



## NOTE

**Refugee Resettlement Federalism**

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**Abstract.** The Refugee Act of 1980 provides state and local officials with a robust role in determining where refugees are resettled. The Act states, for example, that policies and strategies for the placement and resettlement of refugees in the United States must be developed in consultation with representatives of state and local governments. Likewise, the Act requires federal actors to consult regularly with state and local governments about the intended distribution of refugees prior to their placement within the state. Involving state and local officials in the resettlement process makes sense. After all, they are best situated to understand the local factors and conditions that greatly affect the lives of refugees. This Note demonstrates, however, that despite Congress's intent, federal actors monopolize refugee placement decisions. And because states and localities have little input in the process, they are often woefully unprepared to absorb refugees into their communities. This benefits neither the refugees nor the communities in which they are placed.

This Note proposes giving local communities a more meaningful role in the refugee placement process: a right to refuse refugees. To persuade local communities to resettle refugees, the federal government would purchase the cooperation of those communities with federal funds under Congress's spending power. Much like it does in other cooperative federalism programs, the federal government would bargain with individual localities. This Note demonstrates that such bargaining would match refugee groups with communities ready—and resourced—to welcome them. Moreover, it ensures that localities have sufficient funds to provide for the refugees' needs.

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**Table of Contents**

Introduction..... 1199

I. Refugee Resettlement in the United States..... 1203

    A. How Refugee Resettlement Works..... 1203

    B. History of the Refugee Act of 1980..... 1208

II. Resettlement Mismatch..... 1212

    A. Fort Wayne, Indiana..... 1213

    B. Clarkston, Georgia..... 1215

    C. Manchester, New Hampshire..... 1217

III. A Functional Case for Refugee Resettlement Federalism ..... 1219

    A. The Mechanics of Federal-Locality Bargaining ..... 1219

    B. The Functional Benefits of Refugee Resettlement Federalism ..... 1223

        1. Ensuring better “matching” ..... 1223

        2. Correcting information asymmetries..... 1226

        3. Correcting funding mismatches..... 1229

        4. Rediscovering political accountability..... 1230

    C. Confronting Concerns..... 1232

        1. Holdout costs..... 1232

        2. Ideological considerations..... 1233

Conclusion..... 1235

## Introduction

Within weeks of the Islamic State's attack on Paris in November 2015 and the discovery that one of the attackers carried a fake Syrian passport, twenty-eight American governors announced their opposition to resettling Syrian refugees within their states.<sup>1</sup> But despite the states' spirited opposition, courts and commentators have universally agreed that states have no authority to block resettlement of Syrian refugees within their borders.<sup>2</sup> After all, allowing states to do so would violate the two most longstanding and firmly rooted principles of immigration law: the exclusive power of the federal government to regulate immigration and the equally canonical corollary that states may not meddle in immigration policy.<sup>3</sup> These principles continue to be invoked, almost reflexively, despite being attacked over the years for their interpretive fidelity,<sup>4</sup> descriptive reality,<sup>5</sup> and functional desirability.<sup>6</sup>

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1. Polly Mosendz, *Map: Every State Accepting and Refusing Syrian Refugees*, NEWSWEEK (Nov. 16, 2015, 6:19 PM), <http://www.newsweek.com/where-every-state-stands-accepting-or-refusing-syrian-refugees-395050>.
  2. *See, e.g.*, *Alabama v. United States*, No. 2:16-cv-00029-JEO, 2016 WL 4070146, at \*4, \*7 (N.D. Ala. July 29, 2016) (holding that the Refugee Act's consultation provisions do not provide a private right of action to the states), *appeal docketed*, No. 16-15778 (11th Cir. Aug. 31, 2016); *Tex. Health & Human Servs. Comm'n v. United States*, 166 F. Supp. 3d 706, 713 (N.D. Tex. 2016) (finding the same), *appeal docketed*, No. 16-11241 (5th Cir. Aug. 13, 2016); Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Law Is Clear: States Cannot Reject Syrian Refugees*, WASH. POST (Nov. 19, 2015), <http://wpo.st/VWwF2>; Steve Vladeck, *Three Thoughts on Refugee Resettlement Federalism*, LAWFARE (Nov. 17, 2015, 12:07 AM), <https://www.lawfareblog.com/three-thoughts-refugee-resettlement-federalism>.
  3. *See* Gulasekaram & Ramakrishnan, *supra* note 2; Vladeck, *supra* note 2; *see also* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Fong Yue Ting v. United States*, 149 U.S. 698, 722 (1893) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one." (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889))); *Chinese Exclusion Case*, 130 U.S. at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.").
  4. *See* STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 180-83, 189-90 (1987) (arguing that the federal exclusivity principle is not consistent with early practice). *But see* Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532-58 (2001) (arguing that the authority to regulate immigration has always been exclusively federal).
  5. *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 576 (2008) ("The federal exclusivity principle . . . does not map well onto reality on the ground.").

Yet if one looks closely, there are actually many good reasons to give localities a say in determining where refugees are ultimately resettled. Local officials, after all, are in the best position to understand the local factors and conditions that greatly affect the lives of refugees, such as their own capacity to absorb refugees and the availability of employment opportunities, affordable housing, and other resources.

For precisely these reasons, Congress intended for state and local officials to have a robust role in the refugee placement process. The Refugee Act of 1980,<sup>7</sup> as amended, provides that “local voluntary agency activities should be conducted in close cooperation and advance consultation with State and local governments.”<sup>8</sup> It requires the federal government to “consult regularly (not less often than quarterly) with State and local governments and private nonprofit voluntary agencies concerning the sponsorship process and the intended distribution of refugees among the States and localities before their placement in those States and localities.”<sup>9</sup> The Act also commands that the federal government, “to the maximum extent possible, take into account recommendations of the State” regarding “the location of placement of refugees within a State.”<sup>10</sup>

But despite Congress’s clear intentions, the federal government continues to monopolize refugee placement decisions with little to no input from local officials. In a 2012 investigatory report, the U.S. Government Accountability Office (GAO) revealed that despite the mandate to consult with state and local officials, most federal actors charged with placing refugees do not do so.<sup>11</sup>

Unsurprisingly, then, refugees are often placed in communities that are shockingly unprepared to receive them, and so they fail to receive the critical

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6. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59, 67-84 (arguing that Congress should “delegate greater responsibility to the states . . . in the areas of employment-based admissions, immigration enforcement, and employer sanctions”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627-28 (1997) (arguing that delegating immigration responsibilities to the states may benefit aliens as a group).

7. Pub L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

8. 8 U.S.C. § 1522(a)(1)(B)(iii) (2015).

9. *Id.* § 1522(a)(2)(A).

10. *Id.* § 1522(a)(2)(D). Notably, while federal law requires federal actors to consult with state and local officials, Congress subsequently made clear that the Refugee Act’s consultation requirement was “not intended to give States and localities any veto power over refugee placement decisions, but rather to ensure their input into the process and to improve their resettlement planning capacity.” H.R. REP. NO. 99-132, pt. 1, at 19 (1985).

11. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-729, REFUGEE RESETTLEMENT: GREATER CONSULTATION WITH COMMUNITY STAKEHOLDERS COULD STRENGTHEN PROGRAM 12-13 (2012).

services they need.<sup>12</sup> As one refugee advocate described, “I think it’s unfair for the government to put a ton of refugees in a city and not equip [the city] with the resources to handle them.”<sup>13</sup> A scathing report by the Georgetown University Law Center’s Human Rights Institute concluded:

[T]he United States is opening its gates to refugees and simply forgetting about them after they have arrived. In the process, the United States is in danger of failing to meet its legal obligations to extend protection to the most vulnerable refugees, promote their long-term self-sufficiency, and support their integration.<sup>14</sup>

And because the arrival of refugees often strains local services in communities unprepared to receive them, the current national-centric system tends to exacerbate hostilities between refugees and local communities.<sup>15</sup>

This Note argues that giving local governments a more meaningful role in the refugee placement process—a right to refuse refugees—will better match refugee groups with communities capable and willing to welcome them. Scholars across the political spectrum have made the case for local involvement in traditional immigration policy—known as immigration federalism.<sup>16</sup> Little ink, however, has been spilled on the desirability of local involvement in refugee policy. This Note helps fill that gap.

A system of “refugee resettlement federalism” would work like this: to persuade localities to accept a group of refugees, the federal government must encourage them to do so through federal grant money.<sup>17</sup> To ensure localities use the money to provide needed services to the refugees, the federal government may impose conditions on the grant. Under its spending power, the federal government has broad leeway to do so. It may require localities to

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12. See *infra* Part II (describing three case studies that demonstrate this phenomenon).

13. S. COMM. ON FOREIGN RELATIONS, 111TH CONG., ABANDONED UPON ARRIVAL: IMPLICATIONS FOR REFUGEES AND LOCAL COMMUNITIES BURDENED BY A U.S. RESETTLEMENT SYSTEM THAT IS NOT WORKING 13 (Comm. Print 2010) [hereinafter ABANDONED UPON ARRIVAL].

14. HUMAN RIGHTS INST., GEORGETOWN UNIV. LAW CTR., REFUGEE CRISIS IN AMERICA: IRAQIS AND THEIR RESETTLEMENT EXPERIENCE 1 (2009).

15. See ABANDONED UPON ARRIVAL, *supra* note 13, at 7-8 (explaining that the influx of refugees in Fort Wayne, Indiana created—in the words of interviewed locals—a “potentially explosive situation”).

16. See Rodríguez, *supra* note 5, at 571 (“[I]mmigration regulation should be included in the list of quintessentially state interests . . . because managing immigrant movement is itself a state interest.”); Schuck, *supra* note 6, at 59 (arguing “for a more robust role for the states in certain areas of immigration policy”); Spiro, *supra* note 6, at 1628 (arguing that devolving regulation of immigration issues to the states may “work to the net benefit of aliens as a group”).

17. For a general discussion of federal-state bargaining and federalism implications, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 855-91 (1998).

provide certain services to the refugees, such as financial assistance, job training, housing assistance, health screenings, mental health services, and “English as a second language” (ESL) instruction in local schools. It may also require localities to comply with antidiscrimination requirements. Individual localities will then evaluate the costs and benefits of accepting refugees to determine whether the bargain is worth it. Because localities will subjectively value their right to refuse differently depending on locality-specific considerations and the characteristics of the refugees in question, different localities will require different amounts of money from the federal government to relinquish their right to refuse. The federal government will then choose the best offer—the locality that demands the least money. The locality that demands the least money is the locality that subjectively values its right to refuse the least. Such a system will tend to resettle refugees in localities that are willing to welcome them.

This Note argues that such a system is functionally desirable—in other words, that it is good policy<sup>18</sup>—for four reasons. First, unlike the current national-centric system, refugee resettlement federalism matches refugee groups with communities eager and able to welcome them. This benefits refugees as well as the localities in which they settle: refugees are more likely to receive the services they need, and localities are less likely to have to divert resources to provide for refugees they are ill equipped to handle. Second, refugee resettlement federalism ensures that the federal government provides localities with much-needed information about refugees before settlement. This is important because it helps localities better prepare their social services infrastructure for increased demand. More significantly, it helps localities tailor their services to the unique needs of the refugees. Third, refugee resettlement federalism ensures that localities have sufficient funds to provide for the refugees. Rather than the reactive one-size-fits-all funding under the current system, funding will now proactively address the refugees’ needs. Fourth, refugee resettlement federalism ensures that the federal government is accountable for the number of refugees it accepts. Under the current system, the federal government reaps the political benefits of accepting refugees without fully internalizing the costs, which are passed on to local governments. This creates political accountability problems not unlike those

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18. As such, this Note should be of interest even to the staunch nationalist. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890-94 (2014) (explaining how federalism can serve as a means to achieve national goals and objectives).

described by Justice O'Connor in *New York v. United States*, the Supreme Court's seminal anticommandeering case.<sup>19</sup>

This Note proceeds in three Parts. Part I explains the current refugee resettlement framework in the United States. Through an analysis of the Refugee Act of 1980 and its subsequent legislative history, this Note reveals that Congress envisioned a robust role for state and local officials in determining where refugees are resettled. Using three case studies, Part II illustrates that despite Congress's express intent, federal actors largely bypass state and local officials when deciding where refugees will be resettled. The case studies illustrate how the current system benefits neither the refugees nor the communities in which they are resettled.

Part III makes the functional case for a system of refugee resettlement federalism. Part III.A explains that our system of government is riddled with similar bargaining arrangements. Indeed, refugee resettlement federalism is not different in kind from other cooperative programs between the federal and nonfederal governments—such as the Clean Air Act, Medicaid, and the Affordable Care Act. Part III.B lays out the functional benefits of refugee resettlement federalism. And finally, Part III.C addresses potential concerns with this proposal. In short, it addresses concerns that refugee resettlement federalism will be plagued by holdout costs and will permit states to block refugees on the basis of ideology.

## **I. Refugee Resettlement in the United States**

### **A. How Refugee Resettlement Works**

The Refugee Act of 1980 authorizes refugees' admission into and resettlement in the United States.<sup>20</sup> The purpose of the Act is twofold: first, "to provide a permanent and systematic procedure for the admission . . . of refugees of special humanitarian concern to the United States" and second, "to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."<sup>21</sup> Under current law, a refugee is a person who "is unable or unwilling to return to" his or her home country "because of persecution or a well-founded fear of persecution on account of

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19. 505 U.S. 144, 168-69 (1992) (explaining that federal government commandeering of state regulatory apparatuses serves to "diminish[]" the political "accountability of both state and federal officials").

20. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

21. *Id.* § 101(b).

race, religion, nationality, membership in a particular social group, or political opinion.”<sup>22</sup>

Each year, the President sets the annual number of refugee admissions after consulting with Congress.<sup>23</sup> These admissions are allocated across the regions of the world<sup>24</sup> and change from year to year.<sup>25</sup> The President may also leave some admission slots as an unallocated reserve for additional refugee admissions from any region.<sup>26</sup> As an example, for 2016, President Obama proposed a worldwide refugee ceiling of 85,000, with 79,000 admissions allocated among regions of the world: 25,000 slots were allocated to Africa, 13,000 to East Asia, 4000 to Europe and Central Asia, 3000 to Latin America and the Caribbean, and 34,000 to the Near East and South Asia.<sup>27</sup> President Obama proposed an additional 6000 slots for an unallocated reserve.<sup>28</sup>

U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security, is responsible for adjudicating refugee cases.<sup>29</sup> Based on overseas prescreening interviews with prospective refugees, USCIS employees, known as the “Refugee Corps,” determine whether an individual qualifies for refugee status and whether the individual is otherwise

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22. 8 U.S.C. § 1101(a)(42) (2015). Note that a person who meets the definition of a refugee but applies for this status from *within the United States* is an “asylee.” See *id.* § 1158(a)(1). Asylees are processed differently from those who enter the country with refugee status; they are not the subject of this Note. For procedures governing the admission of asylees, see *id.* § 1158.

23. *Id.* § 1157(b).

24. The regions are Africa, East Asia, Europe and Central Asia, Latin America and the Caribbean, and the Near East and South Asia. See Presidential Determination on Refugee Admissions for Fiscal Year 2016, 80 Fed. Reg. 62,433 (Oct. 16, 2015).

25. See ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 3 tbl.1 (2015) (listing year-over-year variation in regional refugee admissions allocations from 2004 to 2015).

26. See, e.g., *id.* at 4.

27. U.S. DEP’T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016, at 5 tbl.1 (2015), <http://www.state.gov/documents/organization/247982.pdf>. President Obama also announced that at least 10,000 of the 85,000 refugee slots will be given to Syrians. See Press Release, White House, Press Briefing by Press Secretary Josh Earnest (Sept. 10, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/11/press-briefing-press-secretary-josh-earnest-91015>.

28. U.S. DEP’T OF STATE ET AL., *supra* note 27, at 5 tbl.1.

29. See *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/refugees> (last updated May 25, 2016). The Immigration and Nationality Act (INA) grants the Attorney General the authority to admit, at his discretion, any refugee who is not firmly resettled in a third country, is determined to be of special humanitarian concern, and is admissible to the United States. 8 U.S.C. § 1157(c)(1) (2015). “The authority to determine eligibility for refugee status has been delegated to USCIS.” U.S. DEP’T OF STATE ET AL., *supra* note 27, at 15.

admissible under immigration law.<sup>30</sup> For example, to be admissible, an applicant cannot be “firmly resettled” in a third country and must not be barred from admission on “criminal, security, [or] public health grounds.”<sup>31</sup>

Once a refugee is accepted by the USCIS, that refugee is assigned to one of nine voluntary nonprofit resettlement agencies known as the “Volags” (short for “voluntary agencies”).<sup>32</sup> The Refugee Act of 1980 authorizes the Director of the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (DHHS) to fund cooperative agreements with the Volags to provide initial resettlement services to refugees.<sup>33</sup> Today, the Volags are charged with determining where refugees will live and providing initial resettlement assistance—“including housing, furnishings, food, and clothing”—to refugees for at least thirty days.<sup>34</sup> The Volags “maintain a nationwide network of 312 affiliated offices in 185 locations to provide [these] services.”<sup>35</sup>

The Volags vary in organization, capability, and geographical reach. Thus, decisions about which of the voluntary agencies will resettle particular refugees are quite important. Those decisions are made at the Refugee Processing Center in Arlington, Virginia and are based on refugee biographical information such as “family size, nationality, ethnicity, religion, and medical conditions.”<sup>36</sup>

While the Department of State’s Bureau of Population, Refugees, and Migration (PRM) instructs the Volags to “[d]escribe the date, content, and results of consultative discussion undertaken by the affiliate with state and local officials in preparing” its proposal to resettle refugees in a certain locality,<sup>37</sup> the PRM has provided the Volags with little guidance regarding its

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30. See U.S. DEP’T OF STATE ET AL., *supra* note 27, at 15-16.

31. *Id.* at 16.

32. *Id.* at 19. The nine Volags are the Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, U.S. Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, and World Relief Corporation. See *Voluntary Agencies*, OFF. REFUGEE RESETTLEMENT (July 12, 2012), <http://www.acf.hhs.gov/programs/orr/resource/voluntary-agencies>.

33. 8 U.S.C. §§ 1521(a), 1522(b)(1)(A).

34. See U.S. DEP’T OF STATE ET AL., *supra* note 27, at 19.

35. *Id.*

36. ANDORRA BRUNO, CONG. RESEARCH SERV., R41570, U.S. REFUGEE RESETTLEMENT ASSISTANCE 7-8 (2011) (quoting HUMAN RIGHTS INST., *supra* note 14, at 9).

37. See ABANDONED UPON ARRIVAL, *supra* note 13, at 4 (quoting Bureau of Population, Refugees & Migration, U.S. Dep’t of State, FY 2010 Funding Opportunity Announcement for Reception and Placement Program: Affiliate/Sub-Office Abstract 2 (May 21, 2009)).

expectations for the content of these consultations.<sup>38</sup> As such, one governmental report found that “[m]ost local voluntary agencies” it studied had not implemented measures to ensure that local stakeholders have an “opportunity to provide input on the number and types of refugees that can be served.”<sup>39</sup>

With respect to placement, the ORR administers a set of refugee resettlement assistance programs and is required by law to “consult regularly . . . with State and local governments and private nonprofit voluntary agencies concerning . . . the intended distribution of refugees among the States and localities.”<sup>40</sup> In addition, the ORR must “develop and implement, in consultation with representatives of voluntary agencies and State and local governments, policies and strategies for the placement and resettlement of refugees within the United States”<sup>41</sup> and “provide for a mechanism whereby representatives of local affiliates of voluntary agencies regularly . . . meet with representatives of State and local governments to plan and coordinate in advance of their arrival the appropriate placement of refugees among the various States and localities.”<sup>42</sup>

The ORR implemented these requirements by issuing regulations requiring states that receive refugee assistance funds from the federal government to “assure that meetings are convened, not less often than quarterly, whereby representatives of local resettlement agencies, local community service agencies, and other agencies that serve refugees meet with representatives of State and local governments to plan and coordinate the appropriate placement of refugees in advance of the refugees’ arrival.”<sup>43</sup> As such, every state that applies for federal refugee resettlement assistance (as discussed below) must submit a “state plan” that includes an assurance that state officials will meet this requirement.<sup>44</sup> Thus, while the Volags ultimately decide where refugees will be

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38. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 11, at 13.

39. *Id.*

40. 8 U.S.C. § 1522(a)(2)(A) (2015).

41. *Id.* § 1522(a)(2)(B).

42. *Id.* § 1522(a)(2)(C)(ii).

43. 45 C.F.R. § 400.5(h) (2016).

44. For example, California’s state plan includes assurance that the California Department of Social Services, the state agency responsible for administering California’s refugee assistance program, “will convene meetings no less often than quarterly with representatives of: 1) local affiliates of [resettlement agencies]; 2) local community service agencies and other agencies that serve refugees; and 3) state and local governments to plan and coordinate the appropriate placement of refugees in advance of their arrival.” CAL. DEP’T OF SOC. SERVS., CALIFORNIA STATE PLAN FOR REFUGEE ASSISTANCE AND SERVICES: FEDERAL FISCAL YEAR 2014/15, at 18 (2014), [http://www.cdss.ca.gov/refugeeprogram/res/pdf/StatePlans/2015/Approved\\_State\\_Plan\\_California\\_2015.pdf](http://www.cdss.ca.gov/refugeeprogram/res/pdf/StatePlans/2015/Approved_State_Plan_California_2015.pdf). Similarly, Arizona’s state plan includes the assurance that “it will convene meetings not less often than quarterly with representatives of: 1) local resettlement agencies (RAs), 2) local community service agencies, and other agencies that serve refugees, and 3) state

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resettled, at least on paper, states and localities are supposed to have input both at the national level (in consultations with the ORR and national Volags) and at the local level (in consultation with the local affiliates of the national Volags).

Once refugees are resettled, the ORR is responsible for providing them with assistance.<sup>45</sup> The INA authorizes the ORR to provide cash and medical assistance, social services projects, and targeted assistance for refugees.<sup>46</sup> The ORR has established two different types of programs to provide this assistance: (1) state-administered programs and (2) Wilson-Fish programs.<sup>47</sup>

The majority of eligible refugees receive their resettlement assistance through state-administered programs.<sup>48</sup> Under such programs, the “ORR reimburses states for the full costs of their refugee cash assistance and . . . medical assistance programs.”<sup>49</sup> To receive payment, states must submit a “state plan” for refugee assistance that meets the various requirements of ORR regulations and is approved by the ORR.<sup>50</sup> The state plan may be publicly administered (as it is in thirty-three states) or administered through a public-private partnership between the state and local resettlement agencies (as it is in five states).<sup>51</sup>

Alternatively, some refugees receive assistance through a “Wilson-Fish program,” named for the legislation’s sponsors, under which federal funding for financial assistance, medical assistance, employment services, and other social services is administered directly by local resettlement agencies funded by the federal government.<sup>52</sup> Wilson-Fish programs “emphasize[] early employment and economic self-sufficiency” by offering incentive bonuses for early employment.<sup>53</sup> In addition, these programs serve to replace state

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and local governments, to plan and coordinate the appropriate placement of refugees in advance of their arrival.” ARIZ. DEP’T OF ECON. SEC., ARIZONA STATE PLAN FOR REFUGEE RESETTLEMENT 3 (2015), [https://des.az.gov/sites/default/files/media/Refugee\\_Resettlement\\_Program\\_State\\_Plan\\_2016.pdf](https://des.az.gov/sites/default/files/media/Refugee_Resettlement_Program_State_Plan_2016.pdf).

45. See 8 U.S.C. § 1521.

46. *Id.* § 1522(e)(1)-(2).

47. See U.S. DEP’T OF STATE ET AL., *supra* note 27, at 20-21.

48. BRUNO, *supra* note 36, at 12.

49. *Id.*

50. For example, ORR regulations require the state plan to “[d]escribe how the State will coordinate cash and medical assistance with support services” and “how the State will ensure that language training and employment services are made available to refugees receiving cash assistance.” 45 C.F.R. § 400.5(b)-(c) (2016).

51. See *id.* § 400.56; U.S. DEP’T OF STATE ET AL., *supra* note 27, at 20.

52. See BRUNO, *supra* note 36, at 13.

53. See U.S. DEP’T OF STATE ET AL., *supra* note 27, at 20.

programs when the state government declines to participate in ORR-funded refugee assistance programs (as is the case in thirteen states).<sup>54</sup>

#### B. History of the Refugee Act of 1980

It is abundantly clear from the text and history of the Refugee Act of 1980 that Congress envisioned a robust role for states and localities in the refugee placement process. The initial Act directed the federal government to “consult regularly with State and local governments and private nonprofit voluntary agencies concerning the sponsorship process and the intended distribution of refugees among the States and localities.”<sup>55</sup> It soon became clear, however, that the Act’s consultation requirements were not enough.

Less than a year after the Act was passed, state and local officials began complaining that the influx of refugees in certain localities was creating significant problems. For example, the mayor of Rockville, Maryland, William Hanna, testified on behalf of the U.S. Conference of Mayors in a joint hearing before the House Subcommittee on Immigration, Refugees, and International Law and the Senate Subcommittee on Immigration and Refugee Policy that “[w]hile many of the problems relating to resettlement are felt primarily at the local level, city officials virtually have no voice regarding the placement of refugees in their communities.”<sup>56</sup> This lack of input resulted, he explained, in “a severe shortage of low-income rental units, overburdened social service and health systems, and a limited job market” in the D.C. metropolitan area.<sup>57</sup> In the same hearing, a county commissioner of Lancaster County, Pennsylvania testified on behalf of the National Association of Counties that

[d]espite [the] overconcentration [of refugees in certain communities], incoming refugees continue to be resettled in large numbers into already impacted counties, without regard to their capacities to absorb additional numbers. This is [sic] not only makes it more difficult for refugees to become self-sufficient, but also often leads to community tensions and resentment toward refugees.<sup>58</sup>

Members of the House Subcommittee on Immigration, Refugees, and International Law saw first-hand how ill-advised refugee placement decisions

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54. *Id.*

55. Refugee Act of 1980, Pub. L. No. 96-212, § 412(a)(2), 94 Stat. 102, 111 (codified as amended at 8 U.S.C. § 1522(a)(2) (2015)).

56. *Final Report of the Select Commission on Immigration and Refugee Policy: Joint Hearings Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary and Subcomm. on Immigration, Refugees & Int’l Law of the H. Comm. on the Judiciary*, 97th Cong. 121, 125-26 (1981) [hereinafter *1981 Joint Hearings*] (statement of William E. Hanna, Jr., Mayor of Rockville, Maryland).

57. *Id.* at 121.

58. *Id.* at 128, 130 (statement of James E. Huber, Chairman, Board of Commissioners of Lancaster County, Pennsylvania).

could strain local communities. In 1981, members of the Subcommittee “undertook a fact-finding trip to California to review refugee resettlement activities” in San Diego, Orange, and Los Angeles Counties.<sup>59</sup> The Subcommittee reported significant problems with housing, education, and health services. Housing shortages “forced many refugee families to ‘double or triple up.’”<sup>60</sup> In one particularly egregious case, sixty-two refugees lived in *one* housing unit—including thirty-six in the garage.<sup>61</sup> In addition, the schools were burdened by an influx of refugee students who knew little or no English. Resources and funds normally allocated to assist low-income minority students were diverted to assist refugee students, resulting in tension between refugee and minority students.<sup>62</sup> Local health officials found that the counties were utterly unprepared to treat the variety of physical and mental health problems that refugees brought with them, which strained local health resources.<sup>63</sup> In addition, refugees had difficulty finding employment because of language barriers.<sup>64</sup> This difficulty was exacerbated by the fact that ESL classes in Los Angeles and Orange Counties had waitlists of over a year due to the sheer number of refugees seeking assistance.<sup>65</sup>

While secondary migration contributed to some of these issues, bad placement strategies—formulated without consultation with state and local officials—were the root of the problem. Indeed, of the 59,000 Indochinese refugees expected to settle in California in 1981, only 1000 to 2000 were migrants from other parts of the United States.<sup>66</sup> The Subcommittee found that the primary cause of the refugee placement problem was “maldistribution” by

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59. H.R. REP. NO. 97-541, at 4 (1982) (describing the ultimate product of that factfinding trip); SUBCOMM. ON IMMIGRATION, REFUGEES & INT’L LAW OF THE COMM. ON THE JUDICIARY, 97TH CONG., IMMIGRATION AND REFUGEE ISSUES IN SOUTHERN CALIFORNIA: AN INVESTIGATIVE TRIP 23 (Comm. Print 1981) [hereinafter REFUGEE ISSUES IN CALIFORNIA]. California had borne the brunt of refugee resettlement during the late 1970s, when it absorbed 180,000 to 200,000 refugees from Indochina. See REFUGEE ISSUES IN CALIFORNIA, *supra*, at 26. Officials estimated that there were three times as many refugees in California as in the next highest state, Texas, and that one-third of all Indochinese refugees in the United States were resettled in California. *Id.* California estimated that 57,000 Indochinese refugees would be settled in California during 1981 alone. *Id.* For a sense of scale, President Obama proposed that the United States accept 10,000 Syrian refugees for fiscal year 2016. See Press Release, *supra* note 27.

60. REFUGEE ISSUES IN CALIFORNIA, *supra* note 59, at 30.

61. *Id.*

62. See *id.* at 31.

63. *Id.* at 31-32.

64. *Id.* at 33.

65. *Id.*

66. See *id.* at 26.

the Volags.<sup>67</sup> It lambasted the resettlement process in its report, noting that “states and localities are merely notified ‘after the fact’ that a certain number of refugees have been or will be resettled in their jurisdictions. Voluntary agencies continue to exercise *complete control over resettlement destinations, with little or no [state and local] input.*”<sup>68</sup> It noted that the consultation requirement of the Refugee Act had “largely been ignored” and recommended that “states and localities . . . play an active role in resettlement decisionmaking ‘before the fact.’”<sup>69</sup>

State and local officials echoed the Subcommittee’s findings. Ronald Gibbs, the Associate Director of the National Association of Counties, declared that “[t]he [resettlement] process is left to the voluntary agencies in New York to sit down through their statewide network to resettle refugees within the United States” and that “local elected officials, the mayors and county people, [were not] consulted” when the voluntary agencies planned to resettle refugees in their localities.<sup>70</sup> Hanna testified that while the Refugee Act requires federal consultation with states and localities, “[s]uch consultation . . . is generally not taking place.”<sup>71</sup> Representing the National Governors’ Association, Governor Robert Graham of Florida complained that “refugees are resettled by private groups, often without proper consultation with state agencies. . . . Greater cooperation and consultation between the states, the federal government, and the voluntary agencies is essential.”<sup>72</sup>

Congress responded by amending the Act “to require greater coordination between the Federal government, state and local governments, and voluntary agencies in the placement of refugees.”<sup>73</sup> The House Committee Report noted that “[d]espite the specific requirements in the Refugee Act of 1980 that the U.S. Coordinator for Refugee Affairs and the Director of ORR ‘consult regularly with states, localities, and private nonprofit voluntary agencies . . .’, much remains to be accomplished in this area.”<sup>74</sup>

The 1982 amendment imposed two new requirements. First, it “specifically charge[d]” the ORR “with the statutory responsibility” for drafting and

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67. See H.R. REP. NO. 97-541, at 11 (1982) (noting the failure of the ORR to develop a refugee placement policy and criticizing it for allocating refugees primarily on the basis of reunification rather than local capacity considerations).

68. REFUGEE ISSUES IN CALIFORNIA, *supra* note 59, at 38 (emphasis added).

69. *Id.* at 37-38.

70. 1981 *Joint Hearings*, *supra* note 56, at 142-43 (statement of Ronald Gibbs, Associate Director, National Association of Counties).

71. *Id.* at 125 (statement of William E. Hanna, Jr., Mayor of Rockville, Maryland).

72. *Id.* at 119 (statement of D. Robert Graham, Governor of Florida).

73. S. REP. NO. 97-638, at 1 (1982).

74. H.R. REP. NO. 97-541, at 12 (1982).

implementing a refugee placement policy “in close consultation with state and local governments and with the voluntary agencies.”<sup>75</sup> And second, noting that “the Committee remains disturbed that the consultation requirements of the 1980 Act have not been effectively implemented,” Congress also amended the Act to “requir[e] the Director of ORR to establish a mechanism to enable State and local government officials to meet regularly with local voluntary agency representatives on the placement of refugees prior to their arrival in the U.S.”<sup>76</sup> Congress noted that while the amendment suggested “quarterly meetings,” it “expect[ed] that such meetings be held more frequently, as needed,” and that the “meetings [be] meaningful and productive and provide an opportunity for appropriate input on the part of State and local officials and a free exchange of views between these officials and local voluntary agency representatives.”<sup>77</sup>

Because state and local governments continued to “complain[] that their interests and concerns [were] not adequately considered by Volags when . . . allocations [were] made,”<sup>78</sup> Congress amended the Act yet again in 1986 to require the Director of the ORR to consider several locality-specific factors in developing and implementing a placement policy.<sup>79</sup> The factors are: (1) “the proportion of refugees and comparable entrants in the population in the area”; (2) “the availability of employment opportunities, affordable housing, and public and private resources (including educational, health care, and mental health services) for refugees in the area”; (3) “the likelihood of refugees placed in the area becoming self-sufficient and free from long-term dependence on public assistance”; and (4) “the secondary migration of refugees to and from the area that is likely to occur.”<sup>80</sup>

In addition, Congress found that while the ORR conducted four regional consultations in 1984 to meet the consultation mandate of the 1982 amendments, no consultations had been conducted in the first four months of 1985.<sup>81</sup> As such, the 1986 amendments strengthened the consultation requirement by directing the State Department and the ORR to consult “not

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75. *Id.* at 11; *see also* Refugee Assistance Amendments of 1982, Pub. L. No. 97-363, § 4(a), 96 Stat. 1734, 1735 (codified as amended at 8 U.S.C. § 1522(a)(2) (2015)) (requiring the Director of the ORR to “develop and implement, in consultation with representatives of voluntary agencies and State and local governments, policies and strategies for the placement and resettlement of refugees”).

76. H.R. REP. NO. 97-541, at 12.

77. *Id.*

78. *See* H.R. REP. NO. 99-132, pt. 1, at 18 (1985).

79. Refugee Assistance Extension Act of 1986, Pub. L. No. 99-605, § 412(a)(2), 100 Stat. 3449, 3450 (codified as amended at 8 U.S.C. § 1522(a)(2)).

80. 8 U.S.C. § 1522(a)(2)(C)(iii).

81. H.R. REP. NO. 99-132, pt. 1, at 18.

less often than quarterly” with state and local governments and the Volags on the refugee sponsorship and placement process.<sup>82</sup>

Notably, Congress “emphasize[d] that these requirements are not intended to give States and localities any veto power over refugee placement decisions, but rather to ensure their input into the process and to improve their resettlement planning capacity.”<sup>83</sup> As such, Congress clearly envisioned that while the Volags, through their cooperative agreements with the PRM, would have the ultimate authority to decide where refugees would be resettled, states and localities would provide input to help the PRM and the Volags make those decisions. This would ensure that local communities would not receive refugees that they could not handle.

## II. Resettlement Mismatch

Despite Congress’s intent to carve out a robust role for states and localities in the refugee resettlement process, the current framework has largely failed to consider local interests in resettlement decisions. In a 2010 letter to his colleagues on the Senate Committee on Foreign Relations, Senator Richard Lugar noted that while “U.S. refugee policies and procedures are determined at the Federal level, . . . the burdens of addressing the unique needs of refugees . . . are passed on to local communities, often without their consent.”<sup>84</sup> As a result, “the current structure of the U.S. resettlement system is proving a strain on local resources and community relations” and “failing to meet the basic needs of the refugee populations.”<sup>85</sup>

While the current Syrian refugee standoff is likely the first time in recent memory that many Americans have paid attention to refugee resettlement policy, local governments have clashed with the Volags and federal agencies many times over the years.<sup>86</sup> The following three case studies provide but a taste of some of the more recent conflicts and illustrate that despite Congress’s intent, localities often have little say as to where refugees are resettled.

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82. See 8 U.S.C. § 1522(a)(2)(A); H.R. REP. NO. 99-132, pt. 1, at 19.

83. H.R. REP. NO. 99-132, pt. 1, at 19.

84. See ABANDONED UPON ARRIVAL, *supra* note 13, at v.

85. *Id.*

86. See *supra* Part I.B (describing the history of the Refugee Act of 1980 and the complaints from state and local officials regarding a lack of consultation).

A. Fort Wayne, Indiana

Fort Wayne, Indiana, an old Rust Belt city sometimes referred to as the “City of Churches,”<sup>87</sup> is known for opening its arms to those in need. For almost two decades, the city welcomed approximately 100 to 200 refugees per year from around the world.<sup>88</sup> While local officials grumbled from time to time that the city did not have enough resources to meet the needs of these refugees, for the most part the officials considered this range of refugees per year to be “manageable.”<sup>89</sup>

From 2007 to 2008, however, 1500 Burmese refugees were resettled in Fort Wayne without prior notice or consultation.<sup>90</sup> After “languish[ing] in refugee camps for nearly a decade or more,” most refugees understandably arrived with significant needs.<sup>91</sup> As described by the Senate Committee on Foreign Relations, many of the refugees were “illiterate in their native language” and had “few marketable skills.”<sup>92</sup> Many had contracted communicable diseases such as HIV/AIDS, tuberculosis, and hepatitis B.<sup>93</sup> In addition, as victims of extreme persecution, many refugees arrived with serious mental health issues and substance abuse problems.<sup>94</sup> Importantly, federal actors provided no presettlement information about these needs.<sup>95</sup> For example, local officials merely “stumbled” upon the higher rates of hepatitis B infections within the refugee community.<sup>96</sup>

Moreover, because localities receive the same amount of assistance per refugee irrespective of the refugee’s “education level, health condition or psychological background,”<sup>97</sup> the funding to combat substance abuse, depression, and post-traumatic stress disorder was vastly inadequate.<sup>98</sup> As a result, in many cases the refugees’ needs went untreated.<sup>99</sup> The community lacked resources to provide adequate healthcare to refugees infected with

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87. Rosa Salter Rodriguez, ‘City of Churches’ Hard to Prove, FREE REPUBLIC (June 22, 2007, 4:55 PM EST), <http://www.freerepublic.com/focus/f-religion/1854772/posts>.

88. ABANDONED UPON ARRIVAL, *supra* note 13, at 8.

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.*

93. *Id.* at 9-10.

94. *See id.* at 10.

95. *Id.*

96. *Id.*

97. *Id.* at 3.

98. *See id.* at 10 (describing how “funding to combat substance abuse, depression, and post-traumatic stress disorder” was “[t]otally neglected”).

99. *See id.* at 9-10.

HIV/AIDS, tuberculosis, and hepatitis B.<sup>100</sup> The superintendent of the local school district explained the plight of refugee children: “I need nurses, translators, psychologists. I visited one of my schools on the first day of the year and not one of the [refugee] students or parents spoke English. \$15,000”—the amount granted to the school district by the ORR—“is just a drop in the bucket.”<sup>101</sup>

Thus, the city was forced to bear the costs of providing services to refugees. As the county health commissioner explained, the costs of routine medical tests for HIV/AIDS were “dropped on the laps of local and state governments.”<sup>102</sup> Likewise, the highly expensive costs of treating hepatitis B, a lifelong condition, were also left to the city.<sup>103</sup> In many instances, funds were diverted from other programs to pay these costs; money reserved for children in local schools, for example, was diverted to address the needs of refugee youth.<sup>104</sup> As explained by the local school superintendent: “We are robbing Peter to pay Paul.”<sup>105</sup>

What is more, the sudden influx of refugees and the resulting strain on local resources exacerbated hostilities between local residents and refugees. Schools with high populations of refugee children, for example, had low academic performance rates.<sup>106</sup> The situation got so bad that two of the schools with large refugee populations were at “imminent risk of being taken over by State authorities because of chronic underperformance.”<sup>107</sup> As a result, one parent tried to persuade other parents to withdraw their children from local schools because she felt that refugee children were damaging her child’s education.<sup>108</sup> As some local residents described, a “once-welcoming environment” became a “potentially explosive situation.”<sup>109</sup> Controversy erupted, for example, when a local laundry posted a sign reading: “For sanitary

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100. *Id.*; Ken Kusmer, *Burmese Refugees Tax U.S. Agencies*, USA TODAY (Oct. 16, 2007, 9:33 PM), [http://usatoday30.usatoday.com/news/nation/2007-10-16-burma-refugee\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-10-16-burma-refugee_N.htm).

101. ABANDONED UPON ARRIVAL, *supra* note 13, at 9 (alteration in original).

102. *Id.* at 9-10.

103. *Id.* at 10.

104. *Id.*

105. *Id.*

106. *Id.* at 9. One assistant superintendent explained that there was no way refugee children should be expected to achieve academically when they had spent most of their lives in refugee camps. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 7.

purposes, there are no Burmese people allowed.”<sup>110</sup> According to news coverage, “[a]n employee was upset by Burmese customers who were chewing betel nuts and spitting out the red juice.”<sup>111</sup>

The Fort Wayne story illustrates the serious consequences of matching refugees with local communities unprepared to welcome them. Not only do refugees fail to receive the services they need, but the failure to adequately prepare and fund local communities also strains local resources and risks exacerbating hostilities toward the refugees.

#### B. Clarkston, Georgia

Clarkston, Georgia, much like Fort Wayne, has been “shattered under the pressure of a broken refugee resettlement system.”<sup>112</sup> The story of Clarkston teaches a lesson about the importance of presettlement consultation with state and local stakeholders.

To refugee resettlement agencies in the 1980s, Clarkston seemed like a perfect location for a refugee to begin a new life.<sup>113</sup> Sitting just eleven miles outside of Atlanta, Clarkston is just a train ride away from a metropolitan area rich with jobs.<sup>114</sup> Better yet, the small rural town of around 7000 had an abundance of cheap housing.<sup>115</sup> As such, by the mid-1990s, Clarkston became the “primary resettlement city for all of Georgia.”<sup>116</sup> From 1996 to 2001, resettlement agencies placed nearly 20,000 refugees in Georgia, many in Clarkston and nearby DeKalb County.<sup>117</sup> Indeed, so many refugees were resettled in Clarkston that as of 2007, one-third to one-half of the city’s population was foreign born—“most of them refugees.”<sup>118</sup> Notably, much of the resettlement was done without any consultation with local officials. The mayor of Clarkston noted: “We were not part of the process of bringing them here. We were told after the fact that they were coming.”<sup>119</sup>

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110. Judy Keen, *Burmese Try to Adapt to America’s Bigger Village*, USA TODAY (Feb. 21, 2011, 12:22 PM), [http://usatoday30.usatoday.com/news/nation/2011-02-21-burmese21\\_ST\\_N.htm](http://usatoday30.usatoday.com/news/nation/2011-02-21-burmese21_ST_N.htm).

111. *Id.*

112. See ABANDONED UPON ARRIVAL, *supra* note 13, at 11.

113. See Warren St. John, *Refugees Find Hostility and Hope on Soccer Field*, N.Y. TIMES (Jan. 21, 2007), <http://nyti.ms/20W4Xq9>.

114. Warren St. John, *The World Comes to Georgia, and an Old Church Adapts*, N.Y. TIMES (Sept. 22, 2007), <http://nyti.ms/2cv6vtU>.

115. St. John, *supra* note 113.

116. ABANDONED UPON ARRIVAL, *supra* note 13, at 11-12.

117. *Id.* at 26.

118. St. John, *supra* note 114.

119. ABANDONED UPON ARRIVAL, *supra* note 13, at 11.

Had the resettlement agencies consulted with local officials beforehand, however, the agencies would have found that while certain features suggested Clarkston would be a desirable resettlement location, other factors suggested otherwise. Clarkston was close to Atlanta's booming economy, but it was itself a rural town and lacked jobs.<sup>120</sup> It had abundant housing, but years of suburbanization had increased vacancy rates and crime.<sup>121</sup> And its schools were not resourced to handle the sudden influx of refugee children.<sup>122</sup>

Indeed, much like Fort Wayne, Clarkston was utterly unprepared to handle the influx of refugees. The sheer number of refugees significantly strained Clarkston's public education system. As described by a refugee advocate,

it's unfair for the government to put a ton of refugees in a city and not equip them with the resources to handle them. The schools are all failing. Every school in Clarkston is failing because schools are not equipped to handle this. A teacher cannot teach 10 kids at 10 different levels.<sup>123</sup>

For the 2008-2009 academic year, Clarkston High School had the highest percentage of failing math scores of all schools in the Atlanta area—with 47.8% of students reported as failing high school math class.<sup>124</sup> The mayor of Clarkston noted that the resettlement of thousands of refugees in the city without any consultation “left him with the lion's share of responsibility but no voice.”<sup>125</sup>

As a result, the Georgia legislature introduced legislation in 2003 that would have compelled Volags to report to the state government whenever ten or more refugees are resettled in a municipality.<sup>126</sup> In addition, local officials encouraged Volags located within Clarkston “to provide more warning regarding when refugees were due to arrive” so that the city could prepare.<sup>127</sup> The mayor reported that the local resettlement agencies, in response, simply moved outside city limits to avoid these demands for more consultation.<sup>128</sup>

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120. *See id.*; St. John, *supra* note 113.

121. St. John, *supra* note 114.

122. *See* ABANDONED UPON ARRIVAL, *supra* note 13, at 13.

123. *Id.*

124. D. Aileen Dodd & John Perry, *For Many, New Math Equates to Fear, Failure*, ATLANTA J.-CONST., May 21, 2010, at 1A.

125. ABANDONED UPON ARRIVAL, *supra* note 13, at 11.

126. H.B. 1002, 147th Gen. Assemb., Reg. Sess. (Ga. 2003). The bill was introduced but never passed.

127. ABANDONED UPON ARRIVAL, *supra* note 13, at 11.

128. *Id.*

C. Manchester, New Hampshire

Like Fort Wayne and Clarkston, Manchester, New Hampshire had long been a resettlement site for refugees.<sup>129</sup> But after receiving more than 2100 refugees over the previous decade, the city called for a halt in 2011.<sup>130</sup>

In particular, the mayor noted that due to changes in local economic conditions, Manchester had a shortage of jobs and affordable housing.<sup>131</sup> He clarified that he had “nothing against refugees”; rather, his problem was with the International Institute of New England—the local affiliate of a Volag—because it “had consistently refused to seek the city’s advice.”<sup>132</sup> The last straw was when the agency planned to resettle three hundred refugees in Manchester without consulting the city at all.<sup>133</sup>

It is likely that because the agency rarely consulted with local officials, it was unaware of Manchester’s dire economic conditions. The *New York Times* noted that “[f]or the International Institute, which has been resettling refugees in New Hampshire for decades, the moratorium request came as a shock.”<sup>134</sup> Even though the agency had resettled almost as many refugees in Manchester as it had in Boston—“a city with almost six times as many residents”—“there [was] no indication of trouble.”<sup>135</sup> Yet the Institute failed to notice that two of the largest employers of refugees in Manchester, a meatpacking plant and a manufacturing facility, had closed down in the previous few years and that most refugees resettled in the city were working in seasonal, temporary jobs.<sup>136</sup> The Institute conceded that it had failed to “communicat[e] with the city as much as it should.”<sup>137</sup>

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129. Abby Goodnough, *After Taking In Refugees for Years, a New Hampshire City Asks for a Pause*, N.Y. TIMES (Nov. 25, 2011), <http://nyti.ms/2anQViJ>.

130. *See id.*

131. *See id.*

132. *Id.* The International Institute of New England is the local affiliate of the U.S. Committee for Refugees and Immigrants. *See, e.g., FFY 2013-14 State of Massachusetts ORR Funded Programs*, OFF. REFUGEE RESETTLEMENT (Dec. 18, 2013), <https://www.acf.hhs.gov/orr/resource/ffy-2013-14-state-of-massachusetts-orr-funded-programs>; *see also supra* note 32 (listing the nine Volags).

133. *See* Goodnough, *supra* note 129.

134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*

While it is tempting to think that these cases are isolated problems in an otherwise workable system, the long-running tension between the Volags and localities suggests that the Volags frequently fail to appropriately consult state and local officials before making resettlement decisions. In a 2012 investigatory report, the GAO revealed that even though federal law requires the Volags to consult with state and local governments about their resettlement activities, most Volags fail to seek input from relevant local stakeholders about their capacity to provide for refugees.<sup>138</sup> And because the local affiliates receive funding based on the number of refugees they serve, local affiliates are incentivized to maintain or increase the number of refugees they resettle each year, regardless of the capacity of the community to handle more refugees.<sup>139</sup> Because the Volags tend to place refugees where refugees have been successfully resettled in the past, “the same communities are often asked to absorb refugees year after year,” without regard to the capacity of those communities to handle them.<sup>140</sup>

This descriptive account has several implications for federalism scholarship generally. Federalism scholars have long argued that certain structural and practical protections adequately preserve state and local interests in cooperative federalism programs.<sup>141</sup> Yet this Note’s descriptive account complicates these arguments. It shows that even where Congress expressly safeguards state and local interests, structural and practical problems may prevent state and local actors from actually asserting their interests at the federal level. It is beyond the scope of this Note to address the circumstances in which structural and practical considerations undermine rather than protect state and local interests, but this is an area where further scholarship is needed.

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138. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 11, at 13.

139. *Id.* at 12.

140. *Id.*

141. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1262-64 (2009) (arguing that states can act “uncooperatively” when implementing federal programs and that this is “a productive source of friction”); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (explaining that working relationships between state and local officials and federal agency employees “within the same specialty” serve to protect state and local interests); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 217, 282 (2000) (arguing that, as an example of “the political safeguards of federalism,” federal officials depend on local political parties to get elected and so must adequately consider state and local interests (formatting altered)).

### III. A Functional Case for Refugee Resettlement Federalism

By now it should be clear that despite Congress's intent, the current refugee resettlement system fails to sufficiently consider state and local interests. This failure has led to poor placement decisions and suboptimal outcomes for both local communities and the refugees themselves. The remainder of this Note makes the case for granting localities a right to refuse refugees. It demonstrates that doing so is functionally desirable: refugees will be placed in the localities most able to absorb them, and the localities will receive the information and resources necessary to effectively welcome refugees.

This Part proceeds as follows: Part III.A explains that our government is riddled with similar bargaining arrangements. Indeed, *all* cooperative programs between the federal and nonfederal governments are essentially bargaining arrangements. Refugee resettlement federalism, then, is not different in kind. Part III.B establishes that such a system would entail significant functional benefits, both for the refugees and the localities in which they settle. Part III.C addresses potential concerns: that refugee resettlement federalism will be plagued by holdout costs and will permit states to block refugees on the basis of ideology.

#### A. The Mechanics of Federal-Locality Bargaining

Giving localities the authority to refuse refugees provides them with something to *sell* to the federal government. Put differently, the localities are granted an entitlement protected by a property rule.<sup>142</sup> An entitlement protected by a property rule cannot be taken from its holder unless the holder sells it willingly at the price at which she subjectively values the property.<sup>143</sup> Thus, to remove the entitlement from a locality, the federal government must persuade the locality to relinquish it.<sup>144</sup> One way for the federal government to do so is to *purchase* it at or above the price at which the locality values its right to refuse.

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142. Guido Calabresi and A. Douglas Melamed explain that there are three different types of entitlements: "entitlements protected by property rules, entitlements protected by liability rules, and inalienable entitlements." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). An entitlement protected by a property rule cannot be taken from the owner unless the owner voluntarily gives it up. *Id.* In contrast, an entitlement protected by a liability rule may be destroyed by another party so long as that party "is willing to pay an objectively determined value for it." *Id.* For example, one's entitlement to be free from the negligent actions of others is protected by a liability rule—tort damages. Finally, an entitlement is inalienable if "its transfer is not permitted between a willing buyer and a willing seller." *Id.* at 1092-93.

143. *See id.* at 1092.

144. *See id.*

Our system of government is riddled with such arrangements.<sup>145</sup> Indeed, all cooperative programs between the federal and nonfederal governments are essentially bargaining arrangements. As one scholar has explained, the Supreme Court's anticommandeering doctrine grants state and local governments a property rule entitlement to their own regulatory apparatuses.<sup>146</sup> The federal government cannot *command* state and local governments to do its bidding.<sup>147</sup> Rather, to incentivize cooperation, the federal government must *purchase* access to their regulatory resources.<sup>148</sup> For example, Congress cannot direct local officials to regulate the sale of guns<sup>149</sup> or command states to expand Medicaid,<sup>150</sup> instead, Congress must persuade state and local officials to do so by offering federal funds.<sup>151</sup>

The federal government purchases state and local cooperation through Congress's Article I spending power.<sup>152</sup> As traditionally understood, Congress's

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145. Erin Ryan has identified ten distinct types of federal-state bargaining: (1) "interest group representation bargaining, by which state actors lobby federal lawmakers"; (2) "enforcement negotiations, including those over individual enforcement cases, state-federal enforcement partnerships, and enforcement matters within programs of cooperative federalism"; (3) "negotiations over more administrative details, resource allocation, or settlement of litigation"; (4) "spending power bargains, in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states"; (5) "bargained-for encroachment and commandeering, . . . in which states bargain to assume federal power or become bound by federal law"; (6) "negotiations for various exceptions and permissions within frameworks of statutory law"; (7) "negotiated rulemaking under the Administrative Procedure Act"; (8) "policymaking laboratory negotiations, by which federal laws create 'fill-in-the-blank' state policymaking zones and otherwise invite state proposals to modify federal law"; (9) "iterative policymaking negotiations, which create a limited forum for shared state-federal policymaking over time"; and (10) "intersystemic signaling negotiations, by which separately deliberating state and federal actors trade influence over the direction of shared policy." Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 27 (2011).

146. See Hills, *supra* note 17, at 822.

147. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government cannot conscript state officials to carry out federal programs); *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

148. See *New York*, 505 U.S. at 188 (explaining that the federal government may incentivize states to adopt federal regulatory schemes).

149. See *Printz*, 521 U.S. at 933.

150. See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2601-07 (2012) (plurality opinion); see also *id.* at 2656-67 (Scalia, J., dissenting) (noting that seven Justices agreed that the Medicaid expansion violated the anticommandeering principle).

151. *Id.* at 2601-02 (plurality opinion) (explaining that instead of commanding states to participate in or administer a federal program, Congress may use its spending power to persuade states to act).

152. U.S. CONST. art. 1, § 8, cl. 1; see Hills, *supra* note 17, at 871-72.

spending power allows it to spend funds on whatever it wants to promote the “general welfare.”<sup>153</sup> It may attach conditions to the funds so long as the conditions are unambiguous, related to the federal interest, and not coercive.<sup>154</sup>

Notably, Congress’s authority to attach conditions to federal funds is broad; the Supreme Court has invalidated an exercise of Congress’s spending power only once.<sup>155</sup> And Congress does not hesitate to exercise its authority. For example, to receive federal assistance under the current refugee resettlement system, Congress requires states and localities to, among other things, provide assistance in a nondiscriminatory manner,<sup>156</sup> provide language training and employment services,<sup>157</sup> and establish a plan for identifying refugees with medical needs.<sup>158</sup> And importantly, conditions need not stem directly from Congress; in some instances, Congress delegates the responsibility of establishing conditions to federal agencies. The Affordable Care Act, for example, grants the DHHS the authority to attach conditions to federal funds earmarked for the construction of state health insurance exchanges.<sup>159</sup> The DHHS exercised that authority by requiring that exchanges be established in a way that avoids discrimination on the basis of “race, color, national origin, disability, age, sex, gender identity or sexual orientation.”<sup>160</sup>

Once the federal government puts together an offer package, *individual localities* decide whether to accept the conditions and the funds. This presents the local governments with an opportunity to bargain one-on-one with the national government.<sup>161</sup> If the conditions are too burdensome, or if the federal grant is insufficient to cover the costs of implementing the federal program,

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153. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); see also U.S. CONST. art. 1, § 8, cl. 1 (granting Congress the power to “provide for the common Defence and general Welfare of the United States”).

154. See *Dole*, 483 U.S. at 207 (noting that conditions must be in pursuit of the general welfare, unambiguous, and related to the federal interest); see also *NFIB*, 132 S. Ct. at 2602-03 (plurality opinion) (discussing the requirement that conditions be free from coercion); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (explaining that conditions must be unambiguous).

155. See *NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.” (capitalization altered)).

156. 8 U.S.C. § 1522(a)(5) (2015) (prohibiting states from discriminating on the basis of “race, religion, nationality, sex, or political opinion”); 45 C.F.R. § 400.5(g) (2016) (implementing 8 U.S.C. § 1522(a)(5)).

157. 8 U.S.C. § 1522(a)(6)(A)(ii).

158. *Id.* § 1522(a)(6)(A)(v).

159. See 42 U.S.C. § 18041(a) (2015).

160. 45 C.F.R. § 155.120(c)(1)(ii).

161. Hills, *supra* note 17, at 860-61.

the local government may ask the federal government to relax certain conditions or to provide larger grants.<sup>162</sup> If the ultimate offer is not worth it, the locality may freely turn it down.<sup>163</sup>

As one scholar has explained, so long as a property right is involved, the federal government must obtain the property right from the locality in the same way it obtains goods and services from private parties.<sup>164</sup> After all, when the federal government wishes to procure military weapons, computing equipment, or consulting services,<sup>165</sup> it purchases those goods and services from private parties under Congress's spending power.<sup>166</sup> In both the federal-private and the federal-locality contexts, the marketplace for goods and services is *competitive*. In the private context, private contractors will not provide the federal government with the requested goods or services if the government's offer is too low. Likewise, if the private party's asking price is too high, the federal government can approach a different private party. So too in the federal-locality context. A locality will not accept offers below the price at which it values its right to refuse refugees. And if a locality's asking price is too high, the federal government can always approach another locality. So long as the federal-locality marketplace operates correctly,<sup>167</sup> cooperative spending programs should retain all the benefits of a competitive marketplace for goods and services.

A system of refugee resettlement federalism is not different in kind from any other cooperative arrangement between the federal and nonfederal governments. As it must in other cooperative programs, the federal government uses federal grant money to persuade localities to accept refugees. The federal government will impose conditions on the grants to ensure that localities provide needed services to the refugees. Individual localities would then decide whether to accept the federal government's offer.

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162. See *id.* at 861.

163. For example, as of March 2016, nineteen states had refused federal funds to expand Medicaid under the Affordable Care Act. *A 50-State Look at Medicaid Expansion*, FAMILIES USA, <http://familiesusa.org/product/50-state-look-medicaid-expansion> (last visited Apr. 4, 2017). Twenty-eight states turned down funds to implement health insurance exchanges. See *State Health Insurance Marketplace Types, 2017*, KAISER FAM. FOUND., <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types> (last visited Apr. 4, 2017).

164. See Hills, *supra* note 17, at 861.

165. See, e.g., *Top 100 Contractors Report*, FED. PROCUREMENT DATA SYS., [https://www.fpds.gov/fpdsng\\_cms/index.php/en/reports/62-top-100-contractors-report3.html](https://www.fpds.gov/fpdsng_cms/index.php/en/reports/62-top-100-contractors-report3.html) (to locate, select the icon next to "Fiscal Year 2015") (last visited Apr. 4, 2017).

166. Hills, *supra* note 17, at 861.

167. In other words, information and transaction costs should remain low, the marketplace for goods and services must be thick, and there should not be collusive behavior among market participants. See *infra* Part III.C.1.

B. The Functional Benefits of Refugee Resettlement Federalism

This Subpart argues that refugee resettlement federalism is functionally desirable. First, this Subpart demonstrates that refugee resettlement federalism ensures that refugees are resettled in the communities that are ready, resourced, and willing to welcome them. Second, refugee resettlement federalism ensures that the federal government provides localities with much-needed information about refugees before settlement, helping localities better prepare their social services infrastructure for increased demand and tailor their services to the unique needs of the refugees. Third, refugee resettlement federalism ensures that localities have sufficient funds to provide for the refugees. And fourth, refugee resettlement federalism ensures that the federal government is accountable for the number of refugees it accepts.

1. Ensuring better “matching”

Because the federal government has an incentive to resettle refugees at the lowest cost, it will choose to resettle refugees in the locality that demands the least money. The locality that demands the least money is the one that subjectively values its right to refuse the least. Because the locality that subjectively values its right to refuse the least is the locality that is most willing to welcome refugees, refugees will be placed in the locality that is most willing to welcome them. This is “allocationally efficient.”<sup>168</sup> While efficiency for efficiency’s sake is not necessarily desirable if it comes at the expense of other important values,<sup>169</sup> a focus on allocational efficiency, at least in the context of refugee resettlement, tends to vindicate other important interests. Namely, refugees will be matched with communities that are equipped and willing to welcome them. When refugees are matched with these communities, they are more likely to receive the services and opportunities they need to achieve long-term self-sufficiency and to fully integrate into their new communities.<sup>170</sup>

To see how this is so, it is important to understand that under such a system, different localities will demand different amounts from the federal

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168. For a general discussion of allocational efficiency, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-6 (1960), which argues that absent transaction costs, bargaining distributes resources in the most efficient manner regardless of the initial allocation; and Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 223-26 (1980).

169. For example, a focus on efficiency may come at the expense of fairness or other related values.

170. This discussion assumes that it is desirable for refugees to receive the services and opportunities they need to achieve long-term self-sufficiency and to fully integrate into their new communities. This assumption should be uncontroversial.

government to resettle the same group of refugees. This makes sense: different localities will value their entitlement differently depending on local factors.

For example, the fiscal costs of resettling refugees will differ among localities. Consider City *A*, which lacks jobs, low-income housing, and ESL programs in its schools, and City *B*, which has all three. Imagine that the federal government, as a condition for receiving funds, requires localities to provide financial assistance, housing, and ESL programs to refugees. As a result, City *A* must divert funds from already-strained resources to provide assistance to refugees. It may be unduly expensive to provide housing for the refugees because there is a shortage of low-income housing. And local schools may have to hire new ESL instructors to teach the refugee children. City *B*, on the other hand, has sufficient funds to provide for refugees. Housing is cheap and plentiful. And local schools already have established ESL programs in place. Under such circumstances, it costs much more for City *A* to resettle the refugees than City *B*. As such, City *A* may reasonably value its entitlement more than City *B* and will demand more money from the federal government to resettle the refugees.

Beyond fiscal costs, local officials might consider the willingness of voters to accept refugees. Quite obviously, a locality's political appetite for refugees will differ depending on local considerations. A city that lacks the political will to resettle refugees may value its entitlement more than a city that does not.

Localities are not only influenced by "negative" factors such as fiscal costs and the political desire *not* to accept refugees. Indeed, some localities may value their entitlement to refuse refugees *less* because refugees will bring significant benefits to their communities.<sup>171</sup> For example, refugees may stimulate the local economy by alleviating a worker shortage or propping up housing prices.<sup>172</sup> Some refugees may have particular skills that certain communities value more than others. Many localities may also value the cultural diversity that refugees bring.<sup>173</sup> And some localities, perhaps out of humanitarian concerns,<sup>174</sup> may

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171. See Rodríguez, *supra* note 5, at 640 ("[M]any localities are prepared to absorb immigrant populations, whether for economic or ideological reasons.").

172. For example, the GAO has noted that "[c]ommunities can benefit socially and economically from refugee resettlement. . . . [R]efugees help stimulate economic development by filling critical labor shortages as well as by starting small businesses and creating jobs. . . . [R]efugees also bring economic benefits to communities by renting apartments, patronizing local businesses, and paying taxes . . ." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 17; see also Miriam Jordan, *The Town That Can't Do Without Refugees*, WALL ST. J. (Feb. 28, 2017, 9:00 AM ET), <https://www.wsj.com/articles/the-town-that-cant-do-without-refugees-1488290400> (highlighting how refugees fill apartment complexes, open small businesses, and curb labor shortages in Erie, Pennsylvania).

173. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 17 ("[L]ocal service providers in Fargo commented that refugees bring new perspectives and customs to a city with predominately Norwegian ancestry.").

welcome refugees regardless of the cost of resettlement. As such, local officials may *lower* their asking price out of a desire to resettle refugees.

The important point is that localities will value their entitlements to refuse refugees differently. So long as localities demand prices that accurately reflect the subjective value they place on their entitlements,<sup>175</sup> they will demand different prices from the federal government. And because the federal government has an incentive to settle refugees as cheaply as possible, it will choose to resettle the refugee or group of refugees in the locality that is willing to accept the lowest price. Put differently, refugee resettlement federalism ensures that refugees are resettled in the locality that values its entitlement to refuse *the least*: the locality that is most willing to welcome them.

Assuming that both fiscal and ideological considerations motivate localities when they bargain with the federal government, a locality's willingness to welcome refugees is a proxy for both its capacity to provide needed services to refugees and its willingness to absorb them. In general, well-resourced and welcoming localities will be more willing to accept refugees than will poorly resourced and unwelcoming localities. To that end, placing refugees in the localities that have the capacity to provide needed services makes it more likely that refugees will receive those services they need to achieve long-term self-sufficiency and to fully integrate into their new communities. Moreover, refugees likely benefit when they are resettled in localities that are willing, ideologically, to take them. That is because localities that embrace refugees are likely to be more generous with their services.<sup>176</sup>

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174. See, e.g., Eugene Scott, *Mayors Strike Back Against Governors in Refugee Fight*, CNN (Nov. 18, 2015, 7:27 PM ET), <http://cnn.it/1QuTYDi>.

175. States may act strategically, hold out, or otherwise collude to extract more money from the federal government. But for the reasons stated below, these concerns are overblown. See *infra* Part III.C.1.

176. While this is ultimately an empirical question, this seems intuitively true. Moreover, other scholars have provided anecdotal examples where this phenomenon has played out on the ground. See, e.g., Rodríguez, *supra* note 5, at 582-90 (describing localities with generous integration strategies for lawful immigrants such as refugees). For example, in 2005, Illinois Governor Rod Blagojevich signed the "New Americans" executive order and thereby convened the "New Americans Policy Council," a public-private partnership charged with accelerating immigrant and refugee integration. Louise Cainkar et al., Ill. Coal. for Immigrant & Refugee Rights, For the Benefit of All: Strategic Recommendations to Enhance the State's Role in the Integration of Immigrants in Illinois 1 (2006), <http://www.issueLab.org/resources/429/429.pdf>. Instead of adopting an exclusive "English-only" law, as some states have, the Council made innovative recommendations to help immigrants and refugees learn English. See *id.* at 2. It recommended tying advancements in certain areas of the service industry to immigrants' participation in English-language instruction and vocational programs. *Id.* at 17.

## 2. Correcting information asymmetries

Refugee resettlement federalism also helps resolve one of the biggest complaints about the current refugee resettlement system: the failure of national actors to communicate critical information about refugees to localities prior to the refugees' arrival. For example, even though PRM-funded programs treat Iraqi torture victims in refugee camps abroad, information about the refugees' special needs rarely reaches local officials once the refugees are resettled, making it difficult for the refugees to maintain treatment.<sup>177</sup> As one report described, "[t]here is no formal mechanism for information about these survivors of torture and trauma to be fed into the resettlement system."<sup>178</sup> Likewise, a Fort Wayne official complained that federal actors "provide[d] no prearrival population assessments or indicators to aid her in identifying the needs of the refugee groups the city resettles."<sup>179</sup> Rather, the discovery of hepatitis B infections within the refugee community was something the city unwittingly "stumbled" upon.<sup>180</sup> This not only burdens local communities that must bear the cost of these surprises,<sup>181</sup> but more importantly, it also burdens refugees themselves, who often do not receive the treatment or services they need.<sup>182</sup>

As explained by a report from the Human Rights Institute of the Georgetown University Law Center, part of the problem is that "the individual parts that make up" the current refugee resettlement process—the PRM, the ORR, the USCIS, and the Volags—"do not see themselves as responsible for the long-term protection of refugees but rather only for the small part they are doing."<sup>183</sup> This is an inevitable bug of the current resettlement system. Under the current system, the power to resettle refugees rests in the hands of the federal government,<sup>184</sup> but it is the state and local governments that bear the

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177. See HUMAN RIGHTS INST., *supra* note 14, at 37.

178. *Id.*

179. ABANDONED UPON ARRIVAL, *supra* note 13, at 9-10.

180. *Id.* at 10.

181. See *id.* at 3.

182. Refugee survivors of torture, for example, often fail to receive the services they need. Localities with large Iraqi refugee populations often have waitlists up to several months for mental health services. See HUMAN RIGHTS INST., *supra* note 14, at 32. And some refugees are resettled in locations without dedicated torture treatment centers. *Id.*

183. *Id.* at 5, 8, 41.

184. For example, when Alabama and Texas recently requested information on the Syrian refugees that the federal government and Volags planned to resettle within their borders, the federal government simply refused. See Complaint for Declaratory & Injunctive Relief at 6, *Alabama v. United States*, No. 2:16-cv-00029-JEO, 2016 WL 4070146 (N.D. Ala. July 29, 2016); Plaintiff's Amended Application for Preliminary Injunction at 7-9, *Tex. Health & Human Servs. Comm'n v. United States*, 166 F. Supp. 3d 706 (N.D. Tex. 2016) (No. 3:15-CV-3851-N). When Alabama and Texas filed suit  
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costs of the federal government's failure to communicate critical prearrival information. Once a refugee is resettled, the federal government need not pay for the refugee's mental health services. That is because the federal government provides the same "one-size-fits-all assistance" regardless of factors such as the refugee's health conditions or psychological background.<sup>185</sup> As such, there is little incentive for federal actors to communicate critical prearrival information to the localities.

Economists would call this a classic violation of the "internalization principle,"<sup>186</sup> which provides that power should be assigned to the "smallest unit of government that internalizes the effects of its exercise."<sup>187</sup> The core premise of the internalization principle is that people affected by a policy choice have a greater incentive than people who are unaffected to understand the costs and benefits of that choice.<sup>188</sup> As such, allocating decisionmaking authority to the level of government that can best "internalize" the costs and benefits of a policy decision ensures that the most informed and socially optimal decision will be made.

Two examples illustrate this principle. The internalization principle suggests that if the pollution from a factory in California affects the country on a national scale, then the federal government, rather than the government of California, should regulate that pollution. That is because the California government, which represents California residents (who are not affected by the pollution outside of California's borders), is unlikely to seek out information about the costs of that pollution in those jurisdictions. As such,

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demanding such information, the federal government responded that it had no obligation to provide the states with the information. See Memorandum in Support of Defendants' Motion to Dismiss at 21, *Alabama*, No. 2:16-cv-00029-JEO, 2016 WL 4070146 ("[T]he Refugee Act . . . does not require the Federal Government to provide [Alabama] with . . . information about each individual refugee who has been resettled or will be resettled in Alabama . . ."); Federal Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction at 15, *Tex. Health & Human Servs. Comm'n*, 166 F. Supp. 3d 706 (No. 3:15-CV-3851-N) ("Nothing in § 1522(a)(2)(A) requires the Government to provide [Texas] with 'demographic, medical, security,' or other 'refugee-specific information' . . ."). Both lawsuits have been dismissed and, as of this writing, are currently on appeal. *Alabama*, 2016 WL 4070146, *appeal docketed*, No. 16-15778 (11th Cir. Aug. 31, 2016); *Tex. Health & Human Servs. Comm'n*, 166 F. Supp. 3d 706, *appeal docketed*, No. 16-11241 (5th Cir. Aug. 13, 2016).

185. See ABANDONED UPON ARRIVAL, *supra* note 13, at 3 ("Currently, irrespective of important factors such as education level, health condition or psychological background each refugee is initially afforded one-size-fits-all assistance.").

186. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 137-38 (2010). For a general discussion of the internalization principle applied in the federalism context, see WALLACE E. OATES, *FISCAL FEDERALISM* 46-47 (William J. Baumol ed., 1972).

187. Cooter & Siegel, *supra* note 186, at 137 (emphasis omitted).

188. *Id.*

California may choose not to regulate pollution from that factory, even if the overall benefits of doing so (including benefits to other jurisdictions) may exceed the total cost. But granting the federal government the authority to regulate pollution solves this problem. That is because the federal government, which represents the nation as a whole, will appropriately consider the non-California benefits of regulating pollution from that factory.

Conversely, when the effects of a policy choice are local, local governments should be responsible for making that choice.<sup>189</sup> The decision to build a neighborhood park, for example, primarily affects the local community where the park is built. As such, local residents are in the best position to seek out information and assess the costs and benefits of such a decision. Allocating decisionmaking authority to the federal government, on the other hand, would be undesirable. That is because taxpayers across the country would share the costs of building and maintaining the park but only local residents would benefit from the park. With the federal government in control, the park would almost certainly never be built because national voters are unlikely to ever think the benefits of the park are worth the cost. This is so even though local residents value the park's benefits over its costs and would willingly pay for it with local taxes if given the chance.

The internalization principle, then, explains why “the individual parts” that make up the current refugee resettlement process “do not see themselves as responsible for the long-term protection of refugees but rather only for the small part they are doing.”<sup>190</sup> Because the federal government does not bear the cost of unexpected services, it has no incentive to implement measures to avoid the need for unexpected services—such as providing presettlement information to the localities.

Refugee resettlement federalism fixes this problem by empowering localities to demand information about refugees from the federal government. Indeed, because states and localities often bear the cost of providing unexpected services, states are unlikely to accept a large group of refugees without requesting such critical prearrival information. This information not only helps localities evaluate the benefits and costs of accepting the federal government's offer, but it also helps them better prepare for refugees' impending arrival.

Importantly, information sharing helps refugees, too. That is because receiving prearrival information helps local communities tailor their services to the refugees' unique needs.<sup>191</sup> After all, while all refugees have faced some

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189. *Id.* at 138.

190. HUMAN RIGHTS INST., *supra* note 14, at 41.

191. See ABANDONED UPON ARRIVAL, *supra* note 13, at 5 (“The overall resettlement system must be structured to identify and address the diverse needs of resettling populations.”)  
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sort of tragedy, refugees arrive with unique problems. For example, Burmese refugee children who arrive in America having never seen or flushed a toilet<sup>192</sup> have different needs than Iraqi refugees who are victims of torture.<sup>193</sup>

One need only look at the situation in Fort Wayne to see why receiving prearrival information is important. Had Indiana known that the Burmese refugee population suffered from high rates of illiteracy, mental health problems, tuberculosis, and hepatitis B, the state could have proactively arranged for stakeholders to provide appropriate services.<sup>194</sup> Not only would this have helped Fort Wayne prepare its social services infrastructure for greater demand, but it would have also ensured that refugees received appropriate services upon arrival.

### 3. Correcting funding mismatches

Relatedly, refugee resettlement federalism ensures that localities receive sufficient funds to cover the cost of resettling refugees. Under the current system, federal funding for resettlement services is “reactive”<sup>195</sup>: it is dictated by the number of refugee arrivals in the state over the previous two fiscal years.<sup>196</sup> The reactive nature of resettlement funding prevents resources from reaching localities that have a sudden influx of refugees.<sup>197</sup> For example, while new refugee arrivals increased 1500% from fiscal years 2006 to 2008 in Detroit, funding for resettlement services increased just 72% from fiscal years 2007 to

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This should involve overseas gathering of information that is used to help local communities plan for and better meet refugee needs.”); HUMAN RIGHTS INST., *supra* note 14, at 2-3, 37 (recommending that “[r]efugee resettlement should be . . . tailored to the unique needs and experiences of refugees” and explaining that the failure to communicate the unique needs of refugees to local communities makes this difficult).

192. See ABANDONED UPON ARRIVAL, *supra* note 13, at 8-9.

193. See HUMAN RIGHTS INST., *supra* note 14, at 37.

194. While local officials presumably know which local stakeholders should be contacted, the Volags may not. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 13. The GAO, for example, found that “most local voluntary agencies . . . visited have not taken steps to ensure that other relevant service providers are afforded the opportunity to provide input on the number and types of refugees that can be served. As a result, many local service providers experienced challenges in properly serving refugees.” *Id.*

195. See HUMAN RIGHTS INST., *supra* note 14, at 33.

196. For example, for fiscal year 2015, the ORR allocated social service funds according to the following formula: the total amount of funds budgeted divided by the total number of refugees and other eligible populations who were resettled in the state for fiscal years 2013 and 2014. See Letter from Bob Carey, Dir., Office of Refugee Resettlement, to State Refugee Coordinators (Apr. 28, 2015), <http://www.acf.hhs.gov/orr/resource/state-letter-15-04>.

197. HUMAN RIGHTS INST., *supra* note 14, at 33-34.

2009.<sup>198</sup> Funds for the newly resettled refugees were not set to arrive until 2011.<sup>199</sup>

Moreover, current funding is “one-size-fits-all”: states receive the same amount of funding per refugee regardless of the refugee’s needs.<sup>200</sup> For instance, a state receives the same amount of funding for an educated and literate refugee as it does for an illiterate refugee who is a victim of torture. Thus, funding can be vastly inadequate for refugees with significant needs.<sup>201</sup>

Refugee resettlement federalism solves these two problems by ensuring that resettlement costs are funded *proactively*.<sup>202</sup> That is, because localities decide whether to accept or reject the federal government’s offer to resettle a group of refugees based on presettlement information provided by the federal government, localities will generally request funds—*prior to resettlement*—sufficient to meet the needs of the particular group of refugees. As such, local communities will have sufficient funds to meet refugee needs *before* the refugees are resettled. For example, under a system of refugee resettlement federalism, local officials in Fort Wayne would have been able to demand sufficient funds from the federal government to provide the “nurses, translators, [and] psychologists” that refugee schoolchildren needed.<sup>203</sup>

#### 4. Rediscovering political accountability

The consequence of empowering localities to demand sufficient funds to cover the cost of resettling refugees is that the federal government must bear many of the costs currently borne by localities.<sup>204</sup>

To the extent one believes that the federal government should weigh both the costs and benefits of its decisions, this cost shifting is eminently appropriate. The Supreme Court has determined that the federal government has plenary power over immigration admissions and removals, and that power

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198. *Id.* at 34.

199. *Id.*

200. ABANDONED UPON ARRIVAL, *supra* note 13, at 3.

201. *See id.* at 9 (quoting the Fort Wayne school superintendent as saying that “[t]he one-size-fits-all approach is just not working”); *supra* Part II.A.

202. *See* ABANDONED UPON ARRIVAL, *supra* note 13, at 5 (recommending that funding formulas become “more flexible” and “forward-looking”); HUMAN RIGHTS INST., *supra* note 14, at 33-34 (noting that one of the problems with refugee resettlement is that funding decisions are “reactive” rather than “proactive”).

203. Wendy Robinson, the superintendent of Fort Wayne Community Schools, noted that the \$15,000 provided by the ORR was insufficient to meet these needs. ABANDONED UPON ARRIVAL, *supra* note 13, at 9.

204. It is important to note that refugee resettlement federalism does not necessarily cost more to the *overall system*. Rather, refugee resettlement federalism merely requires the federal government to bear the costs currently borne by the localities.

is exclusively federal.<sup>205</sup> As such, the federal government—and only the federal government—has the power to decide how many refugees to accept. The internalization principle instructs that the federal government should bear the costs of that decision.<sup>206</sup> After all, the federal government cannot make an optimal decision about the number of refugees to admit without considering the full cost of admitting refugees.

To be sure, the federal government does pay *something* for the refugees it admits—it provides cash and medical assistance, funding for social services projects, and targeted assistance for refugees, either through the states or through Wilson-Fish programs.<sup>207</sup> But as this Note has argued, the federal government does not bear the *full* cost of admitting refugees under the current system.<sup>208</sup> Rather, much of the cost is borne by local communities.<sup>209</sup>

The current system, then, presents a classic political accountability problem not unlike the one described by Justice O'Connor in *New York v. United States*.<sup>210</sup> At the federal level, federal officials reap the political benefits of accepting refugees but avoid the pain of having to fully pay for them.<sup>211</sup> At the local level, states and localities are forced to pay for federal decisions out of their own treasuries but have little ability to influence federal policy.<sup>212</sup> Accountability is diminished, then, because local officials may “bear the brunt” of an unpopular federal decision they had no role in making.<sup>213</sup> And federal officials might “remain insulated from the electoral ramifications of their decision[s].”<sup>214</sup> Refugee resettlement federalism resolves this problem by forcing the federal government to internalize the full costs of admitting refugees. Federal officials, then, would both reap the political benefits of accepting refugees and bear the political costs.

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205. See *supra* note 3 and accompanying text.

206. See *supra* notes 186-90 and accompanying text.

207. See *supra* notes 45-54 and accompanying text.

208. See *supra* Part III.B.2-3.

209. See *supra* Part III.B.3.

210. 505 U.S. 144, 168-69 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”); see also PAUL L. POSNER, THE POLITICS OF UNFUNDED MANDATES: WHITHER FEDERALISM? 6 (1998) (explaining that unfunded mandates “can serve to undermine accountability in our intergovernmental system”).

211. See *New York*, 505 U.S. at 168-69 (explaining that political accountability is diminished when federal officials insulate themselves from the ramifications of potentially unpopular policy choices by passing the costs of those choices onto the states).

212. See *id.*

213. *Id.* at 169.

214. *Id.*

### C. Confronting Concerns

This Subpart addresses the two most likely concerns with this Note's proposal: refugee resettlement federalism (1) will be plagued by holdout costs and (2) permits localities to block resettlement due to ideological considerations.

#### 1. Holdout costs

The analysis above rests on the assumption that transaction costs are generally low.<sup>215</sup> But as in any market for services, participants may act strategically. For example, localities may misrepresent the true costs of resettling refugees within their borders in hopes of exacting a higher payment from the federal government. Such strategic behavior might prevent the federal government from placing refugees in optimal communities. For example, if Town *A* subjectively values its right to refuse at \$100 and Town *B* subjectively values its right to refuse at \$120, refugees would be optimally resettled in Town *A*. But if Town *A* misrepresents its subjective value by holding out for \$130, refugees will be resettled in Town *B* instead. Where misrepresentation occurs, refugees will not be resettled in the locality that is most willing to welcome them.

Additionally, localities may collude to drive up costs. Towns *A* and *B*, for example, may concurrently decide to hold out for \$200, even though both subjectively value the right to refuse at a much lower price. The federal government must then pay one of the localities \$200 to resettle a group of refugees that should have cost \$100. At best, this would be an inefficient allocation of resources. At worst, it may make it too expensive for the federal government to resettle many refugees at all.

These concerns, however, are overblown. That is because competition between the states for federal funds will prevent any misrepresentation. Imagine, for example, that the federal government hopes to resettle a group of Iraqi refugees. Town *A* subjectively values its right to refuse at \$100, Town *B* at \$102, and Town *C* at \$105. If Town *A* attempts to misrepresent its subjective value to obtain a higher payment (say, by demanding \$110), it will quickly lose federal funding to Town *B* or Town *C*. As Roderick Hills, Jr. has argued, "local politicians usually are extremely reluctant to turn down federal money . . . because voters are notoriously willing to retaliate against politicians who fail to apply for 'free' federal money."<sup>216</sup> As such, in the competitive market for federal funds, localities are unlikely to misrepresent the costs of resettlement.

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215. See *supra* note 167 and accompanying text.

216. Hills, *supra* note 17, at 876.

Moreover, the sheer number of local governments competing for federal funds makes coordinated collusion highly unlikely. After all, the greater the number of market participants, the more difficult it is to coordinate collusive behavior.<sup>217</sup> What is more, collusion seems especially unlikely given the sheer diversity in opinion among localities about the desirability of refugees. Indeed, in the context of the Syrian refugee crisis, many local officials have announced their willingness to accept refugees even as the governors of their states have announced opposition to them.<sup>218</sup> Given this diversity in opinion and the politically charged implications of rejecting refugees, any large-scale bipartisan collusion among localities is highly unlikely.<sup>219</sup>

## 2. Ideological considerations

A more vexing objection to refugee resettlement federalism is that granting the localities a right to refuse would allow localities to block refugees due to ideological or political considerations. Although this Note does not

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217. See Donald Dewey, *Information, Entry, and Welfare: The Case for Collusion*, 69 AM. ECON. REV. 587, 592 (1979) (explaining that “[w]ith very large numbers” of firms, “the contract costs of collusion are simply ‘too high’”); F.T. Dolbear et al., *Collusion in Oligopoly: An Experiment on the Effect of Numbers and Information*, 82 Q.J. ECON. 240, 243 (1968) (“In order to achieve cooperation all firms in an industry must realize that collusion is possible and be willing to take the risk inherent in attempting to collude. As the number of firms in a market increases, the probability that these conditions will be satisfied decreases.”).

218. For example, the Chicago City Council voted to reaffirm Chicago as a welcoming place for refugees even as Illinois Governor Bruce Rauner indicated that the state may withhold aid from them. Scott, *supra* note 174. Likewise, while Florida Governor Rick Scott announced that his state would not accept Syrian refugees, the mayor of Tallahassee stated that the city would welcome them. *Id.*

219. Jessica Bulman-Pozen has argued that state governments serve as platforms to “amplify competition between the political parties.” Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014). As such, state disagreement with federal policy can be motivated by political partisanship. *Id.* at 1082. In simplified terms, Democratic-controlled states reflexively oppose federal policy when Republicans control the federal government, and Republican-controlled states reflexively oppose federal policy promulgated by a Democratic-controlled federal government. *Id.* at 1080. As such, Republican and Democratic states rarely, if ever, collude to undermine federal policy. For example, when Republican states openly rebelled against the individual mandate of the Affordable Care Act, not a single Democratic state governor joined the federalism ruckus. *Id.* at 1098 & n.76 (citing Robert N. Weiner, *Much Ado: The Potential Impact of the Supreme Court Decision Upholding the Affordable Care Act*, in THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS 69, 69-72 (Nathaniel Persily et al. eds., 2013)) (describing the “partisan lineup,” with twenty-seven Republican-controlled states opposing the Act and thirteen Democratic-controlled states defending the Act). While there may be fewer incentives for local officials to participate in such partisanship, it is not unreasonable to think that similar dynamics prevent large-scale collusion between Democratic-controlled and Republican-controlled localities.

propose to relax the antidiscrimination guarantees of federal law<sup>220</sup> when local activity conflicts with such protections,<sup>221</sup> it recognizes that some may find ideologically driven decisionmaking undesirable even if that decisionmaking does not violate antidiscrimination law.

This Note's response is threefold. As detailed in Part III.B.1, allowing localities to decide whether to accept refugees based on ideological considerations serves a useful function: it ensures that refugees are placed in localities that are more likely to welcome and integrate them. For the most part, these localities tend to be more generous with their services, benefitting refugees. As such, it may be the case that the benefits of refugee resettlement federalism justify the costs that stem from allowing localities to block resettlement on the basis of ideology. Cristina Rodríguez has made a similar argument in the immigration federalism context, concluding that we should relax the federal exclusivity doctrine to allow localities to pass immigration laws regardless of whether those laws are pro- or anti-immigrant.<sup>222</sup> While doing so would give voice to anti-immigrant sentiments in some cases, she concludes that relaxing the federal exclusivity doctrine is nonetheless desirable because it would ensure "better integration [of immigrants] in the long run."<sup>223</sup> That is because immigrants would "sort" themselves by settling in localities where they are more likely to be welcomed and have a smoother path to fully integrating.<sup>224</sup>

Whether one thinks this "sorting" function justifies any potential harm that stems from allowing localities to block refugee resettlement on the basis of ideology is, at bottom, a normative preference. But this Note demonstrates that there is at least a strong policy reason why allowing such decisions by localities is desirable. As such, it should not be reflexively rejected simply because it may give voice to anti-refugee sentiments in some localities.<sup>225</sup>

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220. These guarantees include the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *See* U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2015)).

221. *See, e.g.,* Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902, 903-05 (7th Cir. 2016) (upholding the grant of a preliminary injunction in favor of the organizational plaintiff because Indiana's directive to state agencies not to pay federal grant funds to local refugee resettlement agencies for social services provided to Syrian refugees was a likely violation of Title VI and the Equal Protection Clause).

222. Rodríguez, *supra* note 5, at 572-73.

223. *Id.* at 639.

224. *See id.*

225. Indeed, even among immigration law scholars—many of whom, as Peter Schuck explained, "occup[y] a position at the extreme left in the national debate over immigration," Schuck, *supra* note 6, at 58 & n.3—there are some who think the benefits of federalism outweigh the concern about giving voice to anti-immigrant sentiment, *see* Rodríguez, *supra* note 5, at 639-40; Spiro, *supra* note 6, at 1646 (arguing that even  
*footnote continued on next page*

Second, and relatedly, the sentiments that drive localities to block refugees on the basis of ideology—whether it is a fear of others, a dislike for cultural diversity, or a genuinely held concern that refugees are bad for the local economy—will likely remain regardless of whether localities are given the right to refuse. Indeed, as we see from the Fort Wayne case study, the current resettlement system may even *exacerbate* anti-refugee sentiment by placing refugees in communities unequipped to handle them. To that end, refugee resettlement federalism may end up alleviating any festering anti-refugee sentiment by placing refugees in communities only when those communities are ready.

And third, by giving local communities an incentive through federal funds to accept refugees, refugee resettlement federalism encourages local communities to look beyond ideology when deciding whether to accept refugees. A locality that, at first, refuses to accept refugees because of strongly held ideology may yield its position over time once it recognizes that it is forgoing federal funds that could otherwise go toward improving schools and social service programs.

### **Conclusion**

Refugee resettlement federalism is not likely to be a popular topic today given the bluster surrounding the Syrian refugee standoff. For many, the natural reaction is to reflexively reject ideas of refugee resettlement federalism out of hand. This Note, however, strives to convince readers that the national-centric refugee placement process makes little sense. National actors are ill equipped to understand local conditions and local circumstances that ultimately affect the day-to-day lives of the refugees they resettle. Moreover, national actors have little incentive to learn about those conditions and circumstances because most of the costs of their decisions are passed on to local communities. The descriptive account this Note provides illustrates the harm that can be—and has been—done to both refugees and local communities when federal actors place refugees in communities that are shockingly unprepared to absorb them.

To that end, it makes eminent sense for local officials to have a say in the refugee placement process. Indeed, Congress thought so, too. But the wavering system that Congress has created—one where localities merely have a toothless right to consultation—fails to fully capture the benefits of local involvement. By granting local governments a right to refuse, refugee resettlement federalism does what the current system fails to do. It requires that local

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though immigration federalism gives voice to anti-immigrant sentiment in some circumstances, immigration federalism nonetheless leads to “a better result”).

*Refugee Resettlement Federalism*  
69 STAN. L. REV. 1197 (2017)

officials play an intimate role in the resettlement decisionmaking process, and as a result, it ensures that good placement decisions are made: refugees are matched with communities ready—and resourced—to welcome them.