* note 55, at 158–60. As Grahl-Madsen pointed out, if it were otherwise, a persecuting government could prevent a non-resident citizen from claiming refugee status by denationalizing him; if classified as stateless, such a person would not qualify as a refugee because he does not fear persecution in his country of habitual residence. *But see* Paul Weis, *The Concept of the Refugee in International Law*, 87 J. DU DROIT INT'L 928, 972 (1960) (arguing that nationality under the Convention should be determined solely by “whether the person is considered [a national] by the authorities of that country”).

331. But, as we have seen, many refugee tribunals have refused to grant Convention refugee status to people who have a right to a safe country's nationality but decline to use it. *See supra* notes 71, 78, and accompanying text.

332. Under Israeli law, foreign nationals entering on Israeli visas can avoid acquiring Israeli nationality if they express that wish before or within three months after their arrival, but stateless persons are not given that option. Because nearly all exiting Soviet Jews were stripped of their Soviet citizenship, Israel treated them as citizens upon arrival, regardless of their wishes. INS General Counsel Opinion, *supra* note 316, at 2–3. Although international law may prohibit states from naturalizing foreign nationals against their will, involuntarily conferring nationality on stateless persons has been seen as permissible. *See* PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 113–19 (1956) (discussing acquisition of nationality).

333. The opinion reasoned that “[s]ince Jewish immigrants from the Soviet Union are Israeli-protected persons from the moment of their arrival in Austria, they cannot be considered as refugees under the UN High Commissioner's mandate. Jewish immigrants not wishing to proceed to Israel, in view of the availability of the protection and services of the Israel government through the Jewish Agency, cannot claim UN High Commissioner assistance as refugees unless they are able to fulfill the eligibility criteria, vis a vis the Soviet Union and Israel.” Landau, *supra* note 321 (quoting from the UNHCR staff opinion).

reported in an opinion he drafted in 1974 that UNHCR had made a number of eligibility determinations for Jews seeking resettlement, and found most of them to be eligible for refugee status.³³⁴

It was clear, however, that the *yordim* could not meet the Convention's refugee definition. They unquestionably had acquired Israeli nationality as soon as they arrived in Israel.³³⁵ Under Article 1C(3), refugee status ceases when a person "has acquired a new nationality, and enjoys the protection of the country of his new nationality." Unlike the cessation clauses that follow and precede it, the word "voluntarily" is not used.³³⁶ Accordingly, Article 1C(3) has been applied without regard to whether a new nationality was obtained with an individual's consent or by operation of law.³³⁷ Refugee tribunals had regularly relied on it to hold that post-World War II refugees who had gone to Israel and benefited from its Law of Return lost their refugee status.³³⁸

At the time of the Refugee Act's passage, both Congress and the Executive were strongly committed to maintaining the U.S. policy of allowing all Soviet Jews who had not been firmly resettled to enter as refugees. They would not have favored an interpretation of the Act's refugee definition that would have cast doubt on Soviet Jews' eligibility. Reading the Refugee Act's textual differences from the Convention—its use of the phrase "outside any country of such person's nationality" and omission of the Convention's dual national clause—as a meaningful difference intended to preserve the U.S.'s flexibility to admit refugees even if they held another country's

334. Weis, *supra* note 328, at 11–12. That passage is crossed out in pen in the surviving draft, and might not have been included in the final legal opinion.

335. See *supra* note 311 and accompanying text.

336. Cf. Convention, *supra* note 3, art. 1C(1) ("He has voluntarily re-availed himself of the protection of his country of nationality"); art. 1C(2) ("Having lost his nationality, he has voluntarily reacquired it"); art. 1C(4) ("He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution").

337. See GRAHL-MADSEN, *supra* note 55, at 395–96 (explaining that art. 1C(3) "is not subject to the proviso of voluntariness" and "applies irrespective of the way in which the person concerned acquires a new nationality, whether by . . . grant on application . . . or by operation of law in any manner whatsoever"); Weis, *supra* note 328, at 978 (describing as an example of this principle a UN advisory ruling that ethnic German refugees in Austria no longer fell within the UNHCR's mandate when Germany enacted legislation declaring them nationals). It remains the prevailing view that voluntariness is not required. See Susan Kneebone & Maria O'Sullivan, *Article 1C, in THE 1951 CONVENTION*, *supra* note 58, at 481, 499 ("Art. 1 C, para. 3 clearly contemplates situations involving both voluntary and involuntary action, or automatic acquisition of nationality.").

338. Weis, *supra* note 328, at 976, 978; GRAHL-MADSEN, *supra* note 55, at 396 (both describing a series of decisions by the French *Commission des Recours*).

citizenship would thus be highly consistent with what can reasonably be presumed to have been Congress's goal.³³⁹

The policy of welcoming all Soviet Jews as refugees had overwhelming support in Congress, and was not questioned even in the face of rapidly rising applications that created processing backlogs and strained resettlement funds.³⁴⁰ Congress's desire to facilitate and regularize the admission of Soviet Jews, together with the Indochinese crisis, provided much of the impetus for the Refugee Act's passage.³⁴¹ During its first consultation with Congress under the new Act, the State Department made it clear that the open door policy would continue. In April 1980, Secretary of State Cyrus Vance told Congressional committees that it was and "will remain" U.S. policy "to offer a haven to any refugee from the Soviet Union who wishes to resettle in this country."³⁴² In 1981, the State Department publicly criticized Israeli plans to stop referring the dropouts to HIAS for U.S. resettlement and reaffirmed that "United States policy has always been and will continue to be that Soviet Jewish refugees arriving in Vienna should have freedom of choice with regard to where they wish to resettle."³⁴³

339. As is often the case in statutory interpretation, trying to ascertain what Congress as a whole intended is necessarily an exercise in "imaginative reconstruction," given that most in Congress probably gave no thought at all to how the language they enacted differed from the Convention's and what the differing language should be taken to mean. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 226-27 (2d ed. 2006) (explaining imaginative reconstruction). There is, however, specific reason to believe that Joshua Eilberg, who drafted the relevant statutory language, was deeply concerned with the refugee status of Soviet Jews and likely to have been conscious of how niceties of wording could affect their eligibility. See *infra* text accompanying notes 344-61.

340. See LOESCHER & SCANLON, *supra* note 263, at 94 (discussing the continuing political support for Soviet Jewish admissions). The strength of Soviet Jews' political support is also reflected in the disproportionate share of resettlement funding they received as compared with other groups. See LAZIN, *supra* note 306, at 84-85 and 132-33 (citing a Senator complaining in private of the disparity of "\$2,400 to help a Soviet Jew . . . \$600 to assist a Cuban . . . 50 cents per person to help a Vietnamese"). A rare note of Congressional dissent can be seen in comments appended to the House report on the Refugee Act by two members who complained that its refugee definition would cover Soviet Jews despite the fact that they have "a valid destination in a democratic hospitable country where they are wanted, needed, and cared for." H.R. REP. NO. 96-608, at 61-62 (1979) (Additional Minority Views of Reps. Henry Hyde and Harold Sawyer); see also 125 CONG. REC. 37224 (1979) (similar comments by Hyde on House floor).

341. LOESCHER & SCANLON, *supra* note 263, at 154; see 1977 *House Hearings*, *supra* note 196, at 15 (Rep. Fish describing Soviet Jewish and Indochinese refugees as the central concerns of the subcommittee); see also 1979 *House Judiciary Hearings*, *supra* note 200, at 30, 73 (statements by Reps. Lungren and Holtzman).

342. *U.S. Refugee Programs*, *supra* note 260, at 4, 7 (testimony of Secretary Vance).

343. Helen Silver, *State Department Says Soviet Jewish Migrants Should Have Freedom of Choice on Where They Want to Settle*, JTA DAILY NEWS BULLETIN, Aug. 27, 1981 (quoting State Department spokesman Dean Fisher); see also Bernard

The practice of granting refugee status to Soviet Jews who had lived as citizens in Israel for a brief time was in place throughout the period the Refugee Act was being considered by Congress and had quiet (because of Israeli sensitivities)³⁴⁴ but steady support from key Congressional players and State Department officials. As early as 1970, at a House Immigration Subcommittee hearing, then-Chair Michael Feighan (with Joshua Eilberg also present) sought assurance from the INS General Counsel that Jews who went to Israel from Iron Curtain countries and “almost automatically” became citizens would not be considered firmly resettled in Israel and ineligible for U.S. refugee admission. INS counsel responded that time spent in Israel as a “bystation or stopping place” before seeking entry to the United States would not necessarily result in a finding of firm resettlement, even if the stay lasted “a couple of years.”³⁴⁵ In 1973, Eilberg, now the subcommittee’s chairman, praised the “fine statement” given by Gaynor Jacobson of HIAS when Jacobson, in response to a committee

Gwertzman, *U.S. and Israel Disagree on Giving Soviet Choice Where to Settle*, N.Y. TIMES, Aug. 26, 1981 (reporting on the dispute with Israel and the State Department’s stance). An attempt in 1987 by Israeli Prime Minister Yitzchak Shamir to convince the United States that Soviet Jews with Israeli visas should not be admitted as refugees was rebuffed by Secretary of State George Shultz, who made it clear that as long as the American Jewish community favored freedom of choice, it would remain the U.S. position. LAZIN, *supra* note 306, at 199–200. In the late 1980s, as the Soviet Union began to eliminate exit restrictions and the prospect of a mass migration loomed, the United States ended its commitment to accepting all Soviet Jews who wished to come. Even then, they were not deemed ineligible for refugee status based on their ability to go to Israel; INS Commissioner Alan Nelson was careful to reassure Congress that “freedom of choice” remained the U.S. policy. *Soviet Refugees, Hearing Before the Subcomm. on Immigration, Refugees, and Int’l Law, House Comm. on Judiciary*, 101st Cong. 92 (1989) (testimony regarding Soviet refugees). Instead, numerical limits on annual refugee admissions from the USSR and individualized assessments of whether each applicant had a well-founded fear of persecution were used as the screening mechanisms. See BECKERMAN, *supra* note 318, at 530–32 (discussing the institution of entry quotas); LAZIN, *supra* note 306, at 275–77 (describing the negotiations that led to numerical limits). Although Congress and the American Jewish community accepted the need to set admission quotas, continuing Congressional sentiment in favor of Soviet Jews was reflected in the 1989 enactment of the Lautenberg Amendment, which effectively created a presumption that Soviet Jews satisfied the refugee definition’s well-founded fear test. See Victor Rosenberg, *Refugee Status for Soviet Jewish Immigrants to the United States*, 19 TOURO L. REV. 419, 426–36, 440–43 (2003); Beyer, *supra* note 314, at 52–53; LAZIN, *supra*, at 270–81 (discussing the Lautenberg Amendment).

344. Israel found the idea of labeling citizens emigrating from Israel as refugees particularly offensive. See Honig, *supra* note 324, at 6 (reporting on Israeli concerns that the new Refugee Act would encourage emigration from Israel by allowing *yordim* to qualify as refugees); Memorandum, Summary Comments on Meeting in Jerusalem on Issue of Handling by HIAS of Russian Refugees Departing Israel, at 12, *copy in HIAS Files*, “Mtgs. Noshrim,” Box 1024 (quoting Prime Minister Rabin as telling American Jewish organizations in a 1974 meeting that “[n]o government in Israel can accept the fact that a yored is a refugee. This would be the end of Zionism.”).

345. 1970 House Hearings, *supra* note 192, at 190 (exchange between Rep. Feighan and INS General Counsel Charles Gordon); see also *id.* at 175 (listing members present at hearing).

member's question, recounted a sympathetic story to illustrate why *yordim* should be allowed to come to the United States as refugees.³⁴⁶ In 1976, a report on Soviet Jewish emigration issued by a Congressional study group chaired by Eilberg noted that *yordim* were being allowed in as refugees based on case-by-case determinations of whether they had firmly resettled in Israel.³⁴⁷ A 1977 Comptroller General Report to Congress extensively described the INS case-by-case approach and the State Department's practice of treating all Soviet Jews who had lived in Israel for less than a year as refugees.³⁴⁸ In August 1977, a group of Congressional and Executive Branch officials monitoring implementation of the Helsinki accords reported to Congress that the situation of about 300 *yordim* living in "pitiful conditions" in Italy after being denied refugee status on firm resettlement grounds could be exploited by the Soviets for propaganda purposes, and recommended that they be paroled into the United States.³⁴⁹ Around the same time, the U.S. government quietly asked HIAS to resume helping Soviet Jews who had left Israel and were seeking refugee admission to the United States.³⁵⁰ In 1979, the INS was still approving most applications of Soviet Jews who had lived in Israel less than a year.³⁵¹

346. 1973 House Hearings, *supra* note 192, at 303-04. Jacobson described the situation of a "young engineering student I spoke to in Rome, who had learned English intending to immigrate to the United States. . . . He was imprisoned in Leningrad because he was a leader in the fight for human rights. He was finally able to exit to Israel. He worked to pay back all of his immigration debts and then arrived in Rome to achieve what he said has been his destination, the United States." *Id.* at 303.

347. EMIGRATION OF SOVIET JEWS, *supra* note 314, at 4. Later in 1976, HIAS, at Eilberg's request, submitted a letter containing a detailed description of the situation of Soviet Jews in Rome. It noted that *yordim* who had stayed in Israel less than a year were receiving U.S. funded refugee assistance and being admitted to the United States as refugees. Letter from Carl Glick to Rep. Joshua Eilberg (Mar. 9, 1976), copy in HIAS files, "Carl Glick Noshrim Jan-April 1976," Box 1292.

348. See COMPTROLLER GENERAL REPORT, *supra* note 312, at 34-36, 46 (describing the State Department and INS approaches).

349. See COMM'N ON SECURITY AND COOPERATION IN EUROPE, REPORT TO THE CONGRESS OF THE UNITED STATES ON IMPLEMENTATION OF THE FINAL ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: FINDINGS AND RECOMMENDATIONS TWO YEARS AFTER HELSINKI 173-74 (1977) (discussing situation of the "Ostia Jews"). Some of them were later resettled in the United States. See LAZIN, *supra* note 306, at 133, 164 n.17 (describing the commission's recommendation and subsequent resettlement efforts).

350. See *id.* at 133 (quoting HIAS official explaining in 1977 that "we have been quietly requested by American government officials to assume responsibility for processing these individuals"). In 1973, HIAS and the JDC, at Israel's request, had suspended assistance to the *yordim* in Rome. See *supra* note 322. Until HIAS resumed providing services, they were helped by the International Rescue Committee and other non-Jewish groups (still with U.S. government funding), while HIAS handled their resettlement once they arrived in the United States. See 1976 Letter from Carl Glick, *supra* note 347 (describing HIAS' activities in Rome).

351. See *supra* note 317.

Given the political salience of the Soviet Jewry issue and Congress's close attention to the processing of their refugee claims, if the new refugee definition had been meant to incorporate a strict Convention approach to nationality that would have made all Soviet Jews who had spent any time in Israel ineligible and raised doubts as to all the rest, one would expect this to have received some notice—especially when the Act's Congressional shepherds, Eilberg, Holtzman, Rodino, and Kennedy, were all strong proponents of an "open door" for Soviet Jews.³⁵² But there is no indication in the legislative history that anyone in Congress thought that the new definition would pose any obstacle to the continuation of current practices.

The fact that it was Joshua Eilberg who inserted the phrase "outside any country of . . . nationality"³⁵³ provides particular reason to believe that this language was meant to preserve existing practices toward Soviet Jews. As we have already seen, Eilberg paid close attention to the implications of wording differences from the Convention, and he had previously expressed sympathy for the view that possession of a second nationality should not stand as a bar to refugee status.³⁵⁴ Eilberg was a close ally of the American Soviet Jewry movement. While his overall approach to refugee issues was more conservative than Kennedy's,³⁵⁵ his advocacy for an open door policy toward Soviet Jews was unwavering. Although skeptical of the Executive Branch's authority to parole in refugees, Eilberg repeatedly lobbied for paroles of Soviet Jews to speed up their admission.³⁵⁶ His

352. In 1971, when Attorney General John Mitchell said he lacked statutory authority to use the parole power to let in Soviet Jewish refugees, Rodino, who then chaired the House immigration subcommittee, persuaded him to change his mind. See *1973 House Hearings*, *supra* note 192, at 161. Rodino and Holtzman later pressed the Carter Administration to speed up paroles of Soviet Jews. See Letter from Reps. Peter Rodino, Elizabeth Holtzman, Robert McLory and Hamilton Fish, Jr. to Attorney General Griffin Bell (Mar. 29, 1979), *copy in* HIAS Files, "USSR Parole 1978/79," Box 1024 (urging that processing commence immediately). Kennedy pushed for the open-ended use of parole to admit Soviet refugees. See Bernard Gwertzman, *State Department Seeking to Admit 10,000 Vietnamese*, N.Y. TIMES, Dec. 4, 1977, at 1, 18 (describing Kennedy's stance). On Eilberg, see *infra* text accompanying notes 353–61.

353. See *supra* note 211 and text accompanying notes 288–89 (discussing Eilberg's introduction of this change in his Refugee Act of 1977).

354. See *supra* text accompanying notes 211–15 and 277–83.

355. See Kennedy, *supra* note 191, at 144 (describing Eilberg's versions of the Refugee Act as "conservative and restrictionist"). Eilberg's bill set a relatively low annual limit of 20,000 on annual refugee admissions, placed stringent limits on Presidential authority to exceed that number, and included restrictions designed to make it harder for "economic migrants" and illegal entrants to be granted relief. See Anker & Posner, *supra* note 192, at 31–42; see also Martin, *supra* note 190, at 94 (noting Eilberg's and Kennedy's contrasting views).

356. See Gwertzman, *supra* note 343, at 18 (discussing Eilberg's requests for emergency paroles of Soviet Jews in 1976 and 1977); Joseph Polakoff, *Action Asked for Entry into U.S. of 2000 Soviet Jews Now in Rome*, JTA, Feb. 11, 1975 (Eilberg

relationship with HIAS was particularly close.³⁵⁷ When the State Department's 1977 budget proposal cut appropriations for HIAS's resettlement work, Eilberg lobbied strenuously to have the funds restored.³⁵⁸ After Israel accused HIAS of pressuring Soviet Jews in Vienna to go to the United States rather than Israel, Eilberg issued a report and press release in February 1978 that emphatically cleared HIAS of the charges and implicitly rebuked Israel for "pointing the finger" rather than looking at the underlying causes of Soviet Jews' preference for the United States.³⁵⁹ Two months later, Eilberg informed HIAS that he had been visited by an Israeli official who tried to convince him that the dropouts were not refugees.³⁶⁰ Eilberg was also quite familiar with U.S. policy concerning the *yordim* and favorably inclined toward letting in those not firmly resettled in Israel.³⁶¹ It is particularly unlikely that Eilberg, when changing the Convention's wording to "any country" in his bill at the very same time that Israel was vociferously arguing that dropouts and *yordim* were not refugees under the Convention, would have intended that his change in wording be understood to incorporate the Convention's approach.

It is also revealing that the Executive Branch understood the new refugee definition to not require any change in existing policies. A Carter Administration "Q and A" briefing book on the new law included these responses to anticipated queries:

pressuring the State Department and Attorney General to authorize paroles). On Eilberg's often-expressed view that refugee paroles lacked legal legitimacy, see Martin, *supra* note 190, at 94.

357. When Eilberg got into legal trouble, Carl Glick, HIAS's President, even offered to testify as a character witness on his behalf. Letter from Carl Glick to Rep. Joshua Eilberg (Feb. 6, 1978), *copy in* HIAS Files, "Noshrim – Statements, Telexes, Press Releases, 'Papers,' etc.," Box 1024.

358. See Letter from Reps. Charles Vanik, Jonathan Bingham and Joshua Eilberg to Senate Appropriates Comm. Chair John McLellan (Mar. 23, 1977), *copy in* HIAS Files, "USSR Legislation Bills (appropriations etc.) 1976-77," Box 1048 (asking the committee to consider increasing the State Department's budget for HIAS's resettlement work).

359. Press Release, Office of Congressman Joshua Eilberg, HIAS Not Diverting Soviet Jews to U.S., Eilberg Report Shows (Feb. 1, 1978), *copy in* HIAS Files, "Noshrim – Statements, Telexes, Press Releases, 'Papers,' etc.," Box 1024; see also LAZIN, *supra* note 306, at 134 (Eilberg defending HIAS); 1978 Letter from Carl Glick, *supra* note 357 (expressing pleasure that "your information coincides almost exactly with our statements" and stating that the report will be an "antidote" to the "politically inspired venom" of an Israeli official who had recently "emitted a loud yowl about HIAS's activities in Vienna"); *Congressional Report Says HIAS Is Not Diverting Soviet Jews to the U.S.*, JTA, Feb. 2, 1978 (reporting on Eilberg's comments).

360. Letter from Carl Glick to Elie Wiesel (Apr. 20, 1978), *copy in* HIAS Files, "Noshrim – Statements, Telexes, Press Releases, 'Papers,' etc.," Box 1024 (describing what Glick was told about a visit Eilberg received the previous week from Shmuel Adler, an advisor to the Israeli Knesset's Committee on Immigration and Absorption); see also LAZIN, *supra* note 306, at 133–34 (recounting Adler's statement to Eilberg and his staff that Soviet émigrés were not political refugees).

361. See *supra* text accompanying notes 345–47.

Question: [I]n the past, Soviet Jews have resettled in Israel and then come to the United States as refugees. How do you explain that?

Answer: Some Soviet Jewish emigres who have gone to Israel have been granted refugee admission to the United States in the past because INS ruled, on a case-by-case basis, that these particular individuals were not firmly resettled there. INS has held that acquisition of Israeli nationality, in and of itself, does not necessarily mean that the individual is firmly resettled in Israel. The new law does not widen or otherwise change this existing avenue of admission.

Question: The Israelis are concerned that the new law considers some Soviet Jews to be refugees even after they are resettled in Israel. How do you explain that?

Answer: If they have been firmly resettled in Israel, Soviet Jews would not qualify for admission to the U.S. as refugees. The concept of firm resettlement has been an integral part of U.S. refugee law since 1948, and is specifically included in the new act. In addition, Soviet Jews firmly resettled in Israel would no longer meet the definition of refugees in the Refugee Act and in the UN Convention and Protocol on Refugees, as those persons who can demonstrate a well-founded fear of political persecution in their country of nationality.³⁶²

Acquiring Israeli nationality was not seen as a bar to refugee status under the new Refugee Act unless the applicant had also firmly resettled in Israel.

The Attorney General's June 1980 regulations continued to define "firm resettlement" in a manner that did not bar refugee status for persons who had citizenship or residence rights in a country but did not actually go there.³⁶³ However, for those who did travel to and enter a country with an offer of citizenship, the presumption of firm resettlement was made harder to overcome, requiring a showing that the person's conditions of residence were "so substantially and consciously restricted by the authority of the country . . . that he was not in fact resettled."³⁶⁴ Under this new standard, the Soviet Jewish

362. Refugee Policy Q & A 1980, undated, Records of the Cabinet Secretary (Carter Administration)—Stephen Page's Files, "Refugee Policy Q & A 1980," Box 131, Jimmy Carter Library. Although the date, author and distribution of the document is not specified, the contents suggest it was prepared in March or April 1980 (one answer states that it was unclear whether a drop in Soviet Jewish exit visas in the first few months of 1980 represented a new and more restrictive Soviet policy; by May or June this had become clear). The Q & A book may have been put together to help officials preparing to appear before the House and Senate Judiciary committees for the first consultations under the Refugee Act in April 1980.

363. Dep't of Justice, INS, Refugee and Asylum Procedures, Interim Regulations, 45 Fed. Reg. 3791, 3793, 2795 (June 2, 1980), *codified at* 8 C.F.R. §§ 207.1(b), 208.14 (1981); *see supra* note 158 (quoting regulation).

364. Refugee and Asylum Procedures, *supra* note 363. It appears that this reflected a longstanding INS view that the firm resettlement standards had generally been too lenient. *See Problems Under the Refugee Act of 1980 Discussed*, 57 INTERPRETER RELEASES 212-13 (1980) (reporting that INS Central Office officials told resettlement agencies at a May 1980 conference that regulations soon to be issued under the Refugee Act would "tighten up" firm resettlement); *U.S. Refugee Programs*,

yordim would no longer qualify for admission—but only because they were deemed firmly resettled, not because they failed to satisfy the definition of a “refugee.” The significance of this distinction was underscored in 1984, when the Jewish Agency informed HIAS that Israel was considering formally granting citizenship to Soviet Jews *before* they departed the USSR for Vienna, so that dropouts would no longer qualify for refugee status. HIAS responded with a legal opinion concluding that if this were done, the emigrants would not be refugees under the UN definition, but “under United States law, they would still be considered refugees because the law states that for someone to be firmly resettled in a new country, they must not only be offered a permanent ‘home’ but must be physically present in that country.”³⁶⁵ State Department officials reportedly concurred with this analysis.³⁶⁶ In 1987, at a time when there were widespread reports that the Soviet Union was poised to accept Israeli proposals to put emigrating Jews on direct flights to Israel,³⁶⁷ the U.S. issued proposed asylum regulations that re-liberalized the firm resettlement standard by allowing people who spent time in another country with citizenship or residence rights to overcome the presumption of firm resettlement by showing that going to that country was a necessary consequence of the flight from persecution, the stay was no longer than necessary, and the person did not establish significant ties there.³⁶⁸ There were reports in the press at the time that the revision

supra note 260, at 33 (April 1980 Congressional testimony by Ingrid Walter of the American Council of Voluntary Agencies stating that the INS firm resettlement guidelines adopted in the late 1970s were the result of “lengthy discussions” with resettlement agencies and had survived “repeated attempts to whittle them down”); *see also* COMPTROLLER GENERAL REPORT, *supra* note 312, at 34–36 (discussing INS’s determinations that some Soviet Jews who had been in Israel for less than a year were firmly resettled, which was more restrictive than the State Department’s stance).

365. HIAS Exec. Comm. minutes (Oct. 16, 1984), Jewish Agency Suggestion re Nationality of Soviet Jewish Emigrants, at 7, *copy in* HIAS Files, “USSR Noshrim Jan.– Oct. 1984,” Box 1223 (describing Israeli proposal and legal opinion submitted by HIAS Associate Secretary and immigration lawyer Dale Schwartz); *see also* Summary of Staff Analysis of Effects of Conferring Israeli Nationality on Soviet Jewish Emigres (Sept. 12, 1984 (same box and folder) (concluding that, under the firm resettlement standard of U.S. law, “[i]n the case we are considering, the Soviet emigre may hold Israeli nationality, but will not have stepped upon Israeli soil and, therefore, could still qualify as a refugee under U.S. law”).

366. HIAS Exec. Comm. minutes, *supra* note 365, at 7 (stating that “[s]ources in the U.S. State Department concurred in the above legal opinion”).

367. *See* LAZIN, *supra* note 306, at 221–25 (describing discussions of direct flight plans). The “direct flights” under discussion would have included a stop-over in Romania, but in contrast with Vienna, there would be no real opportunity for Soviet Jews to “drop out” in a Communist dictatorship. *Id.* at 223.

368. Dep’t of Justice, INS, Proposed Rules, 52 Fed. Reg. 32,552, 32,557 (Aug. 28, 1987) (codified at 8 C.F.R. § 208.15). The revised firm resettlement rule was enacted in 1990 and has stayed essentially unchanged since. *See supra* notes 158–60. Although the revised rule applied only to asylum, comments from Justice Department sources suggested that the INS would apply the same standard to refugee admissions. *See Israel and U.S. Compete for Exiting Soviet Jews*, REFUGEE REPORTS (U.S. Comm. for

was intended to ensure that Soviet Jews who had no choice but to go directly to Israel would not be precluded from traveling on to the United States as refugees.³⁶⁹ Whether or not that was the motivation, the Attorney General's regulation clearly rests on the assumption that the U.S. refugee definition does not exclude a person fleeing persecution in her home country merely because she also is a national of another country that would not persecute her.

D. *The Standards for Exercising Discretion*

Recognizing that the U.S. refugee definition covers multiple nationals who face persecution in any one country of their nationality does not mean that they are all entitled to asylum or refugee admission. It only makes them eligible to be considered for these forms of relief, which are discretionary in nature.³⁷⁰ The Attorney General, by regulation, and the Board of Immigration Appeals, through precedential adjudication, can establish criteria to govern the appropriate exercise of discretion in such cases.³⁷¹

An appropriate model can be found in regulations that address the closely analogous situation of internal relocation. The regulations provide that asylum applicants who could avoid persecution by relocating to a different part of their country of nationality will be denied asylum if "under all the circumstances it would be reasonable to expect the applicant to do so."³⁷² In assessing whether relocation is reasonable, adjudicators are instructed to consider a broad range of factors, including but not limited to "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and

Refugees) [hereinafter 1988 REFUGEE REPORTS], July 15, 1988, at 11, 12–13 (quoting Justice Department sources as stating they did not want two different standards for refugee admission and asylum, although they were "not jumping" to rewrite the admission regulation).

369. 1988 REFUGEE REPORTS, *supra* note 368, at 12 (discussing June 1988 Evans and Novak column stating that Justice Department regulations cleared by the State Department "will give Soviet Jewish refugees flown to Israel via Romania a new right to come immediately to the United States as 'refugees,' despite the fact that they would be granted Israeli citizenship automatically under Israel's Law of Return"); A.M. Rosenthal, *On My Mind; Justice at State*, N.Y. TIMES, July 12, 1988 (reporting that if direct flights were instituted and Soviet Jews would no longer have the opportunity to drop out in Vienna, the State Department planned to amend immigration regulations to ensure that those going to Israel could still immigrate to the United States).

370. See *supra* text accompanying notes 83–89.

371. This has been done, for example, in regulations that set out the circumstances in which applicants who satisfy the refugee definition because of past persecution should be granted asylum as a matter of discretion, without being required to demonstrate that they have a well-founded fear of future persecution. 8 C.F.R. § [1]208.13(b)(1) (2013).

372. 8 C.F.R. § [1]208.13(b)(1)(i)(B), (b)(2)(ii) (2013).

cultural constraints, such as age, gender, health, and social and family ties.”³⁷³

There is no logical reason why applicants who could relocate to another country of nationality should be treated less favorably than those who could avoid the risk of persecution by relocating within their home country.³⁷⁴ (As will be discussed in Part V, in light of the underlying purposes of refugee protection there is, if anything, stronger reason to expect someone to stay within their home country than to resettle in a nominal country of nationality that was not their actual home.³⁷⁵) The same sorts of considerations that are set out in the internal relocation regulation are equally relevant to determining whether it is reasonable, under all the circumstances, to expect a multiple national to go to another country of nationality. The scenarios set out at the beginning of this Article illustrate some circumstances where it would be unreasonable to expect relocation—situations where a person fleeing persecution would face serious hardships or barriers to integration that would make it very difficult to build a new life in that country.

Factors that the BIA has used to assess whether a discretionary grant of asylum is appropriate when an individual could have sought asylum in another country before traveling to the United States are also transferable to the situation of those who could have gone to a second country of nationality. The BIA has considered, *inter alia*, whether the person had any significant ties to the safe country where asylum could have been sought, and, on the positive side of the ledger, “whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere.”³⁷⁶ Similarly, an applicant’s

373. 8 C.F.R. § [1]208.13(b)(3) (2013); see *Doe v. Holder*, 736 F.3d 871, 879–80 (9th Cir. 2013) (explaining that the regulations’ “reasonableness” test does not require a showing that the applicant would face persecution in the place of proposed relocation; lesser hardships such as discrimination, inability to find work, and lack of family connections may suffice).

374. The situations cannot be distinguished on the ground that there is a greater likelihood of persecution if the person remains in the same country. The reasonableness of expecting relocation is only considered under the regulations if there has first been a finding that the applicant would be able to avoid future persecution by relocating. See 8 C.F.R. § [1]208.13(b)(1)(i)(B), (b)(2)(ii) (2013).

375. See *infra* Part V.B.

376. *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987). In that case, the applicant fled persecution in Yugoslavia and spent six weeks in Belgium before traveling to the United States. The BIA, in determining that a discretionary asylum grant was warranted, emphasized that he did not seek asylum in Belgium because he wanted to join relatives in the United States, whereas in Belgium he had “no significant ties.” *Id.* at 468–70, 475; see also *Matter of Kasinga*, 21 I. & N. Dec. 357, 359, 367–68 (BIA 1996) (favorably exercising discretion in the case of an applicant who spent two months in Germany after fleeing her home country; the BIA found she had valid reasons for not seeking refuge in Germany because she had no relatives there but

family or personal ties to the United States, as balanced against a lack of significant ties in a country of nationality to which the person might have gone, could militate in favor of a discretionary asylum grant.³⁷⁷

Political and cultural affinities might also be considered in the balance. Imagine the case of an Ethiopian national who attended college in the United States, studying American political institutions and international human rights. After returning to Ethiopia he speaks out in favor of democratic reforms and is arrested and tortured. He flees to the U.S. and applies for asylum. But he is also an Italian citizen: his grandfather, who died many years ago, was a soldier during the Italian fascist occupation of Ethiopia and his parents were able to procure an Italian passport and citizenship certificate for him when he was a child. Granting asylum to this applicant would be consistent with the U.S. tradition of viewing itself as a haven for the persecuted that is enriched by those who are drawn by and share a commitment to its ideals of freedom and democracy—a theme emphasized throughout the Refugee Act's legislative history.³⁷⁸ His experiences and values make him well-suited for participation in the U.S. political community,³⁷⁹ and his American education and English-language skills will facilitate his integration. His ties to Italy are, in contrast, fortuitous and thin.

Considering cultural and political affinities does run the risk of opening the door to unjustifiable discrimination in favor of ethnic or religious groups with well-organized constituencies, or against those who belong to disfavored groups or hold unpopular views. The way that during the 1970s and 1980s more generous standards were

did have relatives in the United States); *Matter of Soleimani*, 20 I. & N. Dec. 99, 101–02, 107–08 (BIA 1989) (granting asylum to a woman who spent ten months in Israel and could have remained there if she wished; applying *Pula's* balancing test, the BIA gave strong weight to the fact that she had several close relatives in the United States while only her grandmother lived in Israel).

377. Cf. Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 46–47, 63–65 (1987) (arguing that “[a]n evaluation of the real qualities of contacts and connections that an applicant has with a country” is needed to determine whether discretionary denial based on a reasonable alternative source of refuge is appropriate, but questioning the relevance of U.S. family ties).

378. See *supra* text accompanying notes 299–304. Cf. John A. Scanlon & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe*, in OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES 61, 80–84 (Mark Gibney ed., 1988) (discussing the appropriateness of basing immigration policies on values that citizens ascribe to the nation as a whole, including the self-image of the United States as a nation committed to human rights and welcoming refugees); MICHAEL WALZER, SPHERES OF JUSTICE 49 (1983) (arguing that a country's ideological affinities with those facing persecution based on shared values can give rise to an obligation to admit them as refugees).

379. Cf. Mark Tushnet, *Credal Citizenship*, 9 ISSUES IN LEGAL SCHOLARSHIP 1, 3–4 (2011) (discussing the idea of granting citizenship based on a person's demonstration of commitment to a nation's “founding and animating” principles).

applied to Soviet Jews than to similarly-situated Indochinese refugees, who were routinely denied admission if they had prospects of resettlement elsewhere, provides reason for pause.³⁸⁰ But an individualized assessment of whether a person forced from home by persecution has good reasons for coming to the United States rather than another country is not in itself objectionable, and the criteria for exercising discretion can explicitly prohibit giving positive or negative weight to a person's nationality, ethnicity, or religion.³⁸¹ Consideration of an applicant's political affinities to the United States poses obvious potential for abuse (picture an immigration judge rejecting an applicant on discretionary grounds because her socialism or support for an Islamist political party is "un-American"), but at a very basic level—favoring those who share a commitment to core U.S. values such as democracy, human rights, and tolerance—is defensible.³⁸² These are the same values that underlie U.S. asylum law and the Refugee Convention.³⁸³ Refugee adjudication routinely makes inescapably political distinctions resting on human rights and anti-discrimination norms when it labels some governmental actions persecution and others legitimate punishment for violations of law.³⁸⁴

380. See H.R. REP. NO. 96-608, at 63 (1979) (pointing out that Indochinese refugees, unlike Soviet Jews, were disqualified from participation in the U.S. refugee program if another country was willing to take them); see also Kate Aschenbrenner, *Discretionary (In)justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 624, 631 (2012) (arguing that the inherent vagueness of discretion invites inconsistent application).

381. The Refugee Convention requires that states apply its provisions "without discrimination as to race, religion or country of origin." See Convention, *supra* note 3, art. 3.

382. Cf. Tushnet, *supra* note 379, at 3 (arguing that "creedal" criteria for citizenship should rest on acceptance of core principles but allow for contestation "at the level of detail"). The case for taking political affinities into account may be at its strongest in situations where the person's other country of nationality is undemocratic or has a politics rooted in ethnic or religious identity rather than tolerance and pluralism. (Consider the Bosnian asylum applicant described at the beginning of this Article who was repulsed by the ethnic nationalism of her second country of nationality).

383. See HATHAWAY, *supra* note 43, at 101-24 (discussing the foundational role of human rights norms in defining the concept of persecution); see also Daniel Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 787-96 (1998) (viewing nondiscrimination and the protection of belief and expression as the core values underlying the refugee definition); Guy S. Goodwin-Gill, *Asylum: The Law and Politics of Change*, 7 INT'L J. REFUGEE L. 1, 2-4, 17-18 (1995) (arguing that tolerance is the central value reflected in refugee protection and asylum).

384. See generally Daniel Kanstroom, *Loving Humanity while Accepting Real People: A Critique and Cautious Affirmation of the "Political" in U.S. Asylum and Refugee Law*, in DRIVEN FROM HOME: PROTECTING THE RIGHTS OF FORCED MIGRANTS 115 (David Hollenback ed., 2010) (critiquing and cautiously affirming the "political" in U.S. asylum and refugee law); MATTHEW E. PRICE, *RETHINKING ASYLUM* 24-94 (2009). Compare, e.g., *Romeike v. Holder*, 718 F.3d 528, 535 (6th Cir. 2013) (holding it is not persecution for Germany to punish home-schooling parents who for religious reasons refuse to comply with compulsory school attendance laws), with *Matter of Izatula*, 20 I.

The degree of persecution and trauma a person has suffered is also an appropriate discretionary factor to consider. The U.S. refugee definition (in contrast with the Convention's) has, since its earliest days, allowed for refugee status based on past persecution alone, reflecting a humanitarian and compensatory impulse to provide relief to those who have suffered for their beliefs or identities, regardless of whether they would face further persecution if the United States turns them away.³⁸⁵ The Attorney General's regulations already recognize that those subjected to severe forms of persecution, or who were persecuted in the past and would suffer serious harm (other than persecution) if removed, are deserving of a favorable exercise of discretion.³⁸⁶ Applicants with multiple nationalities who were severely persecuted in the country they fled, or who endured past persecution and would face further hardships if removed to a second country of nationality, should similarly receive favorable consideration.

Discretionary criteria for multiple nationality cases could provide for denial of asylum in situations where the applicant neither faced nor fears persecution in the country of nationality that she lived in, and would only be at risk if she went to another country of nationality that was not her home. Such a person literally falls within the U.S. refugee definition, but has no reason to go to the country of nationality that would persecute her. She can reasonably be expected to return to her home country.³⁸⁷

The discussion so far has focused on discretionary criteria for asylum, not the admission of refugees through the resettlement program. While the legal framework for asylum contemplates that every person applying in the United States or at its borders is entitled to an individualized determination of whether he or she satisfies the refugee definition and deserves a favorable exercise of discretion,³⁸⁸ more drastic triage mechanisms are necessarily applied to winnow down the world's estimated 15.4 million refugees for the 70,000 or so resettlement slots the United States offers each year.³⁸⁹

& N. Dec. 149, 153–54 (BIA 1990) (holding that it is persecution rather than legitimate prosecution for a dictatorship to punish those who seek to forcibly overthrow it in countries where a coup is the only way to effect a change in the political regime).

385. See *supra* text accompanying notes 90–91, 250–51.

386. 8 C.F.R. § [1]208.13(b)(1)(iii) (2013).

387. Denying a discretionary grant of asylum in this situation would also be consistent with Congress's statement in the Refugee Act that the goal of U.S. refugee policy is to respond to the needs of those "subject to persecution in their homelands." See *supra* text accompanying note 290.

388. See 8 U.S.C. § 1158(a)(1) (2014) ("Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum . . .").

389. See U.S. Dep't of State, Homeland Security, and Health and Human Services, *Proposed Refugee Admissions for Fiscal Year 2014: Report to the Congress* 1, 5

The Refugee Act provides that, within an overall annual ceiling set by the President in consultation with Congress, admissions “shall be allocated among refugees of special humanitarian concern to the United States.”³⁹⁰ This is done through sub-ceilings that allocate slots by region, and priority categories established by the State Department to limit the types of refugee claims that will be considered.³⁹¹ Only those who make it through this funnel are evaluated on an individual basis to determine whether they meet the refugee definition and should be admitted as a matter of discretion.³⁹²

The committee reports on the Refugee Act listed as factors relevant to determining whether refugees are of “special humanitarian concern” “the extent of persecution to which they have been subjected and the severity of their present situation[], family ties, historical, cultural or religious ties, the likelihood of finding sanctuary elsewhere, and previous contact with the United States government.”³⁹³ That list is broadly similar to the factors I have proposed for discretionary consideration of multiple national asylum applicants, but in the refugee admission context the extreme scarcity of available slots justifies giving much stronger negative weight to “the likelihood of finding sanctuary elsewhere.” When establishing the priority categories or exercising discretion, a general presumption that people who could live safely in another country of citizenship do not make the cut would be reasonable. But there may be special circumstances where a compelling case could be made for offering resettlement. The current priority categories include Iraqis exposed to persecution as a result of their employment by the U.S. government or other U.S.-based organizations.³⁹⁴ Moral obligations toward someone who took on great risks as an interpreter for the U.S. military could warrant giving strong weight to that person’s desire to be resettled in the United States rather than having to go to a second country of nationality beset by poverty and civil strife. Another preference category consists of refugees of certain nationalities with immediate family members living in the United States;³⁹⁵ family reunification might provide a sufficiently compelling reason to offer resettlement even if the person could relocate to another country of citizenship where she has few connections and lacks family ties.

The zero-sum-game aspect of refugee admission (every person granted takes a slot away from other worthy claimants) does not

(2013) [hereinafter *Refugee Admissions*] (estimating number of refugees worldwide and showing annual admissions ceilings and actual refugee arrivals since fiscal year 2012).

390. 8 U.S.C. § 1157(a)(2)–(3) (2014).

391. *Refugee Admissions*, *supra* note 389, at 5–13.

392. *Id.* at 14–15.

393. H.R. REP. NO. 96-608, at 13 (1979); *see also* S. REP. NO. 96-256, at 6 (1979) (containing a similar list that also includes U.S. “foreign policy interests”).

394. *Refugee Admissions*, *supra* note 389, at 10–11.

395. *Id.* at 11–13.

apply to asylum. To be sure, as David Martin has cogently argued, asylum can be viewed as a scarce resource in the sense that its political viability depends on public confidence that it is reserved for those genuinely deserving of protection. If standards are defined too broadly it may lead to a surge in applications and perceptions of fraud and abuse which generate a restrictionist backlash.³⁹⁶ But asylum applications from multiple nationals, while more prevalent than in the past, will continue to be but a small fraction of asylum claims. Recognizing that the refugee definition does not exclude them will not create any entitlement to asylum, and immigration judges and asylum officers are unlikely to issue discretionary grants in unsympathetic circumstances. Here we can give Joshua Eilberg, the progenitor of the U.S. refugee definition, who was ever mindful of the dangers of uncontrolled refugee flows,³⁹⁷ the last word. At a 1973 hearing on refugee legislation, discussing with a witness why people fleeing persecution in Northern Ireland ought to be eligible for asylum in the United States even though both the UK and Ireland would recognize them as citizens, Eilberg observed that allowing their claims will “not materially affect our economy or population, and yet, it would be very meaningful to those few individuals involved.”³⁹⁸

V. RECONSIDERING THE CONVENTION’S STANCE

A. *The Incongruity of the Multiple Nationality Clause’s Approach*

The previous Part of this Article has shown that the distinctive wording and history of U.S. refugee definition provides strong grounds for interpreting it to cover multiple nationals who would be ineligible for refugee status under the Convention. But what about other countries whose refugee laws are based on the Convention? Should they also reconsider their approach to multiple nationals’ asylum claims?

Amending the Convention refugee definition is not a realistic possibility. A 1977 UN conference aimed at negotiating a new Convention on Territorial Asylum foundered when it became

396. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30 (Howard Adelman ed., 1991); see also Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States*, 15 BERKELEY J. INT’L L. 27, 33–37 (1997) (discussing policy concerns that make decision-makers reluctant to accept a broad definition of refugee).

397. See *supra* note 355.

398. 1973 House Hearings, *supra* note 192, at 330; see *supra* text accompanying notes 278–83 (discussing and quoting from Eilberg’s colloquy with John Collins).

apparent that nations could not reach consensus on any expansion of existing obligations and might even weaken them.³⁹⁹ Nonetheless, the UNHCR, as part of its mandate to supervise international protection of refugees, has had considerable success in influencing state practice through its *Handbook*, other guidelines, and the Conclusions issued by its Executive Committee (Excom).⁴⁰⁰ UNHCR's views not only provide guidance on the Convention's interpretation; they have also been influential in spurring states to go beyond the Convention's minimum requirements. For example, the *UNHCR Handbook*, while acknowledging that under the Convention only "statutory" refugees (those recognized pre-1951) may maintain refugee status based on past persecution if no longer at risk in their home country, states that "[t]his exception . . . reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees . . . that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate."⁴⁰¹ This approach has received broad international acceptance and has been incorporated into domestic asylum standards by, among others, the United States and the European Union.⁴⁰²

399. See ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 61-68 (1980); Paul Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L L. 151, 169 (1979); see also Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 234 (1996) ("The reluctance of the international community to abandon the 1951 foundation reflects . . . a pragmatic awareness that hoped-for advances might instead dilute standards of protection.").

400. See Convention, *supra* note 3, art. 35; Protocol, *supra* note 3, art. II (setting out UNHCR's role supervising the application of the Convention and Protocol and the duty of states to cooperate); see also Guy Goodwin-Gill, *The Dynamic of International Refugee Law*, 25 INT'L J. REFUGEE L. 651, 655-58 (2014) (discussing how UNHCR's *Handbook* and guidelines have influenced the progressive development of state practice); Jennifer Moore, *Restoring the Humanitarian Character of U.S. Refugee Law: Lessons from the International Community*, 15 BERKELEY J. INT'L L. 51, 52-53 (1997) (explaining that because Excom consists of over 50 states with a strong interest in refugees, its Conclusions provide significant evidence of evolving international consensus).

401. UNHCR *Handbook*, *supra* note 20, ¶ 136.

402. See 8 C.F.R. § [1]208.13(b)(1)(iii) (authorizing grants of asylum based on past persecution alone where an applicant shows compelling reasons for being unwilling to return arising from the severity of past persecution or a reasonable possibility of other serious harm); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, For a Uniform Status for Refugees or For Persons Eligible for Subsidiary Protection, and For the Content of the Protection Granted (recast), art. 11(3) [hereinafter *Qualification Directive*] (providing a similar exception for those "able to invoke compelling reasons [for unwillingness to return] arising out of previous persecution"); Joan Fitzpatrick & Raphael Bonoan, *Cessation of Refugee Protection*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 489, 501-512, 519 (Erika Feller et al. eds., 2003) (listing twelve examples of countries adopting this approach in national legislation).

Two important UNHCR pronouncements address situations closely analogous to that of multiple national asylum-seekers and can provide a conceptual foundation for moving state practice in the direction of a more nuanced and humane approach to their claims. Excom Conclusion 15, issued in 1979, calls upon states to adopt common criteria to govern when asylum may be denied on the ground that refuge could be sought elsewhere, based on the following principles:

The criteria should take into account the duration and nature of any sojourn of the asylum-seeker in other countries; . . . The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account; . . . Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.⁴⁰³

The issue of internal relocation—whether a person who could avoid persecution by moving to a different part of his or her home country qualifies for refugee protection—is addressed in the *UNHCR Handbook*, which states, “In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.”⁴⁰⁴ This reasonableness test has won wide acceptance.⁴⁰⁵ It was further elaborated in guidelines UNHCR issued in 2003, which explain that reasonableness should be assessed by asking whether the claimant would be able to “lead a relatively normal life without

403. UNHCR, Exec. Comm. of the High Commissioner’s Programme, *Refugees Without an Asylum Country*, ¶¶ (h)(ii)-(iv), 16 October 1979, Conclusion No. 15 (XXX) – 1979, available at <http://www.refworld.org/cgi-bin/txis/vtx/rwmain?page=printdoc&docid=3ae68c960> [<http://perma.cc/TAY8-VBFG>] (archived Aug. 31, 2014); U.N. GAOR, 34th Sess., Supp. No. 12A at 17, U.N. Doc. A/34/12/Add.1 (1979); see also Legomsky, *supra* note 43, at 664 (noting that in the context of interstate agreements allocating responsibility for determining asylum claims, “the consistent position of UNHCR has been that asylum seekers should not be returned to third countries with which they lack sufficient connection”).

404. UNHCR *Handbook*, *supra* note 20, ¶ 91.

405. See generally Reinhard Marx, *The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures*, 14 INT’L J. REFUGEE L. 179, 199–212 (2002) (discussing general international acceptance of this reasonableness test, albeit with considerable variance in how countries interpret and apply it); see also Januzi v. Secretary of State for the Home Department, [2006] UKHL 5 ¶¶ 7–8 (discussing adoption of UNHCR’s reasonableness test in Canada, New Zealand, Australia, and the UK). The European Union’s directive setting minimum standards for member states’ refugee determinations follows UNHCR’s approach. See *infra* text accompanying note 435. As previously discussed, so do the U.S. asylum regulations. See *supra* text accompanying notes 372–73.

facing undue hardship” in the area of proposed relocation.⁴⁰⁶ The individual’s personal circumstances must be considered, including “factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects.”⁴⁰⁷

Multiple nationality is not intrinsically different. It is one type of situation in which safety from persecution could be found in another country, the general scenario addressed by Excom Conclusion 15. And like internal relocation, it is a situation where nationality confers the right to live in a country, but the person chooses to seek asylum elsewhere. If we interrogate the Convention’s underlying purposes and ask why it is that persons subjected to certain types of persecution are afforded international protection, we can see that taking into account the nature of the asylum-seeker’s links to another country of nationality and whether it is reasonable to expect her to live there is more in keeping with refugee protection’s goals than the sharp exclusionary lines drawn by the Convention’s multiple nationality clause.

B. Multiple Nationality and the Purposes of Refugee Protection

Refugee protection exists to provide a remedy when states fail to protect basic human rights and conditions become so intolerable that a person cannot reasonably be expected to remain home and seek redress from national authorities. National protection takes precedence because the bonds of loyalty and protection that exist between a country and its nationals are generally presumed to provide the most effective and least disruptive mechanism for safeguarding basic human rights.⁴⁰⁸ States are in the best position to protect citizens living within their borders and to provide them with redress

406. UNHCR, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 23, U.N. Doc. HCR/GIP/03/04 (July, 23, 2003).

407. *Id.* ¶ 25. Whether rights of fundamental importance to the individual are respected in the area of proposed relocation is another factor to be considered. *Id.* ¶ 28.

408. See GRAHL-MADSEN, *supra* note 55, at 79 (stating that the defining feature of a refugee is “that the normal mutual bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken (or simply does not exist)”; Andrew E. Shacknove, *Who Is a Refugee?* 95 *ETHICS* 274, 277–78 (1985) (noting that the prevailing conception of refugeehood rests on the idea that there has been a rupture in the “normal, minimal bond of trust, loyalty, protection, and assistance [that] has always existed between virtually every human being and some larger collectivity—be it clan, feudal manor, or modern state”).

when their rights are violated. A country's nationals therefore are expected to make reasonable efforts to seek the remedies available in their home country. As James Hathaway puts it,

Refugee law has traditionally embraced only those who are fundamentally excluded from the national community, in the sense that it is unlikely that they will be in a position to vindicate their claim to protection from within their own country. Those whose human dignity has been infringed in a manner which is internally remediable by working within or to restructure the national community . . . have not been treated as refugees.⁴⁰⁹

The fact that refugee status is not available to all who face deprivations of fundamental rights in their home countries, but only those with a well-founded fear of *persecution*, dovetails with these reasons for giving precedence to national protection. Persons facing less severe kinds of harm, conduct that is rights-violating but not so intolerable that it leaves no reasonable option but to flee, can be expected to endure the risks and work from within to seek change, rather than abandoning the ties of nationality and calling upon the international community for protection.⁴¹⁰

These rationales for giving priority to national protection apply with much less force when the country in question is not the country that was the refugee's home and site of the feared persecution, but instead a nominal country of nationality with which the person lacks significant ties. In such cases there are no existing close bonds to preserve, no ability on the part of the state to prevent the persecution or enact reforms to ensure it won't happen again, and no human rights gains to be had from incentivizing people to work for change from within. Asylum-seekers who could have found safety from persecution by relocating within their home country are not automatically denied refugee status; there is even less reason to disqualify those who would have to go to a different country where the person was never, in any real sense, part of the political and social community.

The only justification that can be offered for a bright-line rule denying refugee status to multiple nationals is a desire to preserve as much as possible of the traditional prerogative of states to exclude non-nationals from their territory, by limiting their protection responsibilities to situations where no other nation has a duty to take the person in. But other key goals of the international protection regime provide reason to reconsider the prevailing approach and adopt a reasonableness standard. When persecution forces flight from home, the availability of asylum elsewhere provides not only a

409. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 123 (1991).

410. See Martin, *supra* note 396, at 41-42.

surrogate mechanism for safety, but a way to restore some self-determination and autonomy to persons deprived of agency.⁴¹¹ It is also aimed at restoring membership. One of the most basic deprivations faced by a refugee is the loss of membership in the community to which she belonged. That loss can be at least partially restored through repatriation, if changed conditions in the home country make that possible, or through acceptance into a new community where the individual has reasonable prospects to build a new life.⁴¹² If an asylum-seeker is deflected to a country where he or she has few real ties and would face obstacles to successful integration or hardships that stand in the way of rebuilding a normal life, neither the agency-restoring nor integration-promoting objectives of the system are well-served. Relocation to a nominal country of nationality that was never “home” does not effectively substitute for the real community ties that were sundered by persecution, and often it will decrease the prospects for successful integration into a new community.⁴¹³

Affording asylum seekers some agency in their choice of destination is also consistent with the Convention’s focus on persecution based on the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. Persecution inflicted for other reasons, such as personal vendettas or indiscriminate violence, does not give rise to refugee

411. Cf. Hathaway, *supra* note 409, at 120, 124 (arguing that refugee status should be viewed as an international entitlement that appropriately responds to the deprivation of human dignity in the refugee’s country of origin by reserving for refugees “a sphere of autonomy” which empowers them to leave abusive situations, “facilitates self-determination,” and “gives people some amount of direct control over their own lives”).

412. Cf. WALZER, *supra* note 378, at 29, 48–49 (suggesting that states may have special duties toward refugees because they have been deprived of “membership itself,” so that their needs cannot be satisfied by exporting resources but “can be met only by taking people in”); PRICE, *supra* note 384, at 13, 164–68, 173–74 (arguing that because persecuted individuals have been “targeted for harm in a manner that repudiates their claim to political membership,” providing surrogate membership in a state of refuge is the appropriate remedy, serving both an expressive and a restorative function).

413. Even from a strictly state-centered viewpoint, there is something to be said for assigning responsibility for an asylum claim to a country where family ties or other affinities enhance the prospects for successful integration, rather than sending the person to a place where such ties are lacking or there are other obstacles to successful resettlement. Even if each individual asylum claim imposes a resource burden on the host state, in the long run states tend to benefit from taking the asylum-seeker’s connections into account. Cf. Legomsky, *supra* note 43, at 667 (“Meaningful links . . . permit speedier and more successful integration, a crucial benefit for both the applicant and the host society . . . [A] willingness to consider the relationship between the applicant and each of the two countries additionally fosters international solidarity and equitable responsibility-sharing.”).

status.⁴¹⁴ The Convention's five protected grounds all relate to persecution that discriminatorily targets and subordinates people based on characteristics that are immutable or fundamental.⁴¹⁵ The privileging of these types of persecution can be seen as a reflection of the centrality of nondiscrimination and freedom of belief and expression as international human rights norms, and as an expression of the international community's view that persecution inflicted on these grounds is especially destructive of the foundations of free societies and deserves special condemnation—and special consideration for its victims.⁴¹⁶ In the words of Jean-François Durieux,

[T]he refugee definition is not intended to describe those aliens whom we cannot deport, but, positively, those aliens whom we want to protect. . . . [It] represents the consensus over a positive and collective commitment to protect specific categories of persons, and to resolve the problems caused by their exodus and exile. This positive inclination, which significantly extends to solutions as well as protection, sets refugees . . . apart from those other persons who also . . . need protection against forcible return to . . . danger.⁴¹⁷

One thing distinctive about persecution aimed at people based on their fundamental identities or beliefs is that it is particularly destructive of agency and self-determination. I do not want to

414. Although it sometimes may give rise to other *non-refoulement* protections, such as the Convention Against Torture's prohibition on return to a place where torture is likely, or the European Union's provision of "subsidiary protection" to persons facing serious risks of severe harm for reasons not covered by the Refugee Convention. See generally Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT'L J. REFUGEE L. 461 (2005) (discussing subsidiary protection under the Qualification Directive).

415. See *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (BIA 1985) (explaining that all five of the Convention grounds involve "an immutable characteristic . . . a characteristic that either is beyond the power of the individual to change or is so fundamental to their individual identities or consciences that it ought not be required to be changed"); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 733-39 (Can.) (finding that the five Convention grounds rest on anti-discrimination human rights principles and should be interpreted accordingly). The Convention begins with a reference to the Universal Declaration of Human Rights and "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Convention, *supra* note 3, pmb. ¶ 1.

416. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 43, at 92–93; Steinbock, *supra* note 383, at 787–96; Walker, *supra* note 44, at 603–04.

417. Jean-François Durieux, *Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection* 17 (Refugee Studies Ctr. Working Paper Series, Paper No. 49, Univ. of Oxford, 2008). The Convention's numerous provisions requiring states to provide refugees with economic, social, and political rights, its requirement that states "as far as possible" facilitate their integration and naturalization, and its affirmation of the international community's "profound concern for refugees" and commitment to "assure refugees the widest possible exercise of [their] fundamental rights and freedoms," all support Durieux's point. Convention, pmb. ¶ 2 and arts. 3–31, 34.

overstate the point; a threat of torture and death based on a gambling debt is just as terrifying and potentially dangerous as any other threat of death or torture. But persecution that targets people based on *who they are*—aspects of their identity they cannot or should not be required to change—or their exercise of the freedoms of conscience and expression, constitutes a direct attack on a person's ability to lead an authentic life, express core beliefs, and act in ways aimed at improving one's own life and the lives of others.⁴¹⁸ In that sense, it particularly undermines a refugee's autonomy. Giving refugees a measure of self-determination in choosing their destination when they are forced to flee a former home is thus an appropriate response to their situation, one that reflects the international community's positive concern for their plight. Once a refugee has arrived in a country and asked for asylum, to disregard her reasonable preferences and send her to a place where she lacks genuine ties or would face serious hardships compounds the loss of agency inherent in becoming a refugee with additional disruption and trauma.⁴¹⁹ The basic approach of the internal relocation guidelines and Excom Conclusion 15 appropriately balances the autonomy-restoring functions of refugee status with state interests by asking whether, in light of the individual's circumstances and social ties, it is reasonable to expect her to live somewhere else. The same considerations should apply with no less force when the "elsewhere" is a country of only nominal nationality.

C. *Toward a More Inclusive Approach: UNHCR and the European Union*

UNHCR, to date, has restricted its comments on multiple nationality to reiterating the Convention's literal requirements and admonishing states not to fall beneath that threshold by denying refugee status in situations where a person might be able to obtain but has no current entitlement to another country's nationality,⁴²⁰ or where the person is a national but the country in question would not provide actual protection.⁴²¹ It should consider issuing new guidance on multiple national asylum-seekers that urges states to go beyond

418. Cf. Matthew Lister, *Who Are Refugees?*, 32 *LAW & PHILOSOPHY* 645, 669–70 (2013) (arguing that persecution based on the Convention-covered grounds can be more serious and threatening than persecution based on "merely contingent or idiosyncratic factors" because it targets "aspects of our lives that are . . . central to our identities").

419. Cf. Legomsky, *supra* note 43, at 667 (arguing that that when determining which country is responsible for an asylum claim, there are strong humanitarian reasons to consider an asylum-seeker's preferences and links to the countries in question in order to avoid inflicting further trauma and disruption).

420. See *UNHCR Comments on QD*, *supra* note 69, at 14–15.

421. *UNHCR Handbook*, *supra* note 20, ¶ 107.

the Convention's text in order to better serve the underlying purposes of refugee protection. As discussed in Part III, UNHCR's statutory mandate is broader than the Convention's refugee definition, encompassing those unwilling to seek a country of nationality's protection "for reasons other than personal convenience."⁴²² This makes it particularly appropriate for UNHCR to take a leading role in promoting a reasonableness test for multiple nationals' asylum claims.

UNHCR took a small step in this direction in its 1999 guidelines on cessation of refugee status. Under Article 1C(3) of the Convention, a person ceases to be a refugee if "[h]e has acquired a new nationality, and enjoys the protection of the country of his new nationality." In its commentary, UNHCR states that this clause should not be applied to a person who lacks genuine ties with the country and is unwilling to avail herself of its protection, citing as example the situation of a refugee who acquires a new nationality by marriage but has not established any genuine link with the spouse's country.⁴²³ UNHCR presented this as an interpretation of the phrase "enjoys the protection," which is textually dubious and at odds with the *Handbook*, which takes the phrase to mean simply that the new country of nationality is willing and able to provide effective protection.⁴²⁴ As a statement of appropriate standards that go beyond the Convention's minimum requirements, however, it makes good sense, and points toward similarly considering the applicant's links and preferences in assessing whether a multiple national qualifies for refugee status in the first place. New UNHCR guidelines on the subject could go a long way in fostering state practice that responds more appropriately and humanely to the plight of persons forced from the country of nationality that was their home who have strong reasons not to go to a nominal country of nationality in which they lack real ties or would face serious hardships.⁴²⁵

The European Union's Qualification Directive (QD), which sets out minimum standards for member states' refugee determinations, also has the potential to move state practice in a more accommodating direction. The QD is one of the central pillars in the EU's efforts, growing out of the 1999 Tampere European Council, to establish a "Common European Asylum System, based on the full and

422. See *supra* notes 55–56 and accompanying text.

423. UNHCR, *The Cessation Clauses: Guidelines on their Application*, April 1999, ¶ 17.

424. UNHCR *Handbook*, *supra* note 20, ¶¶ 129–30; see also Kneebone & O'Sullivan, *supra* note 337, at 499–500.

425. The fact that refugee tribunals in various countries have noted the harsh and unfair results often produced by the Convention's multiple nationality cause and looked for ways to mitigate its impact suggests that UNHCR guidance on the subject would have some influence on state practice. See *supra* text accompanying notes 68–81.

inclusive application of the Geneva [Refugee] Convention” and “absolute respect of the right to seek asylum.”⁴²⁶ An interpretation that offers multiple nationals broader access to asylum would be consistent with the directive’s text, and it would help to solve an interpretive puzzle that has troubled commentators.

The puzzle is this: Article 4(3)(e) of the QD lists among the factors adjudicators must take into account in making an evidentiary assessment of a claim for refugee protection “whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.”⁴²⁷ This procedural requirement implies a corresponding substantive standard, but the QD contains no provision that directly addresses how multiple nationality affects eligibility for refugee status. If Article 4(3)(e) were taken to mean that member states are authorized to deny protection even if the applicant has no definite right to citizenship elsewhere, it would contravene the minimum requirements of the Convention.⁴²⁸ Commentators have proposed that, so as not to violate the Convention, it should be construed to allow states to consider the availability of citizenship elsewhere only if the person has an existing entitlement to it or previously resided in a country where he or she was recognized as a *de facto* national.⁴²⁹

426. Qualification Directive, *supra* note 402, pmb. ¶ 3; Presidency Conclusions, Tampere European Council, Oct. 15–16, 1999, ¶ 13 [hereinafter Tampere Conclusions], http://www.europarl.europa.eu/summits/tam_en.htm [<http://perma.cc/9WR2-D74R>] (archived Aug. 31, 2014). The QD was initially promulgated in 2004, and substantially revised in 2011. For an overview of the origins and development of the Common European Asylum System, see Maryellen Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 10 WASH. U. GLOBAL STUD. L. REV. 87 (2010).

427. Qualification Directive, *supra* note 402, art. 4(3)(e). This provision was enacted as part of the original QD in 2004. Council Directive (EC) No. 2004/83 of 29 April 2004, art. 4(3)(e) [hereinafter QD 2004]. It remained unchanged in the 2011 revision.

428. UNHCR has criticized the provision on the ground that the Convention does not allow refugee status to be denied based on the possibility of “asserting” citizenship in another country; the multiple nationality clause of Article 1A(2) applies only to those who *have* multiple nationality, while Article 1E excludes only those who have “taken residence” in a country that grants them rights and obligations equivalent to nationality. See *UNHCR Comments on QD*, *supra* note 69, at 14–15.

429. HEMME BATTJES, EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW 266 (2006); Gregor Noll, *Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive*, 12 EUROPEAN PUBLIC L. 295, 308–09 (2006); see also *KK & ors v. Sec’y of State for the Home Dep’t*, [2011] UKUT 92 (I.A.C.), ¶ 41, *aff’d sub nom.* *Sec’y of State for the Home Dep’t v. SP (North Korea) & ors*, [2012] EWCA Civ. 114 (C.A. 2012) (discussing expert submission of Guy Goodwin-Gill contending that, in order to interpret the QD consistently with the Refugee Convention, Article 4(3)(e) should be read as if the words “of which he is a citizen” appeared rather than “where he could assert citizenship”).

But if Article 4(3)(e) applies to persons with an existing right of citizenship,⁴³⁰ it necessarily follows that the QD contemplates a substantive eligibility standard for multiple nationals that is more generous than the Convention's. Article 4(3)(e) expressly states that the availability of citizenship elsewhere counts against the applicant only if he or she "could reasonably be expected" to go to that country. Commentators have generally assumed that the QD's definition of "refugee" is no broader than the Convention's,⁴³¹ but if this were so, reasonableness would be irrelevant—a well-founded fear of persecution would be the only acceptable ground for not availing oneself of a country of nationality's protection. A close reading of the QD's text, however, makes for a strong case that the same reasonableness standard that applies when a person could avoid persecution through internal relocation provides the governing standard for multiple nationals as well.

As a starting point, the QD's refugee definition incorporates only part of the Convention definition: while it closely tracks the first sentence of Article 1A(2), it omits the Convention's multiple nationality clause.⁴³² In addition, the QD definition refers to an individual who is outside "the country of nationality." This use of the singular does not in itself prove much; the Convention, after all, uses the same phrase and defines it to mean "each of the countries of which he is a national." But compare the phrase used in the QD's definition of the term "country of origin": "the country *or countries* of nationality"⁴³³ It is a generally accepted principle in interpreting EU legislation that all provisions should be given an *effet utile*, so that distinctly-worded provisions are taken to reflect a difference in

430. In addition to ensuring that the QD is not interpreted so as to deny refugee status to those entitled to it under the Convention, this interpretation does no violence to the text of Article 4(3)(e). A person who holds or is entitled to citizenship in another country is necessarily someone who "could assert citizenship" in that country. Qualification Directive, *supra* note 402, art. 4(3)(e).

431. See, e.g., Jane McAdam, *The Qualification Directive: An Overview*, in *THE QUALIFICATION DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES* 7, 10 (Karin Zwann ed., 2007) (stating that the QD's definition of "refugee" is "substantively identical" to Article 1A(2) of the Convention except that it is narrower in that nationals of EU member countries cannot qualify as refugees); SIDORENKO, *supra* note 50, at 65 (making the same observation).

432. Qualification Directive, *supra* note 402, art. 2(d) (article 2(c) in the 2004 QD). As originally drafted by European Commission, the QD would have incorporated by reference the refugee definition set forth in Article 1A of the Refugee Convention. See Comm'n of the European Communities, Proposal for a Council Directive, Sept. 12, 2001, at 10. This was modified in Council to make the definition freestanding. See Council of the European Union, Asylum Working Party, Outcome of Proceedings, Sept. 6, 2002, Doc. No. 11356/02 ASILE 40 (adopting an autonomous refugee definition).

433. Qualification Directive, *supra* note 402, art. 2(n) (article 2(k) in the 2004 QD) (emphasis added).

intended meaning.⁴³⁴ When the QD's drafters wanted to refer to multiple countries of nationality, they knew how to say so. Thus, it can reasonably be inferred that the omission of the "country or countries" wording from the QD's refugee definition—together with the omission of the Convention's multiple nationality clause—means that for purposes of the QD definition it is enough for an individual to be outside any one country of his or her nationality owing to a well-founded fear of persecution.

The express inclusion of individuals with multiple nationalities in the QD's definition of "country of origin" is particularly significant because that term provides the gateway to the application of the QD's article on internal relocation. Article 8 allows for the denial of an application for refugee protection "if in a part of the *country of origin*" the individual would be effectively protected against persecution, "*and can reasonably be expected to settle there.*"⁴³⁵ The QD's substantive standards for granting refugee protection can thus be read in a way that harmonizes with Article 4(3)(e). A person with more than one nationality is not ineligible merely because he or she could live in one of her countries of nationality (or in some part thereof) without fear of persecution; in order to deny the application, it must be reasonable, under all the circumstances, to expect the person to resettle there.⁴³⁶

The fact that the QD was adopted for the stated purpose of establishing common criteria to guide member states in their application of the UN Convention⁴³⁷ does not stand in the way of reading its text in a manner that goes beyond the minimum requirements of the Convention in order to better serve the

434. See Durieux, *supra* note 417, at 16.

435. Qualification Directive, *supra* note 402, art. 8(1) (emphasis added).

436. A standard focusing on whether the applicant can reasonably be expected to live in another country of nationality would also be consistent with the "safe third country" ground for refusing to consider an asylum application in the EU directive on asylum procedures. Under the Procedures Directive, an application may be deemed inadmissible if the person could seek refuge in a safe third country and the decision is made in accordance with "rules requiring a connection between the person seeking asylum and third country concerned on the basis of which it would be reasonable for that person to go that country." Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, arts. 25(2)(c) & 27(2)(a). This echoes the approach of Excom Conclusion 15. See *supra* text accompanying note 403.

Another provision in the Procedures Directive allows member states to apply a rebuttable presumption that an asylum application is "unfounded" if a person is a national of a country designated a "safe country of origin." Council Directive 2005/85/EC, *supra*, arts. 23(4)(c), 31, & Annex II. This provision, however, addresses whether an individual comes from a country so manifestly safe that the person's claim of facing persecution there is not credible, rather than the question of whether persecution could be avoided by going elsewhere.

437. See Qualification Directive, *supra* note 402, pmb. ¶¶ 23–24.

underlying purposes of refugee protection.⁴³⁸ The QD's preamble treats the Convention as "provid[ing] the cornerstone of the international regime for the protection of refugees,"⁴³⁹ but a cornerstone exists to serve as a foundation to be built on. The directive's stated goal is to provide for a "full and inclusive" approach to the Convention's application, one that "seeks to ensure full respect for human dignity" and "fundamental rights" as well as meeting the Convention's minimum requirements.⁴⁴⁰ The autonomy and membership-restoring purposes of refugee protection, which provide the basis for the reasonableness standard used to adjudge whether a refugee ought to go elsewhere within her own country, apply with equal force to the situation faced by multiple national asylum-seekers.⁴⁴¹ Giving the QD an interpretation that its text can readily support, in order to provide access to asylum for multiple nationals who have valid objections to being sent to a country in which they lack real ties or would face significant obstacles to successful integration, would be consonant with the goals of the European Asylum System.

VI. CONCLUSION

In a world where multiple national affiliations are ever more prevalent and need not reflect any real ties between the individual and a state of nationality, refugee-receiving nations ultimately must choose whether to view refugee status solely as a last resort reserved for those with no place else to go, or as a compensatory and restorative measure that gives persons forced from home by persecution an opportunity to regain some control over their lives.

438. See *QD & AH v. Secretary of State for the Home Dep't*, [2009] EWCA (Civ) 620, [18] (Eng.) (stating that the Qualification Directive "has to stand on its own legs and be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous"); cf. Hugo Storey, *EU Qualification Directive: A Brave New World?*, 20 INT'L J. REFUGEE L. 1, 9–11 (2008) (acknowledging the force of, although ultimately rejecting the view that the Directive's refugee definition must be interpreted on its own terms and not as simply incorporating the approach of the Convention). The QD clearly goes beyond the Convention's text in its provision adopting UNHCR's "humanitarian principle" that refugee status can be maintained even if changed conditions in the home country eliminate the risk of persecution, when an individual has compelling reasons arising from past persecution for not returning. Qualification Directive, *supra* note 402, art. 11(3); see *supra* text accompanying notes 401–02.

439. Qualification Directive, *supra* note 402, pmb. ¶ 4.

440. *Id.* pmb. ¶¶ 3, 16; *Tampere Conclusions*, *supra* note 426, ¶ 13. The European Court of Justice has held that the QD "must . . . be interpreted in the light of its general scheme and purpose" as set forth in the recitals in its preamble. *Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla et al. v. Bundesrepublik Deutschland*, 2010 E.C.R. 1532, ¶¶ 51–54.

441. See *supra* Part V.B.

Countries that feel under siege from uncontrolled refugee flows may gravitate toward the former view, and the minimum requirements of the Refugee Convention allow them ample room to do so. But for countries or confederations that view themselves, by virtue of history or ideology, as havens for the persecuted—such as the United States⁴⁴² and European Union⁴⁴³—going beyond the Convention’s minimum requirements by accepting multiple nationals who have good reasons not to go to another country of nationality is consistent both with their founding principles and the core purposes of refugee protection. U.S. and EU asylum laws differ from the Convention’s wording in significant ways, and reading those differences to embrace a broader approach to multiple nationals’ eligibility is justified both by textual and purposive considerations. The UNHCR should recognize that the international regime for refugee protection is best served when persons forced from their real home country by persecution are not unreasonably forced to relocate to a nominal country of nationality, and encourage state practice that provides a more humane response to their asylum claims. The approach advocated in this Article represents a return to the original principles of the international refugee regime, which recognized that persons forced from home by persecution who have “valid objections” to seeking a country of nationality’s protection should not be required to do so.⁴⁴⁴

442. See *supra* text accompanying notes 299–304.

443. The Tampere European Council, which established the framework for the Common European Asylum System, declared that, “It would be in contradiction with Europe’s traditions to deny . . . freedom to those whose circumstances lead them justifiably to seek access to our territory.” *Tampere Conclusions*, *supra* note 426, ¶ 3.

444. U.N.G.A. Res. 8(I) and IRO Constitution, *supra* notes 53–54; UNHCR Statute, *supra* note 55.
