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Applying the U.S. Constitution to Foreign Asylum Seekers: Exposing a Curious, Inconsistent Practice in the Federal Courts

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APPLYING THE U.S. CONSTITUTION TO FOREIGN ASYLUM SEEKERS: EXPOSING A CURIOUS, INCONSISTENT PRACTICE IN THE FEDERAL COURTS

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Asylum law is based on an international treaty, but federal courts routinely invoke U.S. constitutional norms in adjudicating asylum claims. Specifically, they rely on constitutional norms when gauging whether an asylum applicant has suffered harm amounting to "persecution" and whether the harm was inflicted "on account of" a protected characteristic, such as political opinion or religion. In a close analysis of this unusual practice, this Article argues that federal courts have come to inconsistent, and often incompatible, conclusions regarding the use of constitutional norms in the analysis of asylum claims: principally, on whether constitutional norms establish sufficient, insufficient, necessary, or unnecessary conditions for qualifying for asylum. In addition to exposing these inconsistencies, this Article offers insights into improving the current practice of using constitutional norms in deciding asylum cases. Ultimately, this Article seeks to start a larger discussion of the diverse roles of constitutional law in asylum law and of the relationship between U.S. constitutional law and international human rights law—what it is and what it should be.

I. INTRODUCTION

The U.S. Constitution does not apply to foreign nations' treatment of their own citizens, but it nonetheless plays a special role in asylum cases, a role that has not been adequately explained or appreciated to date. Two stories illustrate the central role of the U.S. Constitution in this context. The first story involves the plight of a man named Chang.[1] In the late 1980s, Chang lived in the Chinese countryside.[2] He and his wife had two children, but they wanted a bigger family.[3] When China adopted the one-couple, one-child policy, and the government told Chang to report to a clinic for sterilization, he fled to the United States.[4] Chang sought asylum and argued that he feared persecution on account of his membership in a particular social group, namely, persons who oppose the one-child policy.[5] He further argued that the one-child policy violated rights guaranteed by the 14th Amendment to the United States Constitution, thus rendering the policy persecutory on its face.[6] The Board of Immigration Appeals (BIA) however, dismissed his appeal on the grounds that the Chinese government enforced the policy uniformly and without discrimination.[7] In rejecting the idea that the consequences awaiting Chang, such as fines and forced sterilization, amounted to persecution, the BIA wrote:

> The respondent submits that the freedom to have children is an absolute right under the 14th amendment to the United States Constitution and, for that reason, countries that abridge this

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1. Matter of Chang, 20 I. & N. Dec. 38 (B.I.A. 1989).
2. *Id.* at 39.
3. *Id.*
4. *Id.*
5. *Id.* at 43.
6. *Id.* at 46.
7. *Id.* at 43–44.

> right must be found to be engaging in acts of persecution. The resolution of the constitutional issues that could arise if the population problems underlying the implementation of the 'one couple, one child' policy in China were to occur in the United States is a matter of speculation that it is hoped this country need never address. However, the fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefore persecuted on account of one of the five grounds enumerated in section 101(a)(42)(A) of the [Immigration and Nationality] Act.[8]

Thus, the BIA rejected the view that a policy adopted by a foreign country amounts to persecution simply for its failure to pass U.S. constitutional muster, and an asylum applicant's proof of a constitutional violation is insufficient to prove his eligibility for asylum.[9]

The second story takes place years later and involves a man named Nasser Mustapha Karouni, a gay man with HIV, who lived in Lebanon and faced brutal violence by homophobic militias that the government failed to control.[10] He applied for asylum, but the Immigration Judge denied him relief, and the BIA affirmed.[11] He petitioned for review in the U.S. Court of Appeals for the Ninth Circuit.[12] Invoking *Lawrence v. Texas*,[13] the court explained that Karouni faced grave danger for exercising a fundamental liberty protected by the U.S. Constitution's Due Process Clause.[14] The court reasoned:

> [T]he Attorney General is essentially arguing that the INA requires Karouni to change a fundamental aspect of his human identity and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that "ha[ve] been accepted as an integral part of human freedom in many other countries[.]"[15]

Thus, the likely violation of a constitutional norm was sufficient to justify

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8. *Id.* at 46.

9. *See id. Chang* was decided prior to the 1996 Amendments to the refugee definition to include individuals subject to coercive family planning policies. *See* INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012).

10. Karouni v. Gonzales, 399 F.3d 1163, 1165–68 (9th Cir. 2005).

11. *Id.* at 1165–66.

12. *Id.*

13. 539 U.S. 558 (2003).

14. *Karouni*, 399 F.3d at 1173.

15. *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)) (citation omitted).

granting Karouni's petition for review. As illustrated by these vignettes, U.S. courts at times invoke U.S. constitutional norms explicitly when deciding asylum cases based on harm that foreign citizens suffer in their home countries.[16]

This practice is both surprising and sensible. The surprise follows from asylum law's status as the most "thoroughly international" area of U.S. law.[17] Asylum law is based on the United Nations Convention Relating to the Status of Refugees (Refugee Convention)[18] and the 1967 Protocol to the Refugee Convention.[19] It articulates states' obligation to shield refugees from persecution and the rights that accrue to refugees in the asylum state.[20] Moreover, Congress designed the Refugee Act of 1980—the domestic statute implementing the treaty—to bring U.S. law into conformity with international law.[21] As a result, scholars have long advocated for courts to interpret U.S. asylum law more consistently with international law.[22] In such a context, courts' use of U.S. constitutional law conflicts with the conventional scholarly wisdom.[23]

The practice, however, also makes sense for a number of reasons. First, the United Nations High Commissioner for Refugees (UNHCR) expressly contemplates that courts will reference national legislation as a yardstick when evaluating the legitimacy of another state's actions. The UNHCR Handbook (the Handbook)—the premier guide to interpreting the Refugee Convention—itself advocates resorting to domestic law when analyzing issues such as the distinc-

16. Although this Article exclusively focuses on federal courts' and agencies' explicit use of constitutional norms in asylum adjudications, adjudicators have also invoked constitutional norms *implicitly*. *See* Dwomoh v. Sava, 696 F. Supp. 970, 972 (S.D.N.Y. 1988) (finding that applicant faced persecution on account of his political opinion where he participated in a coup d'etat of an authoritarian government that deprived defendants of jury trials and rights sounding in due process); Matter of Izatula, 20 I. & N. Dec. 149, 154 (B.I.A. 1990) (finding that applicant faced "persecution" rather than "prosecution" by authoritarian Afghan government due to that government's illegitimacy and lack of democratic institutions).

17. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L. J. 1059, 1061 (2011).

18. Convention Relating to the Status of Refugees, pmbl., July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

19. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:3 (2015 ed.) ("[T]he United States enacted specific statutory measures to conform provisions of its domestic law to the Refugee Convention.").

20. Refugee Convention, *supra* note 18, arts. 1, 33.

21. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987); Farbenblum, *supra* note 17, at 1061–62.

22. *See, e.g.*, ANKER, *supra* note 19, § 1:5; Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 24–25 (1997); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections From Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1240 (1994).

23. *See* Musalo, *supra* note 22, at 1240.

tion between a state's lawful prosecution of a criminal defendant and the illegitimate persecution of one of its citizens.[24] The Handbook recommends that states consider their own national legislation, as well as principles contained in "various international instruments relating to human rights . . . ."[25] Thus, reliance on domestic law when evaluating eligibility for asylum is not completely novel.

Second, the practice of using constitutional norms makes sense because asylum law and constitutional law, although distinct in purpose, both protect civil and political rights.[26] Asylum law creates a status (asylum) that protects individuals from persecution on account of a protected characteristic, and persecution often takes the form of a violation of a core human right, such as the right to hold a religious belief or to express a political opinion.[27] Constitutional law, through the Bill of Rights, protects some of these same rights, such as the free exercise of religion and the right to free speech.[28] Both areas of law often call upon courts to analyze the legitimacy of challenged state action and define the contours of a civil or political right.[29] Both areas of law also identify protected groups in society: asylum law articulates protected characteristics in the definition of "refugee," and constitutional law identifies suspect classifications throu gh its Equal Protection Clause jurisprudence.[30] Thus, the common language of rights and legitimacy produces a "family resemblance"[31] between the fields that makes the use of constitutional norms sensible and intuitive in the

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24. UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 59-60 (1992), http://www.unhcr.org/4d93528a9.pdf [https://perma.cc/P79Y-Y7XN] [hereinafter UNHCR HANDBOOK]; KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 919 (2d ed. 2002).

25. *See* UNHCR HANDBOOK, *supra* note 24, ¶ 60.

26. Others have identified comparable links between international human rights law and U.S. constitutional law. *See, e.g.*, Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (observing similarities between American constitutional rights and international human rights). Unlike human rights law, the U.S. constitution fails to mention or protect any economic, social, or cultural rights, many of which are relevant to asylum. *See id.* at 418.

27. ANKER, *supra* note 19, § 1:2.

28. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.1 (4th ed. 2011) (discussing the reasons why the Constitution protects free expression, one of which is to promote self-governance); *id.* § 12.3.1 (discussing the Constitution's "absolute" protection for freedom of religious belief).

29. *Id.* § 12.3.1; ANKER, *supra* note 19, §§ 1:1–1:5.

30. CHEMERINSKY, *supra* note 28, § 9.1.1.

31. *Cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66–67 (G. E. M. Anscombe, R. Rhees & G. H. Von Wright eds., 3d ed. 1958) (describing how different meanings of a word share a family resemblance, "overlapping and criss-crossing.").

asylum context.[32]

Finally, scholars have noted the important background role that constitutional norms have played in the U.S. legal system.[33] These norms, such as the prohibition on racial discrimination, permeate the legal culture that judges inhabitand inform judicial interpretation of statutes.[34] Unsurprisingly, this influence extends to immigration law,[35] and as this Article determines, to asylum law in particular.

This Article examines asylum decisions in which courts invoke U.S. constitutional norms when analyzing whether the harm and failure of state protection an asylum applicant has suffered constitute "persecution," and if so, whether this persecution has been inflicted "on account of"[36] a protected characteristic.[37] Scholars have addressed the role of constitutional principles as important background norms for interpreting statutes and regulations in the immigration context,[38] and some have assumed or noted in passing a relationship between constitutional law and asylum law.[39] However, to this author's

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32. *Cf.* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1794 (2009) (arguing that constitutional law shares many of the same attributes that lead scholars to doubt the viability of international law).

33. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 549, 562 (1990) (discussing Bob Jones University v. United States, 461 U.S. 574 (1983)).

34. *Id.* at 549.

35. *Id.*

36. The requirement that persecution be inflicted "on account of" a protected characteristic is known as the "nexus" requirement and follows from the definition of "refugee" contained in Immigration and Nationality Act. Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012); *see* ANKER, *supra* note 19, § 5:1.

37. *See, e.g.*, Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1345 (11th Cir. 2009); Al-Ghorbani v. Holder, 585 F.3d 980, 999 (6th Cir. 2009); Pavlyk v. Gonzales, 469 F.3d 1082, 1087 (7th Cir. 2006); Musabelliu v. Gonzales, 442 F.3d 991, 994 (7th Cir. 2006); Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Di v. Carroll, 842 F. Supp. 858 (E.D. Va. 1994).

38. Motomura, *supra* note 33, at 549 ("'[C]onstitutional' norms provide the background context that informs our interpretations of statutes and other subconstitutional texts.").

39. *Id.* at 564. For other scholarly mentions of the link between asylum law and constitutional law, s*ee, e.g.*, Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 312 (2013) (discussing the role of constitutional law as a "benchmark" for conduct not condoned by the United States, but noting that "[c]onstitutional violations . . . cannot form the definitive basis for finding that an applicant's experiences establish persecution."); *id.* at 328 (noting similarity of analysis of whether harm is "illegitimate" to whether the State has engaged in impermissible action or inaction under U.S. constitutional law); Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 375–77 (2011) (describing asylum law's failure to keep pace with developments in constitutional law with respect to LGBT persons, but not supplying a rationale for linking the two areas); Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 L. & SEXUALITY 59, 82 (2006) (describing implications of *Romer v. Evans*

knowledge, no article to-date has systematically addressed the role of constitutional norms in asylum adjudications.

This Article analyzes this unusual practice and finds that federal courts use constitutional norms in diverse and sometimes inconsistent ways. The two cases described above, *Chang* and *Karouni*, illustrate one of the principal inconsistencies in federal court practice, but this Article identifies and explains another. First, as illustrated by *Karouni*, some courts have used constitutional law to articulate a minimum floor of protection that foreign countries are expected to provide.[40] If a foreign country fails to provide this minimum level of protection, as drawn from the U.S. Constitution, that foreign state risks that its treatment of its citizen could amount to persecution on account of a protected characteristic under U.S. asylum law. In turn, this persecution on account of a protected characteristic would render this foreign citizen eligible for asylum in the United States. These are cases in which proving a constitutional violation is *sufficient* to demonstrate eligibility for asylum. In direct contrast, some courts[41] have acknowledged that the treatment at issue could violate the U.S. Constitution, but the treatment nonetheless does not qualify as persecution on account of a protected characteristic.[42] In these cases, proving a constitutional violation is *insufficient* to demonstrate eligibility for asylum. This Article refers to this contradiction as "sufficient" versus "insufficient."

The second contradiction begins with courts that use constitutional law to articulate a minimum level of *harm* required for the harm to constitute persecution, where any harm not reaching that threshold is necessarily not persecution on account of a protected characteristic. In these cases, a foreign state that inflicts or is complicit in the infliction of harm not rising to the level of a constitutional violation can be assured that U.S. federal courts will not regard its treatment of its citizen as persecution on account of a protected characteristic under

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and *Lawrence v. Texas* on asylum claims brought by gays and lesbians); Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 549–551 (2003) (arguing that First Amendment jurisprudence is relevant to religious asylum claims because the drafters of the Refugee Convention intended states to use their domestic constitutional protections as a "floor" and accord foreign nationals at least as favorable treatment as accorded states' own citizens).

40. The notion that every country must provide a minimum level of protection to its citizen underlies refugee law, for when the home country is unable or unwilling to protect its citizens, refugee law offers "surrogate protection." *See* ANKER, *supra* note 19, § 4:3 ("As noted, the Refugee Convention provides 'surrogate or substitute protection' . . . [of] basic human rights . . . ." (quoting JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 4 (2005)).

41. The analysis in this Article is generally limited to federal appellate decisions because very few agency decisions discuss U.S. constitutional norms in asylum cases.

42. Romeike v. Holder, 718 F.3d 528, 534 (6th Cir. 2013).

U.S. asylum law. These are cases in which a constitutional violation is a *necessary* condition of demonstrating eligibility for asylum. Again, in direct contrast, other courts suggest that harms not amounting to a constitutional violation under U.S. law may still amount to persecution on account of a protected characteristic. In these cases, proving a constitutional violation is *unnecessary* to demonstrating eligibility for asylum. This Article refers to this contradiction as "necessary" versus "unnecessary." Ultimately, this Article analyzes and explains these inconsistencies and the varied roles of constitutional law in asylum cases.

II. FOUNDATIONS OF U.S. ASYLUM LAW

U.S. asylum law is based on the United Nations Convention Relating to the Status of Refugees, the Protocol to this treaty, and a domestic statute, the Refugee Act of 1980. International human rights principles inform both the Convention and Protocol, and these international authorities inform the domestic statute.

A. Refugee Convention & Protocol

International refugee law is based on the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention).[43] The Refugee Convention defines "refugee" as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ."[44] Article 33 obligates states party not to *refouler* (return) migrants whose life or freedom "would be threatened" on account of a protected characteristic.[45]

The 1967 Protocol to the Refugee Convention revised the definition of refugee to eliminate the geographic and temporal limitations present in the 1951 Convention.[46] As the Protocol incorporated the key provisions of the 1951

43. Refugee Convention, *supra* note 18, art. 1.

44. *Id.*

45. *Id.* art. 33.1.

46. Convention and Protocol Relating to the Status of Refugees 2, http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf [https://perma.cc/6KEA-LRQC] ("The Convention . . . has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.").

Convention, in ratifying the 1967 Protocol, the United States adopted those provisions of the 1951 Convention as well.[47] At the time, the Executive Branch assured Congress that the treaty created no new obligations and merely represented a codification of the nation's existing refugee protection policies.[48]

B. Refugee Act of 1980

Congress codified the key provisions of the Refugee Convention and Protocol into domestic law through the Refugee Act of 1980.[49] Through the Act, Congress adopted the definition of "refugee" articulated in the Refugee Convention[50] and the nonrefoulement obligation of Art. 33, which is known in U.S. law as "withholding of removal."[51] Legislative history demonstrates that Congress intended to bring U.S. law into accord with international refugee law.[52] While asylum is a discretionary form of relief, withholding is mandatory.[53]

1. Asylum

Asylum is available to individuals who demonstrate that they are "refugee[s.]"[54] The Immigration and Nationality Act defines "refugee" as:

> (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[55]

Any person who satisfies this definition is eligible for asylum, provided that

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47. *See* David A. Martin, *Reforming Asylum Adjudication: on Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1258 (1990) ("Because the 1967 Protocol incorporates by reference all of the important operative provisions of the 1951 Convention, with one important modification in the definition of "refugee," ratification was tantamount to acceding to the earlier instrument.").

48. *See id.* at 1259.

49. See Deborah E. Anker & Michael H. Posner, *The Forty Years Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1980) (characterizing the Act as "the most comprehensive United States law ever enacted concerning refugee admissions and resettlement.").

50. *Id.* (noting the Act's adoption of "the international definition of refugee from the [Refugee Convention].").

51. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012); 8 C.F.R. § 208.16 (2016).

52. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

53. Anker & Posner, *supra* note 49, at 63.

54. *See* INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012) (asylum may be granted to an alien who either the Secretary of Homeland Security or the Attorney General determine to fall within the definition of "refugee" under 8 U.S.C. § 1101(a)(42)(A) (2012)).

55. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

no bars to asylum or grounds for exclusion from protection apply to him or her.[56] In addition, Congress amended the definition in 1996 to include individuals subject to coercive population control policies.[57] However, not everyone who is eligible for asylum is entitled to receive it. Instead, the Attorney General or Secretary of Homeland Secuirty makes the ultimate determination whether to grant relief in his or her discretion.[58]

2. Withholding of removal

In contrast to discretionary asylum, withholding of removal is a mandatory form of relief from removal.[59] Based on the Refugee Convention's nonrefoulement provision contained in Article 33, withholding is available where an applicant demonstrates that his or her "life or freedom would be threatened" on account of one of the five protected characteristics.[60] The United States Supreme Court has determined that an applicant must prove a level of risk amounting to a "clear probability" rather than merely the "well-founded fear" required for asylum.[61] Withholding is an important form of relief, especially for individuals who fail to file their asylum applications within one-year of arriving in the United States[62] or who are deemed "firmly resettled" in a third country prior to arrival.[63]

Claims for asylum and withholding begin with an asylum officer or Immigration Judge and move through the system, ultimately landing in the U.S. Court of Appeals.[64]

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56. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012).

57. The amendment is reflected in INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012):

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

58. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012);

59. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

60. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2012).

61. INS v. Stevic, 467 U.S. 407, 430 (1984).

62. *See* INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2012).

63. *See* INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (2012).

64. Federal appeals courts consider petitions for review from unsuccessful asylum applicants at the end of a long road. The Immigration and Nationality Act, Section 208, establishes the procedure for applying for asylum and withholding. *See* INA § 208, 8 U.S.C. § 1158 (2012). Asylum seekers

III. THE ROLE OF CONSTITUTIONAL NORMS IN INTERPRETING "REFUGEE"

Federal appellate courts use U.S. constitutional law to interpret the concept of "persecution" and the requirement that persecution occur "on account of" a protected characteristic, otherwise known as the nexus requirement.[65] To the extent that courts use constitutional norms in asylum adjudications at all, they tend to use them as a "benchmark"[66] for evaluating laws and practices in other countries to determine both whether the harm and failure of state protection is sufficiently severe to qualify as persecution and whether it has the requisite

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may apply for asylum either affirmatively or defensively. *Id.* Affirmative applicants lodge an application once they are physically present in the United States, regardless of their immigration status. *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (October 19, 2015), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/K27K-TY6P]. Defensive applicants, in contrast, are already in removal proceedings at the time they lodge their application; this means that the government has already apprehended the applicant and issued a Notice to Appear. *See id.* An affirmative asylum applicant begins the application process by submitting a written application along with the form I-589. *See* 8 C.F.R. § 208.3 (2016). Affirmative applicants appear before an asylum officer who then conducts a non-adversarial interview. 8 C.F.R. §§ 208.9, 208.2(a) (2016) (describing initial jurisdiction of U.S. Citizenship and Immigration Services Refugee, Asylum and International Operations). For affirmative applications, the Refugee, Asylum and International Operations (RAIO) officer considers all of the documents submitted as well as the applicant's narrative and must communicate his or her decision in writing. *See* 8 C.F.R. § 208.19 (2016). If the officer grants asylum, then the process ends, and the Service may not appeal. If the officer decides not to grant asylum, or to refer the case to an immigration judge (IJ), then the IJ conducts a *de novo* hearing on the applicant's claim. *See* 8 C.F.R. 208.14(c) (2016) (describing denial, referral, or dismissal by an asylum officer); *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (October 19, 2015), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/6CB2-KDVT]. Defensive applicants do not appear before an asylum officer; instead, they present their claim to the IJ as a defense to removal in the course of their removal proceedings. 8 C.F.R. § 208.2(b) (2016) (describing "exclusive jurisdiction" enjoyed by Immigration Judges in defensive cases, where the applicant is in removal proceedings). For both affirmative applicants who have been denied or referred to the IJ and for defensive applicants, the IJ conducts an adversarial hearing; the government actively opposes the applicant's claim for asylum. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (October 19, 2015), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/FFB7-QYRQ]. Either party may then appeal the IJ's decision. 8 C.F.R. § 1003.1(b) (defining BIA's appellate jurisdiction), 1003.3(a) (describing procedure for either party to file a notice of appeal) (2012). If the BIA affirms the grant of asylum or remands back to the IJ to grant, the process ends successfully for the applicant; the government may not seek review. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2012) (permitting judicial review of orders of *removal*). If the BIA reverses a grant of asylum or affirms a denial, the applicant's exclusive means of review is through filing a petition for review to the appropriate U.S. Court of Appeals. INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2012) (stating that a petition for review "filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal . . . ."). As a result, a large portion of the federal appellate docket consists of such petitions for review.

65. ANKER, *supra* note 19, §§ 5:1, 5:11–12.

66. Rempell, *supra* note 39, at 311–12.

nexus to a protected characteristic, such as religion or political opinion.[67]

Defining persecution on account of a protected characteristic is a complex task, one aided by the use of multiple sources. Neither the Refugee Convention nor the Act defines "persecution," and scholars have noted the dearth of efforts to define the concept.[68] Other scholars have recognized that "persecution" is a purposefully "flexible" concept, one designed to respond to evolving modes of harm.[69] As a result of its open-endedness, many have drawn on international human rights law to understand persecution.[70] Scholars have justified this resort to international human rights law by referencing the Preamble of the Refugee Convention.[71] The Preamble cites the Universal Declaration of Human Rights as the essential context of the treaty, which informs the treaty's object and purpose.[72] Noted asylum scholar James C. Hathaway has described persecution as the "systematic violation of basic human rights demonstrative of a failure of state protection."[73] On this view, only the violation of "core" human rights—not merely any right protected by an international human rights instrument—can constitute persecution.[74] Accordingly, persecution is "the sustained or systemic violation of basic human rights demonstrative of a failure of state

67. *See, e.g.*, Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1358–59 (11th Cir. 2009) (Marcus, J., concurring) (invoking Free Exercise Clause jurisprudence in analyzing whether applicant would suffer religious persecution if forced to pray in secret); Canas-Segovia v. INS, 902 F.2d 717, 723 n.11 (9th Cir. 1990) (characterizing Free Exercise Clause jurisprudence as "relevant" to the analysis of whether harm awaiting applicants amounted to religious persecution), *vacated and remanded*, 502 U.S. 1086 (1992), *remanded*, 970 F.2d 599 (9th Cir. 1992); Di v. Carroll, 842 F. Supp. 858, 872–73 (E.D. Va. 1994) (analyzing U.S. constitutional law to determine whether opposition to coercive population control policies constituted a "political opinion" for asylum purposes), *overruled by* Di v. Moscato, 66 F.3d 315, 1995 WL 543525 (4th Cir. 1995).

68. Rempell, *supra* note 39, at 284 (discussing manner in which Board of Immigration Appeals has "sidestepped" the task of defining persecution, the federal courts have "shied away from formulating any unified definition," and refugee scholars have not undertaken "major efforts to define persecution . . . .").

69. ANKER, *supra* note 19, § 4.4.

70. *Id.* § 4:2. Scholars justify this reliance on the Refugee Convention's reference to international human rights law in the Preamble. *Id.*

71. Refugee Convention, *supra* note 18, pmbl.

72. *Id.*; *see* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 133 (2002).

73. *See* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 454 (2006) (describing James Hathaway's "surrogate protection" view).

74. ANKER, *supra* note 19, § 4:3. Nonetheless, the definition of a "core" human right continues to evolve. *See* James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 347 (2011). I thank Sabrineh Ardalan for raising this point.

protection."[75]

U.S. courts have understood persecution to mean severe harm in the absence of state protection.[76] Courts have interpreted the concept to include "non-legitimate harm or harm deemed offensive under some normative rubric."[77] Yet persecution does not encompass every form of "suffering or harm [inflicted] upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."[78] It is, instead, an "extreme concept."[79]

Rights violations can constitute persecution in a variety of ways. A law of general applicability can constitute persecution when it is inherently persecutory or when its enforcement or the punishment for violation is persecutory.[80] For example, although compulsory military service is generally not considered persecution, a compulsory military service law may be inherently persecutory where the military in question routinely commits international human rights abuses. [81] In such a case, regardless of whether the law is enforced "neutrally" or the punishment for desertion is reasonable, the law is inherently persecutory.[82] Absent this inherently persecutory character, however, a law of general applicability can lead to persecution where the government discriminatorily enforces the law or punishes violations disproportionately.[83] For example, if a government enforces a compulsory military service law only with respect to certain racial or religious minorities, such enforcement of a "neutral" law may constitute persecution. And if violations of the law are punished disproportionately, that, too, may evince a persecutory intent.[84]

Interpreting "persecution" relating to a law of general applicability is particularly fraught because U.S. courts are called upon to judge the legitimacy of another country's laws and practices.[85] A judgment of legitimacy is laden with

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75. DAVID A. MARTIN, ET AL., FORCED MIGRATION: LAW AND POLICY 151 (2d ed. 2013) (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 104–05 (1991)); *see* ANKER, *supra* note 19, § 4:3.

76. ANKER, *supra* note 19, § 4:4.

77. *Id.*

78. MARTIN, *supra* note 75, at 131 (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)).

79. *Id.*; *see also* ANKER, *supra* note 19, § 4:4.

80. ANKER, *supra* note 19, § 4:6 ("Laws that punish the exercise of a fundamental, internationally protected human right, such as the right to protest peacefully or the right to the free exercise of religion, may be considered persecutory *per se*.").

81. *Id.* §§ 4:6, 5:28.

82. *See id.* § 4:6.

83. *See* MARTIN, *supra* note 75, at 131–32; ANKER, *supra* note 19, § 4.6.

84. ANKER, *supra* note 19, §§ 4.6, 5.28.

85. MARTIN, *supra* note 75, at 132.

values, including constitutional ones.[86] Constitutional norms, however, have an uncertain role in this context. On the one hand, they may provide helpful benchmarks for gauging whether the challenged law, its application, or the prescribed punishment is within the discretion a country has to adopt and enforce its criminal laws, or whether they transgress more widely-shared standards. On the other hand, constitutional norms are hardly universal, and courts and agencies have expressed concern about imposing U.S. constitutional values on the world.[87]

Constitutional norms also play a role in interpreting "nexus." The nexus element requires that the persecution be "on account of" one of the protected characteristics listed in the definition of refugee,[88] and this element often requires courts to interpret the meaning of categories such as "political opinion" or "religion." The U.S. Supreme Court initially articulated the nexus requirement in terms of the persecutor's "motives."[89] However, this standard deviated from international guidance on the matter, eliciting criticism from commentators.[90] Proposing an alternative to a motives-based inquiry, the UNHCR has explained "that the persecution or fear of persecution [must] be 'related to the grounds' so that the grounds 'result' in the persecution."[91] "Grounds" and "reasons" direct the adjudicator to focus on facts about the applicant rather than the intent of the persecutors.[92] Perhaps in response to growing recognition of the gap between domestic and international standards,[93] Congress amended the Immigration and Nationality Act (INA) in 2005 to require asylum applicants to prove that the protected characteristic of the applicant, such as her political opinion or religion, was or would be "at least one central reason" for the persecution.[94] Scholars have suggested that the shift from "motives" to "reasons"

86. *See id.*

87. *See, e.g.*, Matter of Izatula, 20 I. & N. Dec. 149, 156 (B.I.A. 1990) (Vacca, J., concurring); Matter of Chang, 20 I. & N. Dec. 38, 46 (B.I.A. 1989).

88. ANKER, *supra* note 19, § 5.1.

89. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); *see* ANKER, *supra* note 19, § 5.5 (discussing *INS v. Elias-Zacarias*).

90. James C. Hathaway, *Foreword: The Causal Nexus in International Refugee Law*, 23 MICH. J. INT'L L. 207, 208 (2002) (characterizing the *Elias-Zacarias* decision as "extraordinary" and "impossible to square with either the text or surrogate protection purposes of international refugee law."); *see also* ANKER, *supra* note 19, § 5.5 ("The Supreme Court's *Elias-Zacarias* decision was widely criticized . . . .").

91. ANKER, *supra* note 19, §5:2.

92. *Id.*

93. *Id.*

94. INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012); ANKER, *supra* note 19, § 5:12.

signifies a shift toward the international standard for nexus.[95]

Federal courts have used constitutional law to analyze whether a reason for the harm suffered or feared is a protected characteristic. Specifically, courts have used constitutional law to evaluate whether the applicant's opinion is a political one,[96] for example, by analyzing whether the opinion constitutes protected political speech under the First Amendment.[97] Courts have also used constitutional law to define a particular social group based on views of marriage, noting the status of marriage as a fundamental right under U.S. constitutional law.[98]

Only a very limited set of asylum cases relies explicitly on constitutional norms, for U.S. constitutional law has no necessary role in asylum adjudications.[99] Unsurprisingly, most asylum cases do not discuss or cite U.S. constitutional decisions, and in the vast majority of cases, proving that the harm an asylum seeker suffered would have violated the U.S. constitution had the harm occurred on U.S. soil or at the hands of U.S. government officials has no role in proving a claim for refugee status. Among the cases that *do* rely on U.S. constitutional norms, however, courts use constitutional norms diversely, and at some level, inconsistently.

A. The first distinction: sufficient versus insufficient

In asylum cases involving gay rights,[100] the free exercise of religion,[101] and the right to procreate,[102] courts have typically used constitutional norms to articulate a minimum floor of protection, so that an asylum seeker is entitled to protection as long as he or she proves that the harm suffered on account of a protected characteristic would have violated the U.S. constitution. In other words, these cases suggest a violation of constitutional norms is *sufficient* to result in an asylum grant.[103]

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95. ANKER, *supra* note 19, § 5:2.

96. Pavlyk v. Gonzales, 469 F.3d 1082, 1092 (7th Cir. 2006); Musabelliu v. Gonzales, 442 F.3d 991, 996 (7th Cir. 2006).

97. *Pavlyk*, 469 F.3d at 1092; *Musabelliu*, 442 F.3d at 996.

98. Al-Ghorbani v. Holder, 585 F.3d 980, 996 (6th Cir. 2009).

99. *Cf.* Rempell, *supra* note 39, at 312 (noting that, "[c]onstitutional violations . . . cannot form the definitive basis for a finding that an applicant's experiences establish persecution," but acknowledging that "a constitutional infirmity may bear relevance to the severity inquiry . . . .").

100. Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

101. Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1356 (11th Cir. 2009) (Marcus, J., concurring); Canas-Segovia v. INS, 902 F.2d 717, 723 (9th Cir. 1990).

102. Di v. Carroll, 842 F. Supp. 858, 872 (E.D. Va. 1994).

103. In these cases, judges generally acknowledge three points: (1) the U.S. Constitution does not apply to foreign jurisdictions; (2) proving a constitutional violation doesn't *always* entitle a refugee

In direct contrast, other cases explicitly hold that proof of a constitutional violation is simply not enough to demonstrate eligibility for asylum.[104] These cases, as described below, typically involve claims based on the violation of civil rights where the state has imposed less severe forms of harm, such as fines or other non-physical punishment, on those who violate facially neutral laws,[105] or where the violation of a constitutional norm is at best uncertain.[106]

1. Sufficient

In this first set of cases, courts regard proof of a constitutional violation under U.S. law as enough to render an applicant eligible for asylum. In *Canas-Segovia v. INS*, the Ninth Circuit determined that El Salvador's facially neutral conscription law persecuted the petitioners on account of their religious beliefs and imputed political opinion of opposition to the government.[107] The law in question contained no exemption for religious reasons and punished refusal to serve in the Salvadoran military by imprisonment.[108] The court observed that petitioners, Jehovah's witnesses, had "genuine religious convictions which prevent[ed] them from performing military service."[109] Accordingly, they would be imprisoned for their refusal to serve in the military, and this imprisonment would be "on account of [their] religious beliefs."[110] Moreover, the court determined that the government would impute to petitioners oppositional political views, which could lead to "extra-judicial sanctions including torture and death."[111]

In reaching this conclusion, the court analyzed the UNHCR Handbook as well as U.S. constitutional law on the free exercise of religion. Acknowledging that U.S. constitutional law does not bind foreign countries such as El Salvador, the court noted without further elaboration that, "United States jurisprudence is

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to asylum; and (3) constitutional law is nonetheless relevant to the interpretation of "refugee." Upon deeming constitutional principles relevant to asylum law, even with these caveats, courts typically find in favor of the refugee. *Kazemzadeh*, 577 F.3d at 1358 (Marcus, J., concurring); *Karouni*, 399 F.3d at 1173; *Canas-Segovia*, 902 F.2d at 723; *Di*, 842 F. Supp. at 873.

104. *See infra* Part III.A.2.

105. *See e.g.*, Romeike v. Holder, 718 F.3d 528, 530 (6th Cir. 2013) ("There is a difference between the persecution of a discrete group and the prosecution of those who violate a generally applicable law.").

106. *See, e.g.*, Chen v. Ashcroft, 381 F.3d 221, 230–31 (3d Cir. 2004).

107. Canas-Segovia v. INS, 902 F.2d at 727–28, *vacated and remanded*, 502 U.S. 1086 (1992), *remanded*, 970 F.2d 599 (9th Cir. 1992).

108. *Id.* at 727.

109. *Id.*

110. *Id.*

111. *Id.* at 728.

[nonetheless] relevant to analysis of new issues of United States refugee law."[112] The court noted that such precedents established that "a regulation neutral upon its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[113] Thus, relying on what was then an "elementary tenet of United States constitutional law," the court concluded that the Salvadoran conscription policy could constitute persecution despite its facial neutrality.[114] In this way, the Ninth Circuit appeared to regard a constitutional violation under U.S. law as not only relevant, but sufficient in itself to demonstrate persecution on account of religion and imputed political opinion.[115]

Even though *Canas-Segovia* is no longer precedential, the Ninth Circuit's willingness to consider constitutional comparisons is striking and important. The court cautiously invoked constitutional norms, acknowledging that they were not binding, but nonetheless found Free Exercise Clause jurisprudence central to evaluating the relevant law in El Salvador.[116] Indeed, the bulk of the court's reasoning consisted of constitutional analysis, suggesting that little else was required to convince the court that the El Salvadoran law was persecutory on account of the petitioners' religion.[117]

Years later, a concurring judge on the Eleventh Circuit similarly invoked

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112. *Id.* at 723 n.11.

113. *Id.* at 723 (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

114. *Id.* at 723.

115. *Canas-Segovia* is no longer precedential on account of two related developments. In 1992, the Supreme Court decided *INS v. Elias-Zacarias*, which imposed on applicants the obligation to prove the persecutor's intent or motive behind the persecution. *See* INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); Musalo, *supra* note 22, at 1191–92 (discussing implications of the *Elias-Zacarias* decision). The imposition of an intent requirement in *Elias-Zacarias* mirrored developments in First Amendment jurisprudence. *See* Employment Division v. Smith, 494 U.S. 872, 879, 885–86 (1990) (holding that the application of a "valid and neutral law of general applicability" need only satisfy the test of rationality, not strict scrutiny (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982))); *see* Musalo, *supra* note 22, at 1222, 1225 (quoting *Smith* and discussing similarities between *Elias-Zacarias* and *Smith*); *see also* CHEMERINSKY, *supra* note 28, §12.3 (discussing *Smith*). Under *Smith*, a plaintiff must prove discriminatory intent to establish a violation of the First Amendment's guarantee of the free exercise of religion. *Smith*, 494 U.S. at 889–90. Congress responded to *Smith* by passing the Religion Freedom Restoration Act (RFRA), which the Supreme Court has determined overruled *Smith* with respect to the federal government only. *See* 42 U.S.C. § 2000bb-1 (held unconstitional as applied to state and local governments in City of Boerne v. Flores, 521 U.S. 507 (1997)). Congress failed to respond similarly to *Elias-Zacarias*. *See* CHEMERINSKY, *supra* note 28, § 12.3.2.4 (discussing RFRA and *City of Boerne*, 521 U.S. 507); *see also* Musalo, *supra* note 22, at 1181.

116. *Canas-Segovia*, 902 F.2d at 723–24.

117. *See id.*

the First Amendment's Free Exercise Clause jurisprudence in explaining a favorable result for the petitioner.[118] In *Kazemzedah v. U.S. Attorney General,*[119] the Eleventh Circuit granted in part a petition for review in a case involving an Iranian man who had converted to Christianity after arriving in the United States, and who feared returning to Iran.[120] Specifically, he feared persecution on account of his violation of Iran's law against apostasy.[121] The majority noted that the IJ and BIA had inadequately considered whether the petitioner would suffer persecution by practicing his religion underground instead of facing prosecution under the law against apostasy.[122] The concurring opinion examined the relationship between U.S. constitutional law and refugee law.[123] It noted that the need for petitioner to "practice his faith in the dead of night [to avoid persecution] collides with our nation's ideals about the exercise of religious freedom."[124] Admitting that U.S. Free Exercise Clause jurisprudence does not govern asylum claims, the concurring opinion nonetheless asserted that "the suggestion implicit in the BIA's findings and in the government's argument contradicts both the values of our founders and the values that the drafters of the Refugee Act of 1980 embodied when codifying the asylum sections of the INA."[125]

With this reference to the shared values of "our founders" and the drafters of the Refugee Act, and the assumption that those values are common to both, the concurring opinion examined U.S. Free Exercise Clause jurisprudence in some detail,[126] and rejected the notion that "secret practice [of religion] can cure persecution."[127] As the applicant would have to worship in secret in order to avoid persecution, the concurring judge found the Iranian law against apostasy to be inherently persecutory, largely because such a law would be unconstitutional if adopted here.[128] In this way, the concurring judge appeared to regard

118. Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1358 (Marcus, J., concurring).

119. *Id.* at 1341.

120. *Id.* at 1345.

121. *Id.* "Apostasy" is defined as the "renunciation of a religious belief." *See* "apostasy." Merriam-Webster Online Dictionary, 2016, http://www.merriam-webster.com/dictionary/apostasy [https://perma.cc/UGG2-DB4T] (Oct. 8, 2016).

122. *Id.*

123. *Id.* at 1358 (Marcus, J., concurring).

124. *Id.*

125. *Id.* (citation omitted).

126. *Id.* at 1359 (citing Sch. Dist. v. Schempp, 374 U.S. 203, 214 (1963); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); United States v. Ballard, 322 U.S. 78, 87 (1944)).

127. *Id.* at 1360.

128. *Id.* at 1356.

a constitutional violation as a sufficient condition for triggering refugee protection.

This approach to using constitutional norms also appears in a case involving the right to same-sex intimate relationships.[129] Scholars have previously assumed a connection between U.S. constitutional law and asylum adjudications in the realm of gay rights,[130] but they have not challenged, explained, or analyzed it. Assuming a connection, it is no surprise that courts adjudicating asylum claims have relied on precedent such as *Lawrence v. Texas,*[131] which held that laws criminalizing same-sex intimate conduct violate liberties protected by the Due Process Clause of the Fourteenth Amendment.[132] In *Karouni v. Gonzales,*[133] as noted above in the Introduction, the Ninth Circuit relied on *Lawrence* in deciding that a Lebanese man had a well-founded fear of persecution based on his homosexuality, having AIDS, and his Shi'ite religion.[134] Karouni testified that the Lebanese government condemned homosexuality, and that Hizballah, an "Islamic paramilitary organization," regarded homosexuality as a crime punishable by death.[135] Karouni testified that Hizballah punished homosexuality violently.[136] For example, Hizballah shot Karouni's gay cousin in the anus; the man survived, but Hizballah shot him again, this time, fatally.[137] Militia members confronted Karouni and pressed him to confess to the crime of homosexuality for his relationship with a man named Mahmoud.[138] The militia apparently captured Mahmoud, and Karouni never saw him again.[139]

The court considered the BIA's precedent, *Matter of Toboso-Alfonso,*[140] establishing that homosexual status forms the basis of a particular social group under the INA, as well as Immigration and Naturalization Service (INS) guidance recognizing that persons with HIV or AIDS could constitute a particular social group, and the State Department's conclusion that "[n]othing in interna-

129. Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

130. Hazeldean, *supra* note 39, at 373, 387; Pfitsch, *supra* note 39, at 82 (describing implications of *Romer v. Evans* and *Lawrence v. Texas* on asylum claims brought by gays and lesbians).

131. 539 U.S. 558 (2003).

132. *Id.*

133. 399 F.3d 1163 (9th Cir. 2005).

134. *Id.* at 1166.

135. *See id.* at 1166–67.

136. *Id.* at 1168–69.

137. *Id.* at 1168.

138. *Id.*

139. *Id.*

140. 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

tional law can justify the persecution of individuals on the basis of sexual orientation."[141]

Reasoning from these authorities and *Lawrence*, the court rejected the status-conduct distinction urged by the government.[142] Specifically, the court rejected the government's argument that any future persecution Karouni faced arose from his committing "future homosexual *acts*" rather than the "*status*" of being homosexual.[143] The court noted that the status-conduct distinction imposed a "Hobson's choice" on Karouni—facing persecution or remaining celibate.[144] The court noted that the U.S. Supreme Court has regarded intimate sexual conduct as an "integral part of human freedom," protected by the Due Process Clause of the Fourteenth Amendment.[145] Quoting *Lawrence*, the court noted, "[W]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[146] This potential for a "more enduring" personal bond is one reason that sexual identity is fundamental to "human identit[y]," and thus, not a characteristic that an asylum seeker should be required to change to qualify for protection.[147] Although the court declined to opine on why protection under U.S. constitutional law influenced whether the conduct was protected for asylum purposes, it relied on constitutional law to support the view that identity and conduct alike are illegitimate grounds for persecution.[148]

Courts have used other branches of constitutional jurisprudence to gauge the severity of harm as well. In *Shi v. U.S. Attorney General*, the Eleventh Circuit used Eighth Amendment case law as a benchmark to gauge the severity of harm when considering a petition for review of a BIA decision denying asylum.[149] The petitioner, Shi, hailed from China, where he allegedly suffered past religious persecution.[150] Shi alleged that the police "busted up a Christian church service" in Shi's father's home, arresting his father, Shi, as well as other

141. *Karouni*, 399 F.3d at 1171.

142. *Id.* at 1172.

143. *Id.*

144. *Id.* at 1173.

145. *Id.* (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

146. *Id.*

147. *Id.*

148. As scholars have noted, asylum law has not uniformly accepted this conclusion. *See* Hazeldean, *supra* note 39, at 387, 395.

149. Shi v. U.S. Att'y Gen., 707 F.3d 1231, 1232, 1238 (11th Cir. 2013).

150. *Id.* at 1232.

worshippers.[151] Shi further alleged that he was detained for a week and subjected to interrogations and physical abuse.[152] The court noted that Shi had been handcuffed to an iron bar and left outside in the rain overnight, causing him to fall ill.[153] Presented with the question of whether this harm rose to the level of persecution, the court drew on Eighth Amendment jurisprudence.[154] The court noted that the Supreme Court has held that "tying a prisoner to a so-called 'hitching post'" constitutes cruel and unusual punishment in violation of the Eighth Amendment because the hitching post created a "substantial risk of physical harm . . . ."[155] Specifically, the handcuffs created "unnecessary pain," the device was unnecessarily restrictive over several hours of detention, and the whole arrangement unnecessarily exposed the individual to the elements.[156] Noting that "the analog to the Eighth Amendment is in no way perfect," the court nonetheless compared the type of punishment Shi endured, where police had handcuffed him "to an iron bar overnight, outdoors and in the rain . . ." leading to Shi's subsequent illness.[157] Analyzing this instance of punishment alongside the others Shi had alleged, the court concluded that "the totality of the circumstances" rose to the level of persecution. Once the petitioner had demonstrated harm amounting to an Eighth Amendment violation, she had proven sufficient harm to meet the definition of persecution.

Cases arising in response to China's one-child policy illustrate distinct uses of constitutional norms. As noted in the Introduction, the BIA in *Matter of Chang* initially held that the possibility that the one-child policy would violate the U.S. Constitution was, by itself, insufficient to demonstrate that the law was persecutory.[158] The BIA used constitutional law to evaluate the harm applicant faced by considering whether the application of a neutral rule could ever amount to persecution. In contrast, federal courts have later considered in some detail U.S. constitutional precedents regarding personal autonomy and reproductive freedom, not to gauge the severity of harm, but to determine if opposition to the one-child policy might amount to a "political opinion."[159]

In *Guo Chun Di v. Carroll*, the U.S. district court relied extensively on U.S. constitutional precedents to determine whether the asylum seeker's opposition

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1238.
155. *Id.*
156. *Id.*
157. *Id.* at 1238.
158. Matter of Chang, 20 I. & N. Dec. 38, 46 (B.I.A. 1989).
159. *See* Di v. Carroll, 842 F. Supp. 858, 874 (E.D. Va. 1994).

to China's "one child policy" constituted a "political opinion" under the INA.[160] In that case, Guo Chun Di, a citizen of the People's Republic of China (PRC), filed a petition for writ of habeas corpus.[161] Di contended that his opposition to the PRC's coercive population control policies constituted a "political opinion" for asylum purposes.[162] The court analyzed this assertion by examining the definition of "political" under Black's Law Dictionary and then considering U.S. constitutional law regarding the fundamental right to bear children.[163] Citing *Skinner v. Oklahoma*,[164] *Griswold v. Connecticut*,[165] and other U.S. constitutional precedents, the court determined that "intrusions upon this fundamental right [to reproduce] are looked upon with disfavor."[166] The court explained that the Bill of Rights protects the right to make decisions regarding procreation and that this right was analogous to other "fundamental rights," such as freedom of religion and freedom of speech, the infringement of which have been recognized as grounds for asylum.[167]

The court emphasized its limited use of U.S. constitutional law only for analyzing whether Di's opinion could be characterized as "political" and not to suggest that a foreign citizen can establish asylum eligibility "merely by pointing to some right guaranteed in the United States Constitution that is not guaranteed in his or her respective country."[168] The court further distinguished its analysis from mere moral disapproval of the PRC's population control policies or a desire to infringe upon the "foreign policy territory of the political branches . . . ."[169] Nonetheless, the court's detailed analysis of reproductive freedom under U.S. constitutional law appears to have heavily influenced the outcome. Constitutional analysis led the court to conclude that laws limiting reproductive rights are "looked upon with disfavor."[170] U.S. constitutional standards futher provided a benchmark for the court to use in evaluating the law at issue, and a basis for analogizing the law to restrictions on other fundamental

160. *Di*, 842 F. Supp. 871–73, *overruled by* Di v. Moscato, 66 F.3d 315, 1995 WL 543525 (4th Cir. 1995).

161. *Id.* at 861–62.

162. *Id.* at 872.

163. *Id.*

164. 316 U.S. 535, 536, 541 (1942) (holding that state statute requiring "habitual criminals" to undergo sterilization violated the Equal Protection Clause).

165. 381 U.S. 479, 485–86 (1965) (holding that the state law banning the use of contraceptives unconstitutionally violated right to marital privacy).

166. *Di*, 842 F. Supp. at 872.

167. *Id.*

168. *Id.* at 873.

169. *Id.*

170. *Id.* at 872.

rights that have supported asylum eligibility. Thus, although the court emphasized that proving a constitutional violation was not generally a sufficient condition for qualifying for asylum, it appears that proof of a likely constitutional violation was sufficient in this particular case.[171]

The Fourth Circuit reversed *Di*, holding that the district court had failed to defer sufficiently to the appeals court's own precedent, *Chen Zhou Chai v. Carroll*,[172] which had continued to recognize the authority of the BIA's decision in *Matter of Chang*.[173] The appeals court also determined that even if Guo Chun Di succeeded in proving that his opposition to the PRC's population control policy was a "political opinion,"[174] he would still have to prove that the PRC was persecuting him "for a reason other than to enforce its population control policy."[175] The appeals court determined that the district court erred because the record lacked such evidence.[176] However, the appeals court declined to comment on the propriety of the district court's extensive constitutional analysis.

In 1996, Congress amended the definition of "refugee" so that persons subject to the one-child policy were (and currently are) deemed to have been persecuted on account of their political opinion.[177] In effect, Congress legislated the nexus element.[178] This amendment has eliminated the scope for the kind of constitutional analysis that occurred in *Chang* and *Di*. Nonetheless, the question raised as to the proper role of constitutional analysis in asylum cases remains.

In a final example, a federal court used constitutional law to define a proposed particular social group.[179] In *Al-Ghorbani v. Holder*,[180] the Sixth Circuit granted in part a petition for review on behalf of two Yemeni brothers and used constitutional law to articulate the social group to which they belonged.[181] The

171. *Id.* at 872 ("Because the right to make procreational decisions is a basic liberty right protected under the Bill of Rights, it is, in that respect, analogous to other fundamental rights that are well-recognized as legitimate grounds for asylum . . . .").

172. 48 F.3d 1331 (4th Cir. 1995).

173. Di v. Moscato, 66 F.3d 315, 1995 WL 543525, at *2 (4th Cir. 1995).

174. *Id.* at *2.

175. *Id.*

176. *Id.*

177. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012); *see supra* note 57.

178. *See* MUSALO ET AL., *supra* note 24, at 275.

179. *See* Al-Ghorbani v. Holder, 585 F.3d 980, 997 (6th Cir. 2009).

180. *Id.* at 980.

181. *Id.* at 996, 999.

brothers, Salah and Abdulmuneam, fled to the U.S. because they feared violence at the hands of a Yemeni general who disapproved of Abdulmuneam's marriage to his daughter Najla.[182] The brothers belonged to the "meat-cutter" class while the General and his family belonged to a more elite stratum of society.[183] Although the General's rage and use of the police apparatus to detain and punish the brothers was partly motivated by a personal conflict, many other factors shaped the General's motivation, the court found.[184] Specifically, the General acted based on the brothers' social class and their westernized views of marriage, particularly their disapproval of discriminatory restrictions on marriage across class lines.[185]

In considering the brothers' proposed social group based on their family background and their opposition to Yemeni social norms relating to marriage, the court noted that, "In this country, the right to marry is considered fundamental."[186] Quoting *Loving v. Virginia*,[187] the court characterized the right to marry as "one of the basic civil rights of man."[188] The court then concluded, "Persons who are forbidden to marry, or those who oppose discriminatory restrictions on marriage, may therefore constitute a particular social group."[189] Like the district court decision in *Di*, the court suggested that the status of a right as "fundamental"[190] under American constitutional law meant that applicants who oppose restrictions on the exercise of those fundamental rights abroad shared a political opinion, one that could be the foundation for a particular social group in some instances. In this case, petitioners' views in opposition to Yemeni restrictive marriage norms helped define a particular social group of individuals with westernized views on marriage.[191] The court declined to analyze the matter at length, instead simply citing *Loving* and quoting briefly from the case to justify the view that opposition to restrictive marriage norms can, in fact, define a particular social group.[192]

Although the restrictive marriage norms forbidding marriage between classes would violate the fundamental freedom to marry as understood in American

182. *Id.* at 985.
183. *Id.* at 984.
184. *Id.* at 997–98.
185. *Id.* at 996–98.
186. *Id.* at 996.
187. 388 U.S. 1 (1967).
188. *Al-Ghorbani*, 585 F.3d at 996.
189. *Id.*
190. *Id.*
191. *Id.*
192. *See id.*

constitutional law, the same result could have been reached without any reference to constitutional law.[193] Thus, the heightened importance of the rights at stake under U.S. constitutional law was sufficient to justify granting the petition for review in this case, but probably unnecessary.

2. Insufficient

In direct contrast to the above-described cases, federal courts have also held that proving a U.S. constitutional violation does not, without more, establish eligibility for asylum.[194] These are cases where a constitutional violation is "insufficient" to establish asylum eligibility, and more is required of the applicant. Often, in these cases, the right at stake is important or fundamental under U.S. constitutional law, but the government denies the right through economic sanctions or a less physically painful form of persecution.

Specifically, in cases involving parental rights and the right to marry, federal courts have determined that simply proving a constitutional violation is insufficient to establish eligibility for asylum.[195] In *Romeike v. Holder*,[196] the Sixth Circuit explicitly rejected the relevance of U.S. constitutional law in analyzing whether Germany's compulsory school attendance law persecuted Christian parents who wished to homeschool their children for religious reasons.[197] In that case, the parents (Romeikes) had five children whom they home-schooled in order to protect them from anti-Christian influence.[198] The German government imposed fines on the Romeikes for failing to send their children to a public or a state-approved private school, and on one occasion, the police escorted the Romeike children to school.[199] Fellow homeschooling families subsequently assisted the Romeikes in barring the police from escorting the children to school, and the police declined to use force.[200] The school district continued to impose fines, but at no time did the police use force to enforce the law against the Romeikes.[201] By the time the family fled Germany, the total

193. *Id.* (citing Faruk v. Ashcroft, 378 F.3d 940, 943 (9th Cir. 2004) ("We have established that persecution for marrying between races, religions . . . or political opinion is persecution on account of a protected ground.")).

194. *See* Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[W]e interpret *Acosta* as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.").

195. Romeike v. Holder, 718 F.3d 528, 534 (6th Cir. 2013).

196. 718 F.3d 528 (6th Cir. 2013).

197. *Id.* at 530.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

unpaid fines amounted to $9,000.[202]

The court noted that, although the U.S. Constitution protects the fundamental right of parents to guide the upbringing of a child, the absence of this guarantee abroad did not "establish[] persecution on religious or any other protected ground."[203] The court further noted that asylum applicants cannot establish eligibility for asylum merely by demonstrating a violation of U.S. constitutional law or "merely by proving a treaty violation."[204] Specifically, the court noted that Congress declined to create statutory asylum to provide a "safe haven to people living elsewhere in the world who face government strictures that the United States Constitution prohibits."[205]

The court analyzed persecution by assuming that a law of general applicability could never amount to persecution.[206] Instead, the court analyzed the *application* of the German law in question to the Romeikes and determined that it did not constitute persecution because the German government enforced this law of general applicability without distinctions or animus based on protected grounds.[207] In particular, the Romeikes had failed to demonstrate that the compulsory school attendance law was applied selectively to religious homeschoolers or that homeschoolers are punished more severely than others who violate the compulsory school attendance law.[208] Thus, without evidence of either selective enforcement or discriminatory punishment, the Romeikes could not prevail, and the violation of U.S. constitutional norms was *insufficient* to justify granting the petition for review.[209]

Other courts have similarly rejected the sufficiency of U.S. constitutional violations to demonstrate asylum eligibility in cases based on the right to marry.[210] In *Chen v. Ashcroft*,[211] the Third Circuit assessed whether the BIA's decision in *C-Y-Z*, which recognized derivative asylum claims based on forced sterilization of a spouse but not an unmarried partner, irrationally and arbitrarily

202. *Id.*

203. *Id.* at 534 (citing Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923)).

204. *Id.*

205. *Id.* at 530.

206. *Id.* at 534 (characterizing argument that compulsory-attendance law violates fundamental rights as having an "Achilles' heel"—namely that persecution must be "*on account of* a protected ground."). Noting that the petitioners had failed to prove *nexus*, the court then used this failure as proof of lack of persecution. *Id.* The court's analysis, thus, appears to conflate persecution and nexus.

207. *Id.* at 535.

208. *Id.* at 532.

209. *See id.* at 532, 534.

210. *See* Chen v. Ashcroft, 381 F.3d 221, 230 (3d Cir. 2004).

211. 381 F.3d 221 (3d Cir. 2004).

excluded unmarried partners who would have married but for the PRC's "inflated minimum marriage age . . . ."[212] Chen and his fiancée, Chen Gui, began living together in 1994 at the ages of 19 and 18, respectively.[213] In 1995, Chen Gui learned she was pregnant, and the couple sought a marriage license.[214] Officials denied their application because Chinese law required men to be at least 25 years old and women at least 23 years old to marry.[215] Chen alleged that government officials "soon became aware of the pregnancy" and informed the couple that the pregnancy would have to be aborted.[216] Instead of complying with the order, the couple went into hiding.[217] Chen refused to reveal Chen Gui's whereabouts and was attacked.[218] He then fled China, leaving Chen Gui living at his parents' home.[219] He later learned that she was forced to have an abortion during the eighth month of pregnancy.[220]

Without deciding the permissibility of *C-Y-Z* as an interpretation of the 1996 Amendment to the INA, the court determined that the BIA's decision to limit *C-Y-Z* to married couples was permissible, even though some couples were excluded from marrying in PRC due to age restrictions and thus could not benefit from the *C-Y-Z* rule.[221] In evaluating petitioner's claim, the court discussed U.S. constitutional law's recognition of marriage as a fundamental right, as well as various international human rights instruments regarding marriage.[222] It then noted that the states within the United States are authorized to regulate the age of marriage, that many set the age of marriage much younger than the PRC policy, and that these laws are constitutional.[223] Citing precedent such as *Zablocki v. Redhail*,[224] as well as international legal support for "[l]aws setting

212. *Id.* at 222.
213. *Id.* at 223.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 222.
222. *Id.* at 230 (citing Loving v. Virginia, 388 U.S. 1 (1967)); *id.* at n.12 (citing Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 2, Dec. 9, 1964, 521 U.N.T.S. 231, http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx [https://perma.cc/2EG3-ZS85]) ("States Parties to the present Convention shall take legislative action to specify a minimum age for marriage.").
223. *Id.*
224. 434 U.S. 374, 386 (1978).

reasonable minimum marriage ages," the court confirmed the power of the government to regulate marriage consistently with the right to marry.[225] It noted, however, that the states as well as most other countries generally set the minimum age much younger than the PRC, thus recognizing that the PRC's law burdened the right to marry even if it did not violate it.[226]

After considering these points, the court noted that proving a constitutional violation would not be sufficient to demonstrate eligibility for asylum.[227] It noted, "[a] law or practice, however, does not necessarily rise to the level of 'persecution' simply because it does not satisfy American constitutional standards or diverges from the pattern followed by other countries."[228] The court explained that the BIA was not "bound to conclude that minimums of 23 and 25 amounted to persecution."[229] In particular, the court could not conclude that "requiring a person to wait until reaching the age of 23 or 25 is so far outside the accepted realm of human decency as to constitute persecution."[230]

In sum, the court considered U.S. constitutional law, international human rights law, the laws of foreign jurisdictions, and notions of "human decency" in determining that the law in question was not inherently persecutory.[231] The court apparently regarded the PRC's law as anomalous, but not egregious, and likely not even unconstitutional by U.S. standards. At the same time, the court suggested that even if the law were impermissible under U.S. law, it would not be inherently persecutory for that reason alone.[232] As a result, a violation of U.S. constitutional law would be insufficient to establish a claim for refugee status. *Chen* is a softer example of this view because, unlike *Romeike*, where the Sixth Circuit conceded that Germany's compulsory school law would likely violate the First Amendment if adopted in the United States,[233] *Chen* involved laws that would probably not be deemed unconstitutional if adopted here. *Chen* states rather than demonstrates the insufficiency of a constitutional violation to support asylum eligibility.[234]

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225. *Chen*, 381 F.3d at 230.

226. *Id.*

227. *Id.* at 230–31.

228. *Id.*

229. *Id.* at 231.

230. *Id.*

231. *Id.* at 230–31.

232. *Id.*

233. Romeike v. Holder, 718 F.3d 528, 530 (6th Cir. 2013) ("Had the Romeikes lived in America at the time, they would have had a lot of legal authority to work with in countering [their] prosecution.") (citing Wisconsin v. Yoder, 406 U.S. 205, 213–14, (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923)).

234. *Chen*, 381 F.3d at 230–231.

Cases where constitutional violations were sufficient to prove the persecution or nexus elements of a claim for asylum—*Canas-Segovia*, *Karouni*, *Kazemzedah*, *Di*, *Shi*, and *Al-Ghorbani*—generally involved more severe harm. In those cases, the harm at stake was undoubtedly severe: imprisonment, forced sterilization, and torture or death, respectively.[235] These cases all involve sympathetic facts and the egregious, physically painful violation of fundamental rights under U.S. constitutional law. The outcomes of these cases follow from the combination of the threat or prior experience of severe harm and the infringement of a U.S. constitutional right.

On the other hand, in the cases where courts deemed a constitutional violation insufficient to establish eligibility for asylum, the harm at stake was generally less severe—for example, the economic sanctions for homeschooling in *Romeike*[236] or fines incurred for marrying early in *Chen*.[237] Although religious freedom and the right to marry are core constitutional rights, the harms leveled against the applicants for attempting to exercise these rights was noticeably less severe than what applicants faced in the "sufficient" cases. Ultimately, where more physically painful harms awaited the applicants, courts seemed more likely to recognize that persecution had occurred or was likely to occur on account of a protected characteristic and deem proof of a constitutional violation sufficient to prove these elements as well.[238] Thus, the distinction between the "sufficient" and "insufficient" cases can be understood, at least in part, in terms of the severity of physical harm the applicant suffered. Courts may be willing to use constitutional law to augment otherwise sound rationales for meritorious asylum claims, but they are not willing to use constitutional law to resolve weaker claims favorably for the applicant. This approach makes sense, but the ambiguity surrounding whether constitutional norms are used merely in dicta or instead are central to the reasoning of a case can lead to confusion for both courts and litigants alike.

B. The second distinction: necessary versus unnecessary

In the second set of cases, courts have regarded proof of a constitutional

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235. Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1346 (11th Cir. 2009); Al-Ghorbani v. Holder, 585 F.3d 980, 984 (6th Cir. 2009); Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Di v. Carroll, 842 F. Supp. 858, 862 (E.D. Va. 1994).

236. News sources suggest that the Romeikes also faced losing custody of their children, but the Sixth Circuit declined to mention this possibility. *See, e.g.*, Ben Waldron, Home Schooling German Family Allowed to Stay in US (Mar. 5, 2014), http://abcnews.go.com/US/home-schooling-german-family-allowed-stay-us/story?id=22788876.

237. *Chen*, 381 F.3d at 231.

238. The outcomes of these cases suggest a hierarchy of severity placing death, imprisonment, and bodily injury over economic harm. *See* Rempell, *supra* note 39, at 311–12.

violation as either necessary or unnecessary to proving eligibility for asylum. On the one hand, some courts essentially require asylum applicants to prove that the harm suffered violates the U.S. Constitution in order to demonstrate eligibility for asylum. These cases suggest that a constitutional violation is essential or necessary to qualify for asylum. In direct contrast, courts elsewhere suggest that proving a constitutional violation is unnecessary to prove eligibility for asylum.

The "necessary" and "unnecessary" cases are uncommon, and to understand why, it is important to consider how constitutional analogies or arguments would arise in these cases. If a court states that an asylum applicant cannot prevail without proving a constitutional violation, the government would have been the entity to advance that argument. (It would undermine the applicant's interest to argue that she could not possibly prevail without showing a constitutional violation.) Similarly, if a court states that an asylum applicant can prevail, despite failing to prove a violation of the U.S. Constitution, the government most probably pressed for a contrary conclusion.[239] There are few opportunities for the government to raise these arguments in the U.S. Courts of Appeals, for the government cannot petition for review from asylum grants below.[240] Petitioners, on the other hand, are seeking the appellate court to grant their petition based on the BIA's errors, and they would have nothing to lose by raising novel arguments based on constitutional norms. In light of these procedural facts, cases suggesting that proof of a constitutional violation is necessary or unnecessary are relatively uncommon.

1. Necessary

The Seventh Circuit has drawn on constitutional norms to define key terms in the refugee definition, and in so doing, has used these norms to establish necessary conditions for asylum. For example, in *Chen v. Holder*, the court drew on First Amendment jurisprudence to analyze the petitioner's claim of persecution on account of her capitalist views.[241] The petitioner alleged that the government had razed a dozen homes to construct a military building, but had promised the displaced families that they would provide "similarly sized plots of land . . . pay for construction of new houses within three months . . .

239. The applicant would be unlikely to invoke constitutional law where his or her circumstances do not demonstrate a violation because it would undermine the applicant's case regarding the severity of the harm suffered.

240. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2012) (permitting judicial review of orders of *removal*).

241. Chen v. Holder, 607 F.3d 511, 513 (7th Cir. 2010).

[and] provide rent for transitional housing."[242] Although the government paid the rent, it reneged on the other aspects of its promise. Accordingly, Chen filed suit, but the court dismissed her suit, and government officials soon came looking to arrest her.

The BIA determined that Chen's suit "did not advance a political position," and thus, she had not been persecuted on account of one.[243] On review, the Seventh Circuit considered whether litigation might constitute political expression and turned to First Amendment jurisprudence. First, it noted that time, place, and manner restrictions are independent from the speaker's particular views, and that China may have legitimately decided that litigation is not an appropriate vehicle for expressing political views.[244] In addition, the court noted that even under U.S. law, constitutional protection for litigation does not extend to frivolous suits; a plaintiff can be found liable for abuse of process if the plaintiff's suit is "objectively baseless."[245] The Seventh Circuit noted that Chen's suit fell into this category, as she sought to assert *her parents'* rights to land; unsurprisingly, the local court had peremptorily dismissed her suit. The Seventh Circuit then stated, "If courts of this nation would deem such a suit frivolous and sanctionable—and not an impingement on the rights of political opinion sheltered by the first amendment—it cannot be political persecution for other nations to think likewise."[246] Thus, the court used First Amendment standards to define "political position" and a failure to satisfy these standards doomed the petitioner's asylum claim.[247]

In another pair of asylum cases involving claims by government workers based on persecution on account of political opinion and social group, the Seventh Circuit used First Amendment jurisprudence to articulate the contours of "political opinion." An applicant's inability to demonstrate that her opinion would be protected under the standards of the First Amendment meant that the applicant's claim for asylum necessarily failed.[248] In those cases, an asylum

242. *Id.* at 512.

243. *Id.*

244. *Id.* at 513.

245. *Id.*

246. *Id.*

247. *Id.* at 514. The court remanded to the BIA, however, to consider whether the warrant for Chen's arrest—a disproportionate response in the court's view—suggested that the government may have been "setting out to muzzle a political opponent" rather than simply enforcing Chinese law on the proper use of the courts. *Id.*

248. Musabelliu v. Gonzales, 442 F.3d 991, 996 (7th Cir. 2006); Pavlyk v. Gonzales, 469 F.3d 1082, 1092 (7th Cir. 2006).

seeker could not succeed absent a showing that the harm she suffered on account of a protected characteristic would have—at the very least—amounted to a First Amendment violation had it occurred in the U.S.[249]

In these cases, the Seventh Circuit explicitly discussed competing views of the practice of relying on U.S. constitutional norms in asylum adjudications.[250] In *Musabelliu v. Gonzales*,[251] the Seventh Circuit determined that an Albanian former colonel had not suffered persecution on account of his political opinion when he lost his job after meeting with a public prosecutor about military corruption.[252] The court determined that Musabelliu's claims failed for a number of reasons, including that the opinions he expressed were not "political" under First Amendment jurisprudence.[253] Acknowledging that whistle-blowing can constitute a political opinion, the court observed that Musabelliu neither campaigned for the ouster of any leader nor expressed his views in a public forum.[254] Instead, he merely shared his views with his superior officers within the chain of command, "as part of his official duties."[255] Given the limited protection for such views under First Amendment law, the court deemed it "implausible to treat the reference to 'political opinion' [in the INA] as necessarily encompassing forms of expression that may not have constitutional protection even in the United States—and that are, if protected at all, at or near the outer limit of the first amendment's coverage."[256] The court doubted that the INA would protect the expression of opinions abroad that are not constitutionally protected here.[257] Thus, the court suggested that a foreign nation must violate a U.S. constitutional norm before that court would even consider granting a petition for review. The lack of such a violation in this case, among other factors, doomed the application.

Similarly, in *Pavlyk v. Gonzales*,[258] the Seventh Circuit determined that a former Ukrainian prosecutor's mistreatment for investigating governmental corruption also did not amount to persecution on account of political opinion that would entitle the applicant to withholding of removal.[259] The applicant,

249. *Musabelliu*, 442 F.3d at 996; *Pavlyk*, 469 F.3d at 1092 (Cudahy, J. concurring).
250. *See Musabelliu*, 442 F.3d at 996; see also *Pavlyk*, 469 F.3d at 1089.
251. 442 F.3d at 991.
252. *Id.* at 993–94.
253. *Id.* at 995–96.
254. *Id.*
255. *Id.* at 996.
256. *Id.* (citation omitted).
257. *Id.*
258. 469 F.3d 1082 (7th Cir. 2006).
259. *Id.* at 1086–87, 1090 (noting that Pavlyk's asylum claim was untimely, and thus, evaluating

Volodymyr Pavlyk, served in the Soviet army and worked as a prosecutor in Ukraine, where he pursued controversial cases.[260] In the course of his work, he and his family received threats, and someone shot at him as he was leaving work one night.[261] At some point, Ukraine charged Pavlyk with bribery and issued a warrant for his arrest.[262]

Pavlyk claimed that the warrant was a form of retaliation for his controversial investigations, and that he had been and would continue to be persecuted on account of his membership in the particular social group consisting of "Ukrainian prosecutors."[263] The court reasoned that, even assuming the threats amounted to persecution, Pavlyk could not prove nexus to a protected characteristic.[264] The proposed social group was not united by an immutable characteristic,[265] as one could resign and no longer be a Ukrainian prosecutor, nor could Pavlyk prove that the persecution occurred because of his membership in this group.[266] Pavlyk also argued that he was persecuted on account of his political opinion, but the court determined that Pavlyk had not engaged in any "classic political activities."[267] Moreover, although whistle-blowers may qualify for asylum, the court noted that Pavlyk had not sought to bring the results of the investigation to the public "in quest of a political decision."[268] Instead, he was simply doing his job as a prosecutor.[269] Thus, as in *Musabelliu*, the court found no basis for relief.[270]

In concluding that Pavlyk was not eligible for protection, the court noted in dicta that even First Amendment jurisprudence did not protect public officials from retaliation when speaking "within an agency's hierarchy on an issue of public concern, as part of their duties."[271] The court then cited *Garcetti v. Ceballos*,[272] where the Supreme Court held that public officials under such circumstances are not speaking as citizens entitled to First Amendment protection,

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only withholding of removal and Convention Against Torture (CAT)).

260. *Id.* at 1085.

261. *Id.*

262. *Id.*

263. *Id.* at 1088.

264. *Id.*

265. *Id.* at 1088–89.

266. *Id.*

267. *Id.* at 1089.

268. *Id.* (quoting Musabelliu v. Gonzales, 442 F.3d 991, 996 (7th Cir. 2006)).

269. *Id.*

270. In *Pavlyk*, the court determined that it lacked jurisdiction over Pavlyk's asylum claim, thus leaving only withholding and CAT. *Id.* at 1086.

271. *Id.* at 1089.

272. 547 U.S. 410 (2006).

but as employees speaking "pursuant to their official duties . . . ."[273] The court determined that Pavlyk's speech similarly did not constitute political speech, and that "it would be implausible to offer broader protection for speech to an alien under the immigration laws than is provided to citizens under the First Amendment."[274]

Judge Cudahy, concurring, took issue with the majority's use of First Amendment jurisprudence to establish a necessary condition for offering protection under refugee law.[275]

> It seems to me that this importation of our First Amendment's 'extra-employment' condition for protection of speech into the Immigration and Nationality Act's conditions for asylum . . . ignores the plain language of the Act's relevant provisions, which require only that 'the alien's life or freedom would be threatened . . . because of the alien's . . . political opinion.'[276]

Noting that the Act protects not only the *expression* of opinion, but the *holding* of one, Judge Cudahy noted that the Act could encompass protection for any type of expression, including a public employee's expression of a political opinion in the course of his or official duties.[277] Judge Cudahy noted that asylum applicants claiming political persecution generally must demonstrate participation in "classically political activities," but that some applicants may perform public duties that "carry an obvious political implication that invites persecution," such as an election commissioner tasked with certifying an election.[278] In such cases, it may be possible for an applicant to demonstrate persecution on account of his or her political opinion simply by expressing an opinion in the course of his or her official duties.[279]

Rather than finding the more expansive protection under asylum law "implausible," Judge Cudahy defended its reasonableness in light of the different purposes of First Amendment protection and refugee protection.[280] While the First Amendment seeks to protect competing interests in a public employee's

273. *Pavlyk*, 469 F.3d at 1089 (citing *Garcetti*, 547 U.S. at 421).
274. *Id.*
275. *Id.* at 1092 (Cudahy, J., concurring).
276. *Id.*
277. *Id.*
278. *Id.* at 1092–93.
279. *Id.* at 1092.
280. *Id.*

freedom of speech as well as the government's interest in controlling its employees' conduct, the INA is not concerned with "fine-tun[ing]" this balance.[281] Instead, it seeks to protect aliens from "persecution," which Judge Cudahy characterized as a more severe form of harm than what a public employee in the U.S. would face in retaliation for speech in his or her official capacity.[282] The distinct purposes of the First Amendment and U.S. asylum law led Judge Cudahy to reject the majority's conclusion that asylum law could offer protection for a class of speech no broader than what citizens enjoy under the Constitution.[283] On this view, the First Amendment's "minimalist" floor of protection should not function as a ceiling in asylum law. Proving a constitutional violation, while seemingly necessary to the majority, was unnecessary to the concurring judge.

Chen, the Third Circuit case involving China's laws establishing a minimum age for marriage, discussed above, also belongs in this discussion. The court there focused on the fundamental right to marriage, but it also noted the rational basis for regulating the age of marriage and suggested that slightly higher minimum age requirements were neither unconstitutional nor persecutory.[284] Although the court observed that not all laws that would be unconstitutional under U.S. law are necessarily persecutory, it also suggested that until a law *was* unconstitutional, it would not be persecutory either.[285] By focusing on the authority of states within the United States to regulate the minimum age of marriage, the court suggested that the Chinese law would quite likely be constitutional under U.S. standards.[286] Thus, *Chen* is best characterized as a case illustrating that a constitutional violation is insufficient but also necessary to demonstrate eligibility for asylum.

2. Unnecessary

In contrast to the above-described cases, the vast majority of asylum decisions do not require an asylum seeker to prove a U.S. constitutional violation in order to demonstrate eligibility for asylum. Judge Cudahy's concurring opinion in *Pavlyk*, discussed above, is probably the best example of this view.[287] Although this principle is rarely articulated explicitly, as courts lack reason to

281. *Id.*
282. *Id.*
283. *Id.*
284. Chen v. Ashcroft, 381 F.3d 221, 230 (3d Cir. 2004).
285. *Id.* at 231.
286. *See id.* at 230.
287. Pavlyk v. Gonzales, 469 F.3d 1082 (7th Cir. 2006).

opine on all the requirements that are *unnecessary* to its decision, courts have implied this position most strongly in cases relating to protection for LGBT asylum seekers.[288]

Initially, asylum law offered more extensive protections to gays and lesbians than did constitutional law.[289] The BIA's decision in *Toboso-Alfonso* established that "homosexual" status could constitute a particular social group, and that persecution on that basis would render an individual eligible for asylum.[290] Years later, in *Hernandez-Montiel v. INS*,[291] the Ninth Circuit determined that an asylum seeker who was a gay male with a female sexual identity in Mexico was persecuted "on account of his membership in a particular social group."[292]

In *Hernandez-Montiel*, the court held that a particular social group could consist either of a voluntary association or a group united by an "innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[293] Applying this definition to Hernandez-Montiel's proposed particular social group, the court concluded that the community of gay men with female sexual identities in Mexico was a "small, readily identifiable group."[294] Moreover, the court concluded that Hernandez-Montiel's female sexual identity was "so fundamental" to his human identity that he should not be required to change it.[295] The court rejected the BIA's determination that Hernandez-Montiel was persecuted because of his manner of dress, rather than because of his identity as a gay male, and further noted that Hernandez-Montiel could not change "his identity as quickly as the taxi drivers in [the seminal decision of] *Acosta* can change jobs" simply because he could change how he dressed.[296]

Although the court did not expressly invoke U.S. constitutional principles in its ruling, it noted that U.S. precedent upholding the constitutionality of anti-

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288. *See* Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

289. Hazeldean, *supra* note 39, at 373.

290. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 822–23.

291. 225 F.3d 1084 (9th Cir. 2000).

292. *Id.* at 1087, 1091. This was a time when *Bowers v. Hardwick* was the law of the land, and the Supreme Court deemed anti-sodomy laws consistent with the Due Process and Equal Protection Clauses of the U.S. Constitution. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

293. *Hernandez-Montiel*, 225 F.3d at 1093.

294. *Id.* at 1094 (quoting Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).

295. *Id.*

296. *Id.* at 1094, 1096.

sodomy laws had no relevance to Hernandez-Montiel's claim.[297] Specifically, Hernandez-Montiel was not claiming that he was persecuted for violating anti-sodomy laws, but that he suffered persecution when the police raped him twice.[298] As a result, the court divorced consideration of the then-highly limited U.S. constitutional protections for gay rights from the potentially more expansive protection warranted under asylum law.[299] In this way, the court suggested that proving a U.S. constitutional violation was *unnecessary*, and that the applicant might still qualify for asylum, even if the applicant's status or identity lacked constitutional protection.[300] Scholars have characterized *Hernandez-Montiel* as a crucial decision for these reasons.[301]

Similarly, in *Ma v. Ashcroft*,[302] the Ninth Circuit determined that the BIA erred in ruling that Congress authorized derivative asylum applications based on forced abortion or sterilization only for couples in the PRC whose marriages were registered.[303] Although the court did not explicitly discuss U.S. constitutional law, the court considered the government's argument that it was bound to follow China's marriage policy.[304] The court ruled, "While ordinarily we respect the marriage rules and regulations of foreign nations, including the establishment of a minimum [marriage] age, here the entire purpose of Congress's amendment to the asylum statute is to give relief to victims of China's oppressive population control policy."[305] Instead of appealing to the "fundamental right" to marry, which the court in *Chen* had considered, the court here noted simply that the BIA's interpretation would "contravene" Congress's purpose of protecting individuals from the oppressive one-child policy, a part of which is the ban on underage marriage.[306] The right to marriage has an obvious constitutional dimension, which other appellate courts have discussed.[307] Thus, one can infer from the court's failure to explicitly discuss constitutional norms that it regarded proof of a constitutional violation as unnecessary to establish eligibility for asylum.[308]

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297. *Id.* at 1098 (citing *Bowers*, 478 U.S. at 196).
298. *Id.*
299. *Id.* at 1098.
300. *See id.*
301. *See* Hazeldean, *supra* note 39, at 387.
302. 361 F.3d 553 (9th Cir. 2004).
303. *Id.* at 561.
304. *Id.*
305. *Id.* (citation omitted).
306. *Id.*
307. Chen v. Ashcroft, 381 F.3d 221, 230 (3d Cir. 2004).
308. It is also possible that U.S. constitutional norms may have appeared in "phantom" form in

Cases in which proving a constitutional violation was a necessary condition are harder to reconcile with cases and opinions finding it unnecessary. The asylum seekers in *Musabelliu, Pavlyk* and *Chen*, whose petitions for review were denied, faced a range of harms, from purely economic (Musabelliu lost his job)[309] to threats of bodily injury (Pavlyk was shot at) [310] and arrest (one of the harms awaiting Chen).[311] However, none of the applicants suffered bodily harm, and the courts declined to conclude that a reasonable factfinder would be compelled to find that these applicants had suffered persecution or had a well-founded fear of persecution on account of a protected characteristic.[312] Although persecution does not require physical harm,[313] these courts may have regarded the absence of bodily harm as problematic.[314] One might conclude (albeit, speculatively) that the severity of harm (or lack thereof) helps explain the court's ready use of any and all tools, including constitutional law, to justify limiting relief.

However, the cases and opinions that regard proof of a constitutional violation as *unnecessary* to demonstrating eligibility for asylum also involve a range of harms, and thus the "necessary" and "unnecessary" cases cannot be distinguished so easily based on the severity of harm alleged by the applicants. *Hernandez-Montiel* involved police sexual violence, a serious form of physical abuse that clearly meets the severity threshold of a number of conceptions of persecution.[315] In contrast, the harm suffered by the applicant in *Pavlyk* was less severe. Nonetheless, Judge Cudahy openly critiqued the *Pavlyk* majority's use of the First Amendment in the asylum context, despite the less serious nature of the harm Pavlyk had suffered. Judge Cudahy articulated a view of the relationship of constitutional law to asylum law independent of the severity of harm alleged.[316] Characterizing *Pavklyk* for a moment (based on Judge Cudahy's concurring opinion) and *Hernandez-Montiel* both as "unnecessary"

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this case. That is, the court may have avoided discussing the importance of the right to marry under constitutional law by casting the decision as a matter of statutory interpretation and using constitutional norms only in "phantom" form. *Cf.* Motomura, *supra* note 33, at 564–65 (noting that phantom constitutional norms have produced "much more sympathetic" outcomes for noncitizens than the "interpretation of statutes in light of the expressly applicable constitutional immigration law based on plenary power.").

309. Musabelliu v. Gonzales, 442 F.3d 991, 993 (7th Cir. 2006).

310. Pavlyk v. Gonzales, 469 F.3d 1082, 1085 (7th Cir. 2006).

311. Chen v. Ashcroft, 381 F.3d 221, 223 (3d Cir. 2004).

312. *Musabelliu*, 442 F.3d at 994; *Pavlyk*, 469 F.3d at 1091; *Chen* 381, F.3d at 233.

313. ANKER, *supra* note 19, § 4:1.

314. *See Musabelliu*, 442 F.3d at 996; *see also Pavlyk*, 469 F.3d at 1091; *Chen* 381, F.3d at 233.

315. Hernandez-Montiel v. INS, 225 F.3d 1084, 1099 (9th Cir. 2000).

316. *Pavlyk*, 469 F.3d at 1092.

cases, it is notable that they lack a unifying feature such as severity of harm. As a result, a neat reconciliation of the "necessary" and "unnecessary" cases remains elusive.

IV. OUTLINING A PATH FORWARD

The current practice of using constitutional norms in asylum adjudications is complex and inconsistent. It reveals that constitutional norms play diverse roles in the asylum context. Courts and litigants use constitutional norms for different purposes, sometimes as doctrine to gauge the severity of harm, and other times as guidance on the meaning of key terms such as "political opinion."[317] The most problematic aspect of existing practice is the use of constitutional norms to establish necessary or sufficient conditions for relief.

One risk of using any doctrine out of context is that the visiting doctrine may distort that of the home field,[318] and in the asylum context, this can mean a contraction or expansion of protection that is inconsistent with asylum precedent. Specifically, *Pavlyk*, *Musabelliu*, and *Chen* from the Seventh Circuit illustrate the risks of using constitutional norms to establish a necessary condition for asylum. These cases demonstrate the view that asylum law can never provide broader protection than the Constitution.[319] This view is problematic for two reasons. First, making proof of a constitutional violation a prerequisite to asylum eligibility essentially adds an element to the statutory definition of refugee; thus, not only would an applicant have to satisfy the standard articulated in INA § 101(a)(42), but he or she would *also* need to demonstrate that the harm suffered would amount to a constitutional violation if it had occurred here. Such a result makes this approach problematic as a matter of statutory interpretation.

Second, this approach does not appreciate the distinct purposes of asylum law and constitutional law.[320] Although both areas of law deal in civil and political rights, they do so for very different ends. Asylum law explains who is a refugee and under what circumstances a country is obligated to protect refugees.[321] Unlike international human rights law, asylum law does not regulate

317. I thank Hiroshi Motomura for articulating this distinction.

318. *Cf.* Motomura, *supra* note 33, at 549 ("[S]tatutory interpretation confuses and contorts the law when the interpreting court relies for an extended period on constitutional norms that are doctrinally 'improper' in the sense that they do not control in cases which explicitly involve interpreting the Constitution.").

319. *See* Musabelliu v. Gonzales, 442 F.3d 991, 996 (7th Cir. 2006); *see also Pavlyk*, 469 F.3d at 1092.

320. *Pavlyk*, 469 F.3d at 1092 (Cudahy, J., concurring).

321. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

persecutors and does not provide for their punishment or articulate standards for their behavior.[322] It does not establish a set of rights for individuals to enjoy in their home countries (although it does articulate the rights of refugees in their haven states).[323] Constitutional law, on the other hand, articulates limits on government action or inaction and provides standards for the behavior of government agents.[324] It speaks both to government actors and individual persons in the United States, and it articulates the scope of individual rights and the limits on government infringement on protected activities such as political expression, religious belief, and so forth.[325]

Thus, one can imagine a situation in which a right protected by the U.S. Constitution is not violated, but the harm is egregious enough to amount to "persecution" and is inflicted on account of a protected characteristic, thus satisfying the persecution and nexus requirements. For example, Judge Cudahy considered the situation of an official in a foreign country whose job it is to certify elections, and who might face political persecution for simply doing his or her job.[326] Others in that society might impute a particular political opinion to the official, even though he or she has not exercised a First Amendment right to engage in protected speech.[327] Although the official would not have suffered the equivalent of a constitutional violation, he or she would have suffered persecution on account of a protected characteristic. This example illustrates that using constitutional analysis to justify limiting eligibility for asylum is problematic, substantively and methodologically.

Similarly, using constitutional norms to establish a sufficient condition is problematic because not all constitutional violations are also violations of fundamental human rights. Take, for example, the American constitutional requirement that the government provide notice and an opportunity to be heard before taking an individual's property, including government benefits for the indigent.[328] If another country were to implement a social welfare system that authorized the termination of benefits without notice or an opportunity to be

322. *In re* S-P-, 21 I. & N. Dec. 486, 492–94 (B.I.A. 1996); ANKER, *supra* note 19, § 4:11 ("[R]efugee law, unlike international human rights law, is not concerned with accountability *per se* or changing the behavior of states . . . .").

323. *Cf.* Refugee Convention, *supra* note 17, arts. 12–34 (addressing refugees' juridical status, gainful employment, and administrative matters).

324. *See* CHEMERINSKY, *supra* note 28, § 1.1 (discussing protection of individual liberties as one of the Constitution's purposes).

325. *See id.*

326. Pavlyk v. Gonzales, 469 F.3d 1082, 1092–93 (7th Cir. 2006) (Cudahy, J., concurring).

327. *Id.*

328. *See* Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

heard, few would argue that the law is inherently persecutory or violates fundamental rights, even though such a scheme would be unconstitutional under Due Process Clause precedent.[329]

Despite these concerns with using constitutional law to establish necessary or sufficient conditions for asylum eligibility, courts should not abandon the practice of invoking constitutional norms altogether. Constitutional law offers judges a robust body of law to consider in defining the contours of political and civil rights, the legitimacy of state action, and protected classifications.[330] It has a long history of influencing international human rights law.[331] Moreover, judges are reluctant to interpret and apply international law, [332] and in some circumstances, constitutional law may serve as an appropriate surrogate for such considerations. Finally, excising constitutional norms from asylum law would require judges to artificially limit the widespread influence of constitutional norms in American legal culture.[333]

More specifically, the transparent use of constitutional norms has the potential to enrich courts' analyses of asylum claims. Two cases in particular illustrate how the failure to consider relevant constitutional norms can impoverish the analyses of such claims. In a case involving gay rights, a federal appeals court declined to consider recent developments in constitutional protection for LGBT persons. In *Kimumwe v. Gonzales*, the Eighth Circuit determined that an asylum applicant from Zimbabwe had suffered expulsion from school and arrest by the police not for his "status" of being gay, but for his prohibited sexual conduct with other male students.[334] In the first incident, Kimumwe at age 12 "lured" another boy to have sex with him at his school;

329. Although economic harm can constitute persecution, it has to be "deliberately imposed as a form of punishment and it results in sufficiently severe deprivations." ANKER, *supra* note 19, § 4:28 n.4 (citing Zhang v. Gonzales, 495 F.3d 773, 776–77 (7th Cir. 2007)).

330. For a discussion of the similarity of the analysis of suspect classifications under the Equal Protection Clause and "immutable characteristics" defining particular social groups under asylum law, *see* Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: the Right to Choose "Immutable" Identity Characteristics*, 88 N.Y.U. L. REV. 373, 391–92 (2013).

331. Henkin, *supra* note 26, at 415 ("Americans were prominent among the architects and builders of international human rights, and American constitutionalism was a principal inspiration and model for them.").

332. Farbenblum, *supra* note 17, at 1117 ("But federal judges often perceive that if the meaning of a Convention provision is not clear on its face, then it is indeterminate or not amenable to systematic interpretation.").

333. Motomura, *supra* note 33, at 561 (noting that constitutional norms serve "as the unstated background context that informs our interpretation of statutes and other subconstitutional texts" and that "contemporary constitutional law is a significant element of the legal culture that judges inevitably . . . absorb and rely upon . . . .").

334. Kimumwe v. Gonzales, 431 F.3d 319, 321–22 (8th Cir. 2005).

when the boy complained, the school expelled Kimumwe on account of the school's policy prohibiting all forms of sexual conduct, heterosexual and homosexual.[335] The second incident, years later, arose when Kimumwe and a male classmate became drunk and had sex in college.[336] The other boy complained to the school authorities after the encounter, and the police arrested Kimumwe and detained him for two months without charges.[337] After an ally bribed the police, the authorities released Kimumwe.[338]

The majority acknowledged that Zimbabwe's government had "espoused harsh anti-homosexual rhetoric," but suggested that Kimumwe had not been mistreated for being gay, but for prohibited sexual conduct.[339] Accordingly, the court denied the petition for review.[340] The dissent accepted the status-conduct distinction but emphasized aspects of the record that demonstrated that Kimumwe had been persecuted for his homosexual status.[341] For example, regarding the incident when he was 16 years old, Kimumwe had testified that the police officers had told him that they were arresting him for being gay, not for having sex.[342] The dissent further emphasized the Zimbabwean government's hostility toward homosexuals, including President Robert Mugabe's declaration that homosexuals were "sodomites and perverts" and "had 'no rights at all.'"[343] Thus, the dissent determined that no reasonable factfinder could adopt the IJ's conclusion that Kimumwe had not suffered past persecution "based on his status as an openly gay man."[344]

Constitutional norms are potentially relevant here. Analyzing the legitimacy of punishment for same-sex intimate conduct implicates the holding of *Lawrence*, namely, that criminal penalties for engaging in same-sex intimate relationships, and not merely for one's "status" as a gay or lesbian person, violate the liberty protected by the Due Process Clause.[345] Such punishment also contravenes *Romer v. Evans*, which held that a state constitutional amendment that prohibited anti-discrimination laws protecting gays and lesbians violated

335. *Id.* at 320–21.
336. *Id.* at 321.
337. *Id.*
338. *Id.*
339. *Id.* at 323.
340. *Id.*
341. *Id.* at 324 (Heaney, J., dissenting).
342. *Id.*
343. *Id.*
344. *Id.*
345. Lawrence v. Texas, 539 U.S. 558 (2003).

the Equal Protection Clause.[346] Taken together, *Lawrence* and *Romer* stand for the proposition that "moral disapproval of [LGBT people] cannot be a legitimate governmental interest."[347] This concept is relevant to understanding the harms created by homophobic laws or discriminatory enforcement against LGBT persons.

Neither the majority nor the dissent in *Kimumwe*, however, considered these U.S. constitutional protections for sexual minorities. Instead of invoking these norms as a benchmark for evaluating the importance of the rights at stake, the majority discounted country conditions evidence evincing state-sanctioned discrimination, harassment, and violence against sexual minorities in Zimbabwe and invoked the deference owed to the IJ's factual determinations to conclude that Kimumwe had not suffered persecution on account of his membership in a particular social group.[348] On the Eighth Circuit's reading, *Kimumwe* presents a case where the applicant was punished for engaging in sexual conduct that happened to occur between two males.[349] This reading suggests that Kimumwe would have met the same fate had he engaged in sexual acts with a female, but country conditions evidence dramatically contradicts that view.[350] By failing to weigh the country conditions evidence fully and ignoring the Due Process and Equal Protection norms relevant to the issues, the court concluded that Kimumwe had not suffered persecution on account of a protected characteristic.[351]

A federal appeals court also ignored relevant constitutional principles in *Fatin v. INS*, a much older case involving an Iranian woman's desire not to comply with a law requiring every woman to wear a veil, or *chador*, in public.[352] In *Fatin*, the petitioner, Parastoo Fatin, was an Iranian woman who had lived in the United States since the age of 18.[353] Fatin had entered the United States as a student in 1978 and eventually applied for asylum, claiming that she feared persecution on account of her feminist political opinion and membership in a particular social group consisting of "upper class . . . Iranian women who sup-

346. Romer v. Evans, 517 U.S. 620, 635 (1996) ("A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause . . . .").

347. *See* Hazeldean, *supra* note 39, at 416 (quoting State v. Limon, 122 P.3d 22, 35 (Kan. 2005)).

348. *Kimumwe*, 431 F.3d at 322–23 (majority opinion).

349. *Id.* at 320–21.

350. *See id.* at 322, 324–25.

351. *See id.* at 325.

352. Fatin v. INS, 12 F.3d 1233, 1235 (3d Cir. 1993).

353. *Id.*

ported the Shah of Iran, a group of educated Westernized free-thinking individuals."[354] The BIA determined that Fatin would not be singled out and would, instead, be subject to the laws and regulations generally applicable to women in Iran.[355] As a result, the BIA reasoned, Fatin would not suffer persecution *on account of* a protected characteristic.[356]

On petition for review, the Third Circuit agreed. In evaluating whether Fatin would face persecution in the form of Iranian laws based on repressive social norms, the court inquired whether these regulations would be enforced against Fatin based on her membership in a particular social group.[357] The court determined that Fatin feared persecution on account of her membership in the particular social group of Iranian woman "who find [laws based on repressive social norms] so abhorrent that they 'refuse to conform' . . . " despite the risk of severe punishment.[358] However, the court determined that petitioner, according to her testimony, was not actually a member of this group; that is, she would not find compliance "abhorrent."[359] The court reasoned that, because petitioner would rather conform than risk punishment, not wearing a veil was not such a deeply held belief; therefore, forcing petitioner to wear a veil was not persecution.[360] On this logic, no one would ever qualify for asylum based on a claim that wearing the *chador* itself would amount to persecution, and the court would never have to opine on the severity of that harm. By admitting that she would in fact wear the *chador*, as required, such a woman would reveal an intention to comply with the law and avoid punishment.[361] This, in turn, would prove the woman is someone who does not find wearing the *chador* sufficiently abhorrent for the requirement to amount to persecution.

Absent from the analysis is any reference to the First Amendment's guarantee of freedom of expression, even though potential constitutional analogies abound, and the court alluded to U.S. constitutional standards.[362] For example, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that a school regulation banning students from wearing black armbands to protest America's waging of the Vietnam War violated the First

354. *Id.* at 1237.
355. *Id.*
356. *See id.*
357. *Id.* at 1241.
358. *Id.*
359. *Id.* at 1242.
360. *See id.* at 1241.
361. *Id.* at 1241–42.
362. *Id.* at 1240 ("[P]ersecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or *unconstitutional*.") (emphasis added).

Amendment rights of students.[363] Although the justices disagreed about the nature of students' rights to expression in a state-run school and the level of protection warranted, they accepted the proposition that wearing a black armband was a form of political speech.[364] The majority determined that such speech, even by students at a state-run school, was entitled to the highest levels of protection.[365]

An analogy to *Tinker* or comparable precedent would have highlighted the political nature of the harm in *Fatin*—that a law prohibiting a manner of dress associated with a particular political viewpoint infringes on free political expression. The armband ban at issue in *Tinker* amounted to viewpoint-based discrimination, as the armbands were associated with opposition to the Vietnam War, and the ban did not extend to all political viewpoints.[366] The entire purpose of the ban was to silence dissent due to a vague fear of unrest.[367] Similarly, the requirement of wearing the *chador* amounted to a ban on any viewpoint except one that endorsed Khomeini and women's invisibility in public. Thus, in a sense, the *chador* requirement limited Iranian women's ability to express opposition to repressive mores and also constituted a viewpoint-based restriction.

None of this is to say that the Third Circuit should have applied U.S. constitutional analysis to resolve Fatin's asylum claim. Instead, the court could have considered First Amendment jurisprudence as a point of comparison. The *Fatin* court, however, declined to consider the *chador* law as an infringement on the right to political expression of Iranian women.[368] It mostly avoided directly discussing the law itself and the harm it caused, namely that women were forced to wear clothes that expressed alignment with Khomeini or cooperation with repressive social mores. The court instead focused on the supposed lack of vehemence in the applicant's opposition to the law.[369] The court also ultimately alluded to a practical constraint on its judgment—the specter of millions

363. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–06 (1969).

364. *Id.* at 505.

365. *Id.* at 505–06.

366. *Id.* at 510–11. The Tinker majority noted that students were even permitted to wear political buttons or symbols of Nazism. *Id.* at 510; *see also* Holt v. Hobbs, 135 S.Ct. 853 (2015) (holding that a prison's grooming policy burdened a prisoner's free exercise of religion by preventing him from growing his beard).

367. *Tinker*, 393 U.S. at 510.

368. *See* Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (noting poorly developed administrative record on treatment of women in Iran).

369. *Id.* at 1242 ("[T]he petitioner's testimony in this case simply does not show that for her the requirement of wearing the chador or complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution.").

of women from around the world seeking asylum due to repressive laws in their home countries.[370]

Considering constitutional norms in these cases would have led courts to offer a more complete and vivid assessment of the harms alleged. The court in *Fatin* assumed that being forced to wear the veil *could* constitute persecution,[371] but it did not analyze what fundamental rights such a law would violate. By avoiding that discussion, the court was able to move quickly into an analysis of whether the applicant truly abhorred the law or was merely displeased with it.[372] Similarly, in *Kimumwe*, the court failed to consider U.S. constitutional analogies or analyze the legitimacy of Zimbabwe's treatment of sexual minorities.[373] By focusing on the fiction that the same consequences would have befallen a man for sexual encounters with a woman as for encounters with another man, the court avoided discussing the right at stake. Constitutional law can help frame the concepts of "persecution" and "nexus" to make them less foreign and more familiar to courts and litigants.[374] For all of these reasons, courts should continue to use constitutional norms in asylum adjudications, but with greater clarity about the implications of the practice.

V. CONCLUSION

This Article exposes for the first time the federal courts' surprising yet sensible practice of using of U.S. constitutional norms in asylum adjudications. It finds that federal courts treat foreign governments' violations of U.S. constitutional standards inconsistently when evaluating the merits of asylum claims. In some cases, these violations are sufficient for granting asylum; in other cases, they are insufficient. In some cases, these violations are necessary for asylum to be granted; in other cases, they are unnecessary. Ultimately, through this

370. *See id.* at 1240 ("If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country . . . .").

371. *Id.* at 1242 ("[W]e will assume . . . that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs.").

372. *Id.*

373. Kimumwe v. Gonzales, 431 F.3d 319, 322 (8th Cir. 2005).

374. *See* Fatma Marouf, *The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm*, 22 COLUM. J. GENDER & L. 81, 161 (2011). The question remains whether constitutional law displaces important international human rights norms, and if so, whether such displacement supports more carefully circumscribed use of constitutional norms in this context. A full discussion of the normative justification for using constitutional law in asylum cases is beyond the scope of this Article, but it is one of the current projects of the Author.

discussion, this Article reveals the "dual role"[375] of constitutional norms in asylum cases. These norms both serve as doctrine to assist courts in gauging whether the harm alleged is sufficiently severe to amount to "persecution," and help courts define key terms such as "political opinion."[376] In so doing, this Article contributes to a discussion of the diverse roles of constitutional law in asylum law and the relationship of the U.S. Constitution to international human rights law more generally. The latter has implications for the position of this country in the world.

375. E-mail from Hiroshi Motomura, UCLA School of Law, to author (July 3, 2016, 18:14 EST) (on file with author).

376. I thank Hiroshi Motomura for articulating this point.

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