Legal and Philosophical Intersections of Refugee Law:

Imagining a More Just Migration

by

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Despite the United States' trove of migration laws, many of which promise to adhere to the United Nation's handbook on refugees, our migration infrastructure is weak and exclusive. By using Michel Foucault's analytical lens, biopower, this paper will examine the discrepancies between the two dominant forms of migration: immigration and asylum law. While other scholars have conducted refugee studies and claim to use biopower as their lens, this paper will challenge their academized framework by charting the real history of refugee advocacy. To critique these modern scholars, the paper will turn to Hannah Arendt's articulation of citizenship's value and her early work on the stateless. In doing so, this paper will be the first to suggest that the exceptionalism that dominates refugee law—and its separation from immigration law—stems from the biopower that underscores the nation's migration statutes. The interdisciplinary analysis will uncover three areas where the law falls short: the particular social group (PSG) requirement in refugee law, the tendency to imagine citizenship as a binary, and the border wall as a space of legalized violence against migrants. This unique form of jurisprudence, though, reveals immediate solutions to the abstract problems. PSG provisions, for one, must be read with a corrected textualist lens

that respects its broad origins. Statutes like Temporary Protected Status must be protected to fill the gap between immigration and refugee law, initiating a notion of semi-citizenship. Finally, test cases must make use of the constitutional similarities between Civil Rights law and immigration law to protect migrants at the border.

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Introduction

In 1950, the Supreme Court ruled that "the alien…has been accorded a generous and ascending scale of rights as he increases his identity with our society."[1] In 2015, the Supreme Court ruled that an unarmed and nonthreatening teenager who was shot on United States territory by a Border Patrol agent was not protected by the Fourth Amendment because he had no "voluntary connection" to the state.[2] The precedent set and the outcome seemingly contradict one another. This disconnect is not a mistake. Rather, it epitomizes how the nation's judiciary has strayed from its original attempt to protect migrants like the rest of the international community after WWII.

The dramatic change over 60 years stems from the fact that the United States' legal treatment of migrants, as well as the rest of the world, began far before WWII. This paper will start with the origins of 'statelessness', which was the term used to describe those who sought to become migrants after being uprooted from their homes in WWI. Looking solely at the law, though, does not ask broad enough questions. One can analyze immigration law, refugee law, and more in their respective spaces and come to conclusions within each legal discipline. However, this paper will argue that their separation was an exercise of power.

To do so, the legal history of migration will be analyzed with a philosophical lens: Michel Foucault's biopower. Biopower, put simply, was the notion that power in the 19th century transitioned away from discipline exclusively. Instead, the exercise of sovereignty became a matter of controlling the individual by limiting the populations

[1] Johnson v. Eisentrager. 339 U.S. 763 (1950).
[2] Hernandez v. Mesa, 589 U.S. ___ (2020), Justia Law, https://supreme.justia.com/cases/federal/us/589/17-1678/.

movement in order to cultivate an in-group and out-group. Of course, other scholars, like Giorgio Agamben, have already used biopower in refugee studies. Their analysis, though, examine biopower ontologically, using it as a theoretical model that treats the oppression of refugees and citizens as functional equivalents. As a result, they come to the privileged position that abolishing citizenship is a form of empowerment.

While citizenship is not without flaws, philosophers like Hannah Arendt chart the actual history of migrants in Europe and their fight to become legally recognized by becoming an exception to biopower. This is refugee exceptionalism, a concept that will then be applied to migrants within this paper's focus: those in the United States. This struggle with biopower separated immigration and refugee law, explaining why they are exercised differently today.

This paper will be the first legal-historical review to utilize Foucault's original conception of biopower in migration law. But evaluating philosophy and the law together is not a new form of analysis. While formalism and legal realism, legal analyses that isolate the law as a discipline, are the most commonly practiced forms of jurisprudence, philosophical law has also been an essential facet of the legal landscape.[3]

This paper will use legal philosophy as a basis for analysis surrounding immigration and refugee law. It would be difficult not to, for the way we *politic* about migrants, refugees, and immigrants has been historically inseparable from the way we *think* about them. Those legal distinctions, in fact, are rooted in our sentiments and philosophy surrounding movement and borders.

[3] Philosophical law is also referred to as virtue jurisprudence.

The simplest examples of this relationship are the ways that social movements birthed many of the United States' pernicious laws for minority immigrants. In the mid 19th century, the idea of minorities taking White individuals' jobs took off, leading to "virulent" anti-Chinese campaigns spanning two decades in the 1860s.[4] The premise of the protest was simple: "The Chinese Must Go!" As the nation bought into xenophobia, the law responded. In 1882, Congress passed the first Chinese Exclusion Act.[5]

Only a few decades later, the United States submitted to shifting perceptions of Japanese immigrants as well. As Ku Klux Klan membership skyrocketed in the 1920s, the public mounted a campaign to "Keep California White."[6] The very way that the nation thought about Japanese immigrants shifted. They were relegated from a useful minority group to the Other. Like they did against Chinese migrants, California became one of 11 states in 1920 to pass first anti-Japanese Alien Land Law.[7] The United States' history is riddled with these moments, including but not limited to restricting Jewish "entrance…from eastern Europe" in 1921 and Japanese internment camps during WWII. Conceptions of minorities and their migration both influences and is influenced by the law.

By revealing how biopower pervades the law, this paper will explore abstract solutions to combatting biopower that are grounded in legal tools. And they are needed, now more than ever. Our migrant infrastructure is in trouble. In 2020, the United States

[4] Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, SSRN ELECTRON. J. (2012), http://www.ssrn.com/abstract=2126014.
[5] Id.
[6] Joel S. Fetzer, Public Attitudes toward Immigration in the United States, France, and Germany (Cambridge University Press 2000).
[7] Id.

ranked 21st worldwide in the number of Syrian Refugees it hosted.[8] As a nation that prides itself on being a beacon of liberty across the world, the United States has not been living up to its promise. As climate change begins to uproot hundreds of millions from their homes, and democratic backsliding threatens to only exacerbate that number, looking for immediate solutions is crucial.

A corrected application of biopower exposes the flaws within the law that need addressing. Refugee law was built on a foundation of refugee exceptionalism that appropriated the United Nation's original conception. Secondly, immigration law separated itself by making advancements through civil rights techniques unavailable to other migrants. Finally, the physical border is a space of biopower that remains unchallenged through the improper legal advocacy. In spite of all the flaws, a biopolitical reading produces a thin silver lining: the solutions already exist.

[8] Major Syrian Refugee-Hosting Countries Worldwide 2020, Statista, https://www.statista.com/statistics/740233/major-syrian-refugee-hosting-countries-worldwide/.

The Origins of Statelessness

After World War I, forced resettlement devastated most of the European continent. The war had uprooted many communities, forcing families out of their countries with nowhere to go. To respond, the major allied powers facilitated the ratification of the 'minority treaties,' the first international attempt to protect the stateless within the law.[9] Prior to the endorsement of a larger 'Human Rights' that came after WWII, the minority treaties worked by identifying and classifying various minority groups, including but not limited to the "Jews, Trotskyites, etc," and forcing the newly birthed nation states to accommodate them.[10] However, these minority treaties did not reflect an endearing allied power. In preexisting nations, large publications like the *Schwarze Korps* suggested that "Jews were the scum of the earth," fearmongering the threat they faced if such refugees began arriving in troves to major nations.[11] The language regarding migrants at the time suggests that "inalienable human rights" were not the driving force behind the treaties that formed the foundations of refugee and immigration law. Instead, the motives for refugee protection are better described by the desire to, simply put, keep them elsewhere.

The Minorities Treaty between the Associated Powers and Poland epitomizes this lack of altruism. The treaty, designed to offer protections to the stateless after the war, only mentions minorities five times in the entire text.[12] The provisions of Articles 2 through 8, which are the only provisions related to minorities in the established

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[9] Some Thoughts on the Origins of the Post-WWI Minorities Regime | H-Nationalism | H-Net, https://networks.h-net.org/node/3911/discussions/5403423/some-thoughts-origins-post-wwi-minorities-regime.
10 Hannah Arendt, The Origins of Totalitarianism 269.
11 Id.
[12] Minorities Treaty Between the Principal Allied and Assosciated Powers and Poland 10 (Jun. 1919).

nation-state, are merely "fundamental laws."[13] While this was purportedly designed to protect the stipulations as cemented, the actual consequence was articles that were not recognized the nation's law, meaning adherence to them was not guaranteed. Notwithstanding, the treaty enumerates Poland's responsibility to assure its inhabitants protection "without distinction of birth, nationality, language, race or religion."[14] Not stipulated, though, is any mention of citizenship – protection did not necessitate it for those displaced after war.

The weak language in the treaty reflects pressures to subdue anti-imperialist sentiment. Indeed, the language of "protection" and "nationals" is an attempt to "appropriate an emerging language of…minority rights" from the Bolshevik sphere of power.[15] None of the main allied powers, for example, enshrined universal protections for minorities in their own nations. By relegating minority protections to the "new or immature states," minority protection became a false totem. The powerful nations would retain their legal influence over newly created nations, and the subjugated nations would pose as spheres of protections for minorities – now excluded from the allied powers.

Economic and geopolitical advantages underscore the minority treaties. Refugee protections were advertised to the new nation-states as bundled with economic provisions. While the minorities treaty between the Allied Nations and Poland dedicated 6 articles to minority protections, the other 16 were related to trade and military aid.[16]

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[13] *Id.*
[14] *Id.*
[15] Some Thoughts on the Origins of the Post-WWI Minorities Regime | H-Nationalism | H-Net, supra note 9.
16 Minorities Treaty Between the Principal Allied and Assosciated Powers and Poland, supra note 12.

Remaining under allied hegemony, then, was essentially an exchange of harboring minorities for "goods in transit shall be exempt from all customs or other duties."[17] The Treaty of Lausanne, as well, discussed the agreement between Germany and Turkey as an "exchange…of populations," which aligned with the national interests at the time.[18] Denationalizing approximately 1.2 million "Greeks" and 350,000 Muslim "Turks," the treaties were designed to appease Mustafa Kemal's Turkish Government and the Venizelos' Greek administration.[19] Documents recording the minutes of the 1922 commission revealed that the exchange had support because it was the "most efficacious way" of compensating for the economic losses incurred during the war.[20]

Ultimately, the treaties represent one of the first international attempts to construct a legal protection for stateless individuals and refugees. Acknowledging the allied nation's interest in excluding refugees from their borders and the economic incentives offered to new nation states is the first step to understanding the reclusive legal realm that refugee law operates in.

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[17] Id.
[18] Treaty of Lausanne - World War I Document Archive, https://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne.
[19] Some Thoughts on the Origins of the Post-WWI Minorities Regime | H-Nationalism | H-Net, supra note 9.
20 Great Britain, Parliamentary Papers, Turkey No. 1 (1923) Lausanne Conference on Near Eastern Affairs, 1922-1923 (Cmd. 1814) (London: HMSO, 1923), 117.

Introducing Biopower

Given that the minority treaties' history reveals the stratification of allied states with new states for economic purposes, applying philosophical lenses to the jurisprudence of statelessness fosters a deeper understanding. Specifically, this paper will interpret the current state of immigration and refugee law through Michel Foucault's concept of "biopower," an enigmatic lens that looks beyond the state's ability to wield violence and traces the workings of power through the production of subjectivity and techniques of control over the body.

Foucault's biopower is best understood as a succession to "power's hold over life."[21] Up until the mid-19th century, the state occupied this role, asserting its control by monopolizing sanctioned violence. Foucault defines this as the right of the sword but suggests that the nineteenth century saw a movement in state control towards "the power to 'make' live and 'let' die."[22] Foucault begins this idea by imagining it as a thought experiment of the state's control over birth, medicine distributions and more. However, in the few lectures that he dedicated towards biopower, his language remains vague, as he suggests that this form of control permeates the entire state's regime. Most importantly, according to Foucault, biopower is exercised to,

> ensure the spatial distribution of individual bodies (their separation, their alignment, their serialization, and their surveillance) and the organization, around those individuals, of a whole field of visibility. They were also techniques that could be used to take control over bodies.

21 Michel Foucault, "Society Must Be Defended": Lectures at the Collège de France, 1975-76 (Picador 1st edition. ed. 2003).
22 Id.

Biopower, thus, is a – mostly – apparently nonviolent form of control that succeeds Foucault's consideration of violence. It seeks to, as he puts it, "rule a multiplicity" by controlling the individual body in aggregate.[23] Seemingly referencing an understanding of Plato's individual political body, Foucault suggests that the nineteenth century's transformation of power required the state to encroach on not just the political body but also the biological. By reducing man to species, the state could transcend control simply through disciplining the political body. Power was not over the state's citizens, but rather over the body before citizenship.

Reading the Minority Treaty as Biopower

The Minority Treaties were not just rooted in exclusion; they, too, were a form of control. Not restricted to the Little Treaty of Versailles and Lausanne, all the treaties covered nationalities where there were considerable numbers in two of the newly formed nation states.[24] Overall, about 30 percent of all 100 million inhabitants in the new states were to be recognized by the treaties.[25] But with this stipulation that isolated the refugees of war to single nations, the stateless populations reached as much as 50 percent of the total population of a nation state. Given that their rights were not written into the law and were instead *supposed* to be treated as above the law, the stateless populations were neither politically guaranteed rights nor had their nationalities recognized.

23 *Id.*
24 Arendt, supra note 10.
25 *Id.*

The powers' fear of dissent due to the poor protections offered in the treaties forced them to show their hand and reveal their true intent. Given that anywhere between 25 and 50 percent of the population were opposed to the new governments, the creators of the treaties divulged that the protections were "a kind of assimilation" that was designed to "secure" them into a national community.[26] At the same time, too, most countries in Europe passed additional laws guaranteeing their ability to control the population, with most legislatures phrasing a broad enough power to denaturalize any group of inhabitants at any given moment.[27] Austria, for example, in 1933 passed a law that could deprive anyone of Austrian nationality if they were found to have participated in an act that was "hostile to Austria."

As a result, the language of the Minority Treaties secures a form of biopower. Given that the international community was fearful of being able to kill on the basis of race as a sovereign power, Foucault suggests that nation states sought to maintain their equilibrium through other means. To preserve an advantage, he writes, is not a matter of disciplining, but, rather, regularizing.[28] Rather than create hegemony through war, biopower, the restriction of population, is the mechanism that the state uses to make itself "healthier," in the eugenical sense.[29] The state does this by creating legislation that solely purports to benefit its citizenry. The secondary consequence, though, is the true intention to marginalize and exclude an undesired race. To Foucault, biopower is inseparable from race. The same holds true for the minority treaties. The documents

26 C. A Macartney & Royal Institute of International Affairs, National States and National Minorities (1934).
27 Arendt, supra note 10.
28 Foucault, supra note 21.
29 Id.

quite literally restricted the movement of certain populations on the basis of their race, but at the same time erased the legal recognition of their race. In fact, the term "displaced persons," which accounts for both legal and colloquial language today was invented during WWI to "liquidate statelessness" by erasing the term 'stateless' from legal language. By reducing stateless individuals to their species body by relegating them to a space without legal recognition under the guise of protection, the Minority Treaties successfully allowed the nations to control minorities beyond their own borders. By not recognizing entire groups of stateless minorities, individuals lost control of their movement and were subject to the whims of the nation states that governed. To control them, allied powers did not need discipline. As the framers of the treaties acknowledged, their ultimate form of power was assimilation.

Biopower, and its legal entrenchment in the first minority treaties, has historically been at odds with asylum. The right of asylum was thought to have long preceded the war and the emergence of mass statelessness.[30] However, not a single minority treaty mentioned it in their written law. In the Treaty of Lausanne, more language was dedicated to trade benefits than actual minority protections. Without the Treaties, the unconditional protection stood. With the treaties, however, the absence of the right to asylum in the documents meant that the states were only legally required to perform the duties that were codified. Asylum was not one of them. The law reduced minorities to stateless individuals and erased the language on top of it; this biopower then wrested the right to asylum away from these individuals by suggesting that the political body maintained the right – not the species body the state controls.

[30] Arendt, supra note 10.

This was devastating for many individuals after WWI. Josef Ben-David, for example, was a Jewish man who found himself in a state of statelessness after WWI. Having reached Poland, he thought he would be protected by the Minorities Treaty between the newly formed state and the allied nations.[31] The lack of legal protection for the right to asylum betrayed him. His story details how a Polish town clerk stole his documents that proved his Russian citizenship. He was exiled from Poland. Without being recognized as a minority because he could not prove so anymore, Josef became a stateless victim, existing without work or any rights and without "permission to stay [or] permission to leave."[32]

Biopower, in the Minority Treaties, was the act of legally defining the in-group to demarcate the out-group. By recognizing certain minorities as protected, other marginalized populations were unilaterally dismissed by the sovereign. But the protected minorities were not guaranteed rights either. The distinction gave the state power over the accepted minorities as well. Even by rejecting citizenship documents, the sovereign could render any minority as legally forgotten, thereby excluding minorities within the state and those outside of it. Thus, rather than control the citizen through the threat of violence as they did previously, biopower was a legal form of control with farther reach and greater impact.

Only citizenship, and its written legal guarantee, was a recognized form of existence. The universal declaration of rights became irrelevant. Citizenship, and its legal buttressing, became the antithesis to asylum.

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31 Udi Greenberg, How the World Gave Up on the Stateless, New Repub. (Nov. 10, 2020), https://newrepublic.com/article/160148/world-gave-stateless-siegelberg-book-review.
32 *Id.*

Excoriating Citizenship

With biopower being exercised against stateless migrants, it is essential to explore the definition and merit of citizenship. It would, after all, be simple to suggest that the history of migration has been built on an oppressive system through citizenship. Foucault's biopower suggests this, as he feared the collective's "normalization" of power that oppressed them.[33] Disciples of Foucault, most famously Agamben, took on his general biopower and applied it mercilessly to the stateless refugees, arguing that the solution is to abandon conventional norms of citizenship by abolishing it.

Agamben charts a similar path of describing biopower within citizenship as this paper has. Explicitly mentioning "the refugee," Agamben suggests that they are the victims of the practices and techniques "used to produce, care for and/or dominate individual subjects."[34] He bases his analysis on the concept of "the camp," which exists outside of the normal legal framework of nation states. Agamben reasons that reforming this institution of the camp only entrenches sovereign power.[35] As such, he argues that citizenship must be abandoned.

Agamben, in discussing the refugee camp, hints at a crucial point: refugees exist as an exception. In biopower, rather than defining sovereignty by the notion of legitimate violence in the vein of Karl Schmidt, the sovereign acts by "decid[ing] the

33 Neve Gordon, *On Visibility and Power: An Arendtian Corrective of Foucault*, 25 HUM. STUD. 125 (Springer 2002).
34 Patricia Owens, *Reclaiming 'Bare Life'?: Against Agamben on Refugees*, 23 INT. RELAT. 567 (Dec. 2009).
35 *Id.*

exception."[36] The refugee camp defines the refugee as camps historically are spaces where the law can be suspended. The sovereign benefits from both controlling the refugee by relegating them to a space of exception while controlling its citizens by legally defining them as *not* exceptions. This is biopower at work; the refugee camp that Agamben utilizes is a space where an individual's political life is inseparable from the biological. As biopower logic has been implemented into refugee studies, this is referred to as 'bare life.' Problematically, he later takes bare life to be the expression of widespread biopower.

An Agambenian reading would advocate for abandoning citizenship. The camp is the space where the refugee is at the mercy of the sovereign. To even seek a form of acceptance in a citizenship paradigm would be to accept the fact that the camp can legally distinguish between forms of life. Rather than plead to the powers, Patricia Owens describes how refugees have engaged in the practice of sewing their mouth – sometimes even their eyes – completely shut to show that their reduction to bare life is permanent.[37] It is, in their eyes, an act of political resistance against a form of biopower. By accepting bare life, the refugee rejects the sovereign's power over them by no longer treating citizenship as the ideal. If they were to do so, they would only be reinforcing the lines on which sovereign power depends.[38] To Foucauldians, Agamben claims overcoming biopower should look like abandoning citizenship and starting from pure human, by reclaiming bare life.

36 Id. at 28.
37 Owens, *supra* note 34.
38 Id.

As this paper reconsiders Foucault's work, Agamben misuses biopower. Indeed, Agamben's *homo sacer*, which is used as the basis of the current literature surrounding biopower and refugees, begins with the discussion of bare life and the camp. His analysis of the camp is ontological, as he uses the camp as a thought experiment that equates the citizen and the refugee's oppression, rather than a historical tool to highlight the refugees that are violated. Scholars using *homo sacer*, namely Charles Lee and Nicholas De Genova use bare life to analyze the labor conditions for undocumented migrants in their respective countries and how labor exploitation is a widespread phenomenon. But immediately apparent in these works is a critique that Leila Whitley points out,

> it is striking that they do not describe the ways that particular groups of people are disproportionately illegalized or made vulnerable to illegalization … It is noticeable, for instance, that in reciting these theories I do not need to mention race or racism to give an accurate summary of the major arguments.[39]

Indeed, Agamben's assertion to reclaim bare life by rejecting citizenship relies on the assumption that bare life is not targeted against a certain racial subgroup. Agamben, by making the argument that the refugee's bare life is used to not only control them, but also the citizens themselves, ignores the clear distinction between the refugee and the citizen. Yes, the sovereign is exerting general biopower, but its initial strike is against the refugee. If Agamben's thinking were true, then one analyzing the Minority Treaties would think that their effects were equally dehumanizing for the

[39] Leila Whitley, The Disappearance of Race: A Critique of the Use of Agamben in Border and Migration Scholarship - Document - Gale Academic Onefile, https://go.gale.com/ps/i.do?id=GALE%7CA552763164&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=14470810&p=AONE&sw=w&userGroupName=oregon_oweb&isGeoAuthType=true.

stateless and the citizens of the nation states. They are not. The stateless, as this paper has established, were subject to both a loss of citizenship and a loss of recognition as a minority. The treaties were directed at defining certain minorities and ignoring others.

As Hannah Arendt points out, the stateless' citizenship was inseparable from their identity. She writes that one of the mistakes the Treaties' framers realized was that "it was impossible to…transform them into nationals of the country of refuge."[40] Recall that the records kept of the meeting for the Treaty of Lausanne revealed their desire to assimilate the stateless rather than protect them. As the treaty nations "refused to recognize statelessness," the stateless responded by showing "a surprising stubbornness in retaining their nationality."[41] Despite having no physical connection to their country of origin, and having no government to protect them, Arendt writes that their tie to their nationality prevented them from abandoning their emphasis on citizenship. The earliest example of biopower in migrant logic suggests a critique of Agamben. The stateless' race and their connection to it prevented them from abandoning the construct of citizenship and their memory of it.

40 Arendt, supra note 10.
41 *Id.*

Refugee Exceptionalism

Biopower is used in contemporary refugee logic as a rebuke of citizenship. Though this thesis has shown that refugees have, in their response to the legal expression of biopower in the minority treaties, refused to abandon its construct, that does not render biopower useless. This paper will identify how spaces of biopower can be mobilized as sources of resistance by looking at how refugees have *actually* responded historically to evaluate and propose solutions. Refugees have far more agency than scholars in existing literature afford them.

After WWI, the stateless refugees responded to the state's control by existing as an exception. The state bore no responsibility to protect the stateless in practice. In fact, they were left without the right to any residence, property, or work.[42] Instead of sticking to their bare life and wresting it from the state's control, as Agamben would have it, the refugees began to transgress the law. Statelessness was inherently a crime; in France, for example, it was illegal for the stateless to work or own property. However, unlike being stateless, being a criminal was *recognized* by the general law as a form of status.[43] As the stateless realized their potential to find recognition through transgression, they turned their attention toward regaining "some kind of human equality" by becoming a "recognized exception to the norm."[44] While the stateless, without legal recognition, were always in fear of deportation, the criminal could find a form of citizenship through theft. Thus began the practice of refugee exceptionalism. By finding pockets within the law, migrants, refugees, and stateless – however the sovereign defined an individual in

42 *Id.*
43 *Id.*
44 *Id.*

their pursuit of ignorance – found ways to expand citizenship and force themselves into these spaces.

Arendt's contribution to the stateless' response, and its impact on understanding biopower, is not exclusive to Europe. The same analysis can be applied to the United States to understand the current state of migration law. In 1917, around the same time that many Europeans became stateless in WWI, the Chinese Exclusion Act was still in effect in the United States.[45] The act did several things: it suspended the "coming of Chinese Laborers" and made it illegal to immigrate, determining that any Chinese laborer in the United States who crossed the border would have to acquire an exclusive certification to reenter.[46] All Chinese immigrants became permanent aliens as they were excluded from US citizenship. The act was passed to protect "the good order of certain localities within" the nation that were perceived to be "endanger[ed]" by Chinese immigrants.

The act is a form of biopower, much like the Minority Treaties. As Chinese laborers were excluded to protect the good order, the language mimics Foucault's analysis that "biopolitics deals with the population, with the population as a political problem."[47] To protect equilibrium, which was (and is) White hegemony in America, the act restricted the movement of Chinese individuals precisely in the manner that Foucault describes. In *The History of Sexuality*, Foucault describes how biopolitics operates by reducing the modern man to "an animal whose politics places his existence

45 Chinese Exclusion Act (1882), Natl. Arch., https://www.archives.gov/milestone-documents/chinese-exclusion-act.
46 *Id.*
47 Foucault, supra note 21.

as a living being in question."[48] Precisely, the Chinese Exclusion Act did this. It placed restrictions on "Chinese laborers," despite the fact that most of them, if not all, fell under the broad and pernicious definition "skilled and unskilled and Chinese employed in mining."[49] By choosing to focus on a group of labor and hiding the direct racial aspect, the state captured the Chinese immigrant's political life and controlled the population from there. Just as Foucault admonished, biopower restricted the entire movement of a race and controlled their action by denying them citizenship and legalizing the threat of deportation at any given moment.

Chae Chan Ping v. United States demonstrated the judiciary's introductory role in maintaining biopower in immigration. The Chinese Exclusion Act had promised to protect Chinese laborers who had already been in the nation prior to the legislation, writing that they "shall be accorded all the rights…which are accorded to the citizens and subjects of the most favored nation."[50] The certificate granted to existing laborers was supposed to document a purported equality, but that did not hold true for Chae Chan Ping, a Chinese citizen who worked in the United States. Despite having obtained a certificate that was issued in accordance with the Chinese Exclusion Act, the Supreme Court refused to protect him when he arrived back in the United States. The court reaffirmed that existing Chinese laborers were to be treated as equals to citizens, but qualified that with the following,

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the

[48] Michel Foucault, The History of Sexuality (Pantheon Books 1st American ed ed. 1978).
[49] Chinese Exclusion Act (1882), supra note 45.
[50] *Id.*

> country require it, cannot be granted away or restrained on behalf of any one.[51]

Chae Chan Ping suffered a similar fate to the minorities in Europe whose nationalities and documentation were not recognized. The United States captured the existing Chinese labor in the nation by legally protecting the nation's right to exclude them if they left. At the same time, they demonstrated that biopolitical sovereign power answers to no political body. The Constitution protected the government's right to control the Chinese laborers as a population.

In theme with the stateless in Europe, Chinese immigrants expanded the bounds of citizenship. In 1917, a group of 522 Chinese migrants fled Mexico and arrived in the U.S. under protection of the U.S. Army.[52] At that point, however, there was no legal difference in the nation's laws between an immigrant and a refugee. That only changed with the passing of the Displaced Persons Act in 1948. But refugee law began far earlier, as the Chinese refugees, known as Pershing's Chinese, toiled their way into an alternative form of recognition.

Migration to the U.S. through Mexico had skyrocketed at the time due to the Chinese Exclusion Act. At first, this began as an illegal practice, as many refugees would pay off U.S. immigration officials to cross the border.[53] The 522 Chinese migrants approached the problem differently, instead helping with the

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[51] CHAE CHAN PING v. UNITED STATES., LII Leg. Inf. Inst., https://www.law.cornell.edu/supremecourt/text/130/581.
[52] Lim, *supra* note 4.
[53] Grace Peña Delgado, Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.-Mexico Borderlands 73-103 (2012)

transportation of supplies and soldiers back to the United States after the Punitive Expedition.[54] Having crossed the border, 425 Chinese migrants refused to leave despite the Chinese Exclusion Act.[55] In a standoff between migrants' needs and the biopolitical strength of the U.S., the need for labor offered a solution. The migrants worked as laborers for the War Department during WWI.[56]

Mexico's revolution at the time meant the Chinese individuals could not safely return. There, violence against the Chinese was at an all-time high at the time.[57] Because of their service and General Pershing's advocacy, Congress passed Public Law 29 in 1921, which recognized the Chinese as "refugees" because they met "certain provisions and conditions."[58] Despite the ban on immigration, the Pershing Chinese had seemingly *earned* their way into a form of semi-citizenship, as they were given documents that recognize their status as green cards do today. Faced with the limits of biopower and nonrecognition, they forced an exception.

The story of the Pershing Chinese proves a crucial point: refugee law was born out of immigration law. However, refugee law is not a subset of immigration law; the migrants, who could not be recognized by the biopolitical nature of immigration law and the Chinese Exclusion Act, looked for other forms of recognition like the stateless who committed crime in Europe. By

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54 Lim, *supra* note 4.
[55] Edward Eugene Briscoe, *Pershing's Chinese Refugees: An Odyssey of the Southwest* (1947).
[56] Lim, *supra* note 4.
[57] *Id.*
[58] Act of Nov. 23, 1921, Ch. 148, 42 Stat. 325.

demonstrating their commitment to easy assimilation by learning English and providing necessary labor, they convinced local lawmakers that the biopolitical restriction of their race was ill-founded. Colonel Cecil, who wrote the crucial letter of support to pass Public Law 29, described his praise for the migrants by contrasting them with another biopolitically oppressed group: Black people. He wrote, "I would actually rather have this one Chinese man than three negroes."[59] Refugee law became what immigration law wasn't, meaning the acceptance of migrants whom they did not want to grant full rights to, but could not justify sending back either. The language of the law proves this; lawmakers who sought to establish the Chinese as refugees defined their rights as dependent on their excluded status as a result of the Chinese Exclusion Act. Lawmakers wrote, the rights are dependent on their "circumstances [which] permit to the registration of domiciled Chinese."[60] By circumscribing the legal notion of a refugee within the limits of the Chinese Exclusion Act, the U.S. kept immigration rights separate from refugee rights. Refugee status had to be earned out of a state of biopolitical exclusion, while immigration was a form of acceptance.[61]

Understanding biopower, and its desire to restrict the body, is thus a historical mechanism to understand the difference between immigrants and refugees. Their separation was not a matter of semantics, it was intentional. This paper will show that refugee law following the Pershing Chinese's success still

[59] Briscoe, *supra* note 55.
[60] Act of Nov. 23, 1921, Ch. 148, 42 Stat. 325., supra note 58.
[61] I write that immigration was a form of acceptance because it was not subject to biopolitcal restriction at the time. Because of exclusion acts, those who accessed immigration were desired White migrants. The nation desired their presence.

relies on refugee exceptionalism. The way the legal cases treat both are thus different.

Immigration and Refugee Law

Immigration Law as Civil Rights

Given that this paper searches for tangible solutions for refugee law's shortcomings – outside of Agamben's desire to abolish citizenship – we must look towards what it is separated from: immigration law. By looking at the link between immigration and citizenship through case law, one can begin to imagine pathways toward improving refugee law.

The question of citizenship, as it pertains to immigrants, dates all the way back to the 1857 case *Dred Scott v. Sandford*. The case asked whether a Black person, whose ancestors were "imported into this country" could enjoy all the rights and privileges of a citizen.[62] Presented with the question of whether or not individuals who were not originally a part of the union could *become* a part of the citizenry, the Taney Court ruled that Black people, "were not intended" to be a part of the Constitution.[63] The question of citizenship began as a constitutional question, and was first used in the court to restrict who had access to it. Citizenship cases, specifically immigration related ones, were then centered around the Constitution. We can see the same practice in *United States v. Thind*. There, the case concerned Bhagat Singh Thind, a "high caste Hindu," who had been granted a certificate of citizenship by the District Court of Oregon. The Circuit Court of Appeals in the Ninth Circuit sought to reverse it.

62 Dred Scott v. Sandford, 60 U.S. 393 (1856), Justia Law, https://supreme.justia.com/cases/federal/us/60/393/.
63 Id.

The Court claimed jurisdiction because citizenship, and immigration at the time in 1923, was still a Constitutional matter due to *stare decisis*. The court cited *Ozawa v. United States*, which established the year prior that a Japanese person did not qualify for citizenship because they did not meet the "Caucasian" requirement.[64] Despite a strong legal argument that being a Hindu did qualify as Caucasian, Justice Sutherland retreated deeper into the Constitution, arguing that the framers had understood to Caucasian mean White.[65] These two cases stood for decades, restricting immigration and citizenship in the name of the Constitution.

Intertwining immigration and the Constitution, though designed with pernicious intent, opened the door to progressive outcomes. The same coalition that led the forefront of the Civil Rights coalition fought to end the national origins system that had bolstered the Chinese Exclusion Act.[66] Immigrant advocates took advantage, using the successful techniques of Civil Rights cases in immigration law.

Graham v. Richardson is one of the first immigration cases that adopted Civil Rights legal techniques. Decided in 1971, the case looked at whether welfare benefits should be accessible by lawful permanent residents (immigrants). Carmen Richardson, who lived in Arizona, could not access welfare benefits because of the Arizona statue § 1402(b) in the Social Security Act.[67] She contested that the Equal Protection Clause of the Fourteenth Amendment should prevent a state from restricting a lawfully permanent

64 Ozawa v. United States, 260 U.S. 178 (1922), Justia Law, https://supreme.justia.com/cases/federal/us/260/178/.
65 United States v. Bhagat Singh Thind, 261 U.S. 204 (1923), Justia Law, https://supreme.justia.com/cases/federal/us/261/204/.
66 Hiroshi Motomura, The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age, No. 3564476 (Social Science Research Network Mar. 2020).
67 Graham v. Richardson, 403 U.S. 365 (1971), Justia Law, https://supreme.justia.com/cases/federal/us/403/365/.

resident from receiving welfare benefits.[68] Specifically, they cited the Fourteenth Amendment's provision "[N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." *Yick Wo. V Hopkins*, from 1886, was cited, which set the precedent that "person" was broader than citizen, thus covering a "lawfully admitted resident alien."[69] The Burger Court conceded to Richardson's claim that while states do have discretion when it comes to equal protection principles, their "special public interest" cannot apply to immigrants.[70] Indeed, by appropriating Civil War Amendments as they were used in landmark Civil Rights cases, *Graham v. Richardson* forced the court to acknowledge that lawful immigrants are a "'discrete and insular' minority" that the Constitution must protect. They exploited the courts' understanding of immigration law as constitutionally based, allowing immigrants to enjoy the same protection as citizens. Only in a legal sense, immigrants became a part of a larger sphere of citizenship.

As *Graham* set a new standard for immigrant protection, immigration law became centered around a Civil Rights agenda. At the same time, immigrants' rights became an insular consideration. *Landon v. Plasencia* reflects this. Recall that *Chae Chan Ping. v. United States* surrounded Ping's exclusion from the nation despite his certificate to return after leaving the country. In *Plasencia*, Maria Antoineta Plasencia, a

68 Id.
69 Id.
70 Id.

lawfully permanent resident, was subject to deportation in an exclusion hearing after attempting to transport undocumented migrants to the United States.[71]

However, Plasencia should have been afforded a deportation hearing, not an exclusion hearing. The immigration laws differ between the two, as the statute writes,

> The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.[72]

The differences are stark. In a deportation proceeding, the lawfully permanent resident must be given seven days' notice of charges, are allowed to directly appeal to the court of appeals, and can choose a country if they are to be deported.[73] The statute for exclusion hearings, because they are designed to happen outside the United States, requires neither and instead demands the lawfully permanent resident to file a writ of habeas corpus. Using Civil Rights logic, Plasencia argued that she was denied due process during her hearing because she was given less than 11 hours' notice based on her misclassification in an exclusion hearing.[74] By framing her misclassified hearing on the basis of due process, the court was forced to answer whether or not due process applied to lawful permanent residents if they are returning from another country. In *Chae Chan Ping*, the court disregarded fair evidence of his lawful status in trial.[75] The due process complaint changed that in *Plasencia.* Citing *Kwong Hai Chew. v. Colding*, another case from the Civil Rights Era, they reminded the court that they held that a

71 Landon v. Plasencia, 459 U.S. 21 (1982), Justia Law, https://supreme.justia.com/cases/federal/us/459/21/.
[72] Id.
73 § 242(b), 8 U.S.C. § 1252(b).
[74] Landon v. Plasencia, 459 U.S. 21 (1982), supra note 71.
75 CHAE CHAN PING v. UNITED STATES., supra note 51.

"resident alien" was entitled to fair procedural practices regardless of whether they were entering the nation.[76] The court acknowledged that due process must apply to noncitizens as they remanded the Court of Appeals to reconsider her case.[77]

Comparing the outcomes of *Chae Chan Ping* and *Plasencia* reveals the stark impact that civil rights legal theory had on immigration law. These cases were modeled after *Brown v. Board of Education*, weaponizing the Civil War Amendments, the Due Process Clause, and the Establishment Clause.[78] This legal shift has expanded immigrants' rights at an astonishing rate, but it is essential to acknowledge its consequences as well.

The dependence on immigration law as Civil Rights was exposed in the landmark 2017 case *Trump v. Hawaii*. Following then-President Trump's executive order to suspend seven countries entry into the nation, the Court granted the stay of preliminary injunction to allow the act's enforcement.[79] The plaintiff only made two arguments, the first being that the act violated the Equal Protection Clause and the second the Establishment Clause.[80] The latter clause deems that "one religious denomination cannot be officially preferred over another." A conservative majority, though, ignored the claim on the grounds that banning several nations is not an indictment on a specific religion.[81] Civil Rights legal techniques rely on a court to see through legal minutia, but here the court failed to do so. They turned their eye away

76 Landon v. Plasencia, 459 U.S. 21 (1982), supra note 71.
77 If they are lawful permanent residents.
78 Motomura, *supra* note 66.
79 Trump v. Hawaii, 585 U.S. ___ (2018), Justia Law, https://supreme.justia.com/cases/federal/us/585/17-965/.
80 Id.
81 Id.

from the compelling argument that a ban on seven majority-Islamic nations is to prefer a religion over another.

In all, these cases chart a deliberate attempt to include immigrants in the citizen body. Following the success of the Civil Rights Era, immigration cases used the same legal arguments to force the courts to administer equal outcomes. But this comes at a cost, as the next section looks at the disparate nature of Refugee Law. The past few decades of Civil Rights victories for immigrants have only concerned Legal Permanent Residents. Civil Rights is inherently domestic; their victory through internal legal practices necessarily leaves behind those that the United States does not consider in its citizen body. As refugeehood was borne out of the Pershing Chinese's success, which was always limited by the Chinese Exclusion Act, they were left behind by the decades of immigration law progress.

The Civil Rights approach reveals another facet of immigration law today: it only works when one enters the case already having constitutional rights. In 2017, a United States Border Patrol agent shot and killed a teenager along the U.S.-Mexico border.[82] The boy, unarmed and unthreatening, was playing a game with his friends along what the border patrol agency considers the border. The agent shot on United States soil, unaware of whether the boy was a citizen or not. The family filed suit in *Hernandez v. Mesa*, claiming that the Agent violated the Mexican citizen's Fourth and Fifth Amendment rights.[83] Crucially, they cited Bivens, the Supreme Court's relevant

[82] Hernandez v. Mesa, 589 U.S. ___ (2020), supra note 2.
[83] Id.

precedent which established that the violation of Fourth Amendment rights necessitates damages.[84]

The Supreme Court rejected both claims, deferring to the Court of Appeals' holding that the child had no Fourth Amendment Rights and that the Fifth Amendment was irrelevant. The Court of Appeals cited two related arguments for why the boy had no Fourth Amendment Rights. The first was that the boy was a Mexican citizen and that he had "no significant voluntary connection to the United States."[85] The second was that the boy was purportedly on Mexican soil at the time.

Importantly, the court was flawed in suggesting that the boy was on Mexican soil. While this paper will address the Supreme Court's flawed interpretation later on, the court's deception surrounding the border is blatant and obvious. In 1848, the United States and Mexico signed the treaty of Guadalupe Hidalgo, making the area that the boy was playing on a legally designated "limitrophe" area.[86] A limitrophe, in terms of treaties, quite literally means to be on a border. As Justice Breyer wrote in his dissent, the border has no physical "width," meaning that the United States was obligated by international treaty to operate in that space as its own legally designated border space. Thus, the boy was not off American soil. Justice Breyer notes that given this legal treaty, the boy could have a "voluntary connection" to the United States. But no form of Civil Rights law was available to him because the court's majority did not constitutionally acknowledge his inclusion. As this paper will later interrogate the role

[84] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, Oyez, https://www.oyez.org/cases/1970/301.
[85] Hernandez v. Mesa, 589 U.S. ___ (2020), supra note 2.
[86] Art. V, July 4, 1848, 9 Stat. 926.

that borders play in protecting migrants, understanding that civil rights immigration law as personally accessed, not spatially, is crucial.

Refugee Law: Still Governed by Biopower

While immigrants have advanced through Civil Rights law, refugee law is steeped in biopower. Recall that the legal conception of refugees began when the United States passed Public Law 29, which allowed the refugees to remain in America.[87] Their legal recognition, though, was transactional. The Pershing Chinese were granted legal refuge because of their military service, which made them "deserving aliens" who had earned "compensation."[88] But other factors played a large role, many of which define how refugee law functions today. First, the United States' military's advocacy acknowledged the fact that the Pershing Chinese could not safely return to Mexico because of the growing anti-Chinese sentiment that had festered during Mexico's revolution.[89] Pointing out that the migrants had nowhere to go if not the United States, the Pershing Chinese were painted in the same way Arendt characterizes the stateless in Europe. They were thus unique, separate from the other Chinese laborers that the United States exerted biopower over to keep outside of their borders. Public Law 29, then, is legal proof that the refugee is an exception to the nation, an individual that is deserving of rights but not *citizens' rights.*

[87] Lim, supra note 4.
[88] Id.
89 Id.

Arendt's dehumanized depiction of exceptionalism is key to understanding the ideology behind refugee law. This paper has already discussed how the stateless would commit crime in Europe to be legally recognized as a criminal. Their fate in prison was more favorable than existing illegally. She describes another pathway from stateless to legal recognition: the genius. She writes,

> Just as the law only knows only one difference between human beings, the difference between the normal noncriminal and the anomalous criminal, so a conformist society has recognized only one form of determined individualism, the genius. European bourgeois society wanted the genius to stay outside of human laws, to be a kind of monster whose chief social function was to create excitement, and it did not if he actually was an outlaw.[90]

Citizenship defines the right to have rights, but there are exceptions with rights as well. The monster that is the genius is Arendt's depiction of the unique exception. Nor do they have to be famous; they simply must recover the publicly "recognized identity" that they lost along with their citizenship.[91] In this way, a "dog with a name has a better chance to survive than…just a dog in general."[92]

Refugeehood is the practice of convincing the sovereign that they, too, are the dog, the monster that deserves a name. The Pershing Chinese performed the toxic tasks that the military avoided in the mines without the promise of rights for their service.[93] They presented themselves as separate from the "dog in general," the excluded Chinese. And the refugee was born.

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[90] Arendt, supra note 10.
91 Id.
92 Id.
93 Motomura, *supra* note 66.

Decades after the Pershing Chinese became refugees in the United States, the nation adopted the international standard from the 1951 Convention Relating to the Status of Refugee. Known as 8 U.S. Code §1158 in the United States, a migrant must meet the following burden of proof to establish themselves as a refugee:

> To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.[94]

This passage from the U.S. code reeks of biopower. Examining refugee case law in the decades since the statute was adopted will show that refugee-ism is predominately based on identifying and accepting exemptions to particular demographics in order to control and restrict the broader demographic from accessing rights through citizenship.

The marked difference between the United States' refugee definition and the Refugee Convention is critical. The history of the Refugee Convention reveals that the drafters of the original definition did not believe they could cover an exhaustive list of the types of persecution. As a result, they added the provision "members of a particular social group" to "[suggest] that the former grounds were not thought to be all-encompassing."[95] This move suggests that the international framers at the convention were imagining the refugee definition as adaptable.

This paper will look at the United States' adaptation, specifically following the Refugee Act of 1980. The act increased the annual ceiling for refugees from 17,400 to

[94] 8 U.S. Code § 1158 - Asylum, LII Leg. Inf. Inst., https://www.law.cornell.edu/uscode/text/8/1158.
[95] Daniel J. Steinbock, Interpreting the Refugee Definition, 45 UCLA Law Rev. 733 (University of California at Los Angeles, School of Law 1998).

50,000.[96] More importantly, though, the Act changed the standard from "a reason for persecuting the applicant" to showing a "well-founded fear of persecution."[97] Showing how the changes have given insidious deference to American judges as they moved away from the international open standard will be key to understanding how refugee law bears the mark of biopower.

The first case that dealt with the changes in the 1980 Act was *INS v. Stevic* in 1984. The case concerned Stevic, a migrant who failed to meet the standard of proof in a deportation hearing. Despite the Attorney General's order to withhold deportation if they discovered a migrant to be "subject to persecution," the Board of Immigration Appeals rejected the motion, holding that the respondent had not met the burden of proof "that there was clear probability of persecution."[98] This was a clear departure from the 1980 Refugee Act's standard of a "well-founded fear of persecution," but the Supreme Court upheld the stricter standard.

Justice Steven's justification is harrowing. Going through United States refugee law prior to 1980, Stevens argued that the court had already been interpreting "well-founded fear" as "clear probability of persecution" well before the amendment.[99] Because the court had been incorrectly applying the international standard there was no reason to properly apply it in Stevic's case. The Supreme Court engaged in a form of pseudo-originalism, meaning that their *incorrect* understanding of the convention framers' intent justified their restriction of access to refugee protection.

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[96] Refugee Act of 1980, Natl. Arch. Found., https://www.archivesfoundation.org/documents/refugee-act-1980/.
[97] Id.
[98] INS v. Stevic, 467 U.S. 407 (1984), Justia Law, https://supreme.justia.com/cases/federal/us/467/407/.
[99] Id.

In 1991, the Supreme Court attacked the other piece of the refugee definition: the substantive elements. In *INS v Elias-Zacarias*, the plaintiff fled Guatemala to the United States after a guerrilla organization tried to recruit him. After he refused, the guerillas stalked him multiple times, even going as far to find his family and threaten that they would continue to look for him as well.[100] His case argued that he was being persecuted for his held political belief that he was against military service.[101] Given the guerrilla organization's pursuit, he argued that he had a well-founded fear of persecution.

Justice Scalia, the Supreme Court, and the Board of Immigration Appeals disagreed. Scalia delivered a vicious final opinion that has restricted refugee's ability to prove their legal status for decades. The Court acknowledged that the plaintiff had fled to the United States because of his fear of the guerillas' violence and government retaliation for his association with them.[102] Unfortunately, the Court did not acknowledge the link between his proof of persecution and the fact that he held a political belief. Scalia spun a tale that the guerillas considered him a political opponent because of their *own* beliefs, not his.[103] Despite the plaintiff's proof that his political opinion was of "neutrality" and the guerillas' opposition to that position, Scalia opined that his persecution was based on the organization's general motives. As a result, Elias-Zacarias was not unique. Here, refugee law expressed its most critical flaw: if everyone

[100] INS v. Elias-Zacarias, 502 U.S. 478 (1992), Justia Law, https://supreme.justia.com/cases/federal/us/502/478/.
[101] Id.
[102] Id.
[103] Id.

is oppressed, then no one can be a refugee. As a result, the opinion set a horrendous precedent:

> The ordinary meaning of the phrase "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.[104]

Not only did the court place the burden on the plaintiff to prove that his oppressors' motives were not the primary factor, but the court also crafted the opinion to make it more difficult to prove even if he established persecution based on his own beliefs. Elias presented evidence that his refusal to fight was a political opinion of neutrality; the court, though said that *even* if the court accepted his evidence of refusing to fight, he would still have to prove that the "guerillas will persecute him because of that political opinion, rather than because of his refusal to fight with them."[105] To be a refugee, the plaintiff would have to prove his persecutors' intent, rather than simply prove he is being persecuted like the international standard suggests.

This Supreme Court decision overruled several circuit courts decisions that adhered to the broader and more favorable standard of proof. The dissent, for example, referenced *Bolanos-Hernandez v. INS*, where the circuit court set precedent that neutrality in conflict is a political opinion that is readily accepted in jurisprudence.[106]

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[104] Id.
[105] Id.
[106] Id.

Elias was punished for not being an exception, or the famed monster that Arendt articulated. The court fought to reject him as one. They actively refused to accept his evidence that his belief was a political one but acknowledged that he was persecuted. By reading the international standard literally through an incorrect originalist interpretation, the court reified biopower. Elias was not a unique moment, but rather a general example of persecution in another nation, thus he was not the exemption to biopower that the sovereign accepts. The Pershing Chinese's success necessitated their separation from other Chinese migrants to prove they had "earned" their exemption; Elias failed because the modern court refused to see him that way. By pushing the line of what an exception is even further, biopower controls more populations, preventing lower circuits from being favorable as they had been.[107]

The reductive view on political opinions eventually encroached on the broad intent of "particular social group" category, preventing many modern refugees from accessing protection. In 1989, the Board of Immigration Appeals reduced the applicability of particular social groups in *Matter of Chang*. There, the plaintiff sought to seek refuge from the People's Republic of China because they had threatened to sterilize him for being against the "one couple, one child" population policy.[108] He claimed he was a particular social group in this regard and provided evidence of the harm inflicted on others who had violated the law or been opposed to it.[109] The court rejected his claim, suggesting that because China adopted the policy for the "vast population" at large it could not be viewed as a specific instance of persecution. As they

107 Steinbock, supra note 95.
[108] Matter of Chang, 20 I. & N. Dec. 38 (BIA 1989).
[109] Id.

put it, the general policy could not be "a subterfuge for persecuting any portion on the Chinese citizenry."[110] In this understanding, sterilizing those who opposed the policy is not a form of persecution, but, rather, an exercise of a general policy. An oppressive power is not persecutory if it is not "selectively applied."[111] As a result, "nearly all" decisions on refugees and asylum claims from China in the following years were denied; everyone was oppressed, so no one was oppressed – legally speaking.[112]

Circuit courts now have the discretion to limit particular social groups as they please. In 2005, the Sixth Circuit Court of Appeals denied the escaped survivor of a sex trafficking campaign refugee status. Her case, *Rreshpja v. Gonzalez*, was seemingly bulletproof; she had proven to the court that her attacker warned "she should not get too excited because she would end up on her back in Italy…"[113] The court decided to focus on the other half of the sentence: "…like many other girls."[114] Because of their belief that too many other girls were also victims of the sex trafficking campaign, the court held that the social group was "circularly defined by the fact that it suffers persecution." With that, they suggested that Rreshpja's initial kidnapping was inconclusive persecution because it could be merely a symptom of widespread crime rather than a targeted campaign against a social group. They denied refuge because of fear that biopower could be weakened. Indeed, they write that if they accepted young Albanian women as a particular social group, then "virtually any young Albanian woman who

[110] Id.
[111] Id.
[112] Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO LAW REV. 223 (Cardozo School of Law 2000).
[113] United States Court of Appeals & Sixth Circuit, 420 F3d 551 Rreshpja v. Gonzales, F3d 551 (2005).
[114] Id.

possesses the subjective criterion of being 'attractive' would be eligible for asylum."[115] Notice how the court did not even mention sex trafficking in their warning. The arbitrators of refugee law fear its use. To create small pockets of exemptions is to walk the line between acceptance and exclusion. The court weighed that preventing all women from accessing protection was more valuable than helping an actual victim of prostitution and sex trafficking.

Equally important, the biopolitical nature of refugee law in the United States has transformed to exclude more abstract forms of persecution. As Stevic had to prove the his persecutors' motives, refugee law implicitly necessitated a sentient oppressor. The other cases described in this paper chart how the court rejected asylum claims because the plaintiff failed to prove that their specific identity was the reason an oppressive force persecuted them. Refugee law required a specific instance, rather than "the cumulative effects of deteriorating conditions."[116] Who do climate change refugees point to as their persecutor? The United States' originalist understanding of a refugee currently leaves them without hope for a generous ruling.

In victory and defeat, refugee law is the exercise of biopower. The court has rejected hundreds of cases with whom the common person would sympathize with. The Refugee Convention's conception of its refugee definition was to account for the fact that persecution changes and its victims' traits change as well. Case after case, the United States has strayed farther away from the international definition of refugee law, inching it closer to the exclusive realm it created for the Pershing Chinese decades

[115] Id.
[116] Motomura, supra note 66.

earlier. When a refugee is accepted, their classification is restrictive to the point that courts can turn away any derivative of the same individual. In fact, they alienate themselves from a community they share, as the above plaintiffs did, in order to fit a standard designed in bad faith. In fact, all the groups above: sex trafficked women, Chinese individuals who faced forced sterilization, and victims of guerilla intimidation should have all been granted refuge. This is the nature of biopower. The stateless must present themselves as a monster to be recognized by the sovereign, being so unique that the state can accept them and control the others through their exclusion. Reading refugee law's history as biopower reveals its fundamental characteristic: every acceptance is underscored by another's exclusion. With that, if refugee law remains an exceptional form of the law, "few will associate it with legalization or amnesty" because it appears as an act of "sovereign grace."[117] This is why refugee law was separated from immigration law. Refugees were never meant to have rights.

[117] Id.

Reflecting on biopower and migrant logic

At this point, it is prudent to evaluate the relationship between biopower and the law in this paper. Beginning with the stateless at the beginning of the 20th century, the minority treaties began as a legal designation underscored by sovereign powers' desire to keep undesired minorities out of their own borders. To do so, they exalted refugee protection as 'above the law,' allowing the newly created nation states to deny protection without consequence. By essentially means testing the lowest class that the sovereign will accept – the minority – and consequently denying them such protections, an entire class of humans was simultaneously controlled and excluded.

This historical reading of the minority treaties demonstrates its inherent biopower. At its core, Foucault imagined biopower as a transition toward modern power, designed to control an individual by controlling the movement of the populace. This paper looked at other thinkers' application of biopower in studying migrants, but also applied Foucault's original conception through a recalibrated lens by critiquing current scholarship. Existing literature starts with 'the camp,' which those like Agamben envisioned as a theoretical model that explains the subjugation of both the citizen and the refugee, imagining biopower as an all-consuming threat. But reading biopower as an equal oppressor to the refugee and the citizen renders the use of Foucault's theory useless. Of course, biopower does control the citizen, but it is indirect. Though his original conception surrounded sexuality, Foucault's biopower was rooted in race, in this case, the migrant and the stateless.

The current flawed understanding of biopower isolates philosophy as an area of solution. If biopower is understood to be unilateral suffering, with no directed

hegemony, then why wouldn't Agamben and other thinkers suggest that one should reclaim bare life. Thus, he lauds the refugee who seals their mouth at the camp as rejecting citizenship. To reject citizenship, though, is a privileged, academized call to action against biopower. The refugee sealing their mouth has no parallel to the accepted citizen. Why is the refugee responsible for taking steps to reclaiming bare life rather than the citizen?

On the other hand, looking at the law itself narrows the potential for solutions. This paper looked at how immigration law and refugee law, though often conflated in our language, are entirely separated from one another in their approach. The nation's reforms, for example, the 1980 Refugee Act, are often based on increasing the number of refugees accepted. Without a biopolitical understanding of refugee history, though, there is limited excoriation of why immigration and refugee law are separated in the first place. Or, why a refugee must prove that they are distinct from their own demographic, even if they all face persecution, in order to receive legal protection.

In both disciplines, philosophy and law, the solutions are incomplete. Together, though, they reveal brilliant interdisciplinary questions. How can the gap between immigration and refugee law be bridged? What does refugee law without exceptionalism look like? How can non-citizens gain access to constitutional rights? This paper will look to answer these questions, hoping to offer tangible legal solutions to broader abstract issues.

A More Just Migration

Refugee Law Without Exceptionalism

A brief history of United States refugee law revealed its departure from the original intent of the Refugee Convention. Indeed, the nation's current refugee practice has not escaped the shadow of the Pershing Chinese, whose legal protection was underscored by their lack of rights and separation from other Chinese migrants. This paper will look at excising biopower from refugee law itself first. The solutions already exist; they simply are not practiced.

It is worth interrogating why the particular social group provision has been stunted in recent court decisions. In 1996, Fauziya Kasinga sought asylum in the United States after fleeing from Togo to avoid female genital cutting. The immigration court denied her claim, using the same technique as other refugee cases: "all members of her tribal group are mutilated."[118] The judge went against precedent from the 1985 case *Matter of Acosta*, where the BIA set the standard that women were a persecuted group whose identity was rigid and thus "immutable," seemingly making them worthy of the particular social group.[119] Here, though, the BIA overruled the immigration court, writing that her enduring abuse as a woman – "fundamental to the individual identity of a young woman" – satisfied the particular social group requirement.[120]

Just three years later, the court failed to use the *Acosta* and *Kasinga* standard on an individual basis, deporting a Guatemalan woman for arbitrary reasons. The refugee

118 Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).
119 Matter of R-A- | Center for Gender and Refugee Studies, https://cgrs.uchastings.edu/our-work/matter-r-a-.
120 Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996), supra note 118.

seeker was a girl, who married at 16 years old, and had faced nothing but physical and sexual abuse, rape, attempted forced abortion, death threats, and attempted murder.[121] Her husband voiced a commonly accepted sentiment in Guatemala, justifying himself by saying, "you're my woman, you do what I say."[122] An expert witness testified that this was a widespread practice in Guatemala based on an accepted social notion that considered women as inferior.

The court had one thing to say after three pages of evidence: "we struggle to describe how deplorable we find the husband's conduct to have been." They then deported her. The court held that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" were not a particular social group.[123] Arguing that this definition was neither particular nor widespread – ignoring that such critiques are an oxymoron – the court slipped in a more heinous concern. If the Guatemalan woman had been granted refuge, "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need to be shown."[124] The court fears the particular social group requirement because it has the potential to destabilize the biopolitical exceptionalism that migrants must show.

Refugee case success and potential ensuing migration are linked as a result. Out of hundreds of refugee law cases relating to abuse of women, *Matter of Kasinga* stands out as one of the few cases where the BIA applied the *Acosta* standard for particular

121 In Re R-A-, Respondent. BIA. 2001.
122 Id.
123 Id.
124 Id.

social group. Note that *Kasinga* allowed a tiny tribe in Togo to pass as a particular social group, with only a few thousand members. On the other hand, the other two cases this paper has dealt with on abuse of women, notwithstanding the judges acknowledging these cases' similarities, were from Guatemala and Albania, which have exponentially larger populations. Immigration courts and the BIA have free reign to restrict the particular social group as they see fit, which has historically led to exceptions being granted to regions with incredibly small populations. Designating women from Togo as a particular social group, for instance, risks far fewer potential migrants than women from Guatemala.

To overcome the judicial discretion to enforce biopolitical exceptionalism, the United States judicial system must either return to the United Nation's original Refugee definition or innovate beyond it. The United States originally intended, officially at least, to adhere to the 1951 Refugee Convention definition. The Senate wrote that the Refugee Act was supposed to show a "national commitment to human rights and humanitarian concerns."[125] But the United Nations intended for the refugee definition to be inclusive, rather than the tool for exclusion that it is today. Atle Grahl-Madsen, documenting the promises from the convention, wrote,

> '[M]embership of a particular social group' was added by the Conference of Plenipotentiaries as an afterthought. Many cases falling under this term are also covered by the terms [race, religion and nationality], but the notion of 'social group' is of broader application than the combined notions of racial, ethnic, and religious groups, and in order to stop a possible gap, the Conference felt that it would be as well to mention this reason for persecution.[126]

[125] S. Rep. No. 96-256, at 1 (1979).
[126] Atle Grahl-Madsen, The Status of Refugees in International Law 219 (1966); Kelsey M. McGregor, Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit's Approach, 88 South. Calif. Law Rev. 197 (University of Southern California 2014).

Decades later, though, the United States views the particular social group designation as a restricted fifth group, meant to encapsulate a similar number of migrants as the other four persecuted groups. This reading does not remain true to the United Nations, and it has denied hundreds of cases, explicitly doing so in *In Re-Ra* as the BIA judge feared the particular social group enveloping the other four definitions. It was meant to.

If the United States legislature in 1980 wrote the law to adhere to international standards, they must implement the current provisions in the *UNHCR Refugee Handbook*. Given that the Senate Committee Report described how the act "will bring the United States into conformity with [their] international treaty options," the 2006 UN amendment must be relevant. One of the amendments writes that "the size of the purported social group is not a relevant criterion in determining whether a social group exists."[127] If the United States adhered to the convention, just as they "strove to influence other countries to follow suit," most, if not all the cases detailed in this paper would have a different outcome. *Rreshpja*, for instance, would have no concern over the number of Albanian women that could have qualified for protection. *Matter of Chang* could have been decided over Chang's "similar background" with Chinese men who faced involuntary sterilization and qualified for asylum. The Guatemalan woman would have received the same treatment as her identical case, *Kasinga*, without concern for the slippery slope argument that the BIA made.

[127] UNHCR - Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

Other countries already do so in the law – United States courts can make use of their advancements. Kelsey McGregor points out the United States' judicial history of accepting foreign law in the University of Southern California Law Review.[128] Justice Ginsburg, for example, "found foreign law relevant when the Court upheld the use of affirmative action in university admissions."[129] The same practice could be used for refugee law.

Canada, for example, has reworked what constitutes a refugee. While in the United States, cases like *Stevic* required plaintiffs to demonstrate their persecutor's intent to terrorize a certain demographic, Canada's legal framework allows for a social group to be defined simply by "possess[ing] the traits of female gender, low socioeconomic status, and youth" or other characteristics that the plaintiffs believe define them.[130] While McGregor discusses its application solely in the human trafficking division of refugee law, the concept can be extrapolated. The Seventh Circuit has already shown American courts' potential for reading refugee law differently. In *Cece v. Holder*, the case was almost identical to the *Rreshpja* case in the Sixth Circuit.[131] Straying from virtually all other refugee cases, the Seventh overturned the BIA's initial dismissal of Cece's deportation appeal. The court "look[ed] beyond the language used to define the social group," holding that migrants "need not be swimming against the stream of an embedded cultural norm."[132] McGregor's analysis of this case

[128] Kelsey M. McGregor, Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit's Approach, 88 South. Calif. Law Rev. 197 (University of Southern California 2014).
[129] Id.
[130] *Id.*
[131] The Sixth Circuit reflects the national standard for refugee law.
[132] Cece v. Holder, 733 F.3d 662 (7th Cir. 2013), LII Leg. Inf. Inst., https://www.law.cornell.edu/women-and-justice/resource/cece_v_holder_733_f3d_662_(7th_cir_2013).

parallels the legal fight against biopower. The Seventh Circuit did not ask Cece to show her separation from other trafficked women in Albania, writing that the similarity "does not disqualify an otherwise valid social group."[133] Refugee law has small pockets where it is not defined by biopower. The Seventh Circuit and other nations are proof of this. By defining a particular social group broadly as the Refugee Convention intended, individual suffering amid collective suffering would be protected, not ignored.

A more ambitious, and consequently less realistic, solution happens outside of the judiciary. With a moral spark, the definition of refugee could be rewritten in a new statute, for even the United Nations' is outdated. The current definition requires migrants to associate themselves with an identity and then distance themselves from it to appease biopower. Because refugees are not accepted on a group basis, it is antithetical to require applicants to prove membership in a group. Instead, the basic premise should be simple: if a migrant cannot return to their home country because they fear for their safety, they should be granted refuge. Without explicitly mentioning race, religion, or a particular social group, a different measuring standard would need to take its place. Michael Parrish offers an excellent weighing mechanism, the United Nations Declaration of Human Rights.[134] By framing any infraction of the UN's listed articles, a migrant could claim refuge, without having to calculate a legally acceptable group identity to prove it. The UNDR, with both specific and broad provisions, like the "right to life," would be a dynamic tool for protecting climate refugees as well.[135] Without

[133] *Id.*
[134] Parrish, *supra* note 112.
[135] United Nations, *Universal Declaration of Human Rights*, U. N. (United Nations), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

having to identify an individual persecutor with motive, those destabilized through long-term societal decay would need only prove a deteriorated quality of life.

Both an ambitious and already existing solution to the biopolitical nature of United States refugee law are necessary. They correct the refugee's entanglement with the exclusionary precedent that underscored the Pershing Chinese's victory. Persecution is not unique, nor is it always based on an identifiable trait. Refugee law was designed to be dynamic, not exclusive. It must be practiced as such.

Rethinking Citizenship

Citizenship, as Arendt envisioned, has two sources of value: identity, and what she described as "the right to have rights."[136] As a result, this paper has critiqued Agamben's advocacy to abandon citizenship as an institution and construct. The stateless, dating back to WWI, rooted their identity in their citizenship because it was inseparable from their cultural history. But those who use Foucault in migrant logic are not altogether wrong; citizenship does have inherent flaws.

The main flaw is the binary it depends on. The exclusive nature of biopower has reconstructed identity to reduce individuals to citizens or not citizens. This is reflected in the Civil Rights approach to immigration law. Advocates must consistently make the case that immigrants are entitled to the same rights as citizens – which they are – but their need to be legally recognized in the in-group reinforces the binary with each case. They distance themselves legally from refugees, integrating with citizens while alienating themselves from other migrants altogether.

Citizenship reimagined on a spectrum fills the gap between immigrants and refugees. Elizabeth Cohen, a political theorist on citizenship, articulates a compatible concept: "semi citizenship." Her argument relies on a historical understanding that citizenship has never been *practiced* as a binary outside of the judiciary. Given that citizenship is a meaningless construct without legitimacy from a sovereign, Cohen first discusses the ex-felons who were left off voter rolls in Florida in the 2000 election.[137] If

[136] Arendt, supra note 10.
[137] Elizabeth F. Cohen, Semi-Citizenship in Democratic Politics (Cambridge University Press 2009).

citizenship is confirmed through the act of *using* the rights that citizens are afforded, the ex-felons would seemingly be in a class below the citizen. Similarly, Puerto Ricans, who have been legally designated as U.S. citizens, are not a part of the Electoral College, meaning they are also denied from participating in the civics of citizenship.[138] Pointing out a "myth of full citizenship" in practice, with some citizens not enjoying the same rights as others, Cohen suggests that the law is capable of reflecting that through expansion. Her conception of semi-citizenship parallels the conclusion this paper has come to, as she writes

> Citizenship is therefore a 'gradient category.' It exists in gradation and has 'degrees of membership and no clear boundaries.' There is a difference between a citizen and a non-citizen, but the line between the two cannot be traced to any one point of law, trait, or action. There are multiple points at which individuals can straddle the category by exhibiting some of the traits of citizenship, or receiving some of its rewards, without being entirely included.

Citing Linda Bosniak, another scholar on immigration, Cohen suggests that semi-citizenship would adhere to a principle "that allows 'a range of distinguishable sorts of entitlements and protections that themselves afford forms of 'alien citizenship.'"[139] Bosniak, though, does not discuss what form semi-citizenship takes and Cohen mainly focuses on the theory behind the concept. While detailing a policy that redefines citizenship in the United States is the larger goal at hand, its practice is beyond the scope of this paper. However, neither of the authors point out that the law

[138] The Law That Made Puerto Ricans U.S. Citizens, yet Not Fully American | Essay | Zócalo Public Square, https://www.zocalopublicsquare.org/2018/03/06/law-made-puerto-ricans-u-s-citizens-yet-not-fully-american/ideas/essay/.
[139] Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership (Princeton University Press 2006). Cohen, supra note 137.

has experimented with statutes that fill the gap between immigrants and refugees, implicitly fashioning an unofficial form of semi-citizenship.

In 1990, in the Immigration Act of 1990, Congress ratified the procedure called Temporary Protected Status.[140] The premise was to protect migrants who do not qualify as immigrants or refugees and provide them an "'employment authorized' endorsement."[141] Such migrants include those whose country is in armed conflict, has had an environmental disaster, or if the state would not be able to "handle adequately the [alien's] return to the state."[142] This policy, though not explicitly integrated into either immigration or refugee law, fills a fundamental gap. For one, it does not necessarily require the applicant to identify a persecutor, or to define a specific group identity that faces oppression. It does not require access to constitutional rights like immigration law, nor does it promote migrant exceptionalism like refugee law. The largest hurdle in the application process is its unique process; Temporary Protected Status begins with the Attorney General designating a foreign state in the Foreign Register.[143]

Unsurprisingly, given biopower's strong foundation in United States law, there has been a large effort to prevent this gap from being filled. In 2018, the Trump administration ended Temporary Protected Status recognition for Nepal, threatening to deport and destabilize thousands who fled from Nepal after a devastating earthquake in 2015. With a government struggling to rebuild its infrastructure, one man was able to

[140] 8 USC 1254a: Temporary Protected Status, https://uscode.house.gov/view.xhtml?req=(title:8%20section:1254a%20edition:prelim).
[141] Id.
[142] Id.
[143] Id.

erase protections for thousands who would not qualify for refugee status or immigration.[144] During the pandemic in 2020 as well, the Trump administration was given permission by the Federal Appeals Court to phase out Temporary Protected Status recognition for Sudan, Nicaragua, Haiti, and El Salvador.[145] In an instant, nearly 300,000 individuals lost their legal protection. Often buttressed by policies like Title 42, which gives the government unilateral power to ban migration from certain countries during periods of widespread illness, the government has a trove of weapons to counter a few interspersed options for migrants.[146] Quite literally, this is the eugenical cleansing aspect of biopower that Foucault feared. Rather than discipline the undesired, modern control instead enacts policy to "purify" the in-group, covertly excising the undesired.[147] Precisely, this is the issue with current measures to fill the gap between immigration and refugee law: it often offers protections based on groups, nationalities, and collective identities. In doing so, it gives the sovereign the power to unilaterally banish those same groups by formulating the law around the collective.

Legally protecting nationalities *and* individuals is necessary. Of course, there must be legislative activism to protect already existing options like Temporary Protected Status. They perform the necessary task of providing a legal framework for semi-citizenship. There is room to innovate as well. Temporary Protected Status can be

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[144] Why We Must Defend Temporary Protected Status for Immigrants, Am. Friends Serv. Comm., https://www.afsc.org/blogs/news-and-commentary/why-we-must-defend-temporary-protected-status-immigrants.
[145] Court Rules Trump Ok to End Temporary Protected Status for Immigrant Families, NBC News, https://www.nbcnews.com/news/latino/court-rules-trump-can-end-temporary-protected-status-immigrant-families-n1240072.
[146] Uriel J. García, Here's What You Need to Know About Title 42, the Pandemic-Era Policy That Quickly Sends Migrants to Mexico, Tex. Trib., https://www.texastribune.org/2022/04/29/immigration-title-42-biden/.
[147] Foucault, supra note 21.

reworked to be levied against a certain type of disaster, like forced relocation in climate change, rather than for a specific country. In doing so, the provisions would recognize individuals from several nations, dispossessing the sovereign powers in the United States from persecuting a single nationality. Such policies would be semi-citizenship in practice, filling the vacuum of space between citizens, immigrants, refugees, and migrants. By offering legal recourse for those who do not fit in these exclusive categories, a bolstered TPS could guarantee rights on a spectrum.

Ending Borders as Biopower

While this paper has discussed biopower expressed through citizenship, the border itself plays an instrumental role in maintaining biopower. Indeed, *Hernandez v. Mesa* is a unique case in this paper, as he was not an individual seeking refuge or lawful permanent residency. Instead, he was a child, killed by the state without consequence because he was not afforded constitutional rights as he lived. In many ways, the border represents the violent side of biopower. While Foucault imagined biopower as a transition away from discipline and punishment, he concedes that discipline and biopower are not mutually exclusive.[148]

Scholars have already detailed how the border, specifically the U.S. Mexico border, is a site of biopower. Thomas Nail discusses how the Department of Homeland Security's reason for building the border wall was to "'stop' unwanted human migration from Mexico into the US."[149] But the wall has not stopped migration, it has only increased it. What it has done is increase the number of deaths and incarceration exponentially.[150] The main function of the border is to define a single space where the migrant is at the mercy of the sovereign, without rights. As Foucault put it, "sovereignty [creates a] territorial pact, and guaranteeing borders [is] the major function of [it]."[151] The border is the physical manifestation of the sovereign's desire to purify the demos by legally obstructing any form of movement.

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[148] Foucault, supra note 48.
[149] Thomas Nail, The Crossroads of Power: Michel Foucault and the US/Mexico Border Wall, Foucault Stud. 110 (Jan. 2013).
[150] Id.
[151] Michel Foucault, Dits Et Écrits, Tome 3 (Paris: Gallimard, 1994), 385. Originally from, "Michel Foucault: La Sécurité Et L'état," Tribune Socialiste, November 24-30, 1977.

Even physically, the border is disruptive to biological life. The border wall tears through neighborhoods and wildlife, separating communities and disrupting biospheres without concern while "carefully building around well financed golf courses.[152] Designed with gaps and detention centers around it, the border is meant physically allow for "catch and release," a more cyclical and more sustainable form of control than disciplining and murdering migrants instead.

While the border is a legal exercise of biopower, individuals lose their rights along the border. The murdered child lacked any Fourth Amendment rights because "he had no voluntary connection to the United States," thus implying that the state can withhold rights despite a physical presence in the territory. The nation thus violates their obligation through treaty to treat the border as a limitrophe, its own territory.

To maintain this loss of rights for migrants, the United States suspends rights for its own citizens as well. In 1965, a border patrol agent detained and inspected property without a search warrant 63 miles north of the U.S-Mexico border. The court held that Fourth Amendment rights and constitutional rights generally were suspended "within a reasonable distance from any external boundary."[153] Explicitly, the Court's language mimics biopower, as the Supreme Court held in a similar case, where they detained a traveler, that for any individual by the border, privacy rights are not eliminated but are instead "balanced against the sovereign's interest."[154]

Margaret E. Dorsey's interviews with citizens by the border reveals that their experiences are like migrants too. One U.S. citizen went as far as to say, "it is kind of

[152] Nail, supra note 149.
[153] Marsh v. United States, 344 F.2d 317 (1965) | Caselaw Access Project, https://cite.case.law/f2d/344/317/.
[154] United States v. Montoya de Hernandez, Oyez, https://www.oyez.org/cases/1984/84-755.

like we are the people with an asterisk on the side" because they live in what is colloquially referred to as the "Constitution free zone."[155] Multiple stories detail how Border Patrol Agents regularly harass United States citizens in the same way that they would a migrant. Most egregiously, women of color are targeted by agents regardless of their legal status.[156]

The precedent set by *Marsh v. United* states now applies to the entire United States border. That affects nearly 200 million people, most of them citizens.[157] This biopolitical legal precedent is what denies a non-citizen, like the boy in *Hernandez v. Mesa*, constitutional rights as well.

However, all these factors can be weaponized in the fight to protect migrants from state sponsored violence. Recall that the *Hernandez v. Mesa* case did not set the precedent that migrants cannot wholly access the constitution, it suggested that lacking a "voluntary connection" occludes the potential for Fourth Amendment rights. A hypothetical similar case, for starters, should make use of precedent that the Supreme Court recognizes; *Boumediene v. Bush*, a case that where Justice Kennedy wrote that "*de jure* sovereignty is [not] the touchstone of habeas jurisdiction" and the "geographic reach of the constitution."[158] Thus, the Court would be unable to treat the border region as separate from the state's territory when it sees fit.

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[155] Margaret E. Dorsey & Miguel Díaz-Barriga, The Constitution Free Zone in the United States: Law and Life in a State of Carcelment, 38 PoLAR Polit. Leg. Anthropol. Rev. 204 (Nov. 2015).
[156] Id.
[157] The Constitution in the 100-Mile Border Zone, Am. Civ. Lib. Union, https://www.aclu.org/other/constitution-100-mile-border-zone.
[158] Boumediene v. Bush, 553 U.S. 723 (2008), Justia Law, https://supreme.justia.com/cases/federal/us/553/723/.

Second, advocates must advance test cases where citizens are subject to violence in the border region. Dorsey identifies two harrowing cases that fit this description: *Jane Doe v. El Paso County Hospital District* and *Laura Mireles v. United States Customs and Border Protection Agent Riano*. In the former case, a United States citizen was frisked by Border Patrol Agents, strip searched, and violated by using their fingers in a cavity search.[159] Though they failed to find any drugs, they then took her to the hospital, where she was charged for forced CT exams, vaginal probes, and more.[160] The latter case is even more harrowing. Mireles was also a citizen in the parking lot of her work, where a border patrol agent forced her out of her car and threw her on the ground with a force great enough to immobilize her for more than a day after already confirming her purse held no contraband. She suffered a miscarriage the next day.[161] The same border patrol agency violated citizens in the same way as the non-citizen in *Hernandez*.

Jane Doe's case succeeded in determining that hospitals in border communities cannot perform cavity searches without a warrant.[162] *Mireles* had less success, as the court dismissed her case on the ground that the court lacked jurisdiction surrounding "claims of battery, assault, false imprisonment." However, even within the Constitution-free zone, the court acknowledged that they must respect *Graham v. Connor*, which holds that "citizens have a right to be free from excessive force."[163] The Border Patrol

[159] Doe v. El Paso Cnty. Hosp. Dist., EP-13-CV-00406-DCG | Casetext Search + Citator, https://casetext.com/case/jane-doe-v-el-paso-cnty-hosp-dist.
[160] Id.
[161] American Immigration Council, Mireles v. Riano, et Al., Hold CBP Accountable (Dec. 12, 2013), https://holdcbpaccountable.org/2013/12/12/administrative-complaint-against-united-states-filed-31213-2/.
[162] Jane Doe v. El Paso Hospital District, et Al, ACLU Tex., https://www.aclutx.org/en/cases/jane-doe-v-el-paso-hospital-district-et-al.
[163] Council, supra note 161.

Agent was not granted qualified immunity. Future test cases must advance this fight, advocating for greater constitutional protections to be respected for citizens, and to limit the power of agencies tasked with enforcing biopower's exclusion.

If done so, cases like *Hernandez* could end differently. Because *Marsh v. United States* makes no mention of citizen in the opinion, more successful cases like *Jane Doe* and *Mireles* could change the legal landscape within the border. If citizens are afforded rights by the border, then non-citizens could fight for the same rights. Indeed, in 1950, *Johnson v. Eisentrager* established that "the alien…has been accorded a generous and ascending scale of rights as he increases his identity with our society."[164] One of the measurements established in the case for determining "identity with our society" was where the infraction occurred. If cases similar to *Hernandez* establish the United States must respect its treaty to afford constitutional guarantees in limitrophe spaces, then migrant plaintiffs would be subject to less violence along the border because they would have a "voluntary connection" to the United States. An arbitrary line drawn by the sovereign would no longer be a space for biopower to suspend rights for migrants to detain or discipline them. It would take an organized long-term effort to select the right cases to force the court to acknowledge citizens' rights and destabilize the "Constitution-free zone."

[164] Johnson v. Eisentrager. 339 U.S. 763 (1950)., supra note 1.

Conclusion

Interrogating immigration history is not merely an academic search. This year, migrants fleeing from Ukraine had varying experiences as they sought refuge. While the world took in White refugees without hesitation, countries erected barriers for Black migrants who fled at the same time.[165] Over a century after the minority treaties were codified, the world continues to exert biopower over those who are displaced.

The current literature that dominates refugee studies would fail to account for these racial disparities. Race has been excised from Foucault's original conception of biopower by those like Agamben. This paper is crucial; our approach to refugees must be reflective of the true reality that they face. Citizens and refugees are not the same. In fact, not every refugee is the same.

Rethinking biopower issues a bleaker outlook on our migration law history. It exposes how even the earliest examples of protection for the stateless were underscored by nefarious motives. It reveals that the first legal victory for a refugee led to biopower's entrenchment within United States law. As our judiciary continues their quest to wrest rights away from the populace, it is crucial to acknowledge the portions of the legal landscape that were built on unstable foundations.

Though it is difficult in today's political climate to turn to the courts as a source of solution, this paper has shown that it still retains the power to be a vessel for change. Indeed, we have all the tools to create a more just migration system. Since 1950, and

[165] Margot Hinry, Fleeing War, Facing Racism: Refugees from Ukraine Meet Challenges at Europe's Borders, Natl. Geogr., https://www.nationalgeographic.co.uk/history-and-civilisation/2022/03/fleeing-war-facing-racism-refugees-from-ukraine-meet-challenges-at-europes-borders (last visited Jun. 2, 2022).

even earlier, precedents have been at the court's disposal to bolster refugee and immigration law.

As a result, this paper necessitates amplifying the work of those in power who seek to do good. Justice Ginsburg notoriously used advanced foreign law to guide her judgements. Each Supreme Court decision, even if a poor outcome, contains within the dissent a more compelling legal argument that can be weaponized in future cases. The 7th circuit's work is revolutionary with respect to innovating refugee law. These instances of successful legal advancement are where scholars and advocates must turn their attention to. They are the basis of a legal opposition to biopower and can function as a blueprint for broader application.

Currently, it would be naïve to think that this paper has proposed infallible legal solutions. United States' courts wield tremendous power, but they may not be the only space in which that biopower can be opposed. Notwithstanding, this paper articulated a new approach to examining biopower and the law. Even if the court is not a vessel for positive change, this paper's approach can be applied to different spaces as well. Local and federal policy, for instance, must also be excoriated using a biopolitical lens as well. When using Foucault's philosophical lens, Border policy, immigration law, and refugee law each yielded a different avenue for solutions. The interdisciplinary approach in this paper is crucial to the future of migration. Studying the law requires a larger scope than the law. Biopower extends the timeline in our studies and asks questions that are not readily apparent from a single-disciplinary approach. Though it slows the pace of change, asking the right questions is crucial to creating the right solutions.

With that, if anything, this paper has revealed the rich agency that Refugees have shown to fight against biopower and force their acceptance within it. While academics laud the stateless who sew their mouths shut from their office chair, a true biopolitical approach charts a different outlook on their self-advocacy. Even as the sovereign continues to manipulate their exercise of power, the refugee has always been quick to adapt. Their success must be shared, and it is thus our responsibility to search for solutions to protect them all. In the face of climate catastrophe, the current legal mantra, 'if all refugees are oppressed, then none are,' cannot stand. Our fight begins there.

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