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Immigration, Asylum, and Citizenship: A More Holistic Approach

Julian Lim*

Despite obvious overlaps between immigration law, refugee law, and citizenship, legal scholars have tended to disaggregate them, studying them in isolation. This Article brings refugee law in closer conversation with both immigration law and citizenship by presenting the previously unknown history of Pershing's Chinese refugees: 522 Chinese refugees in northern Mexico who in 1917 gained entry into the United States despite the immigration restrictions of the Chinese Exclusion Act, and in 1921 were granted the right to remain in the country as permanent legal residents.

Using this historical case study, the Article first shows that refugee law would not exist were it not for the presence of exclusions in immigration law in the first place—in particular, race-based exclusions. The Article then demonstrates that immigration law and refugee law work dynamically together to construct what can be thought of as “second-class citizenship” for noncitizens, whereby the refugee admitted into the United States comes to occupy a liminal legal and social space. That is, the refugee “belongs” in the United States through refugee law, but at the same time should not “belong”

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according to exclusionary immigration law. Juxtaposing immigration, refugee law, and notions of citizenship and “belonging,” the Article advances a more holistic approach to these bodies of law and society in the supposedly “post-racial” United States, suggesting that the immigrant/refugee dynamic illuminated through the case of Pershing’s Chinese refugees continues to engage race to define who belongs in the nation and how in the twenty-first century.

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INTRODUCTION

Despite the country’s mythic reputation as a nation of immigrants, the development of U.S. immigration law in the past century has been defined by exclusion. Refugee law, at the same time, has effectively become an alternative pathway to admission for certain immigrants who would otherwise be excluded. In negotiating deeply contentious ideas about who should be excluded from the country and who could be admitted, both immigration law

and refugee law have directly shaped the body politic, which has never been quite coterminous with the nation's citizenry.

Notwithstanding the obvious overlaps between immigration law, refugee law, and citizenship, however, legal scholars have tended to disaggregate them, pursuing their scholarly agendas along distinct and largely disconnected roads. Although refugee law has been incorporated into the broader immigration system in the United States, "refugees" are often understood to be qualitatively different from "ordinary," "stock" immigrants.¹ Immigrants are said to be "willing migrants," whereas refugees are "forcibly displaced."² Immigration law scholars grapple with the complicated political and legal terrain of "illegal" immigrants in the United States, frequently constrained by a domestic vocabulary that begins and ends at the nation's borders. Meanwhile, the framework of U.S. refugee law does not readily accommodate such domestic considerations, instead looking to an international legal regime focused on life-threatening human rights violations abroad.

In stark contrast to the scholarly disaggregation of immigration law and refugee law, these two areas of law have increasingly merged in practice. One of the most prevalent issues in immigration law, for example, is the defensive asylum claim raised by an immigrant facing removal from the country.³ State governments have also blurred the line between immigration law and refugee law, increasingly applying stricter immigration practices—such as the use of more stringent visa requirements, questionable detention practices, and the criminal prosecution of asylum seekers for entering the country with false documents—to deter refugee arrivals.⁴ While refugee law scholars clearly recognize that increasingly xenophobic, nativist, and restrictionist ideologies inform both exclusionary immigration and refugee policies in many countries today, this recognition has not produced much sustained engagement with immigration law. As a result, there has not yet developed a theoretical model that captures the intersections between refugee law and immigration law.

This Article brings immigration law, refugee law, and citizenship into conversation with each other, taking a more holistic approach that enables us to tease out new insights that have been obscured. To do so, the Article recovers the lost history of Pershing's Chinese refugees, a group of 522 Chinese migrants that fled revolutionary Mexico in 1917 and arrived in the United

1. Many commonly apply the term "refugee" to those who are overseas and outside U.S. territory, and reserve "asylum seekers" to describe those who have already managed to reach U.S. shores on their own. On terminology, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 871–72 (5th ed. 2009). Despite the distinctions, in this paper I use both terms interchangeably to refer to the body of law and practices that cover both refugees and asylum seekers.

2. *Id.* at 871.

3. See Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 *DUKE L.J.* 1501, 1506–07 (2010).

4. See LEGOMSKY & RODRÍGUEZ, *supra* note 1, at 1045–64.

States under the protection of the U.S. Army. Despite the dramatic insights it offers about the origins of U.S. refugee law and how immigration and refugee law have been more mutually constitutive than scholars have thought, the story of Pershing's Chinese refugees has fallen through the cracks of time, failing to make any significant ripple in U.S. history, Asian American studies, or immigration and refugee studies. The history remains underexplored by historians and completely unknown in legal literature.⁵

Thinking of these 522 Chinese migrants as refugees changes some of the underlying assumptions about U.S. refugee law. By all accounts, these Chinese migrants should not have been allowed to set foot on U.S. soil at all; under the Chinese Exclusion Acts, the majority of the group would have counted as "laborers," placing them in the category of inadmissible aliens.⁶ In an unprecedented move, however, Pershing's Chinese refugees gained legal admission into the United States in 1917. Four years later they disrupted the legal terrain again by gaining the legal right of permanent residency in the United States through the passage of Public Law Number 29 ("PL 29"). Taking place at the U.S.-Mexico border near the turn of the twentieth century, this episode has fallen outside both the spatial and temporal parameters of U.S. refugee law, which locates its origins in the Displaced Persons Act of 1948 and the context of post-World War II Europe. In recovering this lost history, then, this Article stretches back the timeline of U.S. refugee development, locating Pershing's Chinese refugees within a longer arc of U.S. refugee law.

Simultaneously, the Article uses Pershing's Chinese refugees as an important case study for exploring how immigration and refugee law are mutually implicated in the construction of refugee identity and notions of

5. The only major historical treatment of Pershing's Chinese refugees remains Edward Eugene Briscoe, *Pershing's Chinese Refugees: An Odyssey of the Southwest* (1947) (unpublished M.A. thesis, St. Mary's University). Typically, they are only briefly raised in other works when addressing the anti-Chinese campaigns that emerged in Northern Mexico during the revolutionary and post-revolutionary years. See, e.g., Philip A. Dennis, *The Anti-Chinese Campaigns in Sonora, Mexico*, 26 *ETHNOHISTORY* 65, 67 (1979); Robert H. Duncan, *The Chinese and the Economic Development of Northern Baja California, 1889–1929*, 74 *HISP. AM. HIST. REV.* 615, 626–27 (1994). More recently, a dissertation chapter by Andrew Urban analyzed how the refugees fulfilled a domestic servant-like role to the nation. See Andrew Theodore Urban, *An Intimate World: Race, Migration, and Chinese and Irish Domestic Servants in the United States, 1850–1920*, at 233–84 (June 2009) (unpublished Ph.D. dissertation, University of Minnesota) [hereinafter Urban, *An Intimate World*]. Some of the events discussed in this Article are also discussed in Andrew Urban, *Asylum in the Midst of Chinese Exclusion: Pershing's Punitive Expedition and the Columbus Refugees from Mexico, 1916–1921*, 23 *J. POL'Y HIST.* 204 (2011) [hereinafter Urban, *Asylum in the Midst of Chinese Exclusion*].

6. In 1882, Congress passed legislation that effectively barred Chinese immigrants from entering the United States for over eighty years. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, repealed by Chinese Exclusion Repeal Act of 1943, ch. 344, § 1, 57 Stat. 600. Despite the law's repeal in 1943, Chinese immigration remained negligible until 1965 when Congress ended the ethno-racial quota system that gave preference to western European immigrants. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 227 (2004).

citizenship. It makes two theoretical moves to bring immigration, refugee, and citizenship into closer conversation with each other.

The first move is simply to place immigration law and refugee law in direct juxtaposition, showing that refugee law would not need to exist but for the presence of exclusions in immigration law in the first place. As the Article chronicles the history of Pershing's Chinese refugees, it shows how the construction of these men as "refugees" fundamentally depended on the infamous Chinese Exclusion policy in U.S. immigration law. By constructing a new legal identity as "refugees" to short-circuit the bar of Chinese Exclusion, Pershing's Chinese refugees were transformed from legally "inadmissible" to "admissible" aliens.

By exploring this transformation from excludable immigrant to admissible refugee, the Article further demonstrates how immigration and refugee law work dynamically together to construct a form of "second-class citizenship." In order to make this legal transformation, the identities of Pershing's Chinese refugees also needed to be reconstructed socially and politically. Relying on their service to the U.S. Army and thereby conforming their experiences to narratives of Americanization, Pershing's Chinese refugees successfully navigated the move from "undesirable alien" to "deserving immigrant."⁷

Yet, the Americanization narrative that they so successfully performed to gain permanent status in the United States was only *so* successful. To be sure, the story of Pershing's Chinese refugees is in many respects a celebratory tale, and we can indeed find cheer in their triumph over potentially life-threatening violence and racist immigration laws. But it would be shortsighted to ignore the fact that they received only legal residency status, which left them constantly subject to the threat of deportation, with no path to formal citizenship.⁸ They "deserved" to belong but they did not quite belong. Despite the rehabilitative power of the Americanization narrative that made their admission and legalization possible, they continued to experience anti-Chinese discrimination both socially and legally.

Protection on the one hand easily accommodated forms of persecution on the other hand. The history of Pershing's Chinese refugees reveals how ideas about belonging and citizenship in the United States inform the practices of

7. See *infra* text accompanying notes 38–40, 199–209. The seminal text on nativism and immigration restriction movements is JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (1955). For more recent discussions on the treatment of "undesirable" immigrant groups, see PATRICK ETTINGER, *IMAGINARY LINES: BORDER ENFORCEMENT AND THE ORIGINS OF UNDOCUMENTED IMMIGRATION, 1882–1930*, at 18–36 (2009) (describing early movements to restrict immigration in the 1880s); ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 36–39 (2003) (discussing debates about "desirable" versus "undesirable" immigrants largely before the Johnson-Reed Immigration Act of 1924); NGAI, *supra* note 6. (analyzing treatment of various "undesirable" groups in the post-1924 era).

8. See *infra* text accompanying notes 224–26.

immigration and asylum, and how those processes then regenerate—in tandem—new subjects for second-class citizenship in the nation. Drawing from the works of scholars who emphasize the more elastic dimension of citizenship and the ways in which citizenship can encompass a broader range of practices than is suggested by formal, constitutional citizenship, this Article provides a new conceptualization of second-class citizenship for *noncitizens*.⁹ By examining how one of the first legal recognitions of refugees in the United States was negotiated during a period of intense race-based immigration restriction, the Article sheds light on the dynamic relationship between immigration law and refugee law in constructing second-class citizenship for noncitizens, as well as ideas about who belongs and how in the national polity.¹⁰

In Part I, the Article describes the long-lost history of Pershing's Chinese refugees, placing the episode within a broader narrative of anti-Chinese exclusion and violence on both sides of the U.S.-Mexico border. In doing so, it reclaims an important piece of U.S. refugee history, filling a void and challenging the usual post-World War II European origin narratives of refugee law. By destabilizing the dominant framework for thinking about the legal history of refugee law, the Article sets the stage for a theoretical reconceptualization of refugee law.

Parts II and III develop the theoretical points that support a more holistic approach to immigration, refugee, and citizenship law and theory, resisting the dominant approaches in legal scholarship that position refugee law in binary opposition to immigration and citizenship. Instead, Part II uses the case of Pershing's Chinese refugees to show how refugee law would not exist were it not for exclusions in immigration law in the first place. Part III then demonstrates how immigration law and refugee law work dynamically together to construct a form of second-class citizenship for noncitizens. Highlighting the powerful capacity of certain Americanization narratives to transform excludable immigrants into deserving refugees, the case of Pershing's Chinese

9. See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006) (discussing the deeper challenges of the concept of citizenship, including the implication of exclusion); T. Alexander Aleinikoff, *The Constitution of Equal Citizenship for a Good Society: Citizenship Talk: A Revisionist Narrative*, 69 *FORDHAM L. REV.* 1689 (2001) (explaining that the narrative of citizenship should focus on more than second-class citizenship, examining membership of immigrants, Indians, and residents in U.S. territories); Linda Bosniak, *Varieties of Citizenship*, 75 *FORDHAM L. REV.* 2449 (2007) [hereinafter Bosniak, *Varieties of Citizenship*] (challenging the conception of citizenship as based on exclusion through national and internalized borders); see also *infra* text accompanying notes 157–65.

10. In calling attention to the dynamic nature of refugee law's relationship to the broader immigration system, I borrow from Kimberlé Crenshaw's ideas about the need to reframe Critical Race Theory as "dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era." Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1261 (2011).

refugees illuminates the ways in which those Americanization narratives can yet remain limited and marginalizing. Left straddling the line between deserving refugee and excludable immigrant, Pershing's Chinese refugees both "belonged" and did not "belong," experiencing their own noncitizen form of second-class citizenship.

Part IV closes by highlighting how the more holistic approach advanced in this Article might further open up different and more productive conversations about immigration, asylum, and citizenship in the law today. My model illuminates similar dynamics that may be playing out in contemporary refugee cases. Briefly applying this framework to the narratives of Iraqi military translators, women, and gay men, the Article calls for further explorations of how immigration and refugee law work dynamically today to construct second-class citizenship, and in different ways with respect to different groups of migrants. A better understanding of the immigration/refugee dynamic also paves the way for future research about the fluidity of legal identities, the role of law in constructing citizenship and belonging in their fullest sense, and the role of refugee law in constructing the U.S. state. Indeed, a more holistic approach that reflects the experiences of people negotiating the intersections of immigration and refugee law may challenge the United States' traditional self-identification as a "refugee-receiving" nation, contesting the presumptions of non-persecution and non-discrimination that attach to the "refugee-receiving" label. Thus, by positing a more holistic approach to the study of immigration, asylum, and citizenship, this Article presents a more integrated framework that encourages future conversations among policy makers, scholars, and practitioners about how to better promote more democratic practices than we have now at the nation's borders and within.

I.

RECONCEPTUALIZING THE LEGAL HISTORY OF U.S. REFUGEE LAW

Although the history of Pershing's Chinese refugees presents an extraordinary case of legally recognized refugees in the United States, most Americans, both within the academy and without, have never heard of them. Set in the early twentieth century, and involving Chinese immigrants at the U.S.-Mexico borderlands, the story of Pershing's Chinese refugees deviates sharply from the dominant legal and historical narratives of refugee law, traditionally framed as a product of the post-World War II European world. But as the subsequent Sections will demonstrate, by disrupting our common understandings of U.S. refugee history, the case of Pershing's Chinese refugees offers another way of understanding U.S. refugee law that more directly lays bare its fundamental relationship to immigration law.

A. The Dominant Narrative of U.S. Refugee History

It is not surprising that Pershing's Chinese refugees have failed to appear on the radar of scholars of U.S. refugee law and history, given that most authorities associate the origins of refugee law with the rise of Nazi Germany in the late 1930s, the outbreak of World War II, and the persecution of Jews in Europe.¹¹ According to dominant narratives of U.S. refugee law, the Displaced Persons Act of 1948—which proposed to admit 202,000 “displaced persons” from Europe over two years—marked the first significant refugee legislation in U.S. history, granting entry outside the usual immigration process.¹² Prior to the Displaced Persons Act, the United States made no legal distinction between “refugees” and “immigrants,” or so the story goes.¹³

In grounding the temporal and geographic origins of U.S. refugee law in the context of World War II and Europe, U.S. law mirrors international refugee law, which is also largely driven by the mandate of the United Nations Geneva Convention, negotiated in the aftermath of World War II.¹⁴ In fact, the United States directly incorporated the Geneva Convention definition of “refugee” into its own laws when the United States finally passed the comprehensive Refugee

11. See, e.g., GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986) (identifying 1945 and World War II as the point at which the United States began to open its doors to refugees outside of the ordinary immigration procedures); NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, *DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA* 24 (1996) (“For most of American history . . . the law had made no distinction between a refugee and an immigrant. That distinction would be made for the first time . . . when Congress passed the Displaced Persons Act of 1948,” effectively making an exception to immigration quotas to admit “survivors of the Holocaust and others, expelled from or forced to flee their homelands.”). More generally, however, U.S. refugee law and history has not received much in-depth attention by historians. As Carl J. Bon Tempo recently acknowledged, though anthropologists, sociologists, political scientists, and legal scholars have called attention to U.S. refugee law, historians have been slow to engage with it. CARL J. BON TEMPO, *AMERICANS AT THE GATE: THE UNITED STATES AND REFUGEES DURING THE COLD WAR* 2–3 (2008). The few works of history on refugee affairs in the United States mostly focus on the Cold War and the links between American foreign policy and the United States' commitment to refugees. *Id.* Further, Bon Tempo explains the “new immigration” history—as exemplified by works of Mai Ngai, Gary Gerstle, Dan Tichenor, and Aristide Zolberg—“suffers from a blind spot when it comes to refugees; more often than not, the refugee story is left unaddressed or subsumed under the immigration story.” *Id.* at 3.

12. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009. The Act proposed to admit displaced persons under “mortgaged quotas.” See ZUCKER & ZUCKER, *supra* note 11, at 25 (describing the process of “mortgaged quotas” under the Displaced Persons Act). The Act was later revised to increase refugee admissions, allowing a total of 400,000 Europeans to enter the United States as “displaced persons” by the time the Act expired. See BON TEMPO, *supra* note 11, at 25.

13. ZUCKER & ZUCKER, *supra* note 11.

14. As one leading authority on international refugee law explains, “[t]he primary standard of refugee status today is that derived from the 1951 *Convention relating to the Status of Refugees*.” JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 6 (1991). He later continues, “[w]hile other legal and extralegal vehicles add important momentum to the protection system for refugees, it remains clear that state practice today is fundamentally anchored in the basic conceptual framework established by [the Convention].” *Id.* at 27.

Act of 1980.¹⁵ However, as James Hathaway pointedly observed, the Geneva Convention definition of refugee status—a definition that has predominated for more than a half century as the fundamental framework for refugee protection worldwide—was a fundamentally Eurocentric concept.¹⁶ Because it responded specifically to the humanitarian tragedy that engulfed Europe during the late 1930s and 1940s, it also advanced a particularly narrow vision of human rights rooted in the European experience.¹⁷ Indeed, the Geneva Convention definition of refugee required that refugees be geographically related to Europe or otherwise related to “events occurring before 1 January 1951.”¹⁸ It was, as Hathaway explains, “designed by European states . . . for the protection of European refugees . . . reflect[ing] the political norms of European society.”¹⁹ By tethering itself to this framework, then, U.S. refugee law has privileged a narrative of refugee protection defined by the post-war European experience.

15. The Act defines “refugee” based on “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (codified as amended at Immigration and Nationality Act [INA], 8 U.S.C. § 1101(a)(42) (2006)).

16. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129 (1990).

17. *Id.*

18. 1951 Convention relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 2545, ch. 1, art. 1(A)(2). The mandate of the Geneva Convention defined the protectable refugee as any person who

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. The 1967 Protocol expanded the scope of the Convention definition by eliminating the geographical and temporal restrictions but otherwise left the definition of “refugee” intact. See 606 U.N.T.S. 8791, art. I.

19. Hathaway, *supra* note 16, at 134. As a result, refugee law developed in a limited fashion, beholden to a narrow conception of human rights that

only addressed . . . the civil and political rights firmly rooted in Western political thought and consistent with Western political goals. The economic, social, and cultural goals promoted by the socialist bloc were not regarded as rights enforceable by law and the developmental needs of the Third World were largely excluded from the scope of human rights protection.

Id. at 141; see also Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 385 (Gil Loescher & Laila Monahan eds., 1989) (describing how the dominant refugee system was “adopted by the Western countries to deal with Eastern Europeans during the cold war period and to meet the long-standing concerns of religious and racial minorities, notably Jews. It had no precedent in this century and proved inappropriate or unworkable in many subsequent situations.”). The Convention definition was later expanded and institutionalized on an international scale through the United Nations High Commissioner for Refugees, as well as on more regional scales, such as the Organisation of African Unity Convention Relating to the Specific Aspects of Refugee Problems in Africa 1969 or the Cartagena Declaration of 1984 signed onto by many Latin American states, and finally by state-specific refugee legislation. See HATHAWAY, *supra* note 14, at 16–21 (explaining how these regional adaptations of the Convention definition of refugee translated “the core meaning of refugee status to the reality of the developing world”); PATRICIA TUITT, FALSE IMAGES: LAW’S CONSTRUCTION OF THE REFUGEE 10 (1996).

In addition to these chronological and geographical preferences, an analytical emphasis on the role of the nation-state has shaped a great deal of refugee law and history.²⁰ Indeed, for some states, refugees generate an overriding concern regarding the supposed erosion of state sovereignty, followed soon thereafter by questions about how to most efficiently and fairly distribute refugee “costs” among states.²¹ Legal scholars, in particular, have been criticized by other disciplines engaged in refugee studies for focusing too narrowly on legal investigations of refugee status, frequently problematizing the definition of refugee in ways that reify state-centered perspectives.²² The dominant Eurocentric narrative, in turn, has reinforced this “top-down” approach, stressing the political and economic interests of Western states in the development of refugee law, and in ways that tend to overshadow the human rights interests of refugees.²³ No doubt, states exercise extraordinary power in deciding to grant or deny refugee status. However, focusing only on foreign relations and high-ranking government actors neglects the relations and behaviors of “on the ground” actors that occur beneath the radar of state-to-state policy.²⁴ The prioritizing of states in refugee research has rendered refugees themselves largely invisible, “consigned to a passive role in the relationship between states.”²⁵

20. More recently, there has been growing attention to the role of nonstate actors and civil society in refugee affairs. *See, e.g.*, MARÍA CRISTINA GARCÍA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* (2006); Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 309 (1998).

21. *See* TUITT, *supra* note 19, at 8. As Tuitt explains, “the overriding aim of refugee law was at its inception and continues to be the reduction of the external costs of refugee-producing phenomena.” *Id.* at 7. Thus states have limited their refugee “costs” by limiting the number of de jure refugees, accomplished in turn by requiring refugees to be outside the country of nationality (the so-called alienage requirement), by privileging certain forms of human rights violations over others, by requiring that refugees be victims of state design rather than of accident or natural disaster, by defining refugee priorities according to foreign policy priorities of Western states, and by spreading the costs to other states. *Id.* at 7–23.

22. *See* B.S. Chimni, *The Birth of a ‘Discipline’: From Refugee to Forced Migration Studies*, 22 J. REFUGEE STUD. 11, 16 (2009) (rejecting reliance on legal categories and definitions of “refugee” as “deeply flawed”); Eftihia Voutira & Giorgia Doná, *Refugee Research Methodologies: Consolidation and Transformation of a Field*, 20 J. REFUGEE STUD. 163, 166 (2007) (noting that refugee law has “traditionally focused on regimes and state perspectives”). More generally, though, the development of refugee studies as an academic field of study has always been “intimately connected with policy developments,” and thus the state constantly remains in the picture. Richard Black, *Fifty Years of Refugee Studies: From Theory to Policy*, 35 INT’L MIGRATION REV. 57, 58 (2001).

23. *See* C.J. Harvey, *Talking about Refugee Law*, 12 J. REFUGEE STUD. 101, 123–24 (1999) (explaining how the usually Western lawyer’s voice can displace the voices of those actually living the refugee experience).

24. *See* Nathan J. Citino, *The Global Frontier: Comparative History and the Frontier-Borderlands Approach in American Foreign Relations*, 25 DIPLOMATIC HIST. 677, 688 (2001); *see also* Jonathan Soffer, *Oral History and the History of American Foreign Relations*, 82 J. AM. HIST. 607, 613 (1995).

25. Frances Nicholson & Patrick Twomey, *Introduction to REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* 1, 3 (Frances Nicholson & Patrick Twomey

It is no wonder, then, that Pershing's Chinese refugees have fallen outside the dominant framework of U.S. refugee history.²⁶ Coming some thirty years before the Displaced Persons Act, and unfolding at the U.S.-Mexico border rather than in Europe, the case of Pershing's Chinese refugees defies the chronological and geographical trends that dominate historical narratives of U.S. refugee law. The case also breaks from the pervasive state-centered focus of dominant refugee law narratives. In the case of Pershing's Chinese refugees, there appears to have been minimal state-to-state political action. Neither the governments of Mexico nor China were in any position to negotiate with the United States over the status of the Chinese in Mexico.²⁷ The United States also had very little geopolitical interest in accepting the refugees.

Thus, instead of adopting a "top-down" approach that minimizes the role of other participants in the process, this Article takes the "view from below," "looking to the bottom," as Mari Matsuda puts it, in addition to "the top," to better understand the experiences of "ordinary" refugees as central actors in their own legal history and the construction of refugee identity.²⁸ By investigating the experiences of refugees and officials on the ground, we can see more clearly how certain Chinese refugees were able to negotiate a style of

eds., 1999). On political priorities of states and their impact on refugee policy, see Hathaway, *supra* note 16, at 169.

26. See Madeline Y. Hsu, *The Disappearance of America's Cold War Chinese Refugees, 1948-1966*, 31 J. AM. ETHNIC HIST., Summer 2012, at 12 (addressing the absence of Chinese refugees from most historical narratives of Asian immigration as well). I would like to thank Adrienne Davis for also reminding me that African American slaves who escaped to Union lines during the Civil War comprise another significant (and even earlier) refugee group that has been excluded from the parameters of traditional U.S. refugee law and history. Although I do not have space to address it in this Article, the connections between the U.S. Civil War, the formation of the Bureau of Refugees, Freedmen and Abandoned Lands (or the "Freedmen's Bureau," as it was more commonly known), and later developments in U.S. refugee law demand further study. For general details on the Freedmen's Bureau, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 68-71 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 379-86 (1979); see also DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868 (1979) (analyzing the legal aspects of Bureau operations).

27. At this time, both Mexico and China were undergoing significant revolutionary turmoil. On China's weakened political state, see *infra* note 163. It should be noted, however, that the Chinese consul general did visit Pershing's Chinese refugees at least once, immediately upon their evacuation to Columbus. See *infra* note 83.

28. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); see also E.J. HOBBSAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 11 (2d ed. 1990); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (emphasizing the role of Chinese immigrants, and Asian veterans more generally, in resisting and shaping immigration laws and enforcement). In addition, Tomiko Brown-Nagin and Charles M. Payne both provide a bottom-up history of the civil rights movement, focusing on local black community members as agents of legal change. See TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 7-8 (2011); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (2d ed. 2007).

“diplomacy from below,” using their migration and claims of asylum to pressure an open-door immigration policy on the United States where there was none—or to be more precise, where they encountered a racially-exclusive one.²⁹ Although very few documents recording their own voices exist today, this Article tries to capture the perspectives of Pershing’s Chinese refugees, as best as possible, to illuminate how refugee identity is constructed from the bottom-up, rather than merely imposed from the top-down. Thus, the Article not only fills a gap in our understandings of refugee law and history, it also illuminates the role of refugees themselves in law-making processes. Moreover, as Parts II and III will demonstrate, in disrupting the narrative trends that dominate U.S. refugee law, the case of Pershing’s Chinese refugees offers a unique opportunity to shift our perspective and examine the scope and limits of U.S. refugee law from a perspective unmoored from Eurocentric concerns. By doing so, we can begin to see more clearly the integral role of the United States’ own immigration laws in shaping its refugee laws.

B. Pershing’s Chinese Refugees

On the morning of March 9, 1916, revolutionary leader Francisco “Pancho” Villa and his men attacked the small town of Columbus, New Mexico, located a few miles from the U.S.-Mexico border.³⁰ After a six-hour battle that left much of Columbus in flames, the Villistas retreated back across the border into Mexico, leaving more than one hundred Mexicans and several Americans dead on U.S. soil. Woodrow Wilson responded by sending General John J. Pershing and the U.S. Army across the border with a mission to capture Pancho Villa and break up the Villista forces. The Punitive Expedition, as it came to be called, spent ten months canvassing western Chihuahua, engaging in a few sporadic skirmishes with Villista bands, and constantly guarding against the growing hostility of President Venustiano Carranza’s soldiers.³¹ Yet, Pershing’s men ultimately never located Villa, and Washington officially

29. The idea of “diplomacy from below” is borrowed from Renaud Morieux, *Diplomacy from Below and Belonging: Fishermen and Cross-Channel Relations in the Eighteenth Century*, 202 *PAST & PRESENT* 83 (2009).

30. For full details of Villa’s raid on Columbus and the Punitive Expedition, see generally HALDEEN BRADY, *PERSHING’S MISSION IN MEXICO* (1966); JAMES W. HURST, *PANCHO VILLA AND BLACK JACK PERSHING: THE PUNITIVE EXPEDITION IN MEXICO* (2008); FRIEDRICH KATZ, *THE LIFE AND TIMES OF PANCHO VILLA* 560–614 (1998) [hereinafter KATZ, *LIFE AND TIMES*]; 2 ALAN KNIGHT, *THE MEXICAN REVOLUTION: COUNTER-REVOLUTION AND CONSTRUCTION* 345–54 (1986); DONALD SMYTHE, *GUERRILLA WARRIOR: THE EARLY LIFE OF JOHN J. PERSHING* 217–82 (1973); Friedrich Katz, *Pancho Villa and the Attack on Columbus, New Mexico*, 83 *AM. HIST. REV.* 101, 101–30 (1978).

31. Although Carranza sought to weaken Villa’s control in the north, the foreign presence of the U.S. Army on Mexican soil seriously undermined the legitimacy of Carranza as Mexico’s leader, creating great tension between the Carranza and the Wilson administrations. See JOSEPH A. STOUT, JR., *BORDER CONFLICT: VILLISTAS, CARRANCISTAS AND THE PUNITIVE EXPEDITION, 1915–1920*, at 93–102 (1999).

ordered the soldiers to withdraw from Mexico. The expedition broke camp at the end of January 1917, and the American soldiers headed back north, accompanied by a trail of refugees and “two wagons full of painted whores,” as a young George Patton wrote in a letter to his wife.³² By February 5, the last American associated with the expedition had quit Mexican soil.

Patton’s letter minimized the extent of the civilian evacuation, for in actuality, several thousand Mexican, American, and Chinese men, women, and children trailed the U.S. Army back to the border. As reported by the press:

Following the troops were hundreds of refugees. Prosperous Mormon families rode in comfortable farm wagons or in small motor cars. Some Mexicans rode in carriages, on horses, mules, burros and on the motor lorries of the expeditionary forces while hundreds of them and Chinese residents from the evacuated region walked through the deep dust which had been made by the feet of hundreds of troops.³³

In the end, close to 2,750 refugees accompanied the expedition back to Columbus with the expectation of gaining asylum in the United States. In all, 522 of them were Chinese.

This Section focuses on the 522 Chinese merchants and laborers in that group who found themselves stuck between a rock and a hard place, between the extralegal violence against Chinese associated with the Mexican Revolution and the unyielding legal wall of Chinese Exclusion at the U.S. border—both informed by anti-Chinese racial ideologies. The following discussion details the broader context in which Chinese immigrants found themselves in the U.S.-Mexico borderlands during the years of the Mexican Revolution; how certain Chinese immigrants managed to attach themselves in 1916 and early 1917 to Pershing and the Punitive Expedition; and finally how Pershing’s Chinese refugees were able to successfully negotiate a troubled entry into the United States and gain permanent residency status.

1. Chinese Immigration to the U.S.-Mexico Borderlands

Although Chinese immigration to the United States is typically associated with California and the Pacific Northwest, a significant number of Chinese immigrants had also ventured farther inland by the late nineteenth century.³⁴

32. Letter from George S. Patton to Beatrice Patton (Jan. 28, 1917) (on file at Library of Congress, Manuscript Division, George S. Patton Papers, Box 6, Folder 13). Patton was Pershing’s aid during the Punitive Expedition.

33. *Fight on Border as Pershing Army Moves North*, BROOKLYN EAGLE, Jan. 29, 1917 (on file at Library of Congress, Manuscript Division, John J. Pershing Papers, Scrapbooks, 1900–1949 microfilm: frame 84, reel 2). The 197 American refugees were mostly Mormon families that had, ironically, faced religious persecution in the United States and had fled to northern Mexico during the Porfiriato, the reign of Porfirio Díaz (1876–1911).

34. See, e.g., NANCY FARRAR, *THE CHINESE IN EL PASO* (1972); MOON-HO JUNG, *COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION* (2006) (discussing the history and role of Chinese immigrant laborers in the South between the 1830s and 1880s); JAMES W.

Many were especially attracted to the U.S.-Mexico borderlands and its booming borderland economy, fueled by railroads and minerals.³⁵ Chinese immigrants may also have been attracted to more remote places along the border for social reasons, as anti-Chinese sentiments were more muted there than in California.³⁶ Most importantly, however, immigration law and policy on both sides of the border directly impacted the migration patterns that would carry Chinese immigrants to the borderlands. The passage of the U.S. Chinese Exclusion Act in 1882 coincided with Mexico's heavy recruitment of foreign capital—both monetary and human—and shifted the currents of Chinese immigration across the Pacific Ocean from the western coast of the United States to Mexico.

a. Chinese Immigration to the United States

Although the U.S. and Chinese governments initially encouraged the immigration of Chinese as a way to promote trade relations,³⁷ the United States soon changed its position. Virulent anti-Chinese campaigns swiftly gained momentum during the 1860s and 1870s, attacking Chinese immigrants as racially inferior and slavish “coolies,” and rallying white workers in California around the cry, “The Chinese Must Go!”³⁸ In response, on May 8, 1882, Congress passed the infamous Chinese Exclusion Act, the United States' first immigration exclusion policy based on race and nationality. The act banned Chinese laborers from entering the United States and declared all Chinese

LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* (2d ed. 1988) (covering the history of 1,200 Delta Chinese in Mississippi who arrived in 1869–1870).

35. By 1889, El Paso, Texas, had become, as some asserted, “the Chinese Mecca of the southwest.” *EL PASO HERALD*, Feb. 5, 1889, at 2.

36. For example, there were a few scattered demands made in local newspapers for the Chinese in El Paso to “be centered and forced to remain in a given locality” for reasons of public health and property values, but it does not appear that any such plan for segregation came into effect. *See EL PASO HERALD*, Feb. 5, 1889; *see also EL PASO HERALD*, Feb. 8, 1889, at 2; *EL PASO HERALD*, Feb. 7, 1889, at 2. Nor does it appear that they were targeted for economic boycotts or exclusion from city limits. In these respects the prejudice that Chinese immigrants encountered in El Paso differed from that found on the West Coast as well as some other parts of the Southwest. On the establishment of “white man’s camps” and anti-Chinese activities in Arizona and New Mexico, *see, for example, KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS* 71–78, 82–83 (2009); *LONE STAR*, Dec. 2, 1885, at 2; *LONE STAR*, Nov. 28, 1885, at 2.

37. *See Burlingame Treaty, U.S.-China*, July 28, 1868, 16 Stat. 739, 740 (guaranteeing “the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents”).

38. *See LEE, supra* note 7, at 24–30; *SALYER, supra* note 28, at 8–17; *see also ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* (1998) (emphasizing the role of national politicians); *ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971) (discussing the relationship between labor demands and anti-Chinese racism).

immigrants ineligible for U.S. citizenship by naturalization.³⁹ By subjecting all Chinese immigrants to intense scrutiny and severing the right to U.S. citizenship, the Chinese Exclusion Act racialized *all* Chinese as “perpetual foreigners”⁴⁰ and inassimilable aliens.

The impact of the law was immediate. Chinese admissions plummeted: in 1887, U.S. immigration officials admitted only *ten* Chinese immigrants, an all-time low.⁴¹ Meanwhile, the number of Chinese departures rose significantly over the next few years, aided in no small part by surges of extralegal anti-Chinese mob violence that erupted across the country, which gave physical expression to the legalized racial politics of Chinese Exclusion.⁴² According to some estimates, nearly 11,500 Chinese residents left the United States in the first fourteen months after the Act’s passage, and the trend continued throughout the 1880s.⁴³ As Congress continued to refine the restrictive policies of exclusion, their shrinking effect on the Chinese population in the United States was palpable, leading scholars such as Aristide Zolberg to observe that

39. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed* by Chinese Exclusion Repeal Act of 1943, ch. 344, § 1, 57 Stat. 600. The Act of 1882 specifically prohibited “Chinese laborers.” *Id.* By 1888, Congress changed the language to exclude *all* Chinese except “officials, teachers, students, merchants, or travelers for pleasure or curiosity.” Scott Act, ch. 1015, § 2, 25 Stat. 476 (1888). *But see* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (holding that a child born in the United States of Chinese parents permanently domiciled in the United States becomes a U.S. citizen at birth). Although the original 1882 Act was set to expire after ten years, over the next twenty years a series of additional acts renewed the duration and refined the terms of Chinese exclusion, extending the policy indefinitely until it was finally repealed in 1943. *See* LEE, *supra* note 7, at 45–46.

40. *See* LEE, *supra* note 7, at 77–109 (describing how racial ideas about the supposed inability of the Chinese to assimilate informed the exhaustive efforts by immigration officials to deem suspect and screen all Chinese persons, regardless of class or status as immigrant versus citizen). The following articles detail the history of racialized identity tropes imposed upon Asian Americans, including the “perpetual foreigner” and the “Yellow Peril” labels, for various political and economic purposes: Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 23–32 (1996); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1289–99 (1993); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 77–81 (1997); *see also* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 80–88 (1999) (describing how the Immigration Act of 1924 denied all Asians the right to naturalize and thus completed the racialization of Asians).

41. LEE, *supra* note 7, at 44. Between 1870 and 1880, a total of 138,941 Chinese immigrants had entered the United States. *Id.* at 25.

42. *See, e.g.,* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of Baldwin v. Franks*, 3 L. & HIST. REV. 349 (1985). Although most of the anti-Chinese violence occurred in the American West, such as in Denver, Seattle, Tacoma, San Francisco, and Rock Springs, Wyoming, mob violence also threatened Chinese in Midwestern cities such as Milwaukee. *See* Victor Jew, “Chinese Demons”: *The Violent Articulation of Chinese Otherness and Interracial Sexuality in the U.S. Midwest, 1885–1889*, 37 J. SOC. HIST. 389 (2003).

43. LEE, *supra* note 7, at 44.

“this willful reduction of a national group stands to date as the only successful instance of ‘ethnic cleansing’ in the history of American immigration.”⁴⁴

Legislated exclusion, however, was not a complete barrier to Chinese migration. As Erika Lee points out, while the Act was a legislative “watershed” in U.S. immigration history, the number of Chinese who gained legal admission into the United States during the exclusion era (1882-1943) rivaled that admitted during the pre-exclusion era (1849-1882), though at a much slower rate.⁴⁵ Chinese immigrants proved particularly resourceful at using the federal courts to challenge the enforcement of the Exclusion Act and general immigration laws, while others successfully gained entry as merchants, merchants’ wives, and students exempted under the Act.⁴⁶ In addition to these legal admissions, countless undocumented Chinese immigrants entered the United States through what Lee describes as “the back doors” of Canada and Mexico.⁴⁷

b. Chinese Immigration to Mexico

In stark contrast to the United States, Chinese immigration to Mexico was actively encouraged by the Mexican government itself, as part of its particularly aggressive agenda to modernize the country. After decades of civil unrest, Porfirio Díaz’s ascendance to the presidency in 1876 catapulted Mexico through a staggering rate of capitalist development and nation-state formation.⁴⁸ As part of its modernization agenda, Mexico actively encouraged

44. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 192 (2006).

45. During the thirty-three-year period before the passage of the Chinese Exclusion Act, 258,210 Chinese reportedly entered the United States. See LEE, *supra* note 7, at 12. During the next sixty-one years of the Exclusion Era, an estimated 300,955 Chinese gained admission to the United States. *Id.*

46. See SALYER, *supra* note 28, at 33–93; Madeline Y. Hsu, *Befriending the Yellow Peril: Student Migration and the Warming of American Attitudes Toward Chinese, 1905–1950*, in *TRANS-PACIFIC INTERACTIONS: THE UNITED STATES AND CHINA, 1880–1950*, at 105 (Vanessa Künnemann & Ruth Mayer eds., 2009); Erika Lee, *Defying Exclusion: Chinese Immigrants and Their Strategies During the Exclusion Era*, in *CHINESE AMERICAN TRANSNATIONALISM: THE FLOW OF PEOPLE, RESOURCES, AND IDEAS BETWEEN CHINA AND AMERICA DURING THE EXCLUSION ERA* 1, 7–12 (Sucheng Chan ed., 2006). Chinese immigrants successfully challenged decisions by administrative officials through the federal courts until 1905, after which time the jurisdiction of the courts to hear Chinese and other immigration cases was sharply curtailed. See SALYER, *supra* note 28, at 117.

47. LEE, *supra* note 7, at 151. From 1882–1920, an estimated 17,300 Chinese immigrants entered the United States through Canada and Mexico, though this figure is still highly speculative and necessarily fails to capture the total number of immigrants who crossed the border undetected by immigration officials. *Id.*

48. Among the Díaz administration’s new priorities were developing communications and transport systems, encouraging domestic manufacturing, wooing foreign investments, and commodifying land and labor. See MIGUEL TINKER SALAS, *IN THE SHADOW OF THE EAGLES: SONORA AND THE TRANSFORMATION OF THE BORDER DURING THE PORFIRIATO* 139–48 (1997); JOHN TUTINO, *FROM INSURRECTION TO REVOLUTION IN MEXICO: SOCIAL BASES OF AGRARIAN VIOLENCE, 1750–1940*, at 258–67 (1986); MARK WASSERMAN, *CAPITALISTS, CACIQUES, AND REVOLUTION: THE NATIVE ELITE AND FOREIGN ENTERPRISE IN CHIHUAHUA, MEXICO, 1854–1911*,

foreign immigration in addition to capital investment, and officials promoted colonization schemes inviting Europeans and Americans to settle and cultivate Mexico's agricultural potential.⁴⁹ Immigrants answered the call, and Mexico's immigrant population of 48,000 in 1895 steadily gained another 10,000 by 1900 and rose to 116,527 by 1910.⁵⁰

Because the rate of American and European immigration lagged behind the government's expectations and needs, however, Mexican elites turned to Chinese immigrant labor. Supposedly docile, easily acclimatized to tropical conditions, cheap, and exploitable, the Chinese were perceived as ideal recruits for railroad construction and agricultural work.⁵¹ In 1899, China and Mexico entered a Treaty of Amity and Commerce guaranteeing the right of "free and voluntary movement" between Mexico and China, and assuring that Chinese immigrants would enjoy the same legal rights as Mexican nationals.⁵² In the face of legal exclusion and racial hostility in the United States, Chinese immigrants now found economic opportunities and political conditions more expansive and promising south of the U.S.-Mexico border.⁵³ While fewer than one thousand Chinese were living in Mexico in 1895, by 1910 the Chinese population in Mexico had grown to 13,200, and their numbers steadily grew to almost 18,000 by 1930, concentrated mainly in the northern frontier states.⁵⁴

at 5 (1984); Friedrich Katz, *The Liberal Republic and the Porfiriato, 1867–1910*, in *MEXICO SINCE INDEPENDENCE* 49 (Leslie Bethell ed., 1991).

49. See ROBERT CHAO ROMERO, *THE CHINESE IN MEXICO, 1882–1940*, at 25 (2010).

50. See 2 MOISÉS GONZÁLEZ NAVARRO, *LOS EXTRANJEROS EN MÉXICO Y LOS MEXICANOS EN EL EXTRANJERO, 1821–1970* [Foreigners in Mexico and Mexicans Abroad], at 122–34, 201 (1994). Sixty "colonies" were established throughout the regions of Mexico during the Porfiriato, including twenty in the north, with Chihuahua holding the most number of colonies. *Id.* at 134. As wealth and resources became concentrated in the hands of fewer and fewer families, over 90 percent of Mexicans were left landless and struggling in rural poverty by 1911. See ANA MARÍA ALONSO, *THREAD OF BLOOD: COLONIALISM, REVOLUTION, AND GENDER ON MEXICO'S NORTHERN FRONTIER* 127–28 (1995); WASSERMAN, *supra* note 48, at 6; Katz, *supra* note 48, at 94. See generally EMILIO KOURÍ, *A PUEBLO DIVIDED: BUSINESS, PROPERTY, AND COMMUNITY IN PAPANTLA, MEXICO* (2004); DANIEL NUGENT, *SPENT CARTRIDGES OF REVOLUTION: AN ANTHROPOLOGICAL HISTORY OF NAMIQUIPA, CHIHUAHUA* (1993). The Porfirian policies of privatizing land and privileging foreigners then had the unintended effect of encouraging out-migration of Mexicans to the United States: between 1900 and 1930, approximately 1.5 million Mexicans migrated to the United States in search of better opportunities. See MARIO T. GARCÍA, *DESERT IMMIGRANTS: THE MEXICANS OF EL PASO, 1880–1920*, at 33–37 (1981); GEORGE J. SÁNCHEZ, *BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES, 1900–1945*, at 18 (1993).

51. See PAUL J. VANDERWOOD, *JUAN SOLDADO: RAPIST, MURDERER, MARTYR, SAINT* 80–81 (2004); Duncan, *supra* note 5, at 617; see also Julian Lim, *Chinos and Paisanos: Chinese Mexican Relations in the Borderlands*, 79 *PAC. HIST. REV.* 50, 58–59 (2010).

52. See ROMERO, *supra* note 49, at 27–29; *EL CIUDADANO*, May 14, 1892, at 4.

53. See James R. Curtis, *Mexicali's Chinatown*, 85 *GEOGRAPHICAL REV.* 335, 337 (1995); Duncan, *supra* note 5, at 616–17; Evelyn Hu-DeHart, *Immigrants to a Developing Society: The Chinese in Northern Mexico, 1875–1932*, 21 *J. ARIZ. HIST.* 275, 275–77 (1980).

54. See JOSÉ JORGE GÓMEZ IZQUIERDO, *EL MOVIMIENTO ANTICHINO EN MEXICO (1871–1934): PROBLEMAS DEL RACISMO Y DEL NACIONALISMO DURANTE LA REVOLUCIÓN MEXICANA* [The Anti-Chinese Movement in Mexico: Problems of Racism and Nationalism During the Mexican Revolution] 55–64 (1991); Curtis, *supra* note 53, at 337; Evelyn Hu-DeHart, *Racism and Anti-Chinese*

Mexico's northern regions held an additional special attraction for many Chinese immigrants during the years of Chinese Exclusion in the United States—that is, it presented miles and miles of unguarded borderlands and the tempting prospect of crossing undetected into the United States. U.S. immigration officials worked to strengthen their surveillance of the border, but Chinese immigrants continued to devise a variety of strategies for crossing it: some found points along the lengthy and unguarded boundary and crossed undetected; others tried to sneak past officers masked in Mexican garb; and still others paid to be smuggled into the country by a syndicate that included Mexican guides, black and white railroad employees, and at times even U.S. immigration officials.⁵⁵ In fact, a lucrative business was built around the organized trafficking of Chinese into the United States through Mexico, and smuggling agents thrived in an elaborate black market of counterfeit papers that extended from China to Mexico, Cuba, New York, New Orleans, and San Francisco.⁵⁶

In summary, by the turn of the century, the combined forces of U.S. and Mexican immigration laws and policies were directing Chinese immigrants to Mexico's northern border region. And then Mexico erupted in revolution.

2. *Seeking Refuge: Reframing Immigration at the Border During the Mexican Revolution*

Although scholars continue to debate various defining features of the Mexican Revolution, one thing is certain: after Francisco Madero challenged

Persecution in Sonora, Mexico, 1876–1932, 9 AMERASIA J., no. 2, 1982, at 1, 3–4 (explaining the Sonoran reaction to the increasing Chinese population); Raymond B. Craib III, Chinese Immigrants in Porfirian Mexico: A Preliminary Study of Settlement, Economic Activity and Anti-Chinese Sentiment 7–9 (Univ. of New Mexico, Latin American Institute Research Paper No. 28, May 1996). The northern states of Baja California, Chihuahua, Coahuila, Sinaloa, Sonora, and Tamaulipas had the highest concentration of Chinese immigrants in Mexico. See Roberto Ham Chande, *La Migración China Hacia México a Través del Registro Nacional de Extranjeros* [Chinese Migration to Mexico Through the National Register of Foreigners], in DESTINO MÉXICO: UN ESTUDIO DE LAS MIGRACIONES ASIÁTICAS A MÉXICO, SIGLOS XIX Y XX [Destination Mexico: A Study of Asian Migration to Mexico, 19th and 20th Centuries] 167, 179 (María Elena Ota Mishima ed., 1997). By 1910, Sonora had the largest Chinese population in all of Mexico. See Craib, *supra*, at 9.

55. See, e.g., GRACE PEÑA DELGADO, MAKING THE CHINESE MEXICAN: GLOBAL MIGRATION, LOCALISM, AND EXCLUSION IN THE U.S.-MEXICO BORDERLANDS 73–103 (2012) (describing smuggling cases); LEE, *supra* note 7, at 161–64 (recounting how Chinese immigrants were disguised as Mexican or African American and the various people involved in the smuggling rings); CLIFFORD ALAN PERKINS, BORDER PATROL: WITH THE U.S. IMMIGRATION SERVICE ON THE MEXICAN BOUNDARY, 1910–54, at 12, 44–46 (1978); Robert Chao Romero, *Transnational Chinese Immigrant Smuggling to the United States via Mexico and Cuba, 1882–1916*, 30 AMERASIA J., no. 3, 2004, at 1 (describing the business of smuggling Chinese nationals into the United States, which sometimes involved railroad employees and immigration officials); Erika Lee, *Enforcing the Borders: Chinese Exclusion Along the U.S. Borders with Canada and Mexico, 1882–1924*, 89 J. AM. HIST. 54, 59–63 (2002) [hereinafter Lee, *Enforcing the Borders*].

56. See DELGADO, *supra* note 55, at 89–99; PERKINS, *supra* note 55, at 44–46; ROMERO, *supra* note 49, at 30–46; Romero, *supra* note 55.

and toppled Porfirio Díaz's regime in 1910, the turbulent years of the Revolution sparked the mass dislocation of communities and people in the Mexican borderlands like never before.⁵⁷ The violence sent men, women, and children fleeing on foot, wagon, and railroad to safety in other parts of the country and across the border.

With the outbreak of revolutionary unrest in Mexico, Chinese immigration patterns also began to change course. The phenomenon of illegal Chinese entry into the United States across the border continued into the 1910s, but at a slower pace. This was partly a consequence of political and civil unrest in Mexico, and partly a result of the outbreak of World War I, both of which disrupted and slowed all transoceanic immigration to Mexico.⁵⁸ It also reflected, however, the effectiveness of the increasingly militarized border, where corps of U.S. soldiers joined immigration officials in deterring revolutionary spillover.⁵⁹

While U.S. immigration officials were spared from chasing down “illegal” Chinese immigrants, they now had to deal with a new spectacular form of migration generated by the Revolution. An increasing number of Mexican immigrants and migratory laborers had been crossing the border since 1900, but those numbers were dwarfed by what immigration officials now faced. Streams of Mexican refugees were now appearing at the border, comprised not only of political exiles but also short- and long-term refugees from all cross sections of Mexican society.⁶⁰ Any imminent prospect of revolutionary violence—whether from “rebel” factions or federal soldiers as well—created dramatic exodus movements to the border by large bodies of Mexican refugees, numbering at times into the several thousands.

For example, when U.S. immigration inspector Frank Berkshire arrived at Eagle Pass in October 1913, he found the international bridge “crowded with

57. See RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* 127–29 (2011).

58. See ETTINGER, *supra* note 7, at 136; ROMERO, *supra* note 49, at 53–55.

59. To better enforce U.S. neutrality laws during the Mexican Revolution, as well as prevent cross-border raiding and contraband arms trafficking, the Wilson administration increased the number of federal troops patrolling the border. ETTINGER, *supra* note 7, at 136–37. Following Villa's attack on Columbus, upwards of 110,000 national guardsmen were stationed on the border in 1916. *Id.* In addition to preventing any spillover of revolutionary activities across the border, these federalized troops also served a variety of functions that U.S. immigration officials found very helpful. *Id.* at 137. One immigration official explained, “unquestionably [U.S. military authorities] are, and have been, rendering valuable assistance to this service. Because of the extraordinary number of officers and employees now performing duty on this border, I am confident that our efforts in the enforcement of the Immigration and Chinese laws have been strengthened to a degree never before equaled [sic].” Letter from Berkshire to Comm'r-Gen. Immigration (Mar. 9, 1911) (on file with National Archives, Washington D.C., Records of the Immigration and Naturalization Service (Record Group 85) [hereinafter National Archives, RG 85], #53108/71).

60. See, e.g., *Americans Flee from Chihuahua: Hundreds Reach El Paso, Driven by Threats of Slaughter by Rebel Leaders*, N.Y. TIMES, July 30, 1912, at 5.

aliens frantic to reach American soil.”⁶¹ Berkshire thus made arrangements to provide over eight thousand Mexican refugees with temporary refuge in the outskirts of Eagle Pass.⁶² Shortly thereafter, the United States again hosted a massive refugee crisis; when Villa took Chihuahua City in late 1913, thousands of Mexican federal soldiers and civilian refugees fled for eight days and 185 miles to the U.S. border at Ojinaga, Mexico, comprising a frantic procession described by the *El Paso Herald* as a “spectacle of despair.”⁶³ When Villa then came north to Ojinaga and drove the federal forces across the border, the U.S. government set up a temporary camp at Fort Bliss for five thousand refugees.⁶⁴

The solution of temporary refuge became the preferred form of managing refugee crises along the border.⁶⁵ All those eligible for entry as determined by immigration and medical inspectors were immediately admitted into the United States, and were free to leave the camp and secure work for themselves. Those categorized as belonging to excludable classes based on health concerns were deported. Overall, Berkshire reported that “[e]xperience on this border has demonstrated that the most practicable way of handling a situation such as described is to give refugees temporary asylum in the border towns,” and then to ultimately require the refugees to return home once the tide had turned.⁶⁶

The U.S. government extended temporary refuge to Chinese laborers from Mexico as well. The Chinese actively sought American protection, which the U.S. Department of State provided through consular offices in various parts of Mexico.⁶⁷ In fact, before Juárez fell to Maderista forces in early May 1911, the

61. Letter from F.W. Berkshire to Comm’r-Gen. Immigration (Oct. 21, 1913) (on file with National Archives, RG 85, #53108/71G). The refugees had been barred from crossing the border by Eagle Pass authorities who had declared a quarantine against the larger city of Piedras Negras across the border. Berkshire explained:

[A]s it was apparent to anyone familiar with the situation a great loss of life would occur if the congestion was not relieved on the bridge, not perhaps that there was danger to most of them from the bullets of the Federals, but that there was grave danger of women and children being trampled to death in their frantic efforts to flee from what they appeared to believe to be death at the hands of the Federals.

Id.

62. *See id.*

63. *See* OSCAR J. MARTÍNEZ, BORDER BOOM TOWN: CIUDAD JUÁREZ SINCE 1848, at 42 (1975) (quoting the *El Paso Herald*).

64. *Id.* at 42–43; KNIGHT, *supra* note 30, at 117–18. For a description of the mixed reactions of residents in nearby El Paso to the presence of so many Mexican refugees from Ojinaga at Fort Bliss, see GARCÍA, *supra* note 50, at 41–43.

65. Letter from Berkshire to Comm’r-Gen. Immigration (Mar. 9, 1911) (on file with National Archives, RG 85, #53108/71) (reporting that “in all cases many aliens have been permitted to enter the country temporarily for refuge, the writer believing this to be the only reasonable and humane course to adopt under the unusual circumstances”).

66. Letter from Berkshire to Comm’r-Gen. Immigration (Oct. 21, 1913) (on file with National Archives, RG 85, #53108/71G). *See also* Department of Labor, Memorandum for the President (Apr. 3, 1916) (on file with National Archives, RG 85, #54152/79).

67. *See, e.g.*, Letter from Alvey A. Adee, Sec’y of State, to the Amer. Consul at Ensenada (July 15, 1911) (reprinted in U.S. Dep’t of State, Papers Relating to the Foreign Relations of the United States with the Annual Message of the President Transmitted to Congress December 7, 1911, at

Chinese residents of Juárez called upon the U.S. consul for protection. The State Department and the then-Department of Commerce and Labor, working in concert, directed El Paso immigration officers to temporarily suspend the Exclusion Act and permit Chinese persons to cross into El Paso if Juárez came under attack, hold those Chinese in the immigration detention quarters, and then promptly return them to Juárez once it appeared safe to do so.⁶⁸ Immigration officials repeatedly waived the exclusion policies on an ad hoc basis whenever violence threatened towns immediately across the border, and allowed Chinese refugees, whether of the merchant class or not, to cross temporarily into American territory. Once quiet was restored across the border, the Chinese were marched back to the Mexican side “in columns of two under guard of immigration officers.”⁶⁹

U.S. immigration inspectors thus stood at the border, facing the constant pressure of mass refugee exodus whenever any warring faction came within gunshot. In June 1915, immigration inspectors worried that “in the event an attack is made on Agua Prieta [across the border from Douglas, Arizona], as is rumored, the entire population of that place, probably including the army as well, will stampede to the United States.”⁷⁰ By January 1916, the general refugee crisis in El Paso, Texas, compelled the U.S. government to take a special census of the city. In addition to 61,898 residents, census enumerators located 7,051 refugees and 1,762 Mexican soldiers.⁷¹ Eleven of the refugees were identified as “Negro,” 485 as “White (excluding Mexican),” and the remaining 6,555 refugees that were packed into El Paso were labeled as “Mexican.”⁷²

What the census did not include, however, were Chinese refugees, as they were not allowed to stay in the United States. Barred by the Chinese Exclusion Act, there was no place for this racial class of refugees to physically and legally exist on the U.S. side of the border. Though humanitarian concern on the part of border officials prompted the ad hoc emergency measures of temporary refuge, the dictates of the Chinese Exclusion Act still significantly curbed the

618 (1911)), available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1911> [hereinafter 1911 Foreign Relations Papers]; Telegram from Henry Lane Wilson, Acting Sec. of State to Amer. Ambassador (Mar. 24, 1911) (reprinted in 1911 Foreign Relations Papers, at 615).

68. Letter from Berkshire to Comm’r-Gen. Immigration (Apr. 17, 1911) (on file with National Archives, RG 85, #53108/71); Telegram from Philander C. Knox, Sec’y of State, to Amer. Ambassador (May 9, 1911) (reprinted in 1911 Foreign Relations Papers, *supra* note 67, at 615–16).

69. Letter from Berkshire to Comm’r-Gen. Immigration (Mar. 18, 1913) (on file with National Archives, RG 85, #53108/71-F) (describing the situation in each border town—in this case, Nogales, Arizona).

70. Letter from Frank W. Heath to Supervising Inspector, Immigr. Serv., El Paso (June 17, 1915) (on file with National Archives, RG 85, #53108/71N).

71. U.S. BUREAU OF THE CENSUS, SPECIAL CENSUS OF THE POPULATION OF EL PASO, TEX. 3 (1916).

72. *Id.* at 5.

reach of humanitarianism. Once the U.S. Army set foot on Mexican soil in 1916, however, some Chinese immigrants found a unique opportunity to combine the moral “push” of humanitarian discourse with the political “pull” of American jurisdiction, and thereby set themselves on the track to legal—and thereby, rights-carrying—recognition as “refugees.”

3. The Punitive Expedition and Pershing’s Chinese Refugees

The first of the Chinese immigrants who approached the Punitive Expedition appear to have been merchants and peddlers who offered the ragged soldiers a variety of scarce supplies.⁷³ For the weary American soldiers in frustrated pursuit of Villa, struggling over unfamiliar terrain and through extreme weather conditions, the Chinese peddlers and merchants that they encountered during the early months of the expedition provided a welcome sight. The troops suffered from lack of reliable transportation facilities and resultantly poor ration supplies, as well as an embattled Mexican population that could offer only little help.⁷⁴ Information was hard to get, and in some places, so were basic goods even though the American soldiers had money to pay.⁷⁵

Unlike the U.S. Army, which had been denied railroad access by the Mexican government to transport soldiers and supplies, the Chinese in Mexico could haul in merchandise over the rails from El Paso and Ciudad Juárez, in addition to carting in merchandise by wagon and mule. Thereby constantly supplied, the Chinese followed the troops from camp to camp, in wagons and on foot, as they marched across Chihuahua in pursuit of the ever-elusive Villa. By May, when the U.S. Army had made its headquarters near Colonia Dublán, a large number of Chinese had set up eating houses, merchandising stands, and laundries near their camps, attaching themselves to the expeditionary force not only as small merchants, but as laborers, cooks, and laundrymen as well.⁷⁶ A so-called Chinatown was started with permission just inside the southwest boundary of the camp, and Chinese-run establishments cropped up in the so-

73. Briscoe, *supra* note 5, at 7–9.

74. See HURST, *supra* note 30, at 101–20; REPORT OF THE GENERAL SITUATION, Letter from Pershing to Commanding Gen. (Apr. 14, 1916) (notes on file with author, document on file with Library of Congress, box 372, folder 1, p. 4, John J. Pershing Papers) [hereinafter REPORT OF THE GENERAL SITUATION] (reporting that “some people regard us much as they do the revolutionists, but when they find we pay our way, they bring out . . . what little else they have cached away to sell. . . . Others meet us and say we have come too late, that there is now nothing left to save.”). The seeming inhospitality that soldiers received from many Mexicans was likely exacerbated by the fear that any cooperation with the Americans would bring vicious reprisal by either Villistas or Carrancistas when the Americans left.

75. See HURST, *supra* note 30, at 101–02; REPORT OF THE GENERAL SITUATION, *supra* note 74.

76. See Briscoe, *supra* note 5, at 7–9; *Chinese on Army’s Hands: 300 with Pershing Fear Mexicans If Americans Withdraw*, N.Y. TIMES, July 18, 1916, at 4.

called “sanitary village” that the army built to monitor prostitution and keep the eleven thousand men entertained during their deployment.⁷⁷

Pecuniary interests thus played a significant role in drawing Chinese immigrants to U.S. military lines; here, Chinese merchants and peddlers had a large, captive market of consumers who could pay, and in U.S. currency, no less.⁷⁸ But then there was also the violence—violence that was brutal, bloody, and extraordinarily unrelenting. As will be discussed in Part II, reports of Chinese killings multiplied at an alarming rate during the months that the U.S. Army occupied northern Mexico, and rumors abounded that Villa was especially intent on massacring all Chinese.⁷⁹ By attaching themselves to the U.S. military and remaining within the jurisdiction of the Punitive Expedition, these Chinese no doubt hoped to reap the benefits of U.S. state protection, no matter how temporary.

When President Wilson finally issued the order to end the mission in January 1917, those civilians with Pershing and his troops received an extraordinary lifeline. A cloud of dust soon strung out for five miles across the Chihuahuan Desert, stirred up by the thousands of soldiers and the refugees’ caravan of civilians following Pershing out of Mexico by wagon and foot.⁸⁰ Pershing evacuated the Chinese refugees in a body, rationalizing that “[a]s long as they are kept together there will be little chance of their getting across the line . . . without our knowing it.”⁸¹ The very last refugee crossed the border on February 5; close to three thousand refugees were now in Columbus, 522 of them Chinese.⁸² When immigration officials then attempted to move the Chinese refugees from Columbus back across the border to Juárez, the Chinese “strenuously objected,” demanding to remain within the military’s jurisdiction in Columbus until the arrival of the Chinese consul general from San Francisco.⁸³ The Chinese strategy, such as it was, of casting their lot with Pershing as refugees would pay off.

77. See James E. Klover, *Chasing the Greatest Bandito of All: First-Hand Account of a Trooper on the Trail of Big Game—Pancho Villa!*, 7 OLD WEST, Spring 1971, at 40, 42; see also SMYTHE, *supra* note 30, at 273 (providing figure of eleven thousand troops).

78. This was no small matter during these difficult years of the revolution when money was scarce and confiscation or mass looting by insurrectionists, federal soldiers, and civilians alike was a constant threat. See MARTÍNEZ, *supra* note 63, at 40–41 (describing food shortages and social insecurity as a result of revolutionary conditions).

79. See *infra* discussion in Part II.B.1.

80. See *Refugees’ Caravan Follows Pershing*, N.Y. TIMES, Jan. 30, 1917; see also Briscoe, *supra* note 5, at 25–32 (describing in greater detail the condition of the refugees’ journey); *Pershing Retiring; Villistas Advance*, N.Y. TIMES, Jan. 28, 1917, at 1.

81. Letter from Pershing to Berkshire (Jan. 25, 1917) (on file with National Archives, RG 85, #54152/79-A)

82. Briscoe, *supra* note 5, at 31–32. It should be noted that all of the Chinese refugees documented as having been evacuated with Pershing were men. See Letter to the Comm’r-Gen. Immigration (Feb. 16, 1917) (on file with National Archives, RG 85, #54152/79-B).

83. Telegram of Berkshire to Immigration Bureau (Feb. 6, 1917) (on file with National Archives, RG 85, #54152/79-A). The Chinese consul general, T.K. Fong did in fact visit the camp and

4. Public Law 29

Of the civilians coming out of Chihuahua with Pershing's expedition, the fate of the Chinese refugees was the most uncertain. The Americans moved on to other parts of the United States while Mexican refugees either returned to Mexico or accepted employment in Arizona, New Mexico, or Colorado.⁸⁴ A few of the Chinese refugees voluntarily returned to China, while a handful voluntarily returned to Mexico. Some forty met the definition of merchant and were thus allowed legal entry into the United States as an exempted class of Chinese immigrants.⁸⁵ For the rest, however, the Chinese Exclusion Acts seemingly limited the federal government's options.⁸⁶ Four months after crossing the border, over 425 Chinese refugees continued to wait at Columbus for some agreeable outcome.⁸⁷ And as Berkshire noted, there were some "several thousand Chinese in Mexico, at least a thousand of whom are now in Juarez . . . awaiting the outcome of action on the Columbus refugees," presumably hoping that their admission into the United States would provide precedent for future Chinese refugees from Mexico.⁸⁸

act as legal adviser to the interned Chinese, while the Chinese Benevolent Association (also known as "the Six Companies," based in San Francisco) began to raise funds for the relief of destitute Chinese refugees at Columbus as well as some five hundred other Chinese encamped at Juárez; see Letter from V.K. Wellington Koo, Chinese Minister to Sec'y of State (Feb. 14, 1917) (reprinted in U.S. Dep't of State, Papers Relating to the Foreign Relations of the United States with the Address of the President to Congress December 4, 1917, at 1088, 1089 (1917), available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1917> [hereinafter 1917 Foreign Relations Papers]).

84. Letter from Pershing to the Adjutant Gen. of Army (Apr. 12, 1917) (on file with National Archives, RG 85, #54152/79-B).

85. *Id.*; see also Briscoe, *supra* note 5, at 2, 43–45.

86. For a moment, it seemed that the Chinese refugees would be sent to Mexicali in Baja California, where revolutionary hostilities were less of a threat and U.S.-based companies were already seeking to import two to three thousand Chinese laborers from China to work in their cotton industries. U.S. immigration officials favored this arrangement, for not only did it solve the problem of the Columbus refugees but it promised to decrease the "additional embarrassments [to the Bureau] likely to arise from bringing large number[s] [of] new Chinese to lower California," so close to their border. Letter from Caminetti, Comm'r-Gen. to Supervising Inspector, Immigration Serv., Columbus, N. M. (Feb. 15, 1917) (on file with National Archives, RG 85, #54152/79-A); see also Letter from Wellington Koo to Mr. Fung Tsiang Kwang (Feb. 7, 1917) (on file with National Archives, RG 85, #54152/79-A). For unclear reasons, however, the plan was not realized and by May it became evident that the Columbus refugees would not be returning en masse to any part of Mexico.

87. Briscoe, *supra* note 5, at 46; Letter from Berkshire to Comm'r-Gen. Immigration (Apr. 21, 1917) (on file with National Archives, RG 85, #54152/79-B). By the time Congress reviewed the matter in November 1921, deaths and deportations had reduced the number of Chinese refugees remaining in the United States to 365. *Registration of Refugee Chinese: Hearing on S.J. Res. 33 Before the Comm. of Immigration & Naturalization*, 67th Cong. 948 (1921) [hereinafter *Registration of Refugee Chinese*].

88. Letter from Berkshire to Comm'r-Gen. Immigration (Apr. 21, 1917) (on file with National Archives, RG 85, #54152/79-B). Briscoe claims that these refugees had been denied permission to cross into the United States. See Briscoe, *supra* note 5, at 36–38. But in a February 14, 1917, telegram, the El Paso immigration office reported that "between six and seven hundred Chinese reported in Juarez about four hundred of whom are recent arrivals period. . . . Chinese in Juarez have been repeatedly advised that asylum will be granted their expense whenever they ask for it period. No

Although no such assistance came to the Chinese lingering across the border in Juárez, the War Department and its need for menial labor again shifted the course of events for Pershing's Chinese refugees: it offered a temporary program which kept the Chinese at work under military supervision at Fort Sam Houston, in San Antonio, where troops were being organized and trained to fight in World War I.⁸⁹ The Chinese refugees themselves voted almost unanimously to move to San Antonio, and on June 6, each Chinese refugee received his certificate of admission from an El Paso immigration inspector. The certificates authorized the refugees' temporary residence in the United States under the jurisdiction of the War Department, but only until they could safely be returned to Mexico.⁹⁰ Certificates in hand, the refugees left Columbus for San Antonio "to serve in the Quartermaster's department of the army, having offered themselves to the country."⁹¹

Thereafter, the welfare of the Chinese camp resided entirely in the hands of the War Department and the civilian official in charge, William Tracy Page. Under Page's supervision, the Chinese refugees worked as laborers, laundrymen, carpenters, blacksmiths, cooks and domestic servants for certain officers and their families, and at times as clerical help.⁹² They worked in kitchens, mess halls, fields, tuberculosis hospitals, and sanitariums. They provided, as Page and many officers later described it, "extensive and valuable services," sometimes "of a hazardous nature."⁹³

With the ceasefire of World War I in Europe the following year, however, the military no longer needed Chinese labor. The same old anxieties about the Chinese refugees then resurfaced. Returning them to Mexico was still not an option for U.S. officials, as violence against the Chinese had not decreased but rather seemed to be on the rise; northern Mexican states now engaged in widespread, organized public campaigns to marginalize and expel the Chinese from Mexico.⁹⁴ When the federal government began to appropriate funds for deporting the refugees at Fort Houston to China in August of 1921, military and civilian friends came to their aid, pushing for the legislation that would eventually materialize as Public Law No. 29.⁹⁵

applications as yet period." Telegram of Harris to Immigration Bureau (Feb. 14, 1917) (on file with National Archives, RG 85, #54152/79-A). Perhaps the Chinese refugees at Juárez were themselves trying to avoid the reach of the immigration officials, waiting instead to see if Pershing's Chinese refugees might set precedent for their own extended asylum in the United States.

89. The United States entered World War I on April 6, 1917.

90. See Briscoe, *supra* note 5, at 49–50.

91. See *id.* at 52 (quoting SAN ANTONIO EXPRESS, June 8, 1917).

92. See *Registration of Refugee Chinese*, *supra* note 87, at 964, 970. For additional details about their work for the Army in Texas, see Briscoe, *supra* note 5, at 53–72.

93. *Registration of Refugee Chinese*, *supra* note 87, at 944, 946.

94. See *infra* text accompanying notes 156–58.

95. Briscoe, *supra* note 5, at 120–30. In addition to Pershing and Page's efforts, practically all of the Army officers under whom the Chinese refugees had been serving also submitted letters "in all

On November 23, 1921, Congress passed Public Law 29, a “Joint Resolution [p]ermitting certain Chinese to register under certain provisions and conditions.”⁹⁶ The law authorized the commissioner general of immigration to register and provide certificates of registration to “the three hundred and sixty-five Chinese men, now temporarily domiciled in the United States,” who had attached themselves to General Pershing and the punitive military expedition and had been brought into the United States “as refugees by said expedition when it returned from Mexico.”⁹⁷ The federal government finally recognized their permanent “right to be and remain within the United States,” issuing to each of them the precursor to documents commonly known today as green cards as incontrovertible evidence of that right.⁹⁸

The law was monumental for these men who, for four years, had been living and working in the United States in a state of uncertainty. Although some framed the law in sterile terms as “merely . . . giving legislative authority for their registration,”⁹⁹ for the Chinese refugees such registration carried with it a host of other salient legal, political, and social rights: the right to move, live, work, and rest where one wanted, out of the shadow of illegality. Finally, Pershing’s Chinese refugees had found their way around the wall of Chinese exclusion, and into the United States legally.

By deviating from dominant approaches to U.S. refugee law, the history of Pershing’s Chinese refugees offers a new lens through which we can ask radically different questions and potentially render visible other “population groups, causal relationships, and questions that [have been] methodologically difficult to capture.”¹⁰⁰ Refugees are more acutely aware than the state of the juncture and disjuncture between immigration law and refugee law. Thus, by taking the view “from below” and reclaiming the lost history of Pershing’s Chinese refugees, this Article opens up two significant avenues of inquiry for

of which the conduct of the Chinese, their faithfulness to duty, and the extremely valuable nature of the services rendered by them were set forth clearly and emphatically.” S. Rep. No. 67-200 (1921).

96. Act of Nov. 23, 1921, ch. 148, 42 Stat. 325.

97. *Id.* at 325–26. For a more detailed discussion of the factors that helped produce the law, see *infra* discussion in Part II.

98. Act of Nov. 23, 1921, ch. 148, 42 Stat. 326. The law directed that the registration of the Chinese refugees “correspond as nearly as circumstances permit to the registration of domiciled Chinese prescribed by section 6 of the Act approved May 5, 1892 . . . as amended by section 1 of the Act approved November 3, 1893.” *Id.* Both the Geary Act of 1892 and the McCreary Amendment of 1893 outlined the procedures for Chinese laborers to apply for and obtain certificates of residence, state-issued documents that foreshadowed the more contemporary green card. Geary Act, ch. 60, 27 Stat. 25 (1892); McCreary Amendment, ch. 14, 28 Stat. 7 (1893); see also LEE, *supra* note 7, at 42.

99. See S. Rep. No. 67-200, at 1 (1921).

100. Oliver Bakewell, *Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration*, 21 J. REFUGEE STUD. 432, 433 (2008) (suggesting that academic researchers pull away from shaping their research directly around top policy categories and concerns); see also Harvey, *supra* note 23, at 123 (positing that a departure from a “top-down approach” in refugee law might produce “different perspectives” from which to ask “radically different questions”).

the study of U.S. refugee law. First, it highlights the dynamic relationship between immigration law and refugee law in the United States. Second, it illuminates how these legal regimes work dynamically together to construct second-class citizenship—both in its legal and social dimensions—for noncitizens.

The following discussions will develop these points in further detail, using the history of Pershing's Chinese refugees to close current gaps in the theoretical treatment of refugee law's relationship with immigration and citizenship law. By disrupting our common understandings of refugee history, the next Part explains how the case of Pershing's Chinese refugees also shakes loose certain binary modes for thinking about these areas of law.

II.

MAKING REFUGEE LAW THROUGH EXCLUSIONARY IMMIGRATION LAW

Although we typically think of refugee crises as products of turmoil in the country of origin, another major contributing factor is the way in which receiving states are increasingly flexing their sovereign muscles to restrict immigration. As Colin J. Harvey has observed, “[i]f individuals and groups can access fair immigration procedures then the temptation to opt for refugee law might be eroded.”¹⁰¹ Indeed, one of the most persistent concerns about refugees is whether they are in fact “genuine” refugees or merely economic immigrants looking for a “back door” into the host country. Restrictive immigration law and policy always remain *a priori* to refugee law, and much of the academic and policy debates about refugee law and development are conducted against the assumed backdrop of increasing immigration restriction.

In other words, refugee law depends on immigration restriction. There is no need to legally construct someone as a refugee unless there is a corresponding immigration law that excludes her from entry. This is a simple point, but one that has not been fully acknowledged yet.

A. *The Immigrant/Refugee Binary in Law*

For the most part, there has been a persistent lack of dialogue between immigration law and refugee law in the legal literature. Indeed, in 1997, James Hathaway and Alexander Neve insisted that state governments generally keep refugee protection separate from immigration law, and for the most part scholars have maintained the gulf.¹⁰² Although refugee law is incorporated into

101. Harvey, *supra* note 23, at 115.

102. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 152 (1997). For examples in line with Hathaway and Neve's position, see Harvey, *supra* note 23, at 128–29; Jeremy Hein, *Refugees, Immigrants, and the State*, 19 ANN. REV. SOC. 43 (1993) (arguing that because they are defined by their relationship to the state, refugees are distinguishable from immigrants). The Hathaway & Neve article prompted limited critical responses on the point of the

immigration law in the United States, it is frequently treated as a subcategory with an altogether different source and its own distinct concerns. As a result, this has led to some criticism that refugee lawyers are solely concerned with the protection of refugees and are not concerned with the rights of other migrants.¹⁰³

This rupture between refugee law and immigration law has been fostered by the common understanding of U.S. refugee law as expressly based on international law, despite its application at the domestic level and its merger with immigration law more broadly.¹⁰⁴ Having adopted the Geneva Convention's definition of refugee and the related concept of *non-refoulement*, which protects persons from being returned to persecution, U.S. refugee laws are seen as more fundamentally derived from and interacting with international norms than domestic ones.¹⁰⁵ The absorption of other international human rights ideals, such as those articulated in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has only strengthened the international outlook of U.S. refugee law.¹⁰⁶ The international humanitarian and human rights ideals promoted by refugee law stand in contrast to immigration law, where the right of the sovereign state and its political community to make decisions about inclusion are often advanced through self-interested claims of ethnic, cultural, political, and economic preferences.

The emphasis on foreign relations and state interests in refugee scholarship itself, as described in the previous Part, further stresses the international arena as the dominant space for refugee determinations, drawing

refugee-immigration relationship, and for the most part, these critical insights have yet to be reflected in the dominant literature. See, e.g., Satvinder Juss, *Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence*, 11 HARV. HUM. RTS. J. 311, 319 (1998) ("The relationship between immigration, migration and refugees could be just as important as asylum *per se* in developing long-term reforms to the refugee regime."). In most writing on refugee law, commentators are either silent on immigration law and policy or make very brief observations before moving on. See, e.g., Hathaway, *supra* note 16, at 175 (observing how the needs of refugees come into tension with the nation-state's interest in restricting immigration "to avoid cultural, ethnic, political, or economic disharmony within their own borders"). A more recent shift in focus from refugee studies to "forced migration" studies signals a major intellectual departure from the dominant refugee paradigm. But while forced migration studies has emerged as a critique of refugee law's insistence on maintaining the boundaries between refugees and internally displaced persons, it has not necessarily generated direct engagement with immigration law more broadly. The gap persists between forced, involuntary migration (the stuff of refugee law and forced migration studies) and "voluntary" migration (the stuff of immigration law). See Chimni, *supra* note 22, at 12.

103. See Harvey, *supra* note 23, at 115.

104. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2-3 (3d ed. 2011).

105. The United States codified the *non-refoulement* principle, based on the Refugee Convention's Article 33 protection against return, in INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006). The statute prohibits the removal of "an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 241(b)(3)(A).

106. See ANKER, *supra* note 104, at 3.

refugee law farther away from any domestically grounded paradigm.¹⁰⁷ Scholars of U.S. refugee law and policy, for example, have critically appraised the primacy of Cold War politics in the shaping of U.S. refugee policy during the second half of the twentieth century. Foreign affairs and geopolitical jockeying often come into tension with and dilute humanitarian goals, leading international refugee law scholars such as Hathaway to conclude that the purpose of refugee law “is not specifically to meet the needs of the refugees themselves . . . but rather is to govern disruptions of regulated international migration in accordance with the interests of states.”¹⁰⁸ So dominant is the state interest and sovereignty-centered perspective that scholars like Hathaway and Peter Schuck have even proposed that international refugee law be reformed by explicitly catering to state interests, sharing the “costs” across global regions, and thereby minimizing the burdens on state sovereignty imposed by refugee crises.¹⁰⁹

Doctrinally as well, refugee law looks outward and away from domestic politics. Conditions and experiences happening in the sending countries construct the legal subject of the “genuine” refugee in U.S. law. The statutory definition of “refugee” under INA § 101(a)(42) requires that a person be unable to return to her country of nationality 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.”¹¹⁰ Different conceptualizations of the requisite “persecution” have been advanced, from active state-sponsored persecution by a predatory government to an absence of state protection by a weak or ineffective government.¹¹¹ However, these conceptualizations of persecution share a common framework of analysis that necessarily directs our attention to the activity (or inactivity) of the state of origin, or “sending” state. Under either understanding, the law shifts our focus from the personal experiences and interests of potential refugees to the relationship between the asylum seeker and the government in the country of origin, and to the conditions of persecution suffered abroad. In short, the

107. See *supra* text accompanying notes 20–25.

108. Hathaway, *supra* note 16, at 133. Hathaway goes on to argue that international refugee law should be reformulated to “emphasize regional and interest-driven protection in tandem with a general obligation to share the burden of addressing refugee needs.” *Id.* at 134.

109. See Hathaway & Neve, *supra* note 102; Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243 (1997). For a critical response to these authors as overly state-focused, see Anker et al., *supra* note 20, at 299.

110. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

111. See, e.g., HATHAWAY, *supra* note 14, at 124 (explaining how, in the case of active state-sponsored persecution, refugee law indicts a government for its systemic infliction of cruelty, harassment, and harm, while in the case of ineffective state protection against persecution by non-state actors, refugee law offers “substitute protection” for the state that cannot provide the degree of protection normally expected of governments); Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 277 (1985) (extending refugee status to those whose home state has failed to protect their basic needs, and not simply to those suffering under tyrannical, predatory governments).

modern prototypical refugee is defined solely by “the adverse conditions within the country of origin,”¹¹² which explains why U.S. State Department Country Reports play such a powerful role in refugee adjudications. The definition of refugee is inherently outward facing, looking at conditions abroad to determine whether the person at our borders deserves to be defined as a refugee.

Perhaps for these reasons, scholars have not actively explored how refugee law intersects with immigration law, which people generally perceive as inward looking and domestically oriented. In contrast to refugee law, the dominant paradigm of immigration law is firmly rooted within the history and national boundaries of the United States and deals primarily with how to treat immigrants at, and within, our borders. As far as immigration law is concerned, the paths that immigrants take to get within our borders, or what happens when they are expelled from our borders, have largely remained peripheral matters to legal scholars, as well as to the law.¹¹³ While the plenary power of Congress to create immigration laws has been justified by foreign relations concerns, most people think that immigration law starts at our nation’s borders and moves in, shaping and controlling issues of security, labor, economics, and national identity within the domestic community.¹¹⁴ Thus, in contrast to refugee law, which looks abroad to see who can be pulled in, immigration law looks inside the nation to see who should be kept out. Despite some overlap, the two bodies of law are thus treated as embodying different legal and normative foundations, furthering divergent policy agendas, and relying on separate legal rules. Though laws affecting refugees are directly incorporated into U.S. immigration law more broadly, a gap persists in the legal scholarship between asylum and immigration.¹¹⁵

112. Coles, *supra* note 19, at 387. In 1993, the United Nations High Commissioner for Refugees began to shift from emphasizing the right to asylum towards eradicating the need to flee in the first place, invoking “the human right to remain in one’s country of origin.” See Hathaway & Neve, *supra* note 102, at 133–37 (discussing the “fallacy” of the “right to remain” language). The question of how refugee law should also address the elimination of the root causes of flight in the refugee’s country of origin thus emerged as one of the critical debates within refugee law studies. See, e.g., *id.*; Schuck, *supra* note 109, at 261–63.

113. For notable exceptions by legal scholars, see, for example, DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012) (examining how U.S. deportation practices are creating an “American diaspora” of deportees and following the post-deportation consequences as felt by individuals, their families and communities still in the United States, and the countries that must process and repatriate them).

114. *But see* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1389–94 (2007) (discussing how U.S. immigration law has hindered multilateral cooperation on national security matters); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2094 (2008) (“[A] focus on international economic development should remind us that immigration policy is a form of foreign policy, and that foreign policy is a way to make immigration policy.”).

115. Casebooks for immigration law courses typically include one chapter specifically designated for asylum. See, e.g., LEGOMSKY & RODRÍGUEZ, *supra* note 1, at Chapter 11; THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 790 (5th ed. 2012). In recognizing that most basic immigration law courses offered in law schools have time to

It is important to recognize, however, that scholars and refugee advocates may well insist on maintaining the separation of refugee from immigrant more broadly as a way to preserve and strengthen refugee rights.¹¹⁶ In the face of nearly unchecked power by nation-states to regulate immigration, there are justifiable concerns that collapsing the distinctions between the refugee and the immigrant would embolden governments to more freely exclude refugees. The problem is, however, that states are already doing so, exercising their sovereign power to exclude by increasing barriers to access and avoiding responsibility for refugees.¹¹⁷ By more fully recognizing the connections between refugee law and immigration law, as the Article will continue to do in the next Section, theory can be brought more closely in line with actual practice. More importantly, this approach may thereby uncover additional ways of protecting refugees and immigrants alike.

B. Immigration Exclusion and the Construction of Refugee Status

The case of Pershing's Chinese refugees first makes explicit a basic but important dynamic that the dominant paradigms obscure: the construction of refugee status cannot be understood without immigration law in the picture—they constitute part of a shared process. Simply put, there would have been no need for PL 29—a law admitting these Chinese refugees outside of normal immigration channels—if there had been no Chinese Exclusion Act, which closed all immigration channels to Chinese laborers. It was the United States' racially exclusionary immigration law itself that necessitated the creation of a whole new category of protected immigrants known as "refugees" for legal admission purposes—requiring, in other words, the transformation of Pershing's Chinese refugees from *de facto* refugees into *de jure* refugees.

1. From De Facto Refugees . . .

Throughout the years of the Mexican Revolution, the U.S. Department of Labor continued to receive Mexican refugees, but with ambivalence, prompting both Chinese and Mexican refugees to be strategic in their self-presentation at the border. Similarly to the Chinese, immigration officials increasingly targeted Mexican immigrants for immigration exclusion after 1900, with rejection rates

provide only a minimal introduction to refugee protection, if at all, the authors of one immigration casebook have published an entirely separate and independent casebook on refugee law for more advanced law school courses. See DAVID A. MARTIN, ET AL., *FORCED MIGRATION: LAW AND POLICY* (2007).

116. See, e.g., Hathaway & Neve, *supra* note 102, at 152 (explaining that the justification for refugee protection appears to be weakened because, "[w]hen refugees are grouped together with all other manner of migrants . . . the fundamental distinction between refugees and other migrants, namely the involuntary nature of the refugee's journey, is lost").

117. See LEGOMSKY & RODRÍGUEZ, *supra* note 1, at 1044–64 (describing U.S. legal reforms adopted to discourage potential asylum applications).

steadily climbing over the course of the revolutionary decade.¹¹⁸ U.S. immigration officials repeatedly commented that, in contrast to earlier Mexican immigrants, those fleeing the Revolution came with little money, were poorly clothed, showed a lack of nourishment, and had more illnesses.¹¹⁹

Such Mexican immigrants could have been turned away entirely and excluded at the border as “persons likely to become public charges” or for health reasons.¹²⁰ But the Department of Labor and local immigration officials had long established a practice of maintaining a more porous border for Mexicans, applying immigration restrictions more flexibly to accommodate the demand for Mexican labor in the American Southwest. As long as U.S. employers needed laborers, officials admitted Mexican immigrants even if they possessed no funds and “only the clothes upon their backs,” because as immigration officials explained, “they secure[d] employment at self supporting wages almost immediately upon stepping across the line.”¹²¹ Thus, as Patrick Ettinger argues, border authorities participated in constructing a permeable border by “[a]ccommodating immigration laws to the waxing and waning demand for Mexican workers . . . during this period.”¹²²

Legal designations thus remained malleable, and the demand for labor in the United States could redefine a Mexican refugee at the border from an excludable pauper to an admissible immigrant.¹²³ In fact, it seemed to work in the Mexican immigrant’s favor to present himself as a potential laborer as opposed to a political refugee. As one Arizona immigration inspector explained in 1915, “During the revolution a very large number of Mexican aliens who were admissible under the immigration law came from Mexico to Douglas,

118. See ETTINGER, *supra* note 7, at 132–41.

119. See, e.g., Letter from E.J. Blaine to Supervising Inspector, Immigration Serv., El Paso (Mar. 23, 1915) (on file with National Archives, RG 85, #53108/71N) (“[T]he quality of arrivals is below the average of Mexican immigrants” prior to the Revolution.); Letter from James E. Trout to Supervising Inspector, Immigration Serv., El Paso (Mar. 23, 1915) (on file with National Archives, RG 85, #53108/71N) (“In normal times we had many of the laboring class who were in the prime of life and fine specimens of physical manhood. This class has almost entirely disappeared, and only the ordinary laborer and a few women and children are now coming.”).

120. Immigration Act of 1891, ch. 551, 26 Stat. 1084 (barring from admission all “paupers or persons likely to become a public charge, [and] persons suffering from a loathsome or a dangerous contagious disease,” among other groups). For more details on the treatment of Mexican immigrants under these provisions, see ETTINGER, *supra* note 7, at 123–35.

121. Memorandum from the Dep’t of Labor to the President (Apr. 3, 1916) (on file with National Archives, RG 85, #54152/79); see also ETTINGER, *supra* note 7, at 123–44.

122. ETTINGER, *supra* note 7, at 124. This does not mean, however, that the process of crossing the border did not change over time. Although Mexican immigrants continued to cross the border in large numbers, they faced increasingly intrusive and invasive surveillance and inspection processes. See Alexandra Minna Stern, *Buildings, Boundaries, and Blood: Medicalization and Nation-Building on the U.S.-Mexico Border, 1910–1930*, 79 HISP. AM. HIST. REV. 41, 63–73 (1999). Moreover, when labor demand was low or nonexistent, U.S. immigration officials would effectively close the border to Mexican immigration by applying certain exclusion categories more actively. See MARTÍNEZ, *supra* note 63, at 35.

123. See ETTINGER, *supra* note 7, at 130.

Arizona, and who are termed political refugees.”¹²⁴ But perceiving the refugees as having “no interest in the United States or its institutions,” the inspector complained that although “[t]hey are still residing here and although being admissible under the immigration law, they cannot be properly termed *desirable* immigrants.”¹²⁵ As the Dillingham Immigration Commission put it more clearly: “in the case of the Mexican he is less desirable as a citizen than as a laborer.”¹²⁶

While Mexican immigrants were more likely to achieve admission at the border by identifying themselves as laborers, Chinese immigrants had to eschew the label of laborer to bypass the Chinese Exclusion Act. In contrast to Mexican immigrants, Chinese laborers enjoyed no similar preference or flexibility in immigration law. Unable to present themselves as Chinese merchants exempt from the bar of Chinese exclusion, the approximately 425 laborers making up the majority of Pershing’s Chinese refugees needed a wholly new legal identity to find refuge in the United States.

The main hurdle that these Chinese immigrants faced in redefining their legal status was the lack of solid legal recognition of international refugees in U.S. law.¹²⁷ Although the term asylum had taken on legal substance by 1910 as a “place of refuge and protection,” it was extremely limited, applying mainly to debtors and “fugitive[s] from justice” who had committed a crime in a foreign land and sought shelter in U.S. legations and warships, or to “unfortunates” (including “the poor,” “deaf and dumb,” or “insane”).¹²⁸ As of 1910, there was no real need in the United States for any legally-designated emigré class of refugee, since immigration remained mostly unrestricted for most white immigrants. Thus U.S. law did not recognize any class of refugees as distinct from immigrants.

However, a popular conception of refugee was alive and well by the turn of the twentieth century, understood predominantly as “[o]ne who flees to a

124. Letter from Frank W. Heath to Supervising Inspector, Immigration Serv., El Paso (Mar. 22, 1915) (on file with National Archives, RG 85, #53108/71N).

125. *Id.* (emphasis added).

126. 1 IMMIGRATION COMMISSION, ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION WITH CONCLUSIONS AND RECOMMENDATIONS AND VIEWS OF THE MINORITY 690 (1911).

127. After the erection of federal immigration laws, Congress recognized very few exemptions for otherwise inadmissible or deportable noncitizens. *See* Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952) (exempting persons fleeing religious persecution from a literacy requirement for admission); ALEINIKOFF ET AL., *supra* note 115, at 812 (mentioning early instances of exemptions for political dissent).

128. BLACK’S LAW DICTIONARY 100 (2d ed. 1910). The term “refugee” does not independently appear as a defined entry in the dictionary. Asylum was also extended to some foreign nationals who sought U.S. protection from political persecution, but these were usually political insurgents in Central and South America who actively sought to topple the existing governments. *See, e.g.,* AMOS SHARTLE HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 270–71 (1912); Barry Gilbert, *The Practice of Asylum in Legations and Consulates of the United States*, 3 AM. J. INT’L L. 562 (1909).

shelter, or place of safety,” and in the international context, “[e]specially, one who, in times of persecution or political commotion, flees to a foreign power or country for safety.”¹²⁹ The term could be applied to displaced and homeless victims attempting to escape from natural disasters at home or from political turmoil abroad.¹³⁰ In a primary sense, the term “refugee” functioned as a descriptive label: a “refugee” was one who sought refuge. However, this descriptive acknowledgment of displaced refugees generated no corresponding legal obligation. As early observers explained, “[t]here is no right of asylum appertaining to individuals. So far as this so-called right exists, it belongs to the State; but to this right there is attached no corresponding duty.”¹³¹

Pershing’s Chinese refugees thus faced a formidable challenge: how to transform popular, *de facto* understandings of “refugee” identity into a specifically American *de jure* definition of refugee status that carried more political and social weight and demanded some sort of affirmative response. How would they redefine “refugeehood” into a call for action and transform themselves from persons seeking refuge to persons deserving of legal refuge?

Through the convergence of various powerful factors, Pershing’s Chinese refugees were able to transform popular conceptions of refugees into a legally protectable category that enabled access to a newfound right to asylum in the United States. Anti-Chinese violence and humanitarian justifications informed both the initial grant of permission to enter the country, as well as the post-expedition push for permanent legislation on the refugees’ behalf. Indeed, these remained dominant themes during the 1921 hearings and debates that led to the passage of PL 29. But in the transformation of Pershing’s Chinese refugees from excludable immigrants to deserving refugees, their associations with the U.S. military proved most critical. The army emerged their lifeline to the United States during the era of Chinese Exclusion.

2. *To De Jure Refugees*

Perhaps ironically, the rising anti-Chinese sentiment in Mexico appears to have compelled the U.S. government to make temporary suspensions of its own

129. WEBSTER’S REVISED UNABRIDGED DICTIONARY 1209 (1913).

130. See, e.g., Edward T. Devine, *War Relief Work in Europe*, 79 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 5–6 (1918) (describing the “dislocated peoples” and “refugee problems” produced during World War I); Lystra E. Gretter, *The Red Cross*, 12 AM. J. NURSING 1019 (1912) (describing thousands of homeless and destitute “refugees” as a result of massive flooding of the Mississippi Valley in 1912); *Sanitary Conditions in Oakland and San Francisco, Cal.—Infectious Diseases in Refugee Camps*, 21 PUB. HEALTH REPS. 537, 537 (1906) (reporting on “contagious and infectious diseases in the refugee camps under the jurisdiction of the [San Francisco] health commission” following the April 18, 1906 earthquake); see also JOHN MCKIERNAN-GONZÁLEZ, *FEVERED MEASURES: PUBLIC HEALTH AND RACE AT THE TEXAS-MEXICO BORDER, 1848–1942*, at 113 (2012) (describing the use of the term “refugee” for Americans fleeing yellow fever in Texas).

131. HERSHEY, *supra* note 128, at 271; see also Gilbert, *supra* note 128, at 562 (“[T]he so-called ‘right of asylum’ is no right at all, but only a privilege granted or claimed where its use seems necessary by reason of an unstable condition of society.”).

anti-Chinese exclusion laws. Due to the perceived economic wealth the entrepreneurial Chinese immigrants appeared to accumulate in comparison to the majority of Mexican laborers, anti-Chinese prejudices circulated among certain sectors of the Mexican population soon after the Chinese began to arrive in Mexico, echoing the virulent racist and xenophobic campaigns in the United States.¹³² These nativist and racial prejudices only intensified with the coming of the Mexican Revolution in 1910 and its new brand of nationalism, which romanticized and idealized an indigenous past.¹³³ Revolutionary leaders pitted the “foreigner” against the “national,” associating foreigners with the economic and social inequities that Diaz’s dictatorship had brought to the majority of rural Mexicans.¹³⁴

Just as today’s legal recognition of refugee status depends on the persecution threatened in the country of origin, the persecution that Chinese immigrants experienced in Mexico was essential to their transformation as admissible refugees. Tragically, the Revolution’s exclusionary nationalist project came with intense anti-Chinese violence: verbal attacks soon turned into physical assaults, robberies, and even killings. In 1911, one of the most prosperous Chinese communities in Mexico came under one of the worst anti-Chinese attacks during the Revolution. A mob of four thousand men and women from neighboring towns and villages pillaged the commercial district of

132. See ROMERO, *supra* note 49, at 145–90; Evelyn Hu-DeHart, *Huagong and Huashang: The Chinese as Laborers and Merchants in Latin America and the Caribbean*, 28 AMERASIA J. 64 (2002); Hu-DeHart, *supra* note 54 (describing the proliferation of complaints that characterized the Chinese as “sojourners” taking all of the Mexican jobs without investing in Mexico, especially in the northern state of Sonora). For comparisons of anti-Chinese campaigns in the United States, Canada, and Mexico, see ETTINGER, *supra* note 7, at 37–92; Kornel Chang, *Circulating Race and Empire: Transnational Labor Activism and the Politics of Anti-Asian Agitation in the Anglo-American Pacific World, 1880–1910*, 96 J. AM. HIST. 678 (2009); Lee, *Enforcing the Borders*, *supra* note 55. José Jorge Gómez Izquierdo asserts that the anti-Chinese arguments and ideas that emerged during Mexico’s revolution were directly taken from the working-class campaigns in the United States during the 1870s and 1880s that resulted in Chinese Exclusion. GÓMEZ IZQUIERDO, *supra* note 54, at 87–88.

133. Revolutionary and post-revolutionary elites promoted *indigenismo* [an idealization of Native peoples and cultures], *mestizaje* [an idealization of mixed-race people and their culture], and the *mestizo* as the icon of racial and social integration of the “new” Mexican nation. See GÓMEZ IZQUIERDO, *supra* note 54, at 71–72; Alexandra Minna Stern, *From Mestizophilia to Biotypology: Racialization and Science in Mexico, 1920–1960*, in RACE AND NATION IN MODERN LATIN AMERICA 187, 189–93 (Nancy P. Appelbaum et al. eds., 2003). But as Gerardo Rénique points out, there also developed a parallel preference for the *blanco-criollo* [white Creole] racial ideal of the Mexican northerner and *anti-chinismo*, which through a succession of several Sonoran presidents came to dominate Mexican politics and state formation. Gerardo Rénique, *Race, Region, and Nation: Sonora’s Anti-Chinese Racism and Mexico’s Postrevolutionary Nationalism, 1920s–1930s*, in RACE AND NATION IN MODERN LATIN AMERICA, *supra*, at 211; Gerardo Rénique, *Anti-Chinese Racism, Nationalism and State Formation in Post-Revolutionary Mexico, 1920s–1930s*, 14 POL. POWER & SOC. THEORY 91, 101–04, 115–16 (2001).

134. As Gómez Izquierdo explains, such revolutionary xenophobia unified an otherwise fractious society, creating thereby “one national community, a necessary condition for political elites to successfully impose their project of domination with social acceptance (consensus).” GÓMEZ IZQUIERDO, *supra* note 54, at 84–85.

Torreón, in the northern Mexican state of Coahuila. By the end of the day, over three hundred Chinese had been killed, including women and children.¹³⁵ News of the massacre traveled far, reaching not only Chinese officials in Washington, D.C. and China, but also Chinese civilians throughout Mexico. The Chinese in Mexicali, on the Baja peninsula, talked about Torreón for several years after and how “everything ended in the killing of the *paisanos*,” their countrymen.¹³⁶

Though no such devastating massacre occurred again, over eight hundred documented Chinese murders occurred between 1911 and 1919, eclipsing the number of anti-Chinese deaths reported in the United States during the entire twentieth century.¹³⁷ To be sure, the Chinese were by no means the only group subject to revolutionary violence in Mexico; the Spanish and other immigrants including Americans were also targeted, and Mexicans as a whole were indiscriminately attacked and killed during the Revolution. For example, fear of an attack by Villa created a panicked exodus from the state of Chihuahua during November 1916. Both Mexicans and foreigners packed every train leaving Chihuahua City, “jamming the car platforms, crowding the roofs and invading the locomotive tender.”¹³⁸ Lack of housing in Juárez caused many Mexican refugees to dig caves for their families, as Mexican military officials would not let them cross into El Paso.¹³⁹

During the Punitive Expedition’s short deployment in Mexico, however, reports of Villista violence particularly targeting the Chinese surged. In November, Villa preceded his attack on Chihuahua City with a promise to the city’s residents that he would spare all foreigners except “the Chinamen and the white Chinamen, that is the Americans, as these ones are the only ones responsible for all the misfortunes of this country.”¹⁴⁰ Soon thereafter, Villistas reportedly attacked Parral and Jiminez in southern Chihuahua and killed over eighty Chinese as well as other foreigners and natives, throwing bodies down

135. The most comprehensive examination of the Torreón massacre remains JUAN PUIG, *ENTRE EL RÍO PERLA Y EL NAZAS: LA CHINA DECIMONÓNICA Y SUS BRACEROS EMIGRANTES, LA COLONIA CHINA DE TORREÓN Y LA MATANZA DE 1911* [Between the Perla River and the Nazas: Nineteenth-Century China and Its Emigrant Laborers, the Chinese Colony of Torreón and the Massacre of 1911], at 147–310 (1993); see also ROMERO, *supra* note 49, at 148–55; Leo M. Dambourges Jacques, *The Chinese Massacre in Torreon (Coahuila) in 1911*, 16 *ARIZ. & WEST* 233 (1974). Several Mexicans attempted to help many of their Chinese neighbors and associates, thus earning themselves the pejorative nickname “*chineros*” by anti-Chinese crusaders. On Chinese-Mexican cooperation, see 3 NAVARRO, *supra* 50, at 87; PUIG, *supra*, at 192; Lim, *supra* note 51, at 69–74.

136. MANUEL LEE MANCILLA, *VIAJE AL CORAZÓN DE LA PENÍNSULA: TESTIMONIO DE MANUEL LEE MANCILLA* [Trip to the Heart of the Peninsula: Testimony of Manuel Lee Mancilla] 34 (2000).

137. ROMERO, *supra* note 49, at 147.

138. See *Scramble to Get Out of the State of Chihuahua*, N.Y. WORLD, Nov. 21, 1916, in Pershing’s Papers: Scrapbooks, 1900–1949 (microfilm: frame 31, reel 2).

139. *Id.*

140. KATZ, *LIFE AND TIMES*, *supra* note 30, at 626.

mine shafts and burning one “American tramp” alive.¹⁴¹ According to other reports carried to the border by fleeing refugees:

[T]he district between Parral and Jiminez ha[d] been cleared by Villa’s followers of more than 200 Chinese. . . . The same refugees who claim to have been witnesses of the outrages also say that two Mexican women who had married Chinese and their five half-caste children were found and thrown alive into the fire and cremated in sight of the crowd. . . .

. . . .

. . . [Although all foreigners reportedly suffered at the hands of Villistas, the] Chinese are called the heaviest sufferers. The fact that none are to be seen in the district in which they formerly did a large mercantile business is taken by the refugees as proof that all, numbering over 200, met the fate of the Chinese caught at Parral and Jiminez.¹⁴²

Of course, it could also have meant that these Chinese had fled towards the border just as those refugees had. In any case, the outlook for the Chinese in Mexico was dire.

Exacerbating this life-threatening violence, organized anti-Chinese campaigns emerged with more “respectable,” middle-class members of Mexican society at the helm. In 1916, Mexican businessmen in Sonora formed the *Junto Comercial y de Hombres de Negocios* (Council of Commerce and Businessmen), an organization with the primary agenda of eliminating Chinese merchant competition. The Junto’s 1916 manifesto targeted not only Chinese merchants but also Chinese immigrants more generally, condemning the Chinese as economic leeches, public health threats, and denizens of vice and crime. Revolutionary violence and the organized sinophobic propaganda of the Junto and other similar clubs that followed cast the Chinese immigrant as completely antithetical to Mexican nationalism.¹⁴³

The Chinese, for their part, immediately appealed to Mexican officials for protection. Through community and commercial organizations, the Chinese complained to the Minister of Foreign Relations and local officials of attacks on Chinese subjects, their homes, and their businesses, requesting that the

141. Telegrams of Vice Consul Blocker to Sec’y of State (Dec. 9, 14, and 19, 1916) (reprinted in U.S. Dep’t of State, *Papers Relating to the Foreign Relations of the United States with the Address of the President to Congress*, December 5, 1916 680–81 (1916), available at <http://digiocoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1916>) [hereinafter 1916 Foreign Relations Papers]. It should be noted that Carrancistas were equally responsible for attacks on and killings of Chinese. See, e.g., Telegram of Consul Letcher to Sec’y of State (Feb. 28, 1916) (reprinted in 1916 Foreign Relations Papers, *supra*, at 795). Moreover, as Katz points out, Villa’s *anti-chinismo* may have been compounded by a desire to appeal to the xenophobia of certain Chihuahuans, especially once his popularity began to wane after 1914. See KATZ, *LIFE AND TIMES*, *supra* 30, at 597, 630.

142. *American Is Killed: Body Then Thrown on Bonfire by Bandits at Jimenez*, WASH. POST, Nov. 20, 1916, at 1.

143. See ROMERO, *supra* note 49, at 157–66.

government protect them “with the energy and efficiency” demanded by the situation.¹⁴⁴ When an individual named Antonio H. Galindo began circulating anti-Chinese material in Chihuahua City, Chinese residents even sought judicial relief to prevent the distribution of the inflammatory messages that they feared would ignite violence against the Chinese in town.¹⁴⁵ However, while Mexican authorities provided express guarantees of protection for the Chinese in Mexico, they also downplayed the losses of Chinese life and property as “natural consequences that follow all revolutions [and] not the manifestation of personal antipathy by the Mexican people towards [Chinese nationals].”¹⁴⁶ Indeed, for most Mexicans and Chinese alike, governmental protection would remain illusory, as officials were weakened and distracted by revolutionary events.

The Chinese thus turned to the United States, desperately fleeing to the border. On November 9, 1916, the U.S. consul at Juárez reported to the Secretary of State that “[t]here are in Juarez fully two hundred Chinese refugees that have come from Villa territory and daily arriving.”¹⁴⁷ In Juárez, the mostly destitute refugees found themselves in an especially vulnerable position. According to the consul: Mexican “bandits,” working under the knowledge “that these people cannot leave . . . [but] anticipating that they have money concealed often abuse them and frequently they are killed.”¹⁴⁸ The Chinese in Mexico were thus caught between the forbidding rock of the Chinese Exclusion Act and the chaotic hard place of revolutionary violence.

However, the anti-Chinese violence of the Revolution also provided a basis for Pershing’s Chinese refugees to harness the important discourse of humanitarianism, which would be critical to their transformation into legally recognizable refugees. As early as July 1916, *The New York Times* reported that a “Charley Tien” had little intention to remain in Mexico if the U.S. troops were to withdraw and that his fellow countrymen were also determined to go north with Pershing. Arguing that they had jeopardized their lives in assisting the U.S. expeditionary force against Villa, these 522 Chinese refugees appealed to humanitarian notions to assert a right “to flee across the line for temporary refuge in case they are threatened.”¹⁴⁹

144. Letter from Woo Chung Ben to Señor. Lic. Manuel Calero, Ministro de Relaciones Exteriores (Feb. 7, 1912) (on file with Archivo Histórico Genaro Estrada, Mexico City [hereinafter SRE collection], Exp. 13-2-50); Letter from Woo Chung to Calero (Feb. 12, 1912) (on file with SRE collection, *supra*, Exp. 13-2-50).

145. Letter from Woo Chung to Pedro Lascaráin (Aug. 27, 1912) (on file with SRE collection, *supra* note 144, Exp. 13-2-50).

146. Letter from B. Cabajal y Rosas to Minister Chang Ying Tang (Aug. 18, 1911) (on file with SRE collection, *supra* note 144, Exp. 16-4-54) (noting twelve cases of robbery or murder against the Chinese in Chihuahua); see also GÓMEZ IZQUIERDO, *supra* note 54, at 93.

147. Letter from Consul Edwards to Sec’y of State (Nov. 9, 1916) (reprinted in 1916 Foreign Relations Papers, *supra* note 141, at 796).

148. *Id.*

149. *Chinese on Army’s Hands*, *supra* note 76; see Briscoe, *supra* note 5, at 21.

Thanks to the unlikely humanitarian appeals of American businessmen and imperialists for U.S. intervention in Mexico, the refugees fortunately had a pervasive discourse of humanitarianism at their disposal. Even American capitalists advocated for U.S. intervention by appealing to conscience and humanitarian sentiment that used the language of humane principles to mask what were otherwise economic and political agendas.¹⁵⁰ As early as 1912, in an otherwise bellicose and financially driven letter in support of intervention, one interested businessman wrote to Senator Albert Fall, chairman of the Senate Subcommittee on Mexican Affairs and an ardent advocate for U.S. intervention,

It is not alone for the [foreign businessman] that I am pleading for some action to be taken, because I think in the sense of humanity their possessions and numbers and sufferings are few, compared with the great masses of enslaved and abused people who are living in that unhappy land, and in the name of humanity and for the cause of justice and right, I am making this plea that the United States Government, who is the foster mother of Mexico, [intervene].¹⁵¹

By 1915, government officials publicly considered intervention in similar tones, suggesting “that what might have previously been considered by some Mexicans as an aggressive intervention has now changed on account of the

150. American financiers and industrialists had invested heavily in Mexico during the Porfiriato, and feared losing all of their money as a result of revolutionary attacks on foreign companies, as well as the general economic disruptions of civil unrest. Historians have explained the commercial penetration of U.S. capital and products into Mexico as another kind of imperial invasion in addition to the territorial conquests of the Mexican frontier. *See, e.g.*, JOHN MASON HART, *EMPIRE AND REVOLUTION: THE AMERICANS IN MEXICO SINCE THE CIVIL WAR* (2002); DANIEL LEWIS, *IRON HORSE IMPERIALISM: THE SOUTHERN PACIFIC OF MEXICO, 1880–1951* (2007) (examining the ways in which Mexican nation-building worked alongside U.S. corporate hegemony); DAVID J. WEBER, *THE MEXICAN FRONTIER, 1821–1846: THE AMERICAN SOUTHWEST UNDER MEXICO* (1982). Andrés Reséndez argues that Mexico’s northern frontier was economically drawn to the United States even before the Mexican-American War, as U.S. trade and consumption patterns informed how local frontier residents conditioned and defined their complicated national loyalties and identities. ANDRÉS RESÉNDEZ, *CHANGING NATIONAL IDENTITIES AT THE FRONTIER: TEXAS AND NEW MEXICO, 1800–1850* (2005).

151. Letter from O.P. Brown to Senator A.B. Fall (Oct. 7, 1912) (on file with Huntington Library, Manuscript Division, “Mexican Files,” box 73(29), Papers of Albert B. Fall, 1887–1941). As chairman of the Subcommittee on Mexican Affairs, Senator Fall gathered testimony about conditions in Mexico and the treatment of Americans there, particularly when they involved American capitalist interests. In May 1917, he was also among the first to seek to employ Pershing’s Chinese refugees on his ranch in New Mexico. Claiming that it would be in the best interest of the Chinese refugees to “be allowed their freedom within the State of New Mexico, where they could immediately be placed in the fields and gardens at work,” Fall offered to “cheerfully give \$100 bond each for the Chinamen whom I might secure for work upon my ranch.” Letter from A.B. Fall to Newton D. Baker (May 2, 1917) (on file with National Archives, RG 85, #54152/79-B). On American economic interests in Mexico, see generally HART, *supra* note 150.

famine conditions to a humanitarian expedition, designed to save the Mexican people, helpless in the hands of military bands.”¹⁵²

Whether or not humanitarian interests served as a pretext for American imperialistic intervention, Chinese immigrants at the border latched onto the discourse of humanitarianism as a rhetorical lifeline out of Mexico and into the United States. As early as May 1912, the American consul at Mazatlán reported that “the Chinese colony, consisting of four hundred residents . . . asks whether permission could be granted for *temporary* residence, *as an act of humanity*, at San Francisco or San Diego.”¹⁵³ For American agents as well as Chinese persons interested in U.S. intervention or aid, the infamous 1911 massacre at Torreón emerged as a compelling call to conscience. Thus when the president of the Chinese colony at Tapachula, Chiapas, requested asylum at the American consulate for himself, as an American citizen, as well as the five hundred other Chinese residents of the city, the American Embassy reassured the Chinese that “on humanitarian grounds such action as is possible should be taken in behalf of the Chinese, in order to prevent a recurrence of so regrettable an incident as that recently taking place at Torreón.”¹⁵⁴

Humanitarian concern regarding general anti-Chinese violence throughout Mexico thus played a significant role in Pershing’s Chinese refugees attaining permission to cross the border with the expedition, and continued to inform their legal status in the United States thereafter, as ongoing anti-Chinese violence stretched out the timeline for the *non-refoulement* of the Chinese refugees. Despite the emergence of a more stable and centralized Mexican state regime by 1920,¹⁵⁵ the anti-Chinese campaigns, born amidst revolutionary violence, continued well into the 1920s and 1930s. Anti-Chinese clubs and

152. *Seek to Save Mexico: Humanitarian Reasons May Force U.S. Intervention*, WASH. POST, May 30, 1915, at 1, 5. In the place of outright military intervention, the U.S. State Department asked the American Red Cross to temporarily provide aid in Mexico in June 1915. See George E. Paulsen, *Helping Hand or Intervention? Red Cross Relief in Mexico, 1915*, 57 PAC. HIST. REV. 305 (1988). For a critical account that identifies the Red Cross as an agent of imperial nationalist projects, as opposed to its image as champion of humanitarian charity and peacemaking, see generally JOHN F. HUTCHINSON, *CHAMPIONS OF CHARITY: WAR AND THE RISE OF THE RED CROSS* (1996). See also Chimni, *supra* note 22, at 13 (linking humanitarianism with colonialist orientation).

153. Letter from Dye, Am. Consul at Nogales to Sec’y of State (May 2, 1912) (reprinted in U.S. Dep’t of State, *Papers Relating to the Foreign Relations of the United States with the Annual Message of the President Transmitted to Congress December 3, 1912*, at 928 (1912), *available at* <http://digioll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1912>) (emphasis added).

154. Letter from Henry Lane Wilson to the Minister for Foreign Affairs (June 2, 1911) (reprinted in 1911 *Foreign Relations Papers*, *supra* note 67, at 617). A letter written in 1916 by an American civilian invoked the Torreón massacre as justification for U.S. intervention. See Letter from W.E. Barnes to Albert B. Fall (Jan. 12, 1916) (on file with Huntington Library, Manuscript Division, “Mexican Files,” box 73(13), Papers of Albert B. Fall, 1887–1941).

155. Mexican Revolution scholars generally identify 1910–1920 as the decade of armed conflict, followed thereafter by an institutional, state-building phase of revolutionary reconstruction and reform. See, e.g., Alan Knight, *The Myth of the Mexican Revolution*, 209 PAST & PRESENT 223, 237–38 (2010); Alan Knight, *Patterns and Prescriptions in Mexican Historiography*, 25 BULL. LATIN AM. RES. 340, 347 (2006).

propaganda proliferated, as Mexican economic leaders and politicians continued to join sinophobia with post-revolutionary nationalism and nation-building projects. In 1919, anti-Chinese leaders in Sonora sought to destroy Chinese merchants by requiring that 80 percent of commercial workforces be Mexican employees. In addition, anti-Chinese agitators began to lobby for legislation requiring residential segregation of Chinese immigrants and the prohibition of interracial marriages between Chinese men and Mexican women.¹⁵⁶ Chinese merchants thus complained that they were being compelled “to stop industrial and commercial undertakings throughout [Mexico]”; they went on: “Our women and children are in a pitiable plight. The Mexicans are depriving us of every right and subjecting us to injustice and inhumanity.”¹⁵⁷ Conditions for Chinese immigrants in Mexico had become so thorny that the U.S. Secretary of Labor recognized in 1919 that it would “not be either safe or just to return these refugees to Mexico.”¹⁵⁸

The discourse of humanitarianism and the anti-Chinese violence it responded to, however, were not wholly sufficient to transform immigrants fleeing persecution into refugees legally deserving of state protection.¹⁵⁹ Many Chinese immigrants who fled to the border would only receive temporary refuge from the U.S. government.¹⁶⁰ Some other factor was necessary to give Pershing’s Chinese refugees the necessary leverage to finally claim entrance and permanent protection as “refugees.”

The most critical factor that helped Pershing’s Chinese refugees was their fortuitous attachment to the Punitive Expedition, and their later service to the U.S. military from within the United States. As one army official explained, “it is manifestly impossible to return them to Mexico, as they would probably be murdered *because of the help they gave the punitive expedition in 1916.*”¹⁶¹ Thus, the Committee on Immigration and Naturalization concluded that the Chinese “can not return to their former homes in Mexico with safety and can not at this time be deported to any other place justly and humanely.”¹⁶² Such conclusions significantly helped make the case for the *permanent* admission of Pershing’s Chinese refugees into the United States. By means of their attachment to the U.S. military, these refugees were able to bypass the normal

156. See ROMERO, *supra* note 49, at 163–66.

157. *Chinese in Mexico Protest*, N.Y. TIMES, Sep. 9, 1919, at 3.

158. LETTER FROM SEC’Y TREASURY, APPROPRIATION FOR TRANSP. TO CHINA OF CERTAIN CHINESE REFUGEES FROM MEXICO, H.R. DOC. No. 181, at 2 (1st Sess. 1919).

159. Other scholars have similarly recognized the gap between humanitarianism and contemporary international refugee law. See TUITT, *supra* note 19, at 7 (“Contrary to popular belief refugee law is not motivated by exclusively humanitarian concerns—indeed, if the concerns of the law are humanitarian this is only marginally and incidentally so.”); Hathaway, *supra* note 16, at 132 (“Current refugee law does not fully embody either humanitarian or human rights principles.”).

160. See *supra* text accompanying notes 67–69.

161. *Registration of Refugee Chinese*, *supra* note 87, at 958 (emphasis added).

162. *Id.* at 943.

immigration process. Through their associations with the U.S. military during the Punitive Expedition in Mexico, which continued through the duration of World War I, temporary evacuees became admissible permanent refugees.

The precise details of how the 522 Chinese refugees negotiated the diplomatic morass they confronted—a Mexican state thrown into revolutionary chaos, a weak Chinese government with little power to protect their nationals abroad, and harsh American laws that prohibited their entry into the United States—are not documented.¹⁶³ What is clear, however, is that Pershing promised the Chinese his protection. As the general explained to immigration official Frank Berkshire, he had given them his word and thus preferred to evacuate them with his troops rather than “have them run the risk of the journey by train and then be turned loose in Juarez.”¹⁶⁴ Pershing’s relationship with the Chinese was, to be sure, not altogether magnanimous. “Being ignorant coolies,” he explained, “they are as likely to be robbed by the Carrancistas as by the Villistas.”¹⁶⁵ And yet that vulnerability provided the basis for his final insistence that all the Chinese should be evacuated with his troops. His superiors agreed, and ordered that “the laws of humanity demand” the evacuation of all those Chinese refugees who had “served or befriended” the expeditionary forces in Mexico.¹⁶⁶

The Punitive Expedition thereby opened a unique door into the United States, one that allowed these Chinese immigrants a way to avoid dealing with the hostile Bureau of Immigration and exploited intergovernment agency conflicts. In fact, the Bureau denied any responsibility for the refugees, insisting that

[n]othing that has been presented makes any of these people in any sense immigrants or people desiring to enter the United States *under the immigration law*. So far as the Bureau is aware, no request has been made upon the Government *or to this Department for protection or the right of asylum* to any of these people now accompanying Gen. Pershing’s column.¹⁶⁷

This memo was largely about interdepartmental relations, and ultimately about how to assign the expenses of managing the Chinese refugee situation. At the same time, however, it suggests that these Chinese immigrants intentionally put

163. On China’s internal revolutionary strife and embattlements with foreign imperial powers, see JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 235–78 (2d ed. 2006); MICHAEL H. HUNT, *THE MAKING OF A SPECIAL RELATIONSHIP: THE UNITED STATES AND CHINA TO 1914*, at 188–226 (1983).

164. Letter from Pershing to Berkshire (Jan. 25, 1917) (on file with National Archives, RG 85, #54152/79-A).

165. *Id.*

166. *Id.*; Letter from Gen. Funston to Adjutant Gen. (Jan. 27, 1917) (reprinted in 1917 Foreign Relations Papers, *supra* note 83, at 1088).

167. Memorandum of A. Caminetti, Comm’r-Gen. to Sec’y (Feb. 1, 1917) (on file with National Archives, RG 85, #54152/79-A) (emphasis added).

their refuge in hands other than the Bureau's to avoid the reach of the immigration laws.¹⁶⁸ As Kitty Calavita explains, "the state" is not monolithic, and interagency conflict can be "a central component of the state policy-making process."¹⁶⁹ Many Chinese immigrants had already used the federal courts to overturn the administrative decisions of Chinese inspectors during the late nineteenth century.¹⁷⁰ In this instance, Pershing's Chinese refugees were able to strategically exploit the divided interests of different government agencies.

Indeed, they had extremely good reason to be wary of the Bureau of Immigration. The supervising immigration inspector at El Paso, Frank Berkshire, had urged Pershing to "discourage or prohibit . . . all Chinese from following the expedition to [Columbus]," and to encourage all Chinese migrants to cross the border at Juárez, where the Bureau had "better facilities for preventing their surreptitious entry into the United States."¹⁷¹ However, had they been sent to Juárez per Berkshire's advice, Pershing's Chinese refugees likely would have simply joined the other hundreds of Chinese immigrants waiting to gain entry into El Paso, who were promised no more than the safety of temporary detention, only to be returned immediately to Mexico once the direct threat of violence had abated.

Because of the services they rendered to the military, Pershing's Chinese refugees were able to circumvent the Bureau and be evacuated with the military. It is not clear whether their service to the army during the Punitive Expedition's tenure in Mexico would have been sufficient in itself to support the passage of PL 29. However, the United States' entry into World War I in April 1917, the military's resultant need for labor, and the ready availability of Pershing's Chinese refugees after their crossing in 1917 allowed them another fortuitous opportunity to continue serving the U.S. government. By the time Congress was considering PL 29 in 1920, advocates could point to three and a half years of dutiful and energetic war-related service that these particular Chinese refugees had provided to the Army, and by extension, to the nation. For their military employers, the Chinese refugees had "performed extensive services and rendered valuable assistance" such that the U.S. government was obligated to provide some form of just compensation, or as Pershing himself put it, "the strongest kind of equities in their behalf."¹⁷²

168. In fact, some of the congressional representatives considering PL 29 expressed suspicion that the Chinese refugees had initially attached themselves to the expedition with the ulterior motives of gaining entry into the United States. See *Registration of Refugee Chinese*, *supra* note 87, at 945–46.

169. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 181 (1992).

170. SALYER, *supra* note 28, at 33–116.

171. Letter from Berkshire to Pershing (Jan. 20, 1917) (on file with National Archives, RG 85, #54152/79-A).

172. See *Registration of Refugee Chinese*, *supra* note 87, at 943, 946.

Indeed, one cannot discount the deep gratitude that military officials held towards the Chinese refugees. Immigration inspectors were surprised to find that

[t]he military officers almost without exception seem to consider that the United States Government is obligated to the Chinese because of the assistance they rendered the military while the expedition was in Mexico, and further, that the obligation is of sufficient moment to justify their unconditional admission into this country.¹⁷³

That the Chinese continued to labor for the U.S. government during World War I and provided “services being valuable, unusual, and in some instances of a hazardous nature”—such as working in tuberculosis hospitals or sanitariums—significantly strengthened the case for permanent admission.¹⁷⁴ When the case of Pershing’s Chinese refugees went before the congressional committee, over twenty army officers submitted letters on the refugees’ behalf, testifying to “their faithfulness to duty, and the extremely valuable nature of the services rendered by them.”¹⁷⁵ They were, as some put it, “deserving aliens.”¹⁷⁶

Thus their associations and activities with the U.S. military transformed Pershing’s Chinese refugees from undesirable—or at best, temporary—immigrants into deserving refugees. In combination with the mounting anti-Chinese persecution in Mexico and a persuasive discourse of humanitarianism, their ties to the U.S. Army provided the opportunity for them to claim a status different from the other Chinese immigrants excluded at the border, and to press the state to act on their behalf.

It is important to keep in mind that the fortuitous convergence of all of these factors supporting the construction of refugee status was only necessary in the first place because of the Chinese Exclusion Act. The anti-Chinese violence in Mexico provided some of the justifications for the initial border crossing and the subsequent passage of PL 29. But the groundwork for the transformation of the 522 Chinese men from excludable immigrants to admissible permanent refugees was, in a fundamental way, laid by domestic conditions within the United States—a country with restrictive anti-Chinese legislation that nonetheless sought the aid of Pershing’s Chinese refugees during its travails in Mexico and during World War I. The Chinese Exclusion Act and the underlying anti-Chinese racism that motivated its passage were a constant presence, not simply as a distant backdrop to conditions in Mexico, but rather as a looming wall that—by its very existence—necessitated the

173. Letter from Berkshire to Comm’r-Gen. Immigration (Apr. 21, 1917) (on file with National Archives, RG 85, #54152/79-B).

174. See *Registration of Refugee Chinese*, *supra* note 87, at 943.

175. *Id.* at 944.

176. *Id.* at 947.

construction of one's refugee status as a kind of exemption from the exclusion that applied generally to Chinese immigrant laborers.

Although dominant understandings of refugee law usually define refugee status in relation to conditions abroad, the history of Pershing's Chinese refugees highlights the ways in which the refugee may also be legally constructed by conditions at home and by discriminatory policies in the *receiving* country. This insight is a critical one, as it pushes back against a problematic binary sustained in refugee law scholarship between "refugee-receiving" and "refugee-producing" states, or what Audrey Macklin has called the "Self/Other dichotomy of refugee discourse."¹⁷⁷ As feminist refugee law scholars have observed, this simplistic and absolute binary facilitates placing blame for population displacement squarely on "refugee-producing" states, and obscures the reality that *every* country, even "refugee-receiving" states, discriminates against women, for example.¹⁷⁸ More generally, moving beyond this binary means problematizing the concept of the "refugee-producing" state, blurring the line between persecution occurring somewhere "out there" (in the non-West) and persecution occurring here in the United States.¹⁷⁹

In other words, the legally recognizable refugee was created by racial persecution not only abroad, but also within the United States and at its very own borders. Or to put it another way, the American state's racial persecution of Chinese immigrants articulated by the Chinese Exclusion Act was a necessary condition precedent for the creation of *de jure* refugee status for Pershing's Chinese refugees. The case of Pershing's Chinese refugees thus illustrates the fundamentally interdependent logic of refugee law and immigration law in producing refugees.

III.

REFUGEE LAW, IMMIGRATION LAW, AND THE CONSTRUCTION OF SECOND-CLASS CITIZENSHIP

Recognizing the forms of persecution that refugees can experience at our own borders enables us to see more clearly the relationship between refugee law and citizenship in the United States. To develop a more holistic model for thinking about immigration, asylum, and citizenship, this Section bridges the

177. Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 264 (1995).

178. *See id.* at 264, 271; Natalie Oswin, *Rights Spaces: An Exploration of Feminist Approaches to Refugee Law*, 3 INT'L FEMINIST J. POL. 347, 352 (2001). Indeed, in response to the refugee crisis generated by the Iraq War, U.S. officials have denied any responsibility for triggering the crisis, shifting the blame from American actions onto sectarian violence between Iraqis. *See* Nir Rosen, *The Flight from Iraq*, N.Y. TIMES MAGAZINE, May 13, 2007, at 32.

179. *Cf.* Linda K. Kerber, *The Stateless as the Citizen's Other: A View from the United States*, 112 AM. HIST. REV. 1, 7 (2007) (addressing the presence of stateless Americans in U.S. history: "Statelessness is a subject that most historians of the United States have treated as belonging to other national histories—Jews, Gypsies, Palestinians").

discursive gap in legal scholarship that persists between refugee law and citizenship law. Here again, we see a conceptual divide between the refugee and the citizen that mirrors the divide between the refugee and the immigrant in the law. Using the example of Pershing's Chinese refugees, the following discussion will draw these bodies of law closer together and demonstrate how refugee law and immigration law work dynamically together to construct a form of second-class citizenship for noncitizens.

A. *The Refugee/Citizen Binary in Law*

While the concept of the refugee as a legal subject has been critiqued to a limited extent, the concept of citizenship has undergone serious deconstruction. Because scholars such as Alexander Aleinikoff and Linda Bosniak have uncoupled citizenship from the formal, constitutional sense of the word, it is now possible to speak of different kinds of citizenship, and to conceptualize citizenship as a practice in addition to a "thing" or a legal status. As Bosniak explains, the term citizenship can be used "to talk about all kinds of things: about the enjoyment of rights of various kinds, about political and civic engagements, about experiences of collective identity and solidarity, and about the possession of formal national membership status or nationality."¹⁸⁰ Thus, citizenship not only refers to the legal status that distinguishes members of a nation from outsiders, but it can also represent lived and experienced "belonging" in a more substantive sense, one connected to identity and communal solidarity. The concept of citizenship has expanded to embody what Jennifer Gordon and Robin Lenhardt have described as one's ability to realize "genuine participation in the larger political, social, economic, and cultural community."¹⁸¹

This means, then, that even if one is a citizen in the formal sense of the word, she may not quite "belong." Hence terms like "second-class citizenship," "quasi-citizenship," and "quasi-polities" have entered the citizenship lexicon.¹⁸² The reverse, however, can also be true: even if one is *not* a citizen in the formal sense of the word, a person can still experience different realizations of "belonging" to the larger community. "Citizenship talk," or discussions about the meaning of citizenship, who possesses it, and what practices create it, then,

180. Bosniak, *Varieties of Citizenship*, *supra* note 9, at 2449.

181. Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2494 (2007). For discussions of the role of race in early twentieth-century naturalization cases, see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817 (2000).

182. See, e.g., Aleinikoff, *supra* note 9, at 1690.

can now include “the story of non-members and members of ‘quasi-polities,’” in addition to formal citizens and disfavored citizens.¹⁸³

In contrast to citizenship, refugee law has generated much less theorization and deconstruction. Colin Harvey aptly observed in 1999 that there had been an “almost complete absence of serious theorizing in refugee law. . . . [R]efugee law has remained astonishingly immune from the [critical theory] battles raging elsewhere in legal scholarship.”¹⁸⁴ Harvey’s critique may not have been completely fair, as there were significant feminist critiques of refugee law and its inadequate protection of refugee women.¹⁸⁵ For instance, scholars such as Sherene Razack and Audrey Macklin drew upon the insights of both feminist legal theory and critical race theory to show how women experienced “interlocking systems of oppression,” and to highlight the process of “cultural othering” that is produced through dominant refugee discourses and practices.¹⁸⁶ More “traditional” refugee scholars such as James Hathaway and Alexander Neve even borrowed from critical race theorist Derrick Bell’s interest-convergence theory to advance their proposal to reform refugee policy.¹⁸⁷

Still, there is a persistent disparity in legal scholarship between “refugee talk” and “citizenship talk.” While there has been some cross-pollination between immigration and citizenship scholarship, refugee law has not directly engaged questions of citizenship very much.¹⁸⁸ Years ago, Roger Zetter pointed out the need to investigate deeply and critically the “processes by which

183. *Id.*; see also Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 560–61 (2006) (“[T]he fundamental legal and societal construct known as citizenship . . . has always included gradations or levels of membership.”).

184. Harvey, *supra* note 23, at 120.

185. See, e.g., Oswin, *supra* note 178 (drawing upon feminist legal theory and the work of Jennifer Nedelsky to critique refugee rights discourse); Sherene Razack, *Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender*, 8 CAN. J. WOMEN & L. 45 (1995) (drawing upon feminist legal theory and critical race theory to critique processes of “cultural othering” in refugee adjudication). For an overall review of feminist critiques of refugee law, see Oswin, *supra* note 178, at 349–55.

186. See Razack, *supra* note 185, at 47–49; see also Macklin, *supra* note 177. Notably, both of these scholars were writing specifically about asylum law in the Canadian context.

187. Hathaway & Neve, *supra* note 102.

188. For a sampling of works analyzing the intersections between immigration law, citizenship, and race, see, for example, Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Non-Persons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996–1997); Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012 (2010). See also Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 829 (2000) (noting that the ways in which “the Critical Race critique facilitates an understanding of the *international system* . . . [have] yet to be established with any degree of certainty”) (alteration in original); Gordon & Lenhardt, *supra* note 181, at 2497 (noting that, “for the most part, mainstream legal scholars in the fields of immigration and Critical Race Theory have generally explored the topic of citizenship in inexplicably separate ways”).

refugees are socialized with certain identities and the structural impacts (control, regulation, opportunities) of these identities.”¹⁸⁹ However, much of refugee law scholarship has instead focused primarily on questions of refugee definition, or on proposing new institutional arrangements to better address the needs of the world’s displaced populations.¹⁹⁰ The questions that have shaped research on refugee law are largely in the nature of who, what, where, when, why: Who should be protected as refugees? What constitutes persecution? Where should refugees seek protection? When are state obligations triggered? And why do we have refugee law in the first place, which is to say, how should we define the purpose of refugee law and how should that shape the practice and implementation of refugee law? The purpose here is not to discredit the significant work of refugee law scholars with this admittedly oversimplified assessment of the field. Rather, it is to point out that the field has been driven by certain kinds of questions about how to better protect refugees in flight and facilitate their admission into a safe state. With its attention focused predominantly on addressing admission criteria, legal scholarship on refugee law seldom asks questions of which other actors participate in the production of the refugee subject, what are the political byproducts of the process of defining refugees, and how those byproducts might inform refugees’ post-admission experiences.

Part of the reason for refugee law’s detachment from “citizenship talk” has its basis in the same international/domestic binary that characterizes refugee law and immigration law. As Bosniak recently observed, “mainstream citizenship theory (including constitutional theory) is often too internally focused and needs to pay more attention to national borders.”¹⁹¹ In contrast to the international, outward orientation of refugee law, writing about citizenship has been largely constrained by a national, domestic framework, and neither field has sought to challenge these orientations in a way that meaningfully engages the other.

A fundamental understanding in the dominant literature of refugee law as palliative in purpose may also explain the disengagement between refugee law and citizenship theory.¹⁹² A core principle of refugee law is the duty of *non-refoulement*, that is, of the refugee-receiving state’s duty to not return refugees

189. Roger Zetter, *Labelling Refugees: Forming and Transforming a Bureaucratic Identity*, 4 J. REFUGEE STUD. 39, 41 (1991).

190. See, e.g., NIRAJ NATHWANI, *RETHINKING REFUGEE LAW* (2003); Hathaway & Neve, *supra* note 102; James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 315 (2012); Lori A. Nessel, *Externalized Borders and the Invisible Refugee* 40 COLUM. HUM. RTS. L. REV. 625 (2009); Schuck, *supra* note 109.

191. Bosniak, *Varieties of Citizenship*, *supra* note 9, at 2449.

192. See Hathaway & Neve, *supra* note 102, at 140 (“The refugee protection system . . . is a palliative regime that protects desperate people until a fundamental change of circumstances allows them to go home safely.”).

to the country where their lives are threatened.¹⁹³ But the receiving state's duty ends there; international law does not necessarily require states to provide more than temporary protection.¹⁹⁴ Thus, no additional affirmative, positive right attaches to one's refugee status, and a right to more permanent status within the country—particularly as a naturalized citizen—does not necessarily follow. Though refugee law and policy during the Cold War years may have been characterized by what some have called an “exile bias” and the expectation of permanent settlement in the host country, the turn to voluntary and involuntary repatriation since the 1980s has reinforced the fragile, liminal, and short-term nature of asylum.¹⁹⁵

Although in the United States legally designated refugees can become eligible for formal citizenship,¹⁹⁶ a conceptual gulf nevertheless remains between the refugee and the citizen, especially with regard to belonging. Indeed, this was illustrated most poignantly in the critical responses to the media's labeling of African Americans as “refugees” in the aftermath of Hurricane Katrina. The use of the label “refugees” to refer to displaced American citizens proved marginalizing, alienating, and unacceptable to many of the victims. “I can't stand people calling me a refugee,” one evacuated New Orleans resident reportedly complained; “I am an American and I love America.”¹⁹⁷ And as the former mayor of New Orleans insisted, “These are not refugees. Let's not refer to them as refugees. They're citizens.”¹⁹⁸ Refugee and citizen thus occupy different spaces in the national imagination.

193. U.S. immigration law has incorporated the obligation of *non-refoulement* in INA § 241(b)(3). See INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006). A grant of withholding of removal under this provision only protects a person from return to the country of persecution. *Id.* § 208(c)(2), 8 U.S.C. § 1158(c)(2) (2006). Unlike asylum, it does not provide a status in the United States nor any pathway to more permanent residency. See ANKER, *supra* note 104, at 7–8.

194. See Hathaway & Neve, *supra* note 102, at 119. Many Western nations such as the United States provide pathways to permanent status for refugees, but as Hathaway and Neve point out, these states are simultaneously erecting serious barriers to a person's ability to claim refugee status. *Id.* at 119–22. Moreover, if the U.S. Attorney General determines that conditions in the refugee's country of origin have changed so that the refugee should no longer face any threat of persecution, asylum can be terminated. INA § 208(c)(2); see also Schuck, *supra* note 109, at 260, 263 (preferring repatriation as soon as feasible, with temporary protection and resettlement as strategies of last resort).

195. See Coles, *supra* note 19, at 390 (describing the exile bias in refugee law). See also Anker et al., *supra* note 20, at 302–03 (criticizing proposals that place repatriation at the center of refugee law reform).

196. A refugee can adjust to permanent legal resident status after one year of physical presence in the United States and can then apply for citizenship status after five years of continuous residence in the country. INA § 209(a), 8 U.S.C. § 1159(a) (2006); INA § 316(a), 8 U.S.C. § 1427.

197. Adeline Masquelier, *Why Katrina's Victims Aren't Refugees: Musings on a “Dirty” Word*, 108 AM. ANTHROPOLOGIST 735, 737 (2006) (quoting an evacuee in New Orleans).

198. Peter R. Petrucci & Michael Head, *Hurricane Katrina's Lexical Storm: The Use of Refugee as a Label for American Citizens*, 25 AUSTRALASIAN J. AM. STUD. 23, 23 (2006).

B. Noncitizens as “Second-Class Citizens”: A Critique of Domestic Conditions

The history of Pershing’s Chinese refugees presents an opportunity to combine the refugee and citizen analyses into one. It reminds us that the urgent questions about how to better protect refugees in flight need not necessarily preclude scholars from also interrogating the quality of protection provided in refugee-receiving countries—predominantly Western states who espouse a politics of universal liberalism and egalitarianism. Nor should the question of how to better protect refugees prevent scholars from investigating whether and to what extent policies in these refugee-receiving countries also function as a form of persecution that harms refugees. In exploring the construction of refugee identity through Pershing’s Chinese refugees, we have an opportunity to draw some crucial observations about the dynamic ways in which immigration law and refugee law work in tandem to construct and reconstruct the social identities of refugees in the United States.

More specifically, the case of Pershing’s Chinese refugees demonstrates the powerful ways in which noncitizens can experience forms of belonging that are shared with citizens. These shared notions of belonging can substantially inform noncitizens’ incorporation into the nation and their communities, but at the same time remain limited and marginalizing.

1. Americanization and Refugee Protection

In order to transform Pershing’s Chinese refugees from excludable immigrants into deserving refugees, the various advocates of PL 29 emphasized the Chinese men’s participation in the civic life of the army base, the broader San Antonio community, and the nation.¹⁹⁹ They turned that military association and civic participation into a right akin to what Ayelet Shachar has identified as “earned citizenship . . . [which exists] not as a handout or act of charity, but as a legal title that arises from the existence of already-established, real, and genuine ties to the political community.”²⁰⁰ Instead of accepting the legal framework of Chinese exclusion, the refugees and their advocates urged the government to adopt a framework that accounted for functional ties, thus providing “substance to the idea that real and effective ties fostered on the ground deserve some form of legal recognition.”²⁰¹ Although still denied the right to naturalize and become full citizens in the end, the relationships that the

199. See *infra* text accompanying notes 209–19.

200. Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 *YALE J.L. & HUMAN.* 110, 115 (2011) (offering *jus nexi*, a principle based on notions of rootedness, as an alternative framework for citizenship in addition to the traditional territorial (*jus soli*) and parental (*jus sanguinis*) principles).

201. *Id.* at 116, 131. Thus, Andrew Urban’s dissertation observes that, in contrast to the usual immigrant story in which citizenship follows settlement, Pershing’s Chinese refugees “prove[d] themselves to be good ‘citizens’” first, and as a result, were allowed to settle permanently in the country. Urban, *An Intimate World*, *supra* note 5, at 234, 241–42.

Chinese refugees forged with the U.S. Army both outside and within the nation's borders—and at both the personal and symbolic levels—became the vehicle through which they redefined their status vis-à-vis the nation. Though they were not made American in a de jure sense, they were recognized in many respects as de facto Americans because they served the U.S. Army. They were akin to, but not equivalent to, those immigrants on the path to citizenship that Hiroshi Motomura identified as “Americans in waiting.”²⁰²

The Chinese refugees thus transformed their semimilitary service during the Punitive Expedition and World War I into broader claims for inclusion in the United States. As Lucy Salyer has explained, throughout its history, the nation has attached such importance to military service “that it became a path to citizenship for those, whatever their race, who were willing to play for high stakes,” thus infusing it with a “liberating potential.”²⁰³ In fact, one of the 522 Chinese refugees, Jung Hoy, gained citizenship by enlisting without permission in the U.S. Army. Jung followed the Seventh Field Artillery regiment, with whom he had been previously employed, to the battlefield in France and was wounded in action. When his officers realized that he had broken the regulations in force for the Chinese refugees by enlisting without permission, they returned him to the Chinese camp. Rather than being punished, however, Jung was “admired for his patriotic desire to follow his employers to the fields of battle” and eventually rewarded with naturalization; he became the only refugee to receive the “[i]nestimable heritage of American citizenship” while still living in the camps.²⁰⁴

Although the other Chinese refugees remained ineligible for formal citizenship, the service-based justifications that eventually led to the passage of PL 29 reflected deeper assumptions by the bill's supporters about the assimilative capacity and Americanization of the Chinese refugees. Indeed, if there was an historical analogue to the term refugee, it resided in the houses of refuge and correction common in American society at the time. These houses were charitable institutions, usually intended for first-time offenders, the young, and sometimes females, founded on the belief that “the welfare both of society and of the offender will be better promoted and conserved by the

202. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

203. Lucy E. Salyer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, 91 J. AM. HIST. 847, 850 (2004). On military service as a pathway to naturalization for Asian immigrants, see Deenesh Sohoni & Amin Vafa, *The Fight to Be American: Military Naturalization and Asian Citizenship*, 17 ASIAN AM. L.J. 119 (2010); Urban, *An Intimate World*, *supra* note 5, at 233–84. On military service by other racial minority groups and struggles for full citizenship rights during World War I, see Steven A. Reich, *Soldiers of Democracy: Black Texans and the Fight for Citizenship, 1917–1921*, 82 J. AM. HIST. 1478 (1996); Chad Louis Williams, *Torchbearers of Democracy: The First World War and the Figure of the African-American Soldier* (2004) (unpublished Ph.D. dissertation, Princeton University).

204. *Registration of Refugee Chinese*, *supra* note 87, at 954–55, 978; *see also* Urban, *An Intimate World*, *supra* note 5, at 267.

exercise of reformatory and corrective measures than by treatment wholly punitive.”²⁰⁵ Intended to eventually restore offenders to society, houses of refuge sought to train them in the ways of industry, instill in them the high principles of morality and religion, and free them from the corrupting influences of improper associates.²⁰⁶ These extant principles closely align with the image that supporters painted of the Chinese refugees as dependent wards whose “perpetual foreignness” had been eroded, reformed, and assimilated through their learned American industriousness and morality.

Indeed, Page, the civilian official who had been in charge of Pershing’s Chinese refugees at San Antonio, emphasized that the refugees’ associations with American institutions had radically transformed them at the most basic, physical level. Forcing them to the now-foreign environment of China, he argued, “would take a toll that would shock humanity,” as it would “undoubtedly cause great mortality among their number.”²⁰⁷ To their advocates, the refugees had become so “Americanized” that, as an army official reasoned, “[i]t would be almost criminal to return them to the filth of China after having lived under the sanitary conditions of our Army camps during the past three years or more.”²⁰⁸

The ideological evidence of their assimilation and Americanization that supporters presented was even more compelling. For example, Page explained that “[a] large majority of these refugees desired to enlist in the armed forces of the United States,” though none of them were allowed to do so.²⁰⁹ He thus highlighted their civilian demonstrations of loyalty and patriotism to the United States. Additionally, not only had they proven themselves “very apt and willing students” of their English-language night classes, but they also voluntarily fundraised for the Red Cross, endowed a hospital bed for wounded American soldiers in France, contributed to the French orphan fund and other charitable organizations, and “paraded the streets with banners in patriotic parades.”²¹⁰

205. See W. J. Tracy, *Houses of Refuge and Corrections*, in 15 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 778 (2d ed. 1900).

206. *Id.*

207. See Letter from Wm. Tracy Page to Hon. Albert Johnson (Dec. 17, 1919) (reprinted in *Registration of Refugee Chinese*, *supra* note 87, at 953–55); see also Urban, *An Intimate World*, *supra* note 5, at 262.

208. See Letter from W.R. Burgess to Wm. Tracy Page (Dec. 5, 1919) (reprinted in *Registration of Refugee Chinese*, *supra* note 87, at 958–59).

209. See Letter from Wm. Tracy Page to Hon. Albert Johnson, *supra* note 207. Page reminded the Committee of Jung Hoy, who, despite orders to the contrary, had enlisted to go into battle and had his patriotism rewarded with citizenship. See *supra* text accompanying note 204. Page then asked, “If he is to be entitled to this privilege, why should he [and] not those who obeyed orders and did their bit in this country (although their desire was to do the same as this man did) be entitled to the same right and privilege?” Letter from Wm. Tracy Page to Hon. Albert Johnson, *supra* note 207.

210. *Id.*; see also Briscoe, *supra* note 5, at 66; Urban, *An Intimate World*, *supra* note 5, at 266. At a practical level, learning to speak English benefitted the Chinese economically, as it enabled them to secure better jobs where they interacted more directly with members of the camps. But as historian Edward Briscoe noted in 1947, “Fundamentally, the night school was a necessary cultural step in the

Ultimately, Page portrayed the refugees as *ideal* Americans, a far cry from the inassimilable Yellow Peril that the Chinese represented to the larger American public:

They have all taken the oath of allegiance to the United States and have been loyal and true to that obligation. There have been no red flags in their camps; they have been good, loyal, honest servants of the Government, living up to the highest standards of civilization and having a respectful obedience to authority and, above all, a lasting trust in the just principles of our Government.²¹¹

Military officers concurred with Page, drawing similar attention to the refugees' patriotism, loyalty to the army and the country, and civic sensibility. One army major opined that "these Chinese are deserving of every consideration. Their services and loyalty have been wonderful, and they are clean, law-abiding men."²¹² Providing perhaps the highest compliment towards the Chinese refugees, the officer concluded, "I would consider them highly desirable as citizens."²¹³ Or as another officer explained, "These men were untiring in their efforts to be of value to the United States Government," and so, he advised, "they are most worthy of [citizenship]."²¹⁴

Indeed, during their last days in camp in January 1922, as the Chinese refugees made preparations to be registered and released from the camp, free to enter civil society according to PL 29, General Pershing himself paid them a visit. Satisfied that the U.S. government had honored its commitment to these Chinese by legally admitting them into the country once and for all, he encouraged the refugees to continue to "learn the American language" and become "good Americans."²¹⁵

In addition to providing a stage upon which Pershing's Chinese refugees could display their loyalty and patriotism, the military environment also fostered for them an Americanization narrative that was particularly gendered, class-based, and racial. Contrary to popular depictions of Chinese laborers as debased, slavish, opium-addicted "coolies" who threatened the economic and physical security of white womanhood, advocates re-envisioned Pershing's Chinese refugees as not merely nonthreatening, but highly desirable servants to the nation.²¹⁶ Ironically, their work as cooks, laundrymen, domestic servants,

direction of integrating the individual in his place in the American community." Briscoe, *supra* note 5, at 65.

211. Letter from Wm. Tracy Page to Hon. Albert Johnson, *supra* note 207.

212. *Registration of Refugee Chinese*, *supra* note 87, at 961.

213. *Id.*

214. *Id.* at 962. Such positive testaments about Pershing's Chinese refugees by military officials stand in contrast to the attitudes of immigration officials, who viewed the refugees with suspicion. See Urban, *Asylum in the Midst of Chinese Exclusion*, *supra* note 5, at 216.

215. Briscoe, *supra* note 5, at 133–34 (quoting SAN ANTONIO LIGHT, Jan. 8, 1922).

216. See *Registration of Refugee Chinese*, *supra* note 87, at 956; see also MARY TING YI LUI, *THE CHINATOWN TRUNK MYSTERY: MURDER, MISCEGENATION, AND OTHER DANGEROUS ENCOUNTERS IN TURN-OF-THE-CENTURY NEW YORK CITY* (2005); NAYAN SHAH, *CONTAGIOUS*

and laborers—feminized work that usually posed a challenge to notions of whiteness and masculinity in mainstream society—was appreciated as invaluable service in the largely homosocial masculine world of the army. In essence, their military service redefined Pershing's Chinese refugees into the ultimate domestic servant, the national equivalent of women not only in need of rescue, but more importantly, of state protection.²¹⁷ In the process of constructing a legal exemption to the Chinese Exclusion Act for these refugees, advocates portrayed them as different from Chinese laborers who otherwise were excludable as "undesirable aliens." Instead, they were significantly rehabilitated to a citizenship-like status through a raced, classed, and gendered narrative of Americanization.

For some, in fact, the Chinese refugees were preferable to others who were actual citizens or eligible for citizenship in the United States. For example, one officer asserted that the Chinese refugees were better workers than the "white and colored [workers]" that had preceded them,²¹⁸ while another commented that the Chinese were "much superior to the Negro and Mexican in this section."²¹⁹ Or as Colonel Cecil explained in his letter of support for the 522 Chinese refugees and, more specifically, his Chinese cook and "housework man": "I have nothing against the negro—I was born and raised amongst them, and my people owned them as slaves—but I would actually rather have this one Chinese man than three negroes. He will do more work, better work, and, at the same time, not steal anything."²²⁰ For racial minorities such as African Americans and Latinos, who were both citizens in the formal sense and not, notions of citizenship and belonging remained flexible, subject to reordering, and constantly contested.

2. Americanization and Marginalization

Significantly, however, this Americanization process ultimately remained limited, less resilient than one might expect, and easily accommodating of subordination.²²¹ As proof of this, we need only remember that the law only recognized Pershing's Chinese refugees with a kind of "quasi-citizenship," as their Americanization narrative came into constant tension with the prevailing

DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN (2001); Urban, *Asylum in the Midst of Chinese Exclusion*, *supra* note 5, at 217 ("Under military supervision, and buffered from the private market, servility was seen as a positive attribute of the Chinese race, and one that could be put to ready use.").

217. See Urban, *An Intimate World*, *supra* note 5, at 233–84 (analyzing how the refugees fulfilled a domestic servant-like role to the nation).

218. See Letter from W.R. Burgess to Wm. Tracy Page, *supra* note 208.

219. See Letter from S.B. Pearson to Wm. Tracy Page (Dec. 15, 1919) (reprinted in *Registration of Refugee Chinese*, *supra* note 87, at 963).

220. Letter from J.S. Cecil to Wm. Tracy Page (Nov. 28, 1919) (reprinted in *Registration of Refugee Chinese*, *supra* note 87, at 957).

221. See HANEY LÓPEZ, *supra* note 181, at 115.

policies of Chinese immigration exclusion. The story of Pershing's Chinese refugees does not sit comfortably within any simple teleological narrative of progressive "uplift." As Ian Haney López has explained, law does not construct race "in one direction or along a single axis."²²² Instead, López continues, "the legal construction of race pushes in many different directions on a multitude of levels, sometimes along mutually reinforcing lines but more often along divergent vectors, occasionally entrenching existing notions of race but also at other times or even simultaneously fabricating new conceptions of racial difference."²²³ In the case of Pershing's Chinese, the racial imperatives of Chinese exclusion were not entirely surmountable.

Thus we see the accommodation of racially subordinating attitudes as Congress limited the rights to be afforded to the refugees, rejecting any provisions that the refugees receive more rights than other Chinese laborers. When debating possible contours of PL 29, the refugees' advocates still had to reassure the House committee that the Chinese refugees "would have the same rights that other registered Chinese laborers have here."²²⁴ Lawmakers thus justified the rights given to the Chinese refugees directly in relation to the policy of Chinese Exclusion, deciding "[t]hat the registration hereby provided shall correspond as nearly as circumstances permit to the registration of domiciled Chinese prescribed by section 6 of the Act approved May 5, 1892 [known as the Geary Act]."²²⁵ The direct point of reference for the once "deserving" Chinese refugee who assisted the U.S. military was, here again, the undesirable and otherwise inadmissible Chinese immigrant laborer. Having gained entry into the country, the "deserving" refugees were now to be treated like all other marginalized Chinese laborer immigrants, required by section 6 of the Geary Act to register with the federal government and carry certificates of residence, or otherwise "be deemed and adjudged to be unlawfully within the United States" and potentially subject to arrest and deportation.²²⁶

By equating the Chinese refugees to Chinese laborers, PL 29 signaled the failure of lawmakers to see Chinese immigrants—even perhaps the most "deserving" and Americanized immigrants—as anything other than the inassimilable, perpetually foreign, and racially excludable Chinese laborer. PL

222. *Id.*

223. *Id.*

224. *Registration of Refugee Chinese*, *supra* note 87, at 967. Some officials were particularly concerned about limiting the ability of Pershing's Chinese refugees to leave and reenter the United States. *See id.* at 973–74.

225. Act of Nov. 23, 1921, ch. 148, § 2, 42 Stat. 325, 326. The Geary Act of 1892 was one of the later acts that extended the policy of Chinese exclusion. Geary Act, ch. 60, 27 Stat. 25 (1892).

226. Geary Act § 6. In addition, those Chinese refugees who could not pass the health examinations and meet other admission requirements of the 1917 Immigration Act were to be deported, and any Chinese refugee who later fell under categories for "expulsion" under the 1917 Immigration Act would likewise be "taken into custody and deported." Act of Nov. 23, 1921 § 2. At least two of Pershing's Chinese refugees were later deported for opium-related offenses. *See* Urban, *An Intimate World*, *supra* note 5, at 276–77.

29 ultimately eroded the efficacy and circulation of the refugee-citizen alliance promoted by the Chinese refugees and their advocates, subtly replacing the narrative of assimilability and Americanization with the familiar narrative of racial exclusion trumpeted by turn-of-the-century nativists and the Chinese Exclusion Acts. For Pershing's Chinese refugees, racial biases kept formal citizenship out of reach as a legal impossibility, while the threat of deportation remained constantly on the horizon.

With this first articulation of a refugee law, Congress thereby incorporated two competing visions of the refugee—the deserving and assimilable immigrant who should be (and ultimately was) admitted into the country, and the racially undesirable and inassimilable immigrant who should be excluded from the country altogether. Though these competing expressions may appear in tension with each other, they actually tracked the internal logic of refugee status, illustrated more recently by the example of Hurricane Katrina's evacuees. Notions of racial belonging—or “unbelonging”—informed the very constitution of U.S. refugee law. The humanized Chinese refugee, deemed worthy of admission into the nation's borders, was simultaneously re-transformed into the racially undesirable Chinese immigrant laborer, targeted for exclusion—both literal and symbolic—from the nation's body politic.²²⁷ Placing these once-“deserving” refugees on the same footing as laborer-immigrants regulated by the Chinese Exclusion Acts, PL 29 rendered them legally and socially suspect, undoing the dramatic intervention their admission into the United States represented. Even if they were “good Americans,” as Pershing urged them to be, they could never be fully “American.” Thus, second-class citizenship was derived from refugee status, constructed through a process of racial subordination within the United States, as well as without.

IV.

PERSHING'S CHINESE REFUGEES AND THE BENEFITS OF A MORE HOLISTIC APPROACH TO IMMIGRATION, ASYLUM, AND CITIZENSHIP

Using the case of Pershing's Chinese refugees, this Article has brought U.S. immigration law, refugee law, and citizenship theory into closer dialogue

227. Of course, this phenomenon was not restricted to the Chinese refugees. As history has shown, though African American, Mexican American, and other Asian American soldiers have used patriotic military service as an avenue to advance equal rights and enhance their status as American citizens, full citizenship for these groups remained elusive and unrealized during the nineteenth and twentieth centuries. Indeed, as Kunal Parker reminds us:

The African American experience in the United States, both before and after the Civil War, might be taken as a model for thinking about immigration. It suggests that foreignness has no intrinsic connection to whether one stands inside or outside territory. That boundary is simultaneously produced and transgressed, not least in the activities of the immigration regime itself.

Kunal M. Parker, *Citizenship and Immigration Law, 1800–1924: Resolutions of Membership and Territory*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 168, 203 (Michael Grossberg & Christopher Tomlins eds., 2008).

with each other. Taking a more holistic approach to these topics closes some of the conceptual gaps and opens up new ways of thinking about practices of inclusion and exclusion at, within, and outside the nation's borders. Rather than treat Pershing's Chinese refugees as an isolated case study, we can use their experience to further explore how the production of second-class citizenship at our borders continues today.

First, it may be worth asking whether the dynamic exemplified in the case of Pershing's Chinese refugees maps on to any category of refugee cases today. There are some obvious parallels in the recent cases of Iraqi refugees who provided assistance to the American military during the U.S. occupation of Iraq. Although today we no longer have explicitly racist immigration laws, Arab, Muslim, and Middle Eastern immigrants have been increasingly associated with the threat of terrorism, and since September 11, 2001, have been disproportionately targeted by antiterrorist immigration measures.²²⁸ The identification of Middle Eastern immigrants with terrorism following September 11 resulted not only in severe immigration procedures, but also a drastic scaling back of refugee admissions.²²⁹ In 2007, however, Congress passed the Refugee Crisis in Iraq Act for Iraqi interpreters and facilitators who were assisting the U.S. military during its occupation of Iraq.²³⁰ As in the case

228. Such measures include special registration requirements, arrests, detentions, interrogations, and selective deportations of large numbers of Arab and Muslim noncitizens. *See generally* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002) ("Congress has enacted new laws that subject noncitizens to guilt by association . . . [a]nd federal and local officials have engaged in ethnic profiling, treating immigrants as suspects based on little more than their Arab ethnicity or national origin."); Engle, *supra* note 188, at 61 ("[T]errorist profiling exposes alien and some citizen Muslims to heightened scrutiny."); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1102–1120 (2005) ("[T]he analogy between Muslims, Arabs and South Asians, on the one hand, and European immigrants, on the other, appears strained in light of evidence showing more ambiguous treatment afforded [the former] groups under the law."); Johnson & Trujillo, *supra* note 114, at 1382–83 (describing how the U.S. government detained thousands of Arabs and Muslims, denying access to counsel and without handing down any criminal indictments); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) ("September 11 facilitated the consolidation of a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim,' . . . reflect[ing] a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens.").

229. Exacerbated by the U.S.-led invasion of Iraq in 2003, admission of Iraqi refugees in particular plummeted. Unable to distinguish between enemy aliens and innocent civilians, the United States closed its doors to the masses of displaced Iraqi refugees, admitting three hundred refugees in 2003 and only seventy in 2004. *See* KELLY O'DONNELL & KATHLEEN NEWLAND, MIGRATION POLICY INST., THE IRAQI REFUGEE CRISIS: THE NEED FOR ACTION 18 (2008), http://www.migrationpolicy.org/pubs/mpi-the_Iraqi_refugee_crisis_the_need_for_action_011808.pdf (table of UNHCR referred cases).

230. HUMAN RIGHTS FIRST, PROMISES TO THE PERSECUTED: THE REFUGEE CRISIS IN IRAQ ACT OF 2008, at 2 (2009).

of Pershing's Chinese refugees, former U.S. government officials and staff, congressional members, Iraq war veterans, journalists, and other refugee advocates came to the aid of these U.S.-affiliated Iraqi refugees, pointing to a special "obligation" to provide a safe haven for these particular refugees.²³¹ The bill thus gained support by constructing these Iraqi refugees as both victims of war and social instability, and as U.S.-affiliated sympathizers who were specifically targeted by Iraqi terrorist insurgents as Americanized "traitors" and "infidels."²³² Similar to the case of Pershing's Chinese refugees, where supporters came forward to aid in reframing the refugees' identities, advocates have been able to reconstruct U.S.-affiliated Iraqi refugees from potentially radical and dangerous "terrorists" into model Americans, and thereby pass special legislation on their behalf.²³³ In many respects, the case of U.S.-affiliated Iraqi refugees closely tracks the experience of Pershing's Chinese refugees.

However, what parallels might there be in less similar asylum cases, for example where refugees cannot claim any special relationship to powerful U.S. institutions such as the army? Or what about cases in which immigration law does not even particularly target the group for exclusion? In contrast to Iraqis who are actively marked today for immigration exclusion, there are refugees—such as gay men and women from "Third World" countries—about whom immigration law has remained relatively silent and neutral. If these refugees sought admission into the United States through normal immigration procedures, they would constitute "ordinary" or "stock" immigrants who are not relentlessly associated with any underlying exclusionary justification. For these otherwise "stock" immigrants, there is no racializing construct to counter with an Americanization narrative. Rather, in the eyes of the law, they might very well be described as "Americans in waiting," to borrow again from Motomura.²³⁴ There is, at least in theory, no barrier to their social and political integration into the United States, except the border and the immigration queue.

231. *Id.* at 1–4. As Senator Edward Kennedy, who led the introduction of the bill in the Senate, explained, "we have a special obligation to keep faith with the Iraqis who have bravely worked for us—and have often paid a terrible price for it—by providing them with safe refuge in the U.S." *The Plight of Iraqi Refugees: Hearing Before the S. Jud. Comm.*, 110th Cong. 176 (2007) [hereinafter *The Plight of Iraqi Refugees*] (statement of Sen. Edward M. Kennedy).

232. *See The Plight of Iraqi Refugees*, *supra* note 231, at 19–20, 23–25 (statement of Sami Al-Obiedy, translator); *id.* at 177 (statement of Sen. Edward M. Kennedy describing how some Iraqi refugees have been targeted as "traitors, infidels, and agents of the occupier," while others have been persecuted for their Christian religious beliefs).

233. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1244, 122 Stat. 3, 396–98; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3136, 3443–44.

234. *See generally* MOTOMURA, *supra* note 202.

Thus, they purportedly occupy the same standing as U.S. citizens, and all that remains is the technicality of legalization.²³⁵

What begs further exploration, then, is the applicability of a holistic approach to refugee cases that fall in this latter, neutral category, such as those involving refugee claims arising from gender or sexual orientation-based persecution, both of which have been largely handled under the “membership in a particular social group” category of refugee law.²³⁶ There is no immigration policy per se that demands the exclusion of women or LGBT immigrants. But that may not necessarily preclude immigration law and refugee law from working dynamically together to construct second-class citizenship for these groups of people.

In such cases, refugee law may indeed become the specific apparatus through which these otherwise “stock” immigrants are de-Americanized. Several refugee scholars have already observed how refugee adjudicators have frequently demanded certain kinds of gendered and racialized performances by women and gay men to successfully claim refugee status. For example, as Anker and Ardalan have found, gay men need to act overtly gay and display visibly “effeminate” traits—they need to talk, dress, and move in a way that asylum adjudicators will read as “gay.”²³⁷ For women, domestic violence in itself will not do.²³⁸ Rather, they need to be exotically persecuted, fleeing

235. See Mendelson, *supra* note 188, at 1018 (describing how U.S. immigration law assumes an Americanization narrative that denies diversity).

236. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

237. See Deborah Anker & Sabi Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 529, 551 (2012). For examples of such cases, see *Todorovic v. U.S. Attorney General*, 621 F.3d 1318, 1323 (11th Cir. 2010) (“[T]he [immigration judge] concluded that Todorovic had failed to prove to a preponderance of the evidence that his life or freedom would be threatened if he were returned to his native country. The [immigration judge] reiterated that it is clear that this gentleman is not overtly homosexual and there is no reason he would be immediately recognized as such.”) (citations omitted) (internal quotation marks omitted); *Razkane v. Holder*, 562 F.3d 1283, 1286 (10th Cir. 2009) (“In his oral ruling, the [immigration judge] found Razkane’s appearance [did] not have anything about it that would designate him as being gay. He [did] not dress in an effeminate manner or affect any effeminate mannerisms.”) (internal quotation marks omitted); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1028 (8th Cir. 2007) (“In a written opinion, the [immigration judge] found Shahinaj’s testimony not credible, stating . . . [n]either [his] dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual.”). The reasoning applied is that where a claimant is not “overtly homosexual,” such as by dressing or carrying himself in an effeminate way, he would not be immediately recognized as gay, and so is at no risk of persecution. See *Todorovic*, 621 F.3d at 1323; see also Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1314 (2011) (describing how the law’s test for gay identity can constitute “governmental instructions on how gay men should comport themselves if they wish to be recognized and protected by [law]—a kind of ‘lesson[] in being gay’”).

238. See Razack, *supra* note 185, at 84–85 (“It will not be of help to those women whose cases are less cinematic but who face no less severe domestic violence. . . . The case of gender-based persecution appears to go more smoothly when the cultural context can be ‘anthropologized’—that is, presented as non-Western, inferior, and unusually barbaric towards women. . . . Ordinary cases of intolerable domestic violence in states that are as male as our own [in the West], but infinitely poorer,

strangely misogynistic practices such as female genital mutilation (“FGM”), the veil, or the threat of “honor killings” imposed by foreign men in dysfunctional, religiously fanatical, irrational Third World societies.²³⁹ In the process of constructing a successful refugee identity, gay men have felt pressured to distance themselves from the masculine heteronormativity of U.S. society, and women from the liberal, westernized feminist. For these otherwise “stock” immigrants, the path to the United States through refugee law is fraught with problematic stereotypes, through which these refugees must effectively de-Americanize themselves.

These are necessarily incomplete sketches for the time being, but I raise these examples of Iraqi translators, women, and gay men to suggest that the dynamic logic of immigration law and refugee law continues to shape the production of marginalized, second-class citizenship today. The model of refugee-law-as-Americanization embodied by Iraqi translators may initially seem at odds with the model of refugee-law-as-de-Americanization that women and gay men seem to present. A holistic approach, however, may help us to make more sense of these seemingly disparate processes and understand more completely how, in the end, what we have is an immigration-refugee dynamic that produces an ever-constant supply of second-class citizens in the United States. Immigration law and refugee law work together to produce marginalized forms of citizenship in different ways for different groups. The goal of this discussion is to spur ongoing investigation of these processes and the various configurations in which they might come, so as to deepen our understandings of how the legal production of refugees potentially shapes their incorporation into the nation in racialized, gendered, and unequal ways.

Second, a more holistic approach to immigration, asylum, and citizenship opens up broader questions about the fluidity of legal identities and the role of law in constructing legal, social, and political belonging. Instead of reproducing a conceptualization of refugees as victims, a more holistic approach would

and where there are not readily accessible orientalist tropes, for example the Caribbean nations, tend to fail.”).

239. See Macklin, *supra* note 177, at 272 (“[G]ender persecution will be most visible and identifiable as such when it is committed by a cultural Other.”); Jenni Millbank & Catherine Dauvergne, *Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law*, 19 COLUM. J. GENDER & L. 898, 913 (2010) (describing how, in the United States, FGM “has come to dominate all discussion of gendered persecution in the American refugee context to the exclusion of other, less exoticized, forms of gendered harms”); Connie G. Oxford, *Protectors and Victims in the Gender Regime of Asylum*, 17 NWSA J. 18, 29 (2005) (“This cultured discourse of fear creates a hypervisibility to exotic practices such as female circumcision and decreases visibility of less exotic practices such as political activism, torture, and detention in the asylum application.”); Razack, *supra* note 185, at 58, 83; see also Millbank & Dauvergne, *supra*, at 900–01 (noting the propensity of American decisions to describe these cultural practices in “prurient detail”); Oxford, *supra*, at 27–30 (describing how immigration attorneys and other service providers for refugee women elevate FGM claims over all others for asylum seekers fleeing countries where FGM is practiced, regardless of the actual motivation for fleeing their country).

reclaim much more agency for refugees and their ability to assert refugee identity. As demonstrated in this Article, a holistic approach would enable us to see how refugees navigate and negotiate the interstices of immigration law and refugee law, and the convergences and divergences in the policies of exclusion and admission embodied in each. Indeed, a more holistic approach might invite deeper explorations of the normative tensions between immigration and asylum, and the extent to which the normative values of refugee law could or should be used to inform questions of immigration law, and vice versa. The international human rights framework could be engaged, for example, not only to strengthen the right to freedom of movement in the refugee context, but in the “ordinary” immigration context as well.²⁴⁰

Moreover, questions about how people negotiate the laws that will define their identities as immigrants, refugees, and citizens touch upon the role of “ordinary” people in constructing not only themselves, but also the United States as a nation-state. The nation-state is not a given, but rather something that citizens and immigrants work to define in a variety of ways every day. Rather than one monolithic body, the nation-state actually presents itself as an assortment of entities that can act in discordant as well as coordinated ways. Just as Pershing’s Chinese refugees were able to exploit certain inter-agency tensions and divisions embodied by the differences in opinion of immigration officials and military officers, “ordinary” human actors constantly push against the seams, bending the laws this way and that. The story of Pershing’s Chinese—and the Punitive Expedition more generally—speaks to the ongoing processes of state construction at the nation’s margins, and the struggle between the hegemony of the nation-state in defining who may belong and the human subjects that it tries to regulate.

By acting within the bounds of the law, however, these “low-level,” everyday actors ultimately reinforce the state, even if such actions take on the features of resistance or a liberatory project. For example, Pershing’s Chinese refugees successfully subverted the reach of the Chinese Exclusion Act by transforming themselves into deserving refugees. However, by relying on and conforming to obvious tropes of Americanization, they ultimately lent legitimacy to the power of the state to exclude other Chinese refugees and immigrants who were not as fortunate in being at the right place at the right time, and who thus could not meet those exacting state definitions and requirements. For Pershing’s Chinese refugees and many others since, there is often very little choice but to strategically leverage whatever ideological foothold the law provides. There may be no problem with this in the abstract, but it is troubling when people are asked to make legal claims that depend on

240. Some immigration scholars have taken steps in this international human rights direction already. See, e.g., Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643.

illegitimate criteria, such as race, gender, class, and/or religion, that can be easily manipulated by the state to create rigid categories that ultimately do not serve the interests of refugees themselves.

For example, what is being lost as well as gained as young undocumented Dreamers continue to come out of the immigration “closet” with their exhilarating stories of living the “American dream”? With great political effect, advocates for the passage of the Development, Relief, and Education for Alien Minors (DREAM) Act have relied on familiar Americanization tropes to publicly rehabilitate young undocumented immigrants as deserving immigrants who are “as American as you and me.”²⁴¹ Focusing on young immigrants who were brought to the United States by their parents at a very young age, who grew up in the United States, attended and frequently excelled in American schools, socialized with other American children, spoke English, stayed out of trouble, and have dreams of entering the class of American professionals who could then “pay back” everything that they had received from their American communities, Dreamers embody the quintessential “deserving” immigrant. Indeed, the Obama administration thought so, essentially adopting an administrative version of the DREAM Act that deferred action for some young undocumented immigrants who were in school or the military.²⁴² These were “productive young people” who only knew the United States, only spoke English, and had “already contributed to our country in significant ways.”²⁴³ That is, they experienced the practices of citizenship and belonging while not having formal legal status.

But what does a measure like the DREAM Act say about their parents, who have not been so readily accepted and who continue to bear the brunt of anti-immigrant hostility as law-breaking “illegals”? Indeed, what does it say about the overwhelming majority of undocumented immigrants in the United States, who remain outside the definition of Dreamers altogether, mostly by virtue of age, lack of educational opportunities, and the harder social conditions that often accompany impoverished and racialized communities? As a matter of immediacy, the narrative of Dreamers as young people trying to fully realize

241. DREAM Act of 2010, S.3827, 111th Cong. (2010). The Act itself stalled in Congress, but it was included in the immigration reform legislation recently passed by the Senate. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 2103 (2013) (as passed by Senate, June 27, 2013).

242. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r U.S. Customs and Border Protection et al. (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. The memorandum directs the Department of Homeland Security (DHS) to exercise prosecutorial discretion by deferring action against individuals who are not above the age of thirty and came to the United States under the age of sixteen; have continuously resided in the United States for at least five years preceding June 15, 2012; have not been convicted of a serious offense or multiple minor offenses; and are currently in high school, have graduated from high school or received a GED, or have served in the military. *Id.*

243. *Id.*

the American dream seems to offer the best political strategy for remedying some of the harsh effects of U.S. deportation policy. At the same time, it legitimizes the state's authority and prerogative to exclude others who do not conform to the image of the young Americanized Dreamer, and, in the long run, reifies a more limited vision of the deserving immigrant that will prove hard for pro-immigration advocates to reverse.

The unintended and often unforeseen consequences of using the law as a tool for antisubordination takes us to a related and third observation about the construction of a discriminatory state and the continuing role of law in producing second-class citizenship. Namely, a more holistic approach to immigration, asylum, and citizenship further lays bare the politics of race and the legal regulation of race relations in the post-civil rights era. With the reform of U.S. immigration laws in 1965, and the dismantling of de jure discrimination more widely across U.S. society in the post-civil rights era, we have supposedly entered what some have called a "colorblind" or even "post-racial" age.²⁴⁴ This could not be further from the truth, particularly in the areas of immigration, asylum, and citizenship.

Despite its facially neutral appearance, immigration law has emerged as a site of intense racial contestation.²⁴⁵ As Karen Engle has explained, "United States immigration law provides a rich site for studying the creation and discipline of the polity because of [its] explicitness about who is considered a potentially good member of the polity and who is presumptively, if not totally, excluded from such membership."²⁴⁶ Those considerations demarcating "good" immigrants and citizens, on the one hand, from "bad" immigrants and citizens, on the other, have frequently relied on ideas about racial differences and

244. The Immigration and Nationality Act of 1965 eliminated racial and national origin bases for admission to the United States, replacing the discriminatory national origins quota system with a first come, first served system that gave preference to immigrants with special occupational skills and relatives of U.S. citizens and legal permanent residents. Immigration and Nationality (Hart-Celler) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

245. See Johnson & Trujillo, *supra* note 114, at 1386 (describing how immigration law has disproportionate impacts on certain groups from Asia and Mexico); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS L. REV. 1, 32-47 (2002) ("[I]n the immigration context, where constitutional protections are relaxed, [certain] practices have been held to be permissible under the Constitution. Recall that the Supreme Court has held that Immigration and Naturalization Service (INS) agents may use 'Mexican appearance' as one factor in the decision to stop moving vehicles and to check the immigration status of their occupants."). See generally Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525; Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1 (2005); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755 (2000).

246. Engle, *supra* note 188, at 64.

inferiority.²⁴⁷ Though the logic of immigration law (including refugee law) is supposed to promote the formation of legally admitted noncitizens into fully-realized American citizens, in practice immigration law works with refugee law to create a caste of second-class citizens in the United States based on discriminatory and illegitimate criteria.

Ultimately, then, what remains to be grappled with is the glaring disjuncture between the conceptualizations of persecution abroad emphasized by refugee law and the persecution that certain immigrants, refugees, and citizens encounter “at home” in the United States. The real experiences of marginalization suffered by refugees in the United States belie any simple binary between “refugee-producing” and “refugee-receiving” countries. Indeed, history rejects the assumption that describing a country as “refugee-accepting” means the country is necessarily a “nonrefugee-producer,” and that nothing that happens there can thus constitute persecution or subordination.²⁴⁸ Instead of adopting this implicit binary structure that dominates much of refugee discourse and distorts our understanding of our own national practices, there is a need to engage more widely with serious questions about how U.S. policies and practices themselves might constitute persecution, if not outright violations of fundamental human rights.²⁴⁹ This Article has attempted to bridge that conceptual divide, to spur further efforts to bring both refugee law *and* immigration law closer in line with human rights and social justice interests. In doing so, it hopefully sheds further light on how the United States may better fulfill its democratic promise to citizens and immigrants alike.

CONCLUSION

The history of Pershing’s Chinese refugees touches on many salient issues relating to immigration and refugee law today. One could use this history to analyze PL 29 as a precursor to private bills, or even prosecutorial discretion and deferred action—the primary avenues in immigration law today for avoiding removal and exclusion.²⁵⁰ The history also lends itself to a deeper

247. See *supra* note 245.

248. See Macklin, *supra* note 177, at 264.

249. See *id.* at 271; see also Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L.J. 281, 307–16 (2002) (arguing that the Canadian state’s deficiencies in protecting its own female citizens from violence constitutes “failure to protect,” rendering the high evidentiary standards demanded of female refugees claiming gender-related violence problematic and less justifiable); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996) (criticizing the representations of the enlightened feminist “West” versus the dangerously patriarchal “non-European” as false and as replicating a kind of colonialist feminism).

250. Private bills are rare legislative actions granting relief from deportation and providing permanent resident status to one specific individual. Private bills are primarily the option of last resort, i.e., pursued when there is no other way to prevent removal through normal immigration channels and where there is no basis for asylum. See ALEINIKOFF ET AL., *supra* note 115, at 773–74. On

exploration of the tensions in refugee law between humanitarian ideals and the realities of state interests. It could even offer an interesting counterpoint to the “rule of law” argument advanced by anti-immigration critics, providing a historical starting point from which to unravel an arbitrary, patchy, and ad hoc development of U.S. refugee law that significantly fails the rule of law test itself.²⁵¹ And most obviously, the history could jumpstart a longer legal history of the role of the U.S. military in the development of U.S. refugee and immigration law.

This Article attempts to start a more comprehensive “refugee-citizenship-immigration talk” that shows how immigration law and refugee law work dynamically together to produce varieties of second-class citizenship. As Bosniak reminds us, “the operation of borders implicates some of the deepest questions of equal and democratic citizenship that we face today.”²⁵² Immigration, asylum, and citizenship processes work in tandem to connect the border to the center of the nation, and construct national identity and notions of belonging through law. The history of Pershing’s Chinese refugees demonstrates this dynamic, demanding a holistic approach to these processes. Today, we cannot fully grasp the power of one without including the others in the equation. By exploring the convergences and disjunctures between immigration, asylum, and citizenship, we may find more democratic ways to define who belongs in the nation and how such belonging should be achieved.

prosecutorial discretion and deferred action in immigration law, see generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

251. See ANKER, *supra* note 104, at 3 (“The law has evolved in a patchy and *ad hoc* manner, in part as a result of the failure of decision-makers to embrace a cohesive framework, lack of leadership from the Board of Immigration Appeals, and hesitancy of the federal judiciary in embracing its responsibility to review decisions of administrative bodies for clear errors of law and fact.”).

252. Bosniak, *Varieties of Citizenship*, *supra* note 9, at 2449.

