

## ARTICLES

### THE PERILS AND POSSIBILITIES OF REFUGEE FEDERALISM

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*The international community is experiencing a refugee crisis. The worldwide number of displaced persons has reached an all-time high. Refugees and asylum seekers, however, now face unprecedented levels of hostility and opposition to their resettlement in the United States. During the last three years, some states have been at the forefront of a movement to block the resettlement of refugees from the Middle East and asylum seekers from Central America in their jurisdictions. Other states have been in the vanguard of an initiative to welcome those fleeing persecution on humanitarian grounds. This Article explores this new phenomenon of “Refugee Federalism.” The Article examines recent state responses to the resettlement of certain groups of refugees and asylees, in particular Middle Eastern refugees and Central American asylees. The piece discusses some states’ attempts, through gubernatorial decrees, legislation, and litigation, to curtail the settlement of such refugees and asylees, as well as the countervailing movement by other states to support them. The Article analyzes the perils and possibilities of state*

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*engagement with refugee and asylee resettlement. It argues that, in accordance with the Supreme Court's longstanding immigration federalism doctrine, states may not exclude refugees from their territories. But, it also proposes that states may nonetheless benefit from playing a more active role in refugee selection, admission, and integration.*

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## INTRODUCTION

*“Given the horrifying events in Paris last week, I am calling for an immediate halt in the placement of any new refugees in Arizona.”*

—Arizona Governor Doug Ducey<sup>1</sup>

*“Clearly, Oregon will continue to accept refugees. They seek safe haven and we will continue to open the doors of opportunity to them. The words on the Statue of Liberty apply in Oregon just as they do in every other state.”*

—Oregon Governor Kate Brown<sup>2</sup>

The United States has a long and distinguished history as a safe refuge for people fleeing persecution in their native lands. In the more than seventy years since World War II, displaced persons from Europe, Asia, Africa, and Latin America have found safe haven and a fresh start in the United States. From 1948 onwards, a series of laws were passed to ensure that those who were persecuted abroad on account of their race, religion, nationality, membership in a particular social group, or political opinion, could resettle in the United States, obtain permanent residency, and, ultimately, become American citizens.<sup>3</sup> Even at times when anti-immigrant rhetoric abounded, and other newcomers were treated with suspicion or distrust, refugees and asylum seekers were often treated differently.<sup>4</sup> This difference was apparent in the very structure of immigration and refugee laws, which separated refugees from immigrants subject to the general quotas,<sup>5</sup> as well as in the laws’ substance.<sup>6</sup> The difference was also evident in the judicial opinions interpreting those laws<sup>7</sup> and

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1. *What Is Your Governor Saying About Syrian Refugees?*, FED’N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/what-is-your-governor-saying-about-syrian-refugees> (last visited Nov. 30, 2016) [hereinafter *What Is Your Governor Saying?*].

2. *Id.*

3. See DAVID A. MARTIN ET AL., *FORCED MIGRATION LAW AND POLICY* 90–96 (2d ed. 2013) (discussing the history of refugee and asylee legislation in the United States).

4. See DAVID W. HAINES, *SAFE HAVEN? A HISTORY OF REFUGEES IN AMERICA* 72 (2010) (observing that refugees improve social perceptions toward all immigrants as they assimilate). See generally MARY PHIPPER, *THE MIDDLE OF EVERYWHERE: HELPING REFUGEES ENTER THE AMERICAN COMMUNITY* (2003) (providing an account of how refugees integrated into the author’s community).

5. See MARTIN ET AL., *supra* note 3, at 90–91 (noting the immigration law provision that, since 1950, has addressed refugees); see 8 U.S.C. § 1151 (2012).

6. See MARTIN ET AL., *supra* note 3, at 90–91 (explaining the evolution of the nation’s laws on exempting refugees from the general deportation rules).

7. *Id.*

in the terms of the debate among members of the public.<sup>8</sup> The juxtaposition of the “worthy” refugee with the “law-breaking” undocumented immigrant or the “greedy” economic migrant was a longstanding—and for many commentators, frustrating—aspect of public discourse about migration law and policy.<sup>9</sup> This is not to say that there was uniform support for refugee resettlement in the United States throughout the post-war twentieth century. Amongst others, Cuban refugees faced hostility in the 1970s and 1980s, as did those fleeing Haiti in the 1980s and 1990s.<sup>10</sup> But, the pockets of animus during those crises do not compare to the nationwide anti-immigrant fervor evinced by the supporters of President-elect Donald J. Trump during the 2016 presidential election.<sup>11</sup> For decades, individuals who were opposed to high immigration levels in general were willing to make an exception for refugees, and for decades this clear cut distinction between “good” refugees and other, and therefore “bad,” immigrants persisted.<sup>12</sup> These binary categories survived the Bay of Pigs, the Vietnam War, the fall of the Iron

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8. See, e.g., Halimah Abdullah, *Immigrants or Refugees? A Difference with Political Consequences*, CNN (July 17, 2014, 2:31 PM), <http://www.cnn.com/2014/07/17/politics/immigration-border-crisis-refugee-politics> (addressing ramifications for asylum seekers considered immigrants versus those labeled refugees); Somini Sengupta, *Migrant or Refugee? There Is a Difference, with Legal Implications*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html> (explaining that countries owe certain legal obligations to refugees but not to immigrants).

9. See, e.g., Ylva Berglund Prytz, *Refugee or Migrant? What Corpora Can Tell*, 15 NORDIC J. OF ENG. STUD. 47, 59 (2016) (“Phrases such as *migrant labour*, *economic migrant* match the idea that *MIGRANT* refers to people moving for work or in search of a different existence, while patterns including *REFUGEE* more often refer to someone who is fleeing or needing help.”); Robert Meister, *Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. CHI. L. SCH. ROUNDTABLE 121, 157 n.163 (1996) (“Refugees are different from ordinary sojourners or ordinary immigrants.”); Mick Hume, “Refugees” Good, “Migrants” Bad?, SPIKED (Sept. 10, 2015), <http://www.spiked-online.com/newsite/article/refugees-good-migrants-bad/17421> (arguing that “[t]he ‘Refugees good, Migrants bad’ rule does nobody any favours”).

10. See HAINES, *supra* note 4, at 68, 85 (noting that Haitians may have been the victim of more discrimination than any other modern-day immigrant group).

11. See, e.g., Evan Osnos, *The Fearful and the Frustrated*, NEW YORKER (Aug. 31, 2015), <http://www.newyorker.com/magazine/2015/08/31/the-fearful-and-the-frustrated> (“Donald Trump has changed the entire debate on immigration.” (quoting radio host Rush Limbaugh)).

12. See PHIPHER, *supra* note 4, at 19 (discussing the difficulties that non-refugee Latinos face and recognizing that “[t]hey are even called ‘illegal aliens[,]’ which sounds like they came from Mars”).

Curtain, and even the 9/11 terrorist attacks.<sup>13</sup> In the last two years, however, this paradigm has shifted.

There is currently an acute refugee crisis on a global scale, and now, more than ever, the international community is calling upon the resource-rich nations of the Global North to assist in the resettlement of displaced persons.<sup>14</sup> In 2015, the United Nations High Commissioner for Refugees (UNHCR) reported that worldwide displacement of persons had reached an all-time high with 19.5 million refugees and 38.2 million citizens displaced within their own countries.<sup>15</sup> For the first time since World War II,<sup>16</sup> however, refugees

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13. Immediately following the September 11, 2001, terrorist attacks, the number of refugees admitted to the United States dropped precipitously by sixty percent. Christopher Marquis, *Threats and Responses: Seeking Haven; Since Attacks, U.S. Admits Fewer Refugees*, N.Y. TIMES (Oct. 30, 2002), <http://www.nytimes.com/2002/10/30/world/threats-and-responses-seeking-haven-since-attacks-us-admits-fewer-refugees.html>. A bipartisan group of senators approached then-President George W. Bush and urged him to expand the refugee program, stating that “[t]ens of thousands of refugees have been stranded overseas in places of danger or squalid refugee camps, and have not been able to find a new secure future in the United States during this past year . . . . These unused spaces are in essence like unused lifeboats on a sinking ship.” *Id.*

14. Harriet Sherwood, *Take in Syrian Refugees, Aid Agencies Tell Rich Countries*, GUARDIAN (Dec. 7, 2014, 7:01 PM), <https://www.theguardian.com/world/2014/dec/08/take-in-syrian-refugees-rich-countries>.

15. *Worldwide Displacement Hits All-time High as War and Persecution Increase*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (June 18, 2015), <http://www.unhcr.org/558193896.html>.

16. Before and during World War II, the United States pursued policies that denied admission to hundreds of thousands of European Jewish refugees. For an account of the hardships encountered by these refugees, see generally DAVID S. WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941–1945* (1984); DAVID S. WYMAN, *PAPER WALLS: AMERICA AND THE REFUGEE CRISIS, 1938–1941* (1968). One of the most well-known examples was the June 1939 return of the German ship, the *St. Louis*, which was turned away from the Port of Miami while carrying 937 passengers, the majority of whom were Jewish refugees. The ship was forced to return to Europe and hundreds of those onboard died in the Holocaust. *Voyage of the St. Louis*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007701> (last visited Nov. 30, 2016); see also Ishaan Tharoor, *What Americans Thought of Jewish Refugees on the Eve of World War II*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii> (comparing public attitudes toward modern refugees and Jewish refugees during World War II).

and asylum seekers who wish to resettle in the United States today face widespread and deeply entrenched hostility and opposition.<sup>17</sup>

In the vanguard of this new movement to oppose the resettlement of refugees and asylees are the governments of various states. State lawmakers and leaders have played a pivotal role in recasting Syrian and Afghan refugees as “terrorists”<sup>18</sup> and portraying Central American minors seeking asylum as gang members, thugs, and drug dealers.<sup>19</sup> A variety of legal instruments, including gubernatorial executive orders, state legislative action, and state-sponsored lawsuits, have been used in furtherance of this transformation.<sup>20</sup> Expressions of anti-refugee animus are not, however, the only iterations of state refugee- and asylee-related lawmaking. State responses to refugees and asylum seekers vary significantly, and there are several examples of state governments that have redoubled their efforts to support and welcome those fleeing persecution.

This Article discusses these new and dynamic developments in state lawmaking, which it characterizes as “refugee federalism”; i.e., the engagement of state governmental actors in lawmaking pertaining to refugees and asylees. There is a rich and growing literature on the general topic of immigration law and federalism,<sup>21</sup> but legal scholars

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17. See Tharoor, *supra* note 16 (discussing the growing opposition to Syrian refugees in the United States following a terrorist attack in Paris in 2015); see also Ishaan Tharoor, *Yes, the Comparison Between Jewish and Syrian Refugees Matters*, WASH. POST (Nov. 19, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/19/yes-the-comparison-between-jewish-and-syrian-refugees-matters> (comparing the suspicions Syrian refugees now face to the suspicions faced by Jewish refugees just before World War II).

18. See, e.g., *What Is Your Governor Saying?*, *supra* note 1 (listing statements by many governors who tied Syrian refugees to fears of terrorism following the Paris terrorist attack).

19. *Central American Minors Are Gang Members, from “Culture of Murder,” Says Congressman*, FOX NEWS LATINO (July 21, 2014), <http://latino.foxnews.com/latino/politics/2014/07/21/congressman-says-minors-who-have-crossed-us-mexico-border-are-gang-affiliated>; see *infra* Section II.A (discussing the change in public perception of refugees in the past few years).

20. For examples of each, see *infra* Section II.C.

21. See, e.g., Kerry Abrams, *Essay, Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1 (2013); Kit Johnson & Peter J. Spiro, *Debate, Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV.

have not yet considered state rulemaking pertaining to refugees and asylees in this way.<sup>22</sup> Therefore, this Article describes the recent proliferation of state lawmaking affecting refugees and asylees, examines critically the differing iterations of this refugee federalism, and provides a normative assessment of potential future developments in the field.

The Article begins, in Part I, with a brief overview of the legal framework governing refugee resettlement and asylum in the United States. It describes the international treaties to which the United States is a party, the federal Refugee Act of 1980,<sup>23</sup> the relevant provisions of the federal Immigration and Nationality Act of 1952 (INA),<sup>24</sup> and the federal-state agreements currently in force pertaining to refugees and asylees. In Part II, the Article explores recent state responses to the resettlement of certain groups of refugees and asylees; specifically, as it pertains to particular Middle Eastern refugees and Central American asylees. It discusses states' attempts through gubernatorial decree, legislation, and litigation to curtail the settlement of such refugees and asylees as well as the countervailing movement by some states to support them. Part III of the Article discusses the perils and possibilities of state engagement with refugee- and asylee-related lawmaking. It explains why, in accordance with the Supreme Court's longstanding immigration federalism jurisprudence, states may not exclude refugees from their territories. But, it also argues that states may nonetheless benefit from playing a more active role in refugee selection, admission, and integration.

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ONLINE 100 (2012); Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333 (2013).

22. See Steve Vladeck, *Three Thoughts on Refugee Resettlement Federalism*, LAWFARE, (Nov. 17, 2015, 12:07 AM), <https://www.lawfareblog.com/three-thoughts-refugee-resettlement-federalism> (arguing that state bans on refugees violate the Constitution, and the power to grant or deny refugee status lies with the President and the federal government). As of this writing, Professor Vladeck's short blog post is the full extent of scholarly engagement on this important topic.

23. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

24. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

## I. THE LEGAL FRAMEWORK FOR REFUGEE AND ASYLEE RESETTLEMENT

*“It’s up to the federal government. If the federal government lets refugees in and places them in your state, the Governor has no authority to turn them down.”*

—New York Governor Andrew M. Cuomo<sup>25</sup>

*“I am directing all state agencies to suspend the resettlement of additional Syrian refugees in the state of Indiana pending assurances from the federal government that proper security measures have been achieved.”*

—Indiana Governor and Vice President-elect Mike Pence<sup>26</sup>

This Part describes the legal framework governing refugee resettlement and asylum in the United States. It discusses the United States’ obligations under various international treaties and conventions pertaining to refugees, in particular the Convention Relating to the Status of Refugees<sup>27</sup> and the Protocol Relating to the Status of Refugees.<sup>28</sup> It outlines the relevant federal statutory provisions governing refugee resettlement and the grant of asylum, most notably the Refugee Act of 1980. It also provides an overview of the current framework for federal and state cooperation with respect to the resettlement of refugees and asylum seekers. As the discussion that follows shows, this legal framework has remained remarkably unchanged at the international, national, and local level for many years, which makes the recent emergence of state challenges to the status quo all the more remarkable.

A. *International Law Governing Refugee and Asylee Resettlement*

In July 1951, the member states of the United Nations adopted the Convention Relating to the Status of Refugees (“the 1951

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25. *Video & Transcript: Governor Cuomo Discusses Syrian Refugee Crisis*, N.Y. ST. (Nov. 17, 2015), <https://www.governor.ny.gov/news/video-transcript-governor-cuomo-discusses-syrian-refugee-crisis>.

26. Michael E. Miller, *ACLU Sues Indiana Gov. Mike Pence, Demands State Accept Syrian Refugees*, WASH. POST (Nov. 24, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/24/aclu-sues-indiana-gov-mike-pence-demands-state-accept-syrian-refugees>.

27. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

28. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

Convention”).<sup>29</sup> The 1951 Convention was subsequently amended and expanded in 1967 by the Protocol Relating to the Status of Refugees (“the 1967 Protocol”).<sup>30</sup> The United States became a party to the 1967 Protocol, and thus to the amended terms of the 1951 Convention, in 1968.<sup>31</sup> Under Article I of the Convention, refugees are defined as persons outside their country of origin or habitual residence, who have a well-founded fear of persecution in that country on account of their race, religion, nationality, membership in a particular social group, or political opinion.<sup>32</sup> Such persons must be unable or unwilling to avail themselves of the protection of the government of that country because the persecution they experience is by government actors or by forces that the government is unable or unwilling to control.<sup>33</sup>

Migrants leaving home to study or work in a foreign country or to reunite with family members living overseas are not refugees.<sup>34</sup> Rather, under international law, only people who have been forced to flee their home because of persecution are refugees.<sup>35</sup> As a consequence of this flight, refugees—unlike other migrants—do not enjoy the protection of their own government while they are abroad.<sup>36</sup> In the absence of this protection, the 1951 Convention and the 1967 Protocol set forth the obligations of signatories, including the United States, to support and protect refugees.<sup>37</sup>

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29. 1951 Convention, *supra* note 27, 189 U.N.T.S. at 150; see United Nations High Commissioner for Refugees, *1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (Sept. 2011) [hereinafter UNHCR, *1951 Convention and 1967 Protocol*], <http://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> (discussing the history and significance of the 1951 Convention and the 1967 amendments).

30. UNHCR, *1951 Convention and 1967 Protocol*, *supra* note 29, at 1. The Protocol removed the Convention’s restrictions on geography and time that limited the Convention’s application to those who became refugees in Europe before 1951. *Id.* at 4.

31. 1967 Protocol, *supra* note 28, 19 U.S.T. at 6223, 6225 (ratifying this treaty obligated the United States to comply with the 1951 Convention).

32. 1951 Convention, *supra* note 27, ch. 1, art. 1(A)(2).

33. *Id.*

34. See UNHCR, *1951 Convention and 1967 Protocol*, *supra* note 29, at 3.

35. *Id.*

36. *Id.*

37. 1951 Convention, *supra* note 27, art. 3–34. Note that under the terms of the Convention, certain persons are excluded from obtaining refugee status, even if they have a well-founded fear of persecution in their home country. These include persons for whom there are serious reasons to suspect that they have committed a serious crime outside their country of refuge, including suspected war criminals, and

Refugees are ordinarily identified and classified as such by UNHCR or other aid agencies after they flee their country of origin but before they reach their nation of permanent resettlement. This recognition of their refugee status might occur, for example, when they are in a refugee camp in a third country. In contrast, those who believe that they meet the definition of a refugee, and who apply for recognition as such within the territory or at a point of entry to the state in which they wish to resettle permanently, are “asylum seekers.”<sup>38</sup> If they are granted asylum in their new country, they become “asylees.”<sup>39</sup> The United States, similar to many other signatories to the 1951 Convention and 1967 Protocol, has different procedures for asylees than for those who enter the country as refugees.

The most important obligation of a host country to a refugee or asylee, set forth in Article 33 of the 1951 Convention, is that of “non-refoulement.”<sup>40</sup> The term “refoulement” derives from the French verb *refouler*, which means to turn back or turn away.<sup>41</sup> In the context of the Convention, the signatories’ agreement to the principle of non-refoulement means that refugees cannot be returned to a country where they face serious threats to their life or freedom.<sup>42</sup> At this point, the principle of non-refoulement is so well established that it is considered a rule of customary international law—binding on all states, even those that have not acceded to the 1951 Convention or 1967 Protocol.<sup>43</sup> For countries like the United States, which are signatories to the 1951 Convention and 1967 Protocol, the commitment to non-refoulement is absolute.

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persons “guilty of acts contrary to the purposes and principles of the United Nations.” *Id.* art. 1(F).

38. The United States Immigration and Nationality Act (INA) distinguishes the terms “asylees” (or “asylum seekers”) and “refugees.” The distinction is minimal—asylees apply for asylum status from within the United States; refugees apply for asylum status from abroad. Compare 8 U.S.C. § 1158 (2012) (asylees), with § 1101(a) (42) (refugees).

39. *Asylee*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/asylee> (last visited Nov. 30, 2016).

40. 1951 Convention, *supra* note 27, art. 33.

41. *Refoulement*, OXFORD ENG. DICTIONARY (3d ed. 2009).

42. 1951 Convention, *supra* note 27, art. 33(1) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

43. UNHCR, *1951 Convention and 1967 Protocol*, *supra* note 29, at 5; see also James C. Hathaway, *Leveraging Asylum*, 45 TEX. INT’L L.J. 503, 519 (2010) (describing “a broad duty of *non-refoulement* in customary international law”).

A number of other rights for refugees and obligations on the part of state signatories are enshrined in the 1951 Convention. Refugees enjoy the right not to be expelled from the new host country, except under certain strictly defined conditions.<sup>44</sup> They have the right not to be punished for entering the signatory state without inspection at the border, as long as they come directly from the country in which they were threatened.<sup>45</sup> They have the right to move freely within the territory of their host country<sup>46</sup> and the right to obtain identity and travel documents from the government of the host country.<sup>47</sup> They also have the rights to work;<sup>48</sup> to pursue an education;<sup>49</sup> to obtain public relief and assistance, if needed;<sup>50</sup> and to access the courts to vindicate those rights.<sup>51</sup>

The 1951 Convention and the 1967 Protocol are not the only international agreements or declarations pertaining to refugees and asylum seekers. At the time of the 1967 Protocol, the United Nations General Assembly also adopted a Declaration on Territorial Asylum, reiterating that granting asylum to those in need “is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State.”<sup>52</sup> There are also a number of regional transnational agreements and declarations applicable to refugees, most notably the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>53</sup> and the 1984 Cartagena Declaration for Latin America.<sup>54</sup> Further, there are various provisions enshrined in international human rights law that protect refugees and asylum seekers. The 1948 Universal Declaration of Human Rights, for example, states that “[e]veryone has the right to seek and to enjoy in other countries asylum from

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44. 1951 Convention, *supra* note 27, art. 32.

45. *Id.* art. 31(1).

46. *Id.* art. 26.

47. *Id.* art. 27–28.

48. *Id.* art. 17–19.

49. *Id.* art. 22.

50. *Id.* art. 23.

51. *Id.* art. 16.

52. G.A. Res. 2312 (XXII), Declaration on Territorial Asylum (Dec. 14, 1967).

53. Sept. 10, 1969, 1001 U.N.T.S. 45.

54. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, Organization of American States Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1.

persecution.”<sup>55</sup> The International Covenant on Civil and Political Rights of 1966 protects migrants from refoulement.<sup>56</sup> The 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provides protection from refoulement for victims of torture.<sup>57</sup> The 1989 Convention on the Rights of the Child applies to all children, without discrimination, including child refugees and asylum seekers.<sup>58</sup> International humanitarian law similarly provides for the protection of displaced persons in the midst of international or armed conflict. Article 44 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, for example, specifically provides protections for refugees and displaced persons.<sup>59</sup>

These international and transnational accords demonstrate a marked degree of consensus among members of the international community about the importance of protection from persecution and support of displaced persons. The cornerstone of this consensus has been the widespread accession of states to the 1951 Convention and the 1967 Protocol.<sup>60</sup> Although the United States was a signatory to the 1967 Protocol, it was not until 1980 that the terms and principles of the 1951 Convention became enshrined in American law with the passage of the Refugee Act.<sup>61</sup>

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55. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

56. International Covenant on Civil and Political Rights art. 13, Dec. 19, 1966, 999 U.N.T.S. 171.

57. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

58. Convention on the Rights of the Child art. 2, 22, Nov. 10, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). Although the United States signed the Convention on February 16, 1995, it has failed to ratify it because it forbids both the death penalty and life imprisonment for children. *Id.* art. 37; Luisa Blanchfield, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1, 6 (2009).

59. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 44, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

60. *See Protocol Relating to the Status of Refugees*, UNITED NATIONS, [https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=V-5&chapter=5&lang=en) (last visited Nov. 30, 2016) (providing information and a current tally of states that have acceded to the 1967 Protocol). As of this writing, 146 states are parties to the 1967 Protocol and thus the 1951 Convention. *Id.*

61. MARTIN ET AL., *supra* note 3, at 91.

*B. Federal Law Governing Refugee and Asylee Resettlement*

In the post-war period between 1948 and 1980, the United States granted admission to thousands of displaced persons. In a series of statutes, Congress authorized the admission of refugees from Europe, Asia, Africa, and Latin America, with a particular emphasis on those fleeing newly-established communist regimes.<sup>62</sup> In 1975, however, at the end of the Vietnam War, the potential influx of hundreds of thousands of Vietnamese refugees led Congress to contemplate a comprehensive scheme for refugee resettlement that would enshrine in domestic law the nation's preexisting international treaty obligations.<sup>63</sup> In 1979, Senator Edward Kennedy introduced S. 643, the Senate Bill that ultimately became the Refugee Act of 1980.<sup>64</sup> The Act was signed into law by President Jimmy Carter on March 17, 1980.<sup>65</sup> One month later, on April 15, 1980, the mass emigration of Cuban citizens, known as the "Mariel boatlift," began.<sup>66</sup> Between April 15 and October 31 of that year, approximately 125,000 refugees from Cuba arrived in the United States seeking asylum.<sup>67</sup>

The Refugee Act of 1980 modified the existing terms of the INA to introduce a comprehensive program for the screening, admission, and resettlement of refugees within the United States.<sup>68</sup> Although the early beneficiaries of the Act were refugees from the former

62. See *id.* at 94 (discussing the immigration statute passed in 1965, which set aside certain percentages of admission for refugees, but the only refugees who qualified came from communist countries).

63. See Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 956–59 (2003); see also MARTIN ET AL., *supra* note 3, at 91 (explaining that the Refugee Act brought U.S. immigration law into line with the provisions of the 1951 Convention).

64. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 145 (1981) (providing Senator Kennedy's own account of the background to the legislative history of the passage of the Act).

65. Jimmy Carter, *Refugee Act of 1980 Statement on Signing S. 643 into Law*, AM. PRESIDENCY PROJECT (Mar. 18, 1980), <http://www.presidency.ucsb.edu/ws/?pid=33154>.

66. See KATE DUPES HAWK ET. AL., *FLORIDA AND THE MARIEL BOATLIFT OF 1980: THE FIRST TWENTY DAYS* 29–34 (2014) (detailing the events that led up to Fidel Castro permitting those who wanted to leave Cuba to do so via boats at the port of Mariel).

67. Yvette M. Mastin, *Sentenced to Purgatory: The Indefinite Detention of the Mariel Cubans*, 2 SCHOLAR 137, 143 (2000). For an account of how the sheer number of asylum seekers overwhelmed the new systems and procedures, leading to mass admission using the preexisting method of parole, see generally *id.*

68. Refugee Act of 1980, Pub. L. No. 96-212, § 311(a)(2), 94 Stat. 102, 111 (codified as amended at 8 U.S.C. § 1522 (2012)).

Soviet Union and Indo-China, the Act applies to refugees from all nations and does not distinguish on the basis of the country or region of origin.<sup>69</sup> The Act provides the statutory definition of refugee, which remains today, namely

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>70</sup>

This language clearly reflects the definition of refugee in the 1951 Convention.<sup>71</sup> An asylee, similarly, is defined as

[a]n alien in the United States or at a port of entry who is found to be unable or unwilling to return to his or her country of nationality, or to seek the protection of that country because of persecution or a well-founded fear of persecution. Persecution or the fear thereof must be based on the alien's race, religion, nationality, membership in a particular social group, or political opinion.<sup>72</sup>

The Refugee Act contains no clause specifying the number of refugees to be admitted to the United States each year. Instead, the President is granted the responsibility to determine annually how many refugees may be admitted.<sup>73</sup> In 1980, the year of the Refugee Act's enactment, refugee admissions surged to 207,116 persons.<sup>74</sup> In 1982, however, the number of admissions dropped to less than 100,000 and remained so for seven years.<sup>75</sup> In 1990, around the end of the Cold War, refugee admissions increased to 122,066 but then dropped once again.<sup>76</sup> From 1995 to 2015, the number of refugees admitted to the United States remained consistently below 100,000 per year.<sup>77</sup> In 2015, the Obama Administration capped refugee

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69. See Steinbock, *supra* note 63, at 956–59 (explaining that under Priority One of the Processing Priorities, refugees from all nations are eligible and acceptance is not restricted to particular regions).

70. 8 U.S.C. § 1101(a)(42)(A) (2012).

71. Compare *id.*, with 1951 Convention, *supra* note 27, art. 1 (defining “refugee”).

72. *Asylee*, *supra* note 39.

73. 8 U.S.C. § 1157(a)(2).

74. *Cumulative Summary of Refugee Admissions*, U.S. DEP'T ST. (Dec. 31, 2015), <http://www.state.gov/j/prm/releases/statistics/251288.htm>.

75. *Id.*

76. *Id.*

77. *Id.*

admissions at 70,000 persons.<sup>78</sup> During the 2016 fiscal year, however, that limit was raised to 85,000 refugees, with the expectation that 10,000 of those refugees would be individuals fleeing persecution in Syria and other war-torn nations in the Middle East.<sup>79</sup> As of this writing, however, just 1736 Syrian refugees have been resettled in the United States since the Obama Administration announced its intention to welcome 10,000 of the most vulnerable such Syrians.<sup>80</sup>

The United States' ebb and flow of refugee admissions is not unusual in the international community as many countries have adopted a similar strategy.<sup>81</sup> Indeed, the 1951 Convention and 1967 Protocol do not require that signatory states admit a certain number of refugees at any time.<sup>82</sup> Instead, the 1951 Convention and 1967 Protocol require that refugees who arrive on a signatory nation's territory not be turned away.<sup>83</sup> In practice, this means that most individuals displaced by war or persecution find refuge in a different

78. Michael R. Gordon et al., *U.S. Will Accept More Refugees as Crisis Grows*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/world/europe/us-to-increase-admission-of-refugees-to-100000-in-2017-kerry-says.html>.

79. *Id.*; Gardiner Harris et al., *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES (Sept 10, 2015), <http://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html>.

80. Somini Sengupta, *U.S. Has Taken in Less than a Fifth of Pledged Syrian Refugees*, N.Y. TIMES (May 10, 2016), <http://www.nytimes.com/2016/05/11/world/middleeast/us-has-taken-in-less-than-a-fifth-of-pledged-syrian-refugees.html>; *see also Syria Regional Refugee Response*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Nov. 7, 2016) (providing a detailed breakdown of the demographics and numbers of registered Syrian refugees); *Myths and Facts: Resettling Syrian Refugees*, U.S. DEP'T ST. (Nov. 25, 2015), <http://www.state.gov/r/pa/prs/ps/2015/11/250005.htm> (addressing popular myths about Syrian refugees and the refugee vetting process).

81. For statistics on which countries admitted refugees in 2014, see United Nations High Comm'r for Refugees, *World at War: Global Trends: Forced Displacement in 2014*, at 21–22 (June 18, 2015) [hereinafter *World at War*], <http://www.unhcr.org/en-us/statistics/country/556725e69/unhcr-global-trends-2014.html> (finding that in addition to the United States, Canada, Australia, Sweden, Norway, and Finland have admitted large numbers of refugees).

82. 1951 Convention, *supra* note 27; 1967 Protocol, *supra* note 28.

83. *See supra* text accompanying notes 40–43 (discussing the concept of refoulement); *see also* Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 7 (2008) (noting that the 1951 Convention's principle of non-refoulement has been recognized by "virtually all" countries that are parties to the agreement).

region of their country of origin or in a neighboring country.<sup>84</sup> Refugees fleeing Syria have overwhelmingly sought resettlement in Turkey, Lebanon, Egypt, and Jordan.<sup>85</sup> Similarly, those fleeing persecution in El Salvador, Guatemala, and Honduras have predominantly sought refuge in Mexico.<sup>86</sup> These contiguous nations thus bear the brunt of the burden of assisting the refugees.

The United States has yet to experience a similar mass influx of refugees and asylum seekers. There is, however, a discernable pattern to the rise and fall of refugee admissions since 1980; during each year in which refugee admissions peaked, the increase could be attributed to U.S. foreign policy decisions or military incursions that had a direct impact on the countries from which the refugees were seeking asylum.<sup>87</sup> The Obama Administration's decision to raise the cap on refugee admissions in light of the ongoing crisis in Syria is merely the latest iteration of this phenomenon.

While the Refugee Act and its attendant regulations allow the executive branch flexibility with respect to the number of refugee admissions each year, the requirements and mechanisms for the admission of refugees and asylum seekers are very precise with specific roles set forth for a variety of government agencies.<sup>88</sup> The Refugee Admissions Program is jointly administered by the Bureau of Population, Refugees, and Migration in the Department of State; the

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84. See United Nations High Comm'r for Refugees, *Global Report 2015: Middle East and North Africa*, at 60 (June 1, 2016), <http://www.unhcr.org/en-us/publications/fundraising/574ed7014/unhcr-global-report-2015-middle-east-north-africa-mena.html> (explaining that 4.6 million Syrians sought refuge in neighboring countries by the end of 2015).

85. *Id.*

86. United Nations High Comm'r for Refugees, *Global Report 2015: The Americas*, at 96 (June 1, 2016), <http://www.unhcr.org/en-us/publications/fundraising/574ed7d54/unhcr-global-report-2015-the-americas.html>.

87. See, e.g., E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 690–91 & n.16 (2015) (arguing for cost-sharing by countries, including the United States, whose military incursions or foreign policy decisions precipitate a refugee crisis); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 143 (1997) (claiming nations should shift towards collectivized protection efforts for refugees); Meital Waibsnaider, Note, *How National Self-Interest and Foreign Policy Continue to Influence the U.S. Refugee Admissions Program*, 75 FORDHAM L. REV. 391, 411, 413–14, 416 (2006) (evaluating admittance of Afghani and Iraqi refugees post-9/11).

88. See Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1070–73 (2011) (providing the framework of refugee law in the United States).

Office of Refugee Resettlement in the Department of Health and Human Services; and offices within the Department of Homeland Security (DHS).<sup>89</sup> U.S. Citizenship and Immigration Services (USCIS), within DHS, conducts interviews in consulates overseas as well as credible fear and asylum interviews for asylum seekers applying within the United States.<sup>90</sup>

Refugees, in contrast with asylees, apply for admission to the United States from an overseas location, such as a refugee camp. Refugees applying to resettle in the United States undergo a rigorous screening and review process, which can take up to two years to complete.<sup>91</sup> This process is so thorough that David Milliband, the current President of the International Rescue Committee, stated recently, “There are many ways to come to the United States. Comparatively the refugee resettlement program is the most difficult short of swimming the Atlantic.”<sup>92</sup> Refugee applicants are referred initially to the United States by the UNHCR, a U.S. embassy, or a non-governmental organization.<sup>93</sup> Refugees who wish to settle in the United States are required to fill out an extensive application form, attend an interview with a USCIS officer at a U.S. embassy, and provide biometric data, which is typically fingerprints and photographs.<sup>94</sup> The application forms and biometric data are then passed to a Resettlement Support Center, which collects information and runs biographic security checks through a variety of federal agencies, including the FBI, DHS, and the Department of State.<sup>95</sup> If the applicant clears those checks, the process proceeds to a medical screening.<sup>96</sup> If, at the conclusion of the medical screening, no

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89. *U.S. Refugee Admissions Program*, U.S. DEP’T. ST., <http://www.state.gov/j/prm/ra/admissions> (last visited Nov. 30, 2016).

90. *Id.*; see RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND “CREDIBLE FEAR” ISSUES IN U.S. IMMIGRATION POLICY 1 (2011).

91. Miriam Jordan, *White House Says Syrian Refugees Face Rigorous Screenings*, WALL ST. J. (Nov. 17, 2015, 6:55 PM), <http://www.wsj.com/articles/white-house-says-syrian-refugees-face-rigorous-screenings-1447803228> (observing that the vetting process makes the wait even longer for refugees from the Middle East).

92. David Miliband, Opinion, *Syrian Refugees Are Not a Threat*, N.Y. DAILY NEWS (Nov. 15, 2015, 5:00 AM), <http://www.nydailynews.com/opinion/david-miliband-syrian-refugees-not-threat-article-1.2434327>.

93. *U.S. Refugee Admissions Program*, *supra* note 89.

94. *Id.*; see 8 C.F.R. § 103.16(a) (2016).

95. *U.S. Refugee Admissions Program*, *supra* note 89.

96. *See id.* (explaining that health screenings are necessary to ensure anyone with a contagious disease does not enter the United States).

problems arise, the applicant is assigned to a Regional Refugee Coordinator in the United States for resettlement.<sup>97</sup>

The pre-entry screening and security clearance process are designed to ensure that the refugee is truly eligible for resettlement under the terms of the INA, as amended by the Refugee Act. The refugee cannot be firmly resettled in any other country.<sup>98</sup> The refugee must demonstrate a personal “well-founded fear” of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>99</sup> The applicant must also demonstrate that none of the grounds of inadmissibility set forth in the INA apply. An applicant must be fully vaccinated and not have a “physical or mental disorder” that might pose a threat to property or to other persons.<sup>100</sup> The applicant must not have a serious criminal record,<sup>101</sup> pose a threat to national security,<sup>102</sup> or have a record of immigration infractions, including misrepresentations on any prior visa applications.<sup>103</sup> Moreover, the applicant must not have engaged in polygamy.<sup>104</sup> Further screening interviews to determine continued eligibility are conducted at the border upon entry to the United States and one year after entry, when the applicant is required to apply for a lawful permanent resident card, known as a “green card.”<sup>105</sup>

The Resettlement Support Center, after conditionally accepting a refugee for resettlement, sends a request for assurance of placement to the United States. At that point, the Refugee Processing Center cooperates with state agencies and nonprofit “voluntary agencies” (VOLAGs) to determine where the refugee will live.<sup>106</sup> Currently,

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97. *Id.*

98. 8 U.S.C. § 1157(c) (2012).

99. § 1101(a)(42).

100. § 1182(a)(1).

101. § 1182(a)(2).

102. § 1182(a)(3).

103. § 1182(a)(6).

104. § 1182(a)(10).

105. See U.S. CITIZENSHIP & IMMIGR. SERVS., I AM A REFUGEE OR ASYLEE: HOW DO I BECOME A U.S. PERMANENT RESIDENT? 1 (Oct. 2013), <https://www.uscis.gov/sites/default/files/USCIS/Resources/D3en.pdf> (describing the process for refugees and asylees to apply for a permanent resident card); U.S. CUSTOMS & BORDER PROT., INSPECTOR'S FIELD MANUAL 155–59 (Charles M. Miller ed., 2008), <https://www.shusterman.com/pdf/cbpinspectorsfieldmanual.pdf> (describing border processing for qualified refugees).

106. AM. IMMIGRATION COUNCIL, AN OVERVIEW OF U.S. REFUGEE LAW AND POLICY 3 (Nov. 2015), [http://www.americanimmigrationcouncil.org/sites/default/files/research/an\\_overview\\_of\\_united\\_states\\_refugee\\_law\\_and\\_policy.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_united_states_refugee_law_and_policy.pdf).

there are nine large resettlement VOLAGs in the United States.<sup>107</sup> Each refugee is assigned to one of those agencies, which work with local and state governments to find appropriate placements within communities for the refugee and to provide transitional assistance.<sup>108</sup> The Director of the Office of Refugee Resettlement and the State Department's Bureau of Population, Refugees, and Migration are required to consult regularly with state and local governments as well as the VOLAGs regarding the distribution of refugees among the states and localities.<sup>109</sup> Unlike other immigrants, refugees resettled in the United States do not need to have a United States-based employer or relative "sponsor" their admission to the country. But, if a refugee approved for admission does have a family member living in the United States, every effort is usually made to place the refugee in a location near that relative.<sup>110</sup>

Once a suitable placement has been identified, and all relevant security checks and medical examinations have been completed, the Resettlement Support Center coordinates with the International Organization for Migration to arrange the refugees' travel to the United States.<sup>111</sup> Refugees traveling to the United States from overseas are given an interest-free loan to pay for their travel.<sup>112</sup> They are, however, required to sign a promissory note stating that they will repay the amount of the loan in full to the U.S. government.<sup>113</sup> The first payment on the loan is due six months after the refugees enter the United States.<sup>114</sup>

Upon arrival in the United States, the refugee becomes the responsibility of the VOLAG. During the refugee's first ninety days in the United States, the VOLAG arranges for food, housing, clothing, employment counseling, medical care, and other necessities,

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107. The nine VOLAGs are comprised of: Church World Service, Episcopal Migration Ministries, Ethiopian Community Development Council, Hebrew Immigrant Aid Society, International Rescue Committee, Lutheran Immigration and Refugee Service, U.S. Committee for Refugees and Immigrants, United States Conference of Catholic Bishops (Catholic Charities), and World Relief. *Voluntary Agencies, OFF. REFUGEE RESETTLEMENT* (July 17, 2012), <http://www.acf.hhs.gov/orr/resource/voluntary-agencies>.

108. AM. IMMIGRATION COUNCIL, *supra* note 106, at 3-4.

109. 8 U.S.C. § 1522(a)(2)(A).

110. AM. IMMIGRATION COUNCIL, *supra* note 106, at 3.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

including transportation from the airport to lodgings.<sup>115</sup> The refugee also receives a number of benefits from the federal Office of Refugee Resettlement (ORR) that are administered jointly by the state voluntary agency and the local affiliate of the VOLAG.<sup>116</sup> These benefits include monetary support: a one-off cash stipend of approximately \$900 for basic needs and up to eight months of “Refugee Cash Assistance,” the exact amount of which is determined according to the size of the refugee’s family.<sup>117</sup> Refugee seniors may also receive monthly Supplemental Security Income, and all refugees receive health care, “Refugee Medical Assistance,” through ORR during their first eight months in the United States.<sup>118</sup> Within six months of arrival, however, refugees are expected to have established a degree of independence and self-sufficiency. They have employment authorization from the federal government as soon as they arrive in the United States, and they are expected to secure employment within six months of arrival.<sup>119</sup> After one year’s residency, they may apply to become lawful permanent residents, and five years thereafter they may apply to become U.S. citizens.<sup>120</sup>

Asylees—immigrants already in the United States who apply for and are granted asylum—may also be eligible for ORR-funded services provided by state voluntary agencies and VOLAGS. ORR allows individuals granted asylum in the United States to access Refugee Cash Assistance and Refugee Medical Assistance for eight months from the date on which asylum is granted.<sup>121</sup> This date

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115. *Id.* at 3–4.

116. *Id.* at 2–3.

117. See *Refugees and Access to Funds & Benefits in the U.S.*, CATH. CHARITIES REFUGEE & IMMIGR. SERVS., <http://www.ccmaine.org/docs/Refugee%20Immigration%20Services/159-RefugeesandAccessToFund.pdf> (last visited Nov. 30, 2016) (discussing how the initial resettlement money can go towards bus fare, food, clothing, apartment security deposit, etc.).

118. *Id.*

119. See AM. IMMIGRATION COUNCIL, *supra* note 106, at 4 (noting that “refugee men who have recently arrived are employed at a higher rate than native born (sixty-seven percent to sixty percent respectively), and refugee women are employed at the same rate as native women”).

120. *Id.*

121. *Asylee Eligibility for Assistance and Services*, OFF. REFUGEE RESETTLEMENT (July 12, 2012), <http://www.acf.hhs.gov/orr/resource/asylee-eligibility-for-assistance-and-services>; see 45 C.F.R. § 400.62 (2015) (requiring state and local agencies to ensure asylees have access to the Refugee Cash Assistance program).

becomes the asylee's functional "date of entry" to the United States.<sup>122</sup> Asylees also receive access to other ORR services for a period of up to five years.<sup>123</sup> Like refugees, they receive work authorization, which, again, is valid from the date on which asylum was granted.<sup>124</sup> The overwhelming majority of asylees choose, by themselves, to settle in a particular location before they apply for and are formally granted asylum. There is, however, one notable exception to this general rule: unaccompanied immigrant children seeking asylum.<sup>125</sup>

An unaccompanied immigrant child is a minor traveling without a parent or guardian, who is apprehended at the border or in the interior of the United States by DHS officers and placed in the care and custody of ORR.<sup>126</sup> Unaccompanied immigrant children, who have often undertaken long and hazardous journeys to escape violent communities or abusive family relationships in their countries of origin, are a particularly vulnerable population.<sup>127</sup> Under a Stipulated Settlement Agreement in a 1996 federal lawsuit, *Flores v. Reno*,<sup>128</sup> and in accordance with section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,<sup>129</sup> the Office of Refugee Resettlement is required to provide an array of services to these children.<sup>130</sup> Where practical, ORR is required to locate a "sponsor" into whose custody an unaccompanied

122. Letter from Lavinia Limon, Dir. of Office of Refugee Resettlement, to State Refugee Coordinators, Nat'l Voluntary Agencies, Other Interested Parties (Aug. 3, 2000) [hereinafter Limon Letter], <http://www.acf.hhs.gov/orr/resource/state-letter-00-15>.

123. 45 C.F.R. § 400.152(b).

124. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 105, at 1 (describing the process for refugees and asylees to apply for a permanent resident card and noting that after five years they may apply for U.S. citizenship).

125. This Article uses the term "unaccompanied immigrant child" to describe these minors rather than the statutory term "unaccompanied alien child." See 8 U.S.C. § 1158(a)(2)(E) (2012).

126. See 6 U.S.C. § 279(a), (g)(2).

127. Linda A. Piowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 266, 274 (2006).

128. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), (C.D. Cal. Jan. 17, 1997) [hereinafter The Flores Settlement Agreement], [https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf). Some of the agreement's terms have been codified at 8 C.F.R. §§ 236.3, 1236.3. For the case culminating in the settlement agreement, see *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *aff'd*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* *Reno v. Flores*, 507 U.S. 292 (1993).

129. Pub. Law 110-457, § 235, 122 Stat. 5044, 5074 (2008) (codified as amended at 8 U.S.C. § 1232).

130. The Flores Settlement Agreement, *supra* note 128, at 7-9.

child may be released. Sponsors may be parents, grandparents, uncles, aunts, or other relatives or friends of the child or child's family.<sup>131</sup> If no sponsor can be identified, the child is placed in the care of an ORR-funded state-licensed provider that may offer foster care, group homes, or residential treatment centers.<sup>132</sup> The state-licensed provider is then responsible for the child's education, health care, English language instruction, vocational training, access to legal services, and other aspects of case management.<sup>133</sup> These state-licensed providers are primarily, but not exclusively, located in states along the southwest border of the United States.<sup>134</sup> As a consequence, the population of unaccompanied child asylum seekers is clustered in this region of the country.

### C. *State Involvement in Refugee and Asylee Resettlement*

The Refugee Act created a framework within which federal and state governments work together to support refugee resettlement. During the period leading up to the passage of the Act, there was some concern by state actors about the potential expenses arising from refugee placement, but there was widespread support for the Act on humanitarian grounds.<sup>135</sup> To address funding concerns, the ORR was created to coordinate disbursement of funds to the states and, where necessary, localities and nonprofit organizations.<sup>136</sup> State enrollment in the federal refugee resettlement program is voluntary.<sup>137</sup> As of this writing, thirty-two states receive federal funds to administer their own State Refugee Resettlement Programs.<sup>138</sup> Five

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131. *About Unaccompanied Children's Services*, OFF. REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/orr/programs/ucs/about> (last updated Sept. 10, 2015).

132. *Id.*

133. *Id.*

134. *See id.* (stating that most providers are near areas where many immigrants are apprehended by authorities).

135. Kennedy, *supra* note 64, at 147–48.

136. *Id.* at 152.

137. *See* Alexa Ura, *Texas Officially Withdraws from Refugee Resettlement Program*, WASH. POST (Sept. 30, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/09/30/texas-officially-withdraws-from-refugee-resettlement-program> (reporting that while Texas withdrew from the refugee resettlement program, the federal government could appoint a nonprofit organization to help settle refugees in Texas).

138. *Find Resources and Contacts in Your State*, OFF. REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/orr/state-programs-annual-overview> (last visited Nov. 30, 2016) [hereinafter *State Resources*] (showing an interactive map that labels thirty-two states as "State Administered").

states—Maryland, Minnesota, Oklahoma, Oregon, and Texas—opt to support refugees through federally funded public-private partnerships, whereby the states maintain policy and administrative oversight, but VOLAG local affiliates are responsible for providing direct services to the refugees.<sup>139</sup> Twelve states—Alabama, Alaska, Colorado, Idaho, Kentucky, Louisiana, Massachusetts, Nevada, North Dakota, South Dakota, Tennessee, and Vermont—have withdrawn from the federal program, so VOLAGs and other nonprofits within these states function as “state-designees” to provide support for refugees in accordance with the federal Wilson-Fish “alternative” program.<sup>140</sup> One state, Wyoming, has no refugee resettlement program whatsoever.<sup>141</sup> Those states that are part of the federal scheme receive funding from ORR to provide the eight months of Refugee Cash Assistance and Refugee Medical Assistance to refugee families who, because of their refugee status, do not yet qualify for regular Transitional Assistance for Needy Families and Medicaid.<sup>142</sup> The federal government also provides funding for English language and vocational training programs.<sup>143</sup> The funding is based on the state’s historical payments to refugees—the number of refugees

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139. See *id.* (labeling five states “Public Private Partnership”); *Divisions: Refugee Assistance*, OFF. REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/orr/resource/divisions-refugee-assistance> (last updated June 27, 2016) (explaining the Public/Private Partnership Program and the Wilson-Fish Program).

140. *State Resources*, *supra* note 138 (labeling twelve states “Wilson-Fish”); OFFICE OF REFUGEE RESETTLEMENT, ANNUAL REPORT TO CONGRESS: FY 2014, at 19 (Mar. 18, 2016) [hereinafter ORR ANNUAL REPORT], <http://www.acf.hhs.gov/orr/resource/office-of-refugee-resettlement-annual-report-to-congress-2014>. The Wilson-Fish alternative program, named for its sponsors in Congress, was initially introduced in the FY 1985 appropriations bill. *Wilson-Fish Alternative Program FY 2015–2016 Program Guidelines*, OFFICE OF REFUGEE RESETTLEMENT, [https://www.acf.hhs.gov/sites/default/files/orr/wilson\\_fish\\_guidelines\\_fy2015\\_16.pdf](https://www.acf.hhs.gov/sites/default/files/orr/wilson_fish_guidelines_fy2015_16.pdf) (last visited Nov. 30, 2016). It amends the INA to allow the Secretary of Health and Human Services to implement alternative projects for refugees. *Id.* When Senator Wilson introduced the Amendment authorizing the program, he stated that his goal was to reduce the burden placed on his home state of California by the significant influx of refugees. 130 CONG. REC. 28,364 (1984) (statement of Sen. Wilson).

141. See Suzan M. Pritchett, *From Refugees and Asylees to Citizens: Clarifying the Refugee Admissions Process*, WYO. LAW., June 2014, at 24, 24, 27 (expressing concern that refugees and asylees who have settled in Wyoming despite its lack of a formal resettlement program lack access to important resources).

142. 8 U.S.C. § 1522(e)(7) (2012).

143. § 1522(e)(3).

resettled in the state during the last two years—as well as reimbursement for actual costs incurred by the state.<sup>144</sup>

The INA requires the Director of ORR and the Department of State's Bureau of Population, Refugees, and Migration to consult regularly with state governments and VOLAGs regarding the allocation of refugees among the states and localities.<sup>145</sup> The consultation process requires the federal government to ensure that a refugee is not initially placed or resettled in an area that is “highly impacted . . . by the presence of refugees or comparable populations unless the refugee has a spouse, parent, sibling,” or child residing in that area.<sup>146</sup> To ensure compliance with this requirement, representatives of state governments must meet regularly with representatives of local affiliates of VOLAGs to plan and coordinate in advance of their arrival the appropriate placement of refugees among the various states and localities within those states.<sup>147</sup> The deliberations at these meetings must include consideration of (1) the proportion of refugees and other immigrants among the area's population; (2) the availability of employment opportunities and affordable housing, as well as educational, health care, and mental health services for refugees in the area; (3) the probability that refugees in the area would become self-sufficient and free from long-term dependence on public assistance; and (4) any probable secondary migration of refugees to and from the area following initial settlement of a new refugee community.<sup>148</sup> This consultative process is the only way in which states have direct input into federal decisions regarding the placement of refugees in specific communities.<sup>149</sup> Thereafter, the state's role is limited to serving as a conduit for funding and access to services.

Typically, a refugee is screened by various federal agencies, in accordance with the stringent requirements of the INA and then selected for placement in a particular state.<sup>150</sup> The Bureau of

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144. ORR ANNUAL REPORT, *supra* note 140, at 11, 13.

145. 8 U.S.C. § 1522(a)(2)(A).

146. § 1522(a)(2)(C)(i).

147. § 1522(a)(2)(C)(ii).

148. § 1522(a)(2)(C)(iii).

149. *See* § 1522(a)(2)(D) (directing federal agencies to consider states' recommendations only “to the maximum extent possible” following the consultation process).

150. *See* Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, WHITE HOUSE (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/20>

Population, Refugees, and Migration notifies the state's voluntary refugee agency.<sup>151</sup> The state agency then contacts a local nonprofit—usually a local affiliate of a VOLAG—and informs it of the pending refugee arrival.<sup>152</sup> That nonprofit organization receives a payment from the Bureau of Population, Refugees, and Migration to arrange housing and other necessities for the refugee upon arrival.<sup>153</sup> Following the arrival of the refugee, the nonprofit receives further funds from ORR but administered through the state's voluntary agency.<sup>154</sup> These funds are used to assist with the refugee's search for employment, medical care, and English language instruction.<sup>155</sup>

In contrast, asylees already residing within a state are required to “self-refer” to a local affiliate of a VOLAG in order to apply for the benefits to which they are entitled under the INA.<sup>156</sup> Like refugees, they are eligible for eight months of cash and medical assistance, as well as employment preparation and job placement assistance and English language instruction.<sup>157</sup> Unlike refugees, however, asylees may already reside in the United States and therefore could be assumed to have some connection to their local community and thus require less assistance in acclimating to daily life. ORR maintains a central database of information about which agencies and offices have received funding and publishes online contact information on a state-by-state basis for use by asylees seeking services.<sup>158</sup>

States are not required by law to provide any special assistance or benefits to refugees or asylees beyond that envisaged in the Refugee Act and supported by the federal funding mechanisms described in the preceding paragraphs.<sup>159</sup> Refugees and asylees, however, like all

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15/11/20/infographic-screening-process-refugee-entry-united-states (mapping out the full screening process for refugees).

151. James R. Edwards, Jr., *Religious Agencies and Refugee Resettlement*, CTR. IMMIGR. STUD. (Mar. 2012), <http://cis.org/religious-agencies-and-refugee-resettlement>.

152. *Id.*

153. *Id.*

154. CAL. DEP'T OF SOC. SERVS., FACT SHEET: RESETTLEMENT AGENCIES (June 2016), [http://www.cdss.ca.gov/refugeeprogram/res/pdf/Factsheets/RA\\_Fact\\_Sheet.pdf](http://www.cdss.ca.gov/refugeeprogram/res/pdf/Factsheets/RA_Fact_Sheet.pdf).

155. *Id.*

156. See Limon Letter, *supra* note 122 (detailing that asylees must register within thirty-one days of being granted asylum to qualify for certain ORR assistance and services).

157. *Id.*

158. *State Resources*, *supra* note 138.

159. For a discussion on the costs of refugee resettlement, see Amber Phillips, *Here's How Much the United States Spends on Refugees*, WASH. POST (Nov. 30, 2015),

lawful immigrants in the United States, do use a variety of state services in the course of their everyday lives. Their children may attend public schools.<sup>160</sup> They are entitled to access medical care in publically-funded hospitals.<sup>161</sup> They may join public libraries and take advantage of any free programming offered to their local community. Moreover, certain groups may also require access to specialized services, such as unaccompanied immigrant children asylees who need supplementary educational training or mental health treatment.<sup>162</sup> In short, like other community members, refugees and asylees use community resources. They also, of course, contribute to their local communities in a number of ways, including financially. The regulatory requirement that refugees obtain employment within six months of resettlement in the United States<sup>163</sup> means that they frequently contribute to their new state's tax revenue shortly after their arrival.

The financial contributions of refugees notwithstanding, as many U.S. citizens have suffered economically in recent years because of the global recession, some lawmakers and commentators have begun to suggest that refugees and asylees impose a great financial burden on the states where they reside.<sup>164</sup> This argument, combined with

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<https://www.washingtonpost.com/news/the-fix/wp/2015/11/30/heres-how-much-the-united-states-spends-on-refugees>.

160. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that any state denying public education to a "discrete group of innocent children," regardless of their immigration status, must justify that denial with a substantial state interest).

161. 40 C.F.R. § 400.93 (2015) (requiring states to provide refugees with an opportunity for medical assistance).

162. See *Office of Refugee Resettlement*, ADMIN. FOR CHILD. & FAM., <http://www.acf.hhs.gov/office-of-refugee-resettlement> (last visited Nov. 30, 2016) (listing the additional services that might be necessary for unaccompanied refugee children).

163. AM. IMMIGRATION COUNCIL, *supra* note 106.

164. See, e.g., Jennifer Harper, *The Cost to Educate Young Illegal Immigrants Over \$761 Million—A Bill for All 50 States*, WASH. TIMES (Sept. 8, 2014), <http://www.washingtontimes.com/news/2014/sep/8/cost-educate-young-illegal-immigrants-over-761-mil> (opining that minors seeking asylum will cost state governments millions of dollars); Karen Ziegler & Steven A. Camarota, *The High Cost of Resettling Middle Eastern Refugees*, CTR. IMMIGR. STUD. (Nov. 2015), <http://cis.org/High-Cost-of-Resettling-Middle-Eastern-Refugees> (estimating the state and federal costs of resettling Syrian refugees to be \$64,370 in five years for each refugee). The argument that the states will need to foot a hefty bill appears to have little foundation in fact. Professor Kevin Fandl, former Counsel to the Assistant Secretary for U.S. Immigration and Customs Enforcement, has argued persuasively that

[o]verall, though states are given no choice in the federal placement of refugees within their borders, the burden of providing support to these refugees falls heavily on the federal and not the state government. . . .

widespread and dramatic claims that refugees from the Middle East might have links to terrorist organizations,<sup>165</sup> has begun to radically reshape some state governments' attitudes and policies toward refugees and asylees. The next Part of this Article explores this attitudinal shift and the executive orders, legislation, and lawsuits that it has spawned, as well as the counter-measures taken by some states to stress that, in their jurisdictions, refugees are welcome.<sup>166</sup>

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[T]here is little economic argument to be made to justify the rejection of a refugee being placed within their borders.

Kevin J. Fandl, *States' Rights and Refugee Resettlement*, 52 TEX. INT'L L.J. (forthcoming 2016).

165. See, e.g., Justin Carissimo, *Republican Governors Are Refusing Syrian Refugees Following the Paris Attacks*, INDEP. (Nov. 16, 2015), <http://www.independent.co.uk/news/world/americas/two-republican-governors-are-refusing-syrian-refugees-in-alabama-and-michigan-a6736511.html> (quoting statements from Republican governors, including: "We must take immediate action to ensure terrorists do not enter the nation or our state under the guise of refugee resettlement"; "To bring Syrian refugees into our country without knowing who they are is to invite an attack on American soil just like the one we saw in Paris last week and in New York City on 9/11"; and "Texas cannot participate in any program that will result in Syrian refugees—any one of whom could be connected to terrorism—being resettled in Texas").

166. No state, however, has yet joined the international #RefugeesWelcome movement. The White House has recently launched two companion initiatives: "Aid Refugees," <https://www.whitehouse.gov/aidrefugees> (last visited Nov. 30, 2016), and "Partnership for Refugees," <http://www.partnershipforrefugees.org> (last visited Nov. 30, 2016). In both instances, the emphasis is on private organizations and nongovernmental actors assisting the federal government at home and UNHCR overseas.

## II. THE EMERGING CONTOURS OF REFUGEE FEDERALISM

*“Effective today, I am directing the Texas Health & Human Services Commission’s Refugee Resettlement Program not to participate in the resettlement of any Syrian refugees in the State of Texas. And I urge you, as President, to halt your plans to allow Syrians to be resettled anywhere in the United States. Neither you nor any federal official can guarantee that Syrian refugees will not be a part of terroristic activity. As such, opening our door to them irresponsibly exposes our fellow Americans to unacceptable peril.”*

—Texas Governor Greg Abbott<sup>167</sup>

*“If refugees—many who are children fleeing a horrific, war-torn country—seek and are granted asylum after a rigorous security process, we should and will welcome them in Connecticut.”*

—Connecticut Governor Dannel Malloy<sup>168</sup>

This Part of the Article discusses the challenges that have recently been brought to the existing federal, state, and local legal framework for refugee and asylee resettlement. It begins with an overview of the changing rhetorical characterization of refugees and asylees by some state governments—an apparent prerequisite to refugee-related initiatives. It then discusses attempts by federal lawmakers to pass legislation that would allow states to veto refugee and/or asylee resettlement in their jurisdictions. It examines state executive orders and legislation designed to either limit or encourage refugees’ and asylees’ settlement. Finally, it concludes with a discussion of lawsuits brought by states to challenge the current federal scheme. This Part of the Article demonstrates that state governments on both sides of the debate—those in favor of welcoming refugees and asylees and those opposed to doing so—are increasingly frustrated by the limited input that they have with respect to the resettlement of refugees within their territories and are therefore actively seeking ways in which to affect law and public policy.

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167. Press Release, Office of Governor Greg Abbott, Governor Abbott to Refuse Syrian Refugees Relocating to Texas (Nov. 16, 2015), <http://gov.texas.gov/news/press-release/21647>.

168. Press Release, John F. Kennedy Presidential Library & Museum, Connecticut Governor Dannel Malloy Announced as Recipient of the 2016 John F. Kennedy Profile in Courage Award (Apr. 4, 2016), <http://www.jfklibrary.org/About-Us/News-and-Press/Press-Releases/2016-PICA-Announcement.aspx>.

A. *Redefining Refugees: Innocent Victims or Criminals and Terrorists?*

Recently, the public discourse around the resettlement of refugees and asylees has undergone a marked change. This change has been most notable with respect to the rhetoric used to describe two discrete and highly visible categories of migrants fleeing persecution: (1) women and children escaping gang violence and domestic abuse in the Central American nations of El Salvador, Guatemala, and Honduras; and (2) Syrian and Afghan refugees fleeing civil war and persecution in their homelands. In both instances, but for very different reasons, the flow of displaced persons increased dramatically in a short period of time. In both instances, the potential prospect of a large influx of migrants provoked strong, and often contradictory, reactions at the federal, state, and local levels in the United States.

Since 2013, an unprecedented number of women and children have fled their homes in the Central American “Northern Triangle” countries of El Salvador, Guatemala, and Honduras.<sup>169</sup> During the first decade of the twenty-first century, outward migration from these three nations was relatively stable.<sup>170</sup> Since 2014, however, the number of people fleeing the region has skyrocketed.<sup>171</sup> According to a report released this year by the governments of these three nations, approximately nine percent of their total population has emigrated in recent years.<sup>172</sup> Data compiled by UNHCR supports this assertion, showing that the number of citizens of these three countries requesting asylum in Belize, Costa Rica, Mexico, Nicaragua,

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169. Marc R. Rosenblum & Isable Ball, *Trends in Unaccompanied Child and Family Migration from Central America*, MIGRATION POL’Y INST. (Jan. 2016), <http://www.migrationpolicy.org/research/trends-unaccompanied-child-and-family-migration-central-america>. The three countries became known as the Northern Triangle after the signing of a trade agreement in Nueva Ocotepeque, Honduras, on May 12, 1992, but the name was not popularized until the signing of the Free Trade Agreement with Mexico in 2001. Suchit Chavez & Jessica Avalos, *The Northern Triangle: The Countries That Don’t Cry for Their Dead*, INSIGHT CRIME (Apr. 23, 2014), <http://www.insightcrime.org/news-analysis/the-northern-triangle-the-countries-that-dont-cry-for-their-dead>.

170. Steven A. Camarota, *A Record-Setting Decade of Immigration: 2000–2010*, CTR. FOR IMMIGR. STUD. (Oct. 2011), <http://cis.org/2000-2010-record-setting-decade-of-immigration>.

171. GOV’TS EL SAL., GUAT. & HOND., *THE NORTHERN TRIANGLE: BUILDING TRUST, CREATING OPPORTUNITIES*, <http://bipartisanpolicy.org/wp-content/uploads/2016/02/Alliance-for-Prosperity-in-the-Northern-Triangle.pdf> (last visited Nov. 30, 2016).

172. *Id.*

and Panama increased by 1179% between 2008 and 2014.<sup>173</sup> During the same time period, the number of nationals of Northern Triangle countries seeking asylum in the United States increased by 370%.<sup>174</sup> In 2015, the American Bar Association described this situation as a “humanitarian crisis.”<sup>175</sup> It became known more commonly as “the surge,”<sup>176</sup> a term that captures the extent to which the tremendous number of asylum seekers, most notably women and children, overwhelmed the already-strained resources of DHS facilities on the southwest border.

UNHCR produced two influential reports, *Children on the Run*<sup>177</sup> and *Women on the Run*,<sup>178</sup> analyzing the causes and consequences of this “surge” in asylum seekers from the Northern Triangle. Chief among those causes is the extreme level of violence that pervades the societies in these countries.<sup>179</sup> Escalating crime levels, especially violent, drug and gang-related crimes, have made El Salvador, Guatemala, and Honduras three of the five most dangerous nations in the Western Hemisphere.<sup>180</sup> As a consequence, according to the United Nations, women and girls in these countries are uniquely vulnerable to “being raped, assaulted, extorted, and threatened by

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173. Silva Mathema, *They Are Refugees: An Increasing Number of People Are Fleeing Violence in the Northern Triangle*, CTR. FOR AM. PROGRESS (Feb. 24, 2016, 12:35 PM), <https://www.americanprogress.org/issues/immigration/news/2016/02/24/131645/they-are-refugees-an-increasing-number-of-people-are-fleeing-violence-in-the-northern-triangle>. For the number of asylum applications in a given year, sorted by country of origin and asylum application, see *Population Statistics Database*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, [http://popstats.unhcr.org/en/asylum\\_seekers](http://popstats.unhcr.org/en/asylum_seekers) (last visited Nov. 30, 2016).

174. Mathema, *supra* note 173.

175. See AM. BAR ASS’N, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS PRESENT A CRITICAL NEED FOR LEGAL REPRESENTATION (2015), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf> (lambasting the lack of legal representation amongst unaccompanied child refugees).

176. Mathema, *supra* note 173.

177. United Nations High Comm’r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/56fc266f4.html>.

178. United Nations High Comm’r for Refugees, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015) [hereinafter *Women on the Run*], <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.

179. See Mathema, *supra* note 173 (acknowledging that El Salvador’s homicide rate is twenty-four times higher than the United States’ homicide rate).

180. *Id.*

members of heavily-armed, transnational criminal groups.”<sup>181</sup> The result has been a mass exodus of children and families, who travel thousands of miles to seek refuge elsewhere, including in the United States. During the fiscal year from October 1, 2013, to September 30, 2014, for example, approximately 120,000 women<sup>182</sup> and approximately 68,500 unaccompanied children were detained along the southwest border of the United States.<sup>183</sup>

There appears to be a broad consensus amongst international and American scholars, advocates, analysts, and government officials that these women and children are fleeing dire situations and risk serious harm in their homelands.<sup>184</sup> Data from the Department of Homeland Security, for example, show that during the 2015 fiscal year, over eighty-two percent of women from Northern Triangle countries who were interviewed by U.S. border officials could demonstrate “credible fear of persecution or torture” and were therefore able to begin the process of applying for asylum.<sup>185</sup> Initial responses by lawmakers at all levels of government were broadly supportive of the would-be asylees. In 2014, the year during which the surge peaked, the Obama Administration announced a multi-agency plan to provide housing, medical care, and transportation to the women and children.<sup>186</sup> Several states, including Massachusetts and Vermont, volunteered the use of state-owned facilities to house women and children, and California even sent a delegation of state legislators to the Northern

181. See *Women on the Run*, *supra* note 178, at 4 (describing the experiences of more than 160 women interviewed for the report).

182. Astrid Galvan, *U.S. Border Patrol: Female Agents Wanted*, ASSOCIATED PRESS (Dec. 9, 2014, 12:50 AM), <http://federalnewsradio.com/business-news/2014/12/us-border-patrol-female-agents-wanted>.

183. U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS, <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY14-FY15.pdf> (last visited Nov. 30, 2016).

184. See Sibylla Brodzinsky, *US and Mexico Agree to Improve Asylum Access for Tens of Thousands of Refugees*, GUARDIAN (July 12, 2016, 6:00 AM), <https://www.theguardian.com/world/2016/jul/12/us-mexico-asylum-agreement-central-america-refugees> (stating that refugees are fleeing “unbridled violence” and are undeterred by dangers associated with crossing the southern border).

185. *Women on the Run*, *supra* note 178, at 50 n.2.

186. See Rebecca Kaplan, *Surge in Unaccompanied Child Immigrants Spurs White House Reaction*, CBS NEWS (June 2, 2014, 8:26 PM), <http://www.cbsnews.com/news/surge-in-unaccompanied-child-immigrants-spurs-white-house-reaction> (announcing that the Federal Emergency Management Agency will “quarterback” the administration’s response encompassing the General Services Administration and the departments of State, Defense, and Health and Human Services).

Triangle region to learn more about the root causes of the surge.<sup>187</sup> In the Midwest, a group of city- and county-level officials formed the Caring Cities Campaign to bring together social service providers to welcome unaccompanied immigrant children.<sup>188</sup>

Then, however, as media reports, including photographic and video footage, describing the sheer numbers of arriving migrants reached the public, the rhetorical tide turned. States and localities rushed to distance themselves from the federal government's resettlement programs, announcing that Central American women and children seeking asylum were "unwelcome" within their borders.<sup>189</sup> Iowa Governor Terry Branstad told federal officials that he did not want Central American immigrants housed in his state.<sup>190</sup> Maryland Governor Martin O'Malley requested the federal administration to not send unaccompanied immigrant children to a planned site in Maryland after it was graffitied with anti-immigration rhetoric.<sup>191</sup> Protests broke out in cities in Arizona, New Mexico, Michigan, and Virginia when residents were informed that residential centers for asylum seekers would be opened in their towns.<sup>192</sup> City and county officials immediately condemned these plans, forcing the federal government to rethink its strategy and instead confine the

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187. Niraj Chokshi, *At Least 32 Governors Have Weighed in on the Border Crisis. Here's What Each Has Said.*, WASH. POST (July 23, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/07/23/at-least-32-governors-have-weighed-in-on-the-border-crisis-heres-what-each-has-said/>; Judy Lin, *California Lawmakers to Visit Central America*, ASSOCIATED PRESS (July 11, 2014), <http://www.scp.org/news/2014/07/11/45300/california-lawmakers-to-visit-central-america> (discussing that California lawmakers planned to visit El Salvador, Guatemala, and Panama for a ten-day trip, which would include a meeting with the president of El Salvador).

188. See Cheryl Corley, *Iowa Mayor Calls for "Caring Cities" to Take in Young Immigrants*, NPR (July 24, 2014, 6:01 AM), <http://www.npr.org/2014/07/24/334851576/iowa-mayor-calls-for-caring-cities-to-take-in-young-immigrants> (discussing the program launched by the mayor of Davenport, Iowa).

189. See Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN (July 16, 2014, 9:46 AM), <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard> (acknowledging the frustration and reluctance of many local leaders to admit refugees).

190. *Id.*

191. *Id.*

192. *Id.*; see also Muzaffar Chishti & Faye Hipsman, *Unaccompanied Minors Crisis Has Receded from Headlines but Major Issues Remain*, MIGRATION POL'Y INST. (Sept. 25, 2014), <http://www.migrationpolicy.org/article/unaccompanied-minors-crisis-has-receded-headlines-major-issues-remain> (acknowledging that the financial cost of providing services to refugees has generated resentment).

women and children to temporary detention centers in Artesia, New Mexico, and Karnes City, Texas.<sup>193</sup> Critics repeatedly gave two reasons to justify opposition to the resettlement of these immigrants: concern about the financial cost of supporting the newcomers<sup>194</sup> and concern that these newcomers would pose a threat to national security.<sup>195</sup> In a remarkably short space of time, the narrative about the women and children turned from sympathy for those fleeing gang violence and domestic abuse to suspicion that the asylees themselves might be violent gang members who posed a threat to law, order, and national security.<sup>196</sup>

These same concerns about the risk posed to national security by migrants fleeing persecution emerged in late 2015 in the context of refugees from Iraq and Syria. The Syrian civil war began in 2011 when hundreds of protestors were shot and killed by President Bashar al-Assad's military forces.<sup>197</sup> Since then, over 470,000 people, which amounts to approximately ten percent of the population of Syria, have been killed,<sup>198</sup> and millions of Syrians have fled the country.<sup>199</sup> UNHCR estimates that seventy-five percent of these

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193. Chishti & Hipsman, *supra* note 192.

194. Abdullah, *supra* note 189 (“I’m concerned these children may be housed here permanently and of course there is going to be a drain on our educational system and other county services.” (quoting Prince William County, Virginia, Board of Supervisors Chairman Corey Stewart)).

195. *Id.* (“The biggest concern we have here in DuPont is the security. . . . You’ve got a lot of people coming here (with) no known backgrounds.” (alteration in original) (quoting DuPont City, Washington, Administrator Ted Danek)).

196. See, e.g., Ashley Collman & Ryan Parry, *Known Gang Members Among Thousands of Illegal Immigrant Children Storming the U.S. Border and Officials Are Now Trying to Silence Officers from Talking to the Media*, DAILY MAIL (June 14, 2014, 4:20 AM), <http://www.dailymail.co.uk/news/article-2657695/Known-gang-members-thousands-illegal-immigrant-children-storming-U-S-border-government-trying-silence-officers-talking-media.html> (lambasting that immigration officials have been directed to treat migrants with known gang tattoos “like any other child entering the country”).

197. See *World at War*, *supra* note 81, at 8, 12; *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

198. Priyanka Bolghani, *A Staggering New Death Toll for Syria’s War—470,000*, PBS FRONTLINE (Feb. 11, 2016), <http://www.pbs.org/wgbh/frontline/article/a-staggerin-g-new-death-toll-for-syrias-war-470000>.

199. Press Release, United Nations High Commissioner for Refugees, UNHCR: Total Number of Syrian Refugees Exceeds Four Million for First Time (July 9, 2015), <http://www.unhcr.org/en-us/news/press/2015/7/559d67d46/unhcr-total-number-syrian-refugees-exceeds-four-million-first-time.html>.

refugees fleeing the conflict are women and children.<sup>200</sup> By December 2015, over 2 million Syrian refugees had resettled in Turkey, and over 800,000 had resettled within the European Union.<sup>201</sup> Other, more distant nations, such as Canada and Australia, have also offered to resettle Syrian refugees.<sup>202</sup> Indeed, between November 2015 and March 2016, Canada accepted 25,000 such refugees.<sup>203</sup> The United States, in contrast, has thus far admitted approximately 2500 refugees from Syria.<sup>204</sup> In late 2015, the Obama Administration made a commitment to admit an additional 10,000 from Iraq and Syria during the 2016 financial year, which led to an uproar in Congress.<sup>205</sup>

In contrast with the public outcry about Central American asylum seekers, the vehement reaction to the potential arrival of Syrian and Iraqi refugees was not stoked by fear of being overwhelmed by the number of newcomers but, rather, by widespread belief that they were extraordinarily dangerous. In the aftermath of the Paris terrorist attacks on November 13, 2015, during which 130 people were killed and many more were injured, a forged Syrian passport with a fake refugee visa was found near the site of the attacks.<sup>206</sup> Even though the passport was false and eight European citizens had actually carried out the attacks, its very existence led to heightened fear and extensive speculation that terrorists were hiding within the

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200. *Stories from Syrian Refugees*, UNITED NATIONAL HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/syria.php> (last updated Oct. 20, 2016).

201. United Nations High Comm'r for Refugees, *Migrant Presence Monitoring* (2016), <https://data.unhcr.org/syrianrefugees/download.php?id=11697>; *Europe's Refugee Crisis*, HUM. RTS. WATCH (Nov. 16, 2016), <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>.

202. *See World at War*, *supra* note 81.

203. #WelcomeRefugees: *Canada Resettles Syrian Refugees*, GOV'T CAN., <http://www.cic.gc.ca/english/refugees/welcome> (last updated June 21, 2016).

204. Julie Hirschfeld Davis, *U.S. Struggles with Goal of Admitting 10,000 Syrians*, N.Y. TIMES (May 30, 2016), <http://www.nytimes.com/2016/05/31/us/politics/as-us-admits-migrants-in-a-trickle-critics-urge-obama-to-pick-up-the-pace.html>.

205. Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html> (discussing the varied and widely divided reactions of several U.S. senators).

206. Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don't Know*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-dont-know/>; *What We Know About the Paris Attacks and the Hunt for the Attackers*, WASH. POST (Mar. 18, 2016), <https://www.washingtonpost.com/graphics/world/paris-attacks/>.

population of genuine refugees.<sup>207</sup> This suspicion and discord, according to German Interior Minister Thomas de Maiziere, may have been the terrorists' ultimate goal in leaving the passport at the scene of the attacks.<sup>208</sup> But, whether it was deliberate or not, the outcome in both Europe and the United States has been widespread antipathy toward Middle Eastern refugees.<sup>209</sup>

As the discussion that follows shows, following the Paris attacks and the San Bernardino shooting on December 2, 2015,<sup>210</sup> many governors and state legislatures released statements to the press insisting that refugees from the Middle East were not welcome in their communities. Even though the refugee resettlement program falls largely under the purview of the federal government—at least with respect to refugee selection, screening, and placement, as well as ongoing financial support—some states sought to interfere with the operation of the program within their borders. In the weeks after the Paris attacks, thirty governors (twenty-nine Republicans and one Democrat) issued statements objecting to the placement of refugees and asking either for the resettlement program to be suspended or for a new, enhanced screening program to be introduced.<sup>211</sup> In contrast, many of the remaining states' leaders issued press releases reaffirming their longstanding commitment to welcome refugees.<sup>212</sup> The federal government's response was to attempt to explain the

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207. Tharoor, *supra* note 206.

208. Patrick Donahue & Rainer Buergin, *Syrian Passport in Paris May Be Planted, German Minister Says*, BLOOMBERG NEWS (Nov. 17, 2015), <http://www.bloomberg.com/news/articles/2015-11-17/syrian-passport-in-paris-may-be-planted-german-minister-says>.

209. Tharoor, *supra* note 206.

210. See Yanan Wang, Justin Wm. Moyer & Peter Holley, *Authorities Pick Through Suspects' Path: Marriage, Baby and Then Bloodshed*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/03/they-were-a-couple-the-striking-difference-between-the-san-bernardino-suspects-and-other-mass-shooters> (describing the suspects of the shooting, which left fourteen dead in California, as married couple Syed Rizwan Farook, a U.S. citizen raised in Illinois, and Tashfeen Malik, a lawful permanent resident of Pakistani origin).

211. See Arnie Seipel, *30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees*, NPR (Nov. 17, 2015, 9:50 AM), <http://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees> (noting that Utah and South Dakota were the only two Republican-led states that did not object to the placement of refugees, though South Dakota had no refugees and did not expect to receive any).

212. See Daniel Victor, *As U.S. Governors Pledge to Bar Syrian Refugees, Three States Extend Welcome*, N.Y. TIMES (Nov. 16, 2015, 1:56 PM), <http://www.nytimes.com/live/paris-attacks-live-updates/as-backlash-builds-others-support-syrian-refugees> (noting welcoming statements from Governor Tom Wolf of Pennsylvania, Governor Dannel P. Malloy of Connecticut, and Governor Peter Shumlin of Vermont).

rigors of the refugee selection and screening process to skeptical state officials.<sup>213</sup> The ORR released a letter to the states explaining the multiple checks and balances required by the Refugee Act and its attendant regulations to ensure that refugees do not pose a threat to the United States.<sup>214</sup> At the same time, the letter reminds recipients that federal funds are provided to the states expressly for distribution to all refugees, including those of Syrian origin, who are under the protection of the federal government, and that states “may not categorically deny ORR-funded benefits and services to Syrian refugees.”<sup>215</sup> Yet, despite this clear instruction, some state and local actors continued to assert that they needed to take action to avoid the “terrorist threat” posed by refugees.<sup>216</sup> In other words, the states argued that they had a Tenth Amendment right to develop their own species of refugee federalism.

*B. Federal Legislation Attempting to Foster Refugee Federalism*

Since 2013, Republican legislators in Congress have supported states seeking to prevent refugees and asylees from settling in their communities. Members of both the House and the Senate have introduced bills with the specific goal of allowing states to veto the placement of refugees and/or to deter asylees from settling within their borders. Examples of recent bills pertaining to state input on refugee resettlement include H.R. 4033, the Refugee Relocation Security Act;<sup>217</sup> H.R. 4197, the House of Representatives’ State Refugee Security Act;<sup>218</sup> and S. 2363, the Senate’s State Refugee Security Act;<sup>219</sup> all of which were introduced in 2015. Recent bills pertaining to asylees include the Asylum Reform and Border Protection Act<sup>220</sup> and the Protection of Children Act.<sup>221</sup> In each instance, the stated justification for shifting

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213. See generally Letter from Robert Carey, Dir., Office of Refugee Resettlement, to Colleagues (Nov. 25, 2015), <http://www.acf.hhs.gov/orr/resource/resettlement-of-syrian-refugees> (noting that refugees are subject to the “highest level of security checks of any category of traveler to the United States,” including a “multi-layered” process involving federal law enforcement, intelligence, and national security agencies).

214. *Id.*

215. *Id.*

216. Carissimo, *supra* note 165.

217. H.R. 4033, 114th Cong. (2015).

218. H.R. 4197, 114th Cong. (2015).

219. S. 2363, 114th Cong. (2015).

220. H.R. 1153, 114th Cong. (2015).

221. H.R. 1149, 114th Cong. (2015). *But see* Press Release, Human Rights Watch, Congress Urged to Reject Bills that Would Undermine Asylum in the United States

more power to state administrations was the need for states to be able to “protect” their citizens from threats to their safety and security posed by refugee and asylee newcomers.<sup>222</sup>

On November 17, 2015, Congressman Rick Crawford of Arkansas introduced the Refugee Relocation Security Act.<sup>223</sup> The Bill has two purposes: First, it prohibits DHS from admitting Syrian or Iraqi nationals into the United States in refugee status until Congress passes a joint resolution authorizing DHS to resume such admissions.<sup>224</sup> Second, it would amend the INA to prevent the executive branch from settling any refugees in any state that “explicitly rejects their admission.”<sup>225</sup> Such “explicit rejection” may either be embodied in an order or statement by the governor of the state or in an act passed by the state legislature.<sup>226</sup> The Bill was immediately referred to the House Judiciary Committee, which, on December 4, 2015, referred it to the Subcommittee on Immigration and Border Security, where it remains as of this writing.<sup>227</sup>

While the Refugee Relocation Security Act was under consideration in the House, the Texas congressional delegation introduced two identical bills in the House and the Senate. On December 8, 2015, Senator Ted Cruz of Texas and his co-sponsor, Richard Shelby of Alabama, introduced S. 2363, the State Refugee Security Act.<sup>228</sup> This bill directs ORR to notify the state agency responsible for coordinating the placement or resettlement of a refugee

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(FEB. 4, 2016), <http://www.humanrightsfirst.org/press-release/congress-urged-reject-bills-would-undermine-asylum-united-states> (outlining the organization’s opposition to the Asylum Reform and Border Protection Act and the Protection of Children Act).

222. See, e.g., Press Release, Sen. Ted Cruz, Sen. Cruz Introduces the State Refugee Security Act of 2015 (Dec. 8, 2015), [https://www.cruz.senate.gov/?p=press\\_release&id=2546](https://www.cruz.senate.gov/?p=press_release&id=2546) (“This legislation will protect the authority of the states and the authority of the governors to keep their citizens safe.” (quoting Sen. Ted Cruz)). This message appears to have resounded with the American people. A Reuters/Ipsos poll conducted in November 2015 found that fifty-two percent of Americans thought that “nations which accept refugees fleeing the strife in Syria are less safe.” Ginger Gibson, *Exclusive: After Paris, Americans Want U.S. to Do More To Attack Islamic State - Poll*, REUTERS, (Nov. 16, 2015, 4:39 PM), <http://www.reuters.com/article/us-france-shooting-usa-poll-idUSKCN0T528Y20151116>.

223. H.R. 4033, 114th Cong. (2015).

224. H.R. 4033 § 2.

225. H.R. 4033 § 3.

226. *Id.*

227. *All Actions: H.R. 4033*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4033/all-actions> (last visited Nov. 30, 2016).

228. S. 2363, 114th Cong. (2015).

not later than twenty-one days before the alien's arrival in the state.<sup>229</sup> Further, and more importantly, it would amend the INA to state that

[n]otwithstanding any other provision of law, no alien eligible to be admitted to the United States under this section shall be placed or resettled in a State if the Governor of that State certifies to the Director of the Office of Refugee Resettlement that the Director has failed, in the sole determination of the Governor, to provide adequate assurance that the alien does not present a security risk to the State.<sup>230</sup>

On December 9, 2015, H.R. 4197, the State Refugee Security Act, a bill with identical text to its Senate counterpart, was introduced in the House of Representatives by Congressman Ted Poe of Texas.<sup>231</sup> The bill was co-sponsored by forty-nine representatives from Texas, Alabama, Arizona, Georgia, Montana, Florida, Indiana, Iowa, Louisiana, Maryland, Michigan, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, and Wisconsin.<sup>232</sup> Both the Senate and House bills are in committee as of this writing.<sup>233</sup>

Bills designed in part to limit Central American women and children seeking asylum from settling the interior of the United States have focused overwhelmingly on limiting the costs associated with the care of such immigrants to the federal government rather than to the states. Somewhat ironically, the argument repeatedly advanced by hostile state administrations is that if state resources are committed to assisting these women and children, there will be "budget shortfalls in state administered refugee programs."<sup>234</sup> As a consequence, bills—such as S. 2611, the Helping Unaccompanied Minors and Alleviating National Emergency Act,<sup>235</sup> which was introduced by Senator John Cornyn of Texas on July 15, 2014—focus on ensuring that children are detained at the border, placed in

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229. S. 2363 § 2.

230. *Id.*

231. H.R. 4197, 114th Cong. (2015).

232. *Cosponsors: H.R. 4197*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4197/cosponsors> (last visited Nov. 30, 2016).

233. *All Actions: H.R. 4197*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4197/all-actions> (last visited Nov. 30, 2016); *All Actions: S. 2363*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2363/all-actions> (last visited Nov. 30, 2016).

234. Maya Burchette, Marion Githegi & Ann Morse, *Child Migrants to the United States*, NAT'L CONF. ST. LEGISLATURES (Oct. 28, 2014), <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>.

235. S. 2611, 113th Cong. (2014).

expedited removal proceedings, and not released into the interior.<sup>236</sup> Indeed, the two bills introduced this year, the Asylum Reform and Border Protection Act<sup>237</sup> and the Protection of Children Act,<sup>238</sup> both attempt to ensure that even asylum seekers who have established that they have a credible fear of persecution will remain in federal detention facilities at the border rather than being released to a community setting where they could access state services.<sup>239</sup>

### C. *State Initiatives to Promote Refugee Federalism*

State governments' reactions to Middle Eastern refugees and Central American asylees have varied tremendously. Some state governors and legislatures have evinced an overwhelmingly positive response, issuing statements of support and launching "Refugees Welcome" initiatives with dedicated funding to assist refugee and asylee newcomers.<sup>240</sup> Other states have attempted to employ a mixture of gubernatorial orders, legislation, and even litigation to prevent refugees and asylees from settling on state soil.<sup>241</sup>

#### 1. *State executive orders and gubernatorial decrees*

During the summer of 2014, at the peak of the surge of women and children seeking asylum from Northern Triangle countries, governors throughout the United States came out in favor of or against the resettlement of these asylees within the borders of their states. At least thirty-two governors made public statements either supporting or condemning unaccompanied immigrant children.<sup>242</sup> The Republican governors of Alabama, Florida, Kansas, Mississippi, Nebraska, North Carolina, Pennsylvania, Utah, and Wisconsin all criticized the Obama Administration for allowing asylees to settle or

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236. *Id.*

237. H.R. 1153, 114th Cong. (2015).

238. H.R. 1149, 114th Cong. (2015).

239. See H.R. 1153 § 6(a); H.R. 1149 § 2(a)(2)(B).

240. See Amanda Girard, *These 9 States Will Continue Welcoming Refugees*, U.S. UNCUT (Nov. 17, 2015), <http://usuncut.com/politics/these-9-states-will-continue-welcoming-syrian-refugees> (listing responses from California, Connecticut, Colorado, Hawaii, Kentucky, Minnesota, Vermont, Virginia, and Washington). As noted above, no state has yet joined the international #RefugeesWelcome movement.

241. See Abigail Abrams, *Refugee Crisis Coming to the US? Governors' Refusal to Accept Syrian Refugees Won't Stop Asylum Seekers, but It Could Complicate Their Lives*, IB TIMES (Nov. 17, 2015, 4:29 PM), <http://www.ibtimes.com/refugee-crisis-coming-us-governors-refusal-accept-syrian-refugees-wont-stop-asylum-2188073>.

242. Chokshi, *supra* note 187.

to be placed in communities within their states.<sup>243</sup> In contrast, some Democratic governors, such as Deval Patrick of Massachusetts, Peter Shumlin of Vermont, and Jerry Brown of California, volunteered housing and a range of social services for these unaccompanied immigrant children.<sup>244</sup> In the case of California, its response included state funding for legal services so that unaccompanied children could contest their deportation in immigration court.<sup>245</sup> The placement of the Central American women and children provoked strong reactions across the political spectrum. Such reactions endure in 2016, as demonstrated by a recent press release from Alabama Governor Robert Bentley vehemently contesting the potential opening of a Department of Health and Human Services shelter for unaccompanied Central American children in his state.<sup>246</sup> Yet, despite the concerns about potential strains on state and local resources, lawmakers' statements about Central American asylees are frequently tempered by expressions of sympathy for their plight.<sup>247</sup> Such sympathy is decidedly lacking in many recent gubernatorial pronouncements about the resettlement of Middle Eastern refugees.

In the immediate aftermath of the Paris and San Bernardino attacks, the governors of thirty-one states announced that Syrian refugees were not welcome in their jurisdictions.<sup>248</sup> Governors

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243. *Id.*

244. *Id.*

245. See Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Signs Legislation to Help Unaccompanied Minors (Sept. 27, 2014), <https://www.gov.ca.gov/news.php?id=18734> ("Helping these young people navigate our legal system is the decent thing to do and it's consistent with the progressive spirit of California.").

246. See Press Release, Office of Alabama Governor Robert Bentley, Governor Bentley Expresses Concern on Alabama Being Considered as a Shelter Location for Unaccompanied Minors (June 3, 2016), <http://governor.alabama.gov/newsroom/2016/06/governor-bentley-expresses-concern-alabama-considered-shelter-location-unaccompanied-minors> ("The federal government is once again usurping the authority of Alabama in its effort to relocate unaccompanied minors. . . . It is actions like this that led me to file a lawsuit in January against the federal government refugee resettlement program. While I am extremely sympathetic to the needs of unaccompanied minors, as Governor of Alabama, I feel strongly that states should play an active role in the decision making process.").

247. *Id.*

248. Ashley Fantz & Ben Brumfield, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015, 3:20 PM), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash>.

Nathan Deal of Georgia,<sup>249</sup> Sam Brownback of Kansas,<sup>250</sup> and Bobby Jindal of Louisiana<sup>251</sup> issued formal executive orders intended to prevent the resettlement of Syrian refugees in their states. Other

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249. *What is Your Governor Saying?*, *supra* note 1. Governor Deal's Executive Order was as follows:

Ordered: That all agencies from the State of Georgia halt any involvement in accepting refugees from Syria for resettlement in the State of Georgia until such time as the United States Department of State has re-examined the security concerns and established new processes for accepting refugees from Syria. In addition, no agency of the State of Georgia shall accept any refugees from Syria for resettlement in this state until such time as Congress has approved of the new processes for accepting refugees from Syria.

Ordered: The Georgia Emergency Management Agency (GEMA) shall confirm that any refugees from Syria who have been resettled in this state do not pose a public safety risk. A report shall be provided to the Office of the Governor as soon as practicable.

*Id.*

250. *Id.* Governor Brownback's Executive Order 15-07 reads:

No department, commission, board, or agency of the government of the State of Kansas shall aid, cooperate with, or assist in any way the relocation of refugees from Syria to the State of Kansas. This order includes, but is not limited to, the Kansas Refugee Program, the Refugee Resettlement Program, and the Refugee Social Service Program administered within the Kansas Department for Children and Families, and the Kansas Refugee Preventative Health Program administered within the Kansas Department of Health and Environment. Furthermore, this Order also includes the funding or administration of any grant program under the authority if [sic] the State of Kansas.

*Id.*

251. *Id.* Governor Jindal's Executive Order BJ 2015-27 states:

NOW THEREFORE, I, BOBBY JINDAL, Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and laws of the State of Louisiana, do hereby order and direct as follows:

SECTION 1: All departments, budget units, agencies, offices, entities, and officers of the executive branch of the State of Louisiana are authorized and directed to utilize all lawful means to prevent the resettlement of Syrian refugees in the State of Louisiana while this Order is in effect.

SECTION 2: The Louisiana State Police, upon receiving information of a Syrian refugee already relocated within the State of Louisiana, are authorized and directed to utilize all lawful means to monitor and avert threats within the State of Louisiana.

SECTION 3: All departments, budget units, agencies, offices, entities, and officers of the executive branch of the State of Louisiana are authorized and directed to cooperate in the implementation of the provisions of this Order.

SECTION 4: The Order is effective November 16, 2015 and shall remain in effect until amended, modified, terminated, or rescinded by the Governor, or terminated by operation of law.

*Id.*

governors, including Robert Bentley of Alabama, C.L. “Butch” Otter of Idaho, Pete Ricketts of Nebraska, Brian Sandoval of Nevada, Chris Christie of New Jersey, John Kasich of Ohio, and Gregg Abbott of Texas, sent letters to President Obama announcing that they had instructed state officials to cease cooperating with ORR, demanding that the federal government refrain from further placing Syrian refugees in their states.<sup>252</sup> Others, such as Governor Paul LePage of Maine and Terry Branstad of Iowa, issued press releases informing the public that they were taking steps to halt all resettlement of Syrian refugees in their states.<sup>253</sup>

At the same time, other state executives hastened to show support for President Obama and the federal government’s plans to continue to resettle refugees. Governor Jack Markell of Delaware, for example, penned an op-ed entitled *Why My State Won’t Turn Refugees Away*, in which he wrote that “we must show empathy by taking into account [refugees’] individual situations and ensuring they are treated humanely.”<sup>254</sup> Other governors, including David Ige of Hawaii and Tom Wolf of Pennsylvania, stressed that they wanted their state officials to work in partnership with the federal government to ensure that every precaution was taken during the screening process.<sup>255</sup> Interestingly, only a handful of governors, such as Governor Maggie Hassan of New Hampshire and Andrew Cuomo of New York, acknowledged in their public statements on the topic that the power over refugee admission and placement lies exclusively with the federal government, thereby precluding the states from banning resettlement within their borders.<sup>256</sup> It is therefore illuminating that thus far in

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252. *Id.*

253. *Id.* (quoting Governor Branstad’s statement that he had “ordered all state agencies to halt any work on Syrian refugee resettlements immediately in order to ensure the security and safety of Iowans. In light of the Paris attacks, resettlement of Syrian refugees in Iowa should cease until a thorough review of the process can be conducted by the U.S. intelligence community and the safety of Iowans can be assured” and Governor LePage’s pronouncement that he would “adamantly oppose any attempt by the federal government to place Syrian refugees in Maine, and will take every lawful measure in my power to prevent it from happening. The safety of Maine citizens comes first, and it is about time the United States and Europe wake up to the nature of the threat against us in the form of radical terrorism”).

254. Jack A. Markell, Opinion, *Why My State Won’t Turn Refugees Away*, CNN (Nov. 18, 2015, 9:50 AM), <http://www.cnn.com/2015/11/17/opinions/markell-us-accept-refugees>.

255. See *What is Your Governor Saying?*, *supra* note 1.

256. *Id.*

2016, the federal government has placed about 110 Syrian refugees in the thirty-one states whose governors avowed to block their settlement.<sup>257</sup> Similarly, the government continues to place Syrian and Iraqi refugees in states where state lawmakers are attempting to pass legislation intended to block refugee resettlement.<sup>258</sup>

## 2. State legislation

As of this writing, two state legislatures—New York and California—have introduced bills designed to provide extra assistance to Central American asylees and refugees. The New York State Senate has considered bills to fund both legal services and educational training—including English as a second language courses—for child asylum seekers and refugees.<sup>259</sup> In September 2014, California Governor Jerry Brown signed into law S.B. 873, which allocates funds to nonprofit groups that provide legal assistance to unaccompanied immigrant children settled in California.<sup>260</sup>

In contrast, no state has signed into law any anti-asylee or anti-refugee acts. During the previous legislative session, however, lawmakers attempted to pass such measures in Arizona, Florida, Kansas, Michigan, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Tennessee, and Virginia, amongst other states.<sup>261</sup> These anti-refugee measures fall into three broad categories: (1) bills designed to create state surveillance of refugees and to preclude state funding for refugees; (2) so-called “Refugee Absorptive Capacity Acts,” which allow municipalities to decide when they have received “enough” refugees and to prevent more from moving to town; and (3) bills that place additional

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257. See Sara Rathod, *The Freak-out Over Refugees Is Continuing in These States*, MOTHERJONES (Feb. 26, 2016, 7:00 AM), <http://www.motherjones.com/politics/2016/02/anti-Syrian-refugee-legislation-states>.

258. *Id.*

259. S. S05968A, 2015–16 Leg. Sess. (N.Y. 2015).

260. S.B. 873, 2013–14 Leg. Sess. (Cal. 2014); see also Patrick McGreevy, *Gov. Brown Approves Legal Help for Minors in the Country Illegally*, L.A. TIMES (Sept. 27 2014, 2:26 PM), <http://www.latimes.com/local/political/la-me-pc-gov-brown-approves-legal-help-for-minors-in-the-country-illegally-20140927-story.html> (noting Governor Brown’s overall concern for unaccompanied Central American children that previously faced poverty and violence); IMMIGRATION LEGAL RES. CTR., HOW CALIFORNIA’S NEW LAW SB 873 BENEFITS UNACCOMPANIED MINORS (2014), [https://www.ilrc.org/sites/default/files/resources/sb\\_873\\_ilrc\\_final\\_pdf.pdf](https://www.ilrc.org/sites/default/files/resources/sb_873_ilrc_final_pdf.pdf) (pointing out that the new law appropriates roughly \$3 million for legal aid to unaccompanied minors in removal proceedings).

261. Rathod, *supra* note 257.

burdens on the VOLAGs and their affiliates who are responsible for administering the refugee resettlement process.

As an example, the proposed Florida bill, H.B. 1095, the “Prevention of Acts of War” bill, was introduced in the House but “died on calendar.”<sup>262</sup> It would have authorized Governor Rick Scott to use the police and the National Guard to exclude any refugees from any country where “[a] foreign terrorist organization . . . organizes, operates, or trains.”<sup>263</sup> It also would have prohibited state officials and any person or organization that had received funds from the state of Florida from assisting refugees.<sup>264</sup> Further, it would also have required the VOLAGs working with refugees to submit biodata, including fingerprints, to the state police to allow the police to monitor the refugees constantly.<sup>265</sup> In South Carolina, Senate Bill 997 passed the Senate and is pending before the House of Representatives judiciary committee.<sup>266</sup> Similar to its Floridian counterpart, S. 997 would require a registry of all refugees in the state including names, addresses, telephone numbers, employer information, and a summary of any public assistance received.<sup>267</sup> The bill also blocks any state funds being used to resettle any refugees—not just those from the Middle East.<sup>268</sup>

Another refugee-related bill is pending in the South Carolina House judiciary committee. H.R. 4396, the Refugee Absorptive Capacity Act, would allow municipalities to halt the settlement of refugees in their areas if the municipality believes that it lacks the infrastructure, such as social services, ESL tuition, or law enforcement capacity, to cope with any more refugees or asylees.<sup>269</sup> An identical measure, Mississippi Senate Bill 2331, the Refugee Absorptive Capacity Act, died in committee on February 23, 2016.<sup>270</sup> Similarly,

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262. HB 1095: Prevention of Acts of War, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2016/1095> (last visited Nov. 30, 2016).

263. H.B. 1095, 2016 Leg. Sess. (Fla. 2016).

264. *Id.*

265. *Id.*

266. S. 997 *Status Information*, S.C. GEN. ASSEMBLY, [http://www.scstatehouse.gov/sess121\\_2015-2016/bills/997.htm](http://www.scstatehouse.gov/sess121_2015-2016/bills/997.htm) (last visited Nov. 30, 2016).

267. S. 997, 121st Gen. Assemb. (S.C. 2016).

268. *Id.*

269. H. 4396, 121st Gen. Assemb. (S.C. 2016).

270. *Senate Bill 2331*, MISS. LEGISLATURE, <http://billstatus.ls.state.ms.us/2016/pdf/history/SB/SB2331.xml> (last visited Nov. 30, 2016).

Kansas House Bill 2612, another “Absorptive Capacity Act,” died in committee on June 1, 2016.<sup>271</sup>

In Nebraska and Arizona, the state legislatures considered bills designed to impose additional heavy burdens on the VOLAGs working with refugees in their state. In Nebraska, the Refugee Resettlement Indemnification Act, L.B. 966, would have held VOLAGs liable for the cost of any criminal act committed by a refugee placed in Nebraska.<sup>272</sup> Arizona’s H.B. 2682 would have required “refugee facilities” to submit to monthly inspections, annual audits, and hefty renewal fees.<sup>273</sup> An additional Arizona bill, H.B. 2370, focused on both refugees and asylees, including unaccompanied immigrant children. The bill insisted that the state would be prohibited from cooperating with the federal government in any way in their resettlement unless the federal government could demonstrate to the state’s satisfaction that the refugees and asylees had undergone a “thorough criminal history, terrorism and health background check.”<sup>274</sup>

Finally, in Tennessee, Senate Joint Resolution 467, captioned as “regarding the commencement of legal action seeking relief, including declaratory and injunctive relief, from the federal government’s mandated appropriation of state revenue and noncompliance with the Refugee Act of 1980 with respect to refugee resettlement in Tennessee,” directed the state Attorney General to file a lawsuit challenging the federal refugee resettlement program.<sup>275</sup> It passed with overwhelming support in both chambers.<sup>276</sup> Despite its popularity, Tennessee Governor Bill Haslam refused to sign the bill into law, stating that he trusted the state’s Attorney General “to determine whether the state has a claim.”<sup>277</sup> The bill, however, authorized the General Assembly to hire outside counsel if the Attorney General refused to pursue the action.<sup>278</sup> The State Senate

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271. H.B. 2612, KAN. ST. LEGISLATURE, [http://www.kslegislature.org/li/b2015\\_16/measures/hb2612/](http://www.kslegislature.org/li/b2015_16/measures/hb2612/) (last visited Nov. 30, 2016).

272. L.B. 966, 104th Leg. Sess. (Neb. 2016).

273. H.B. 2682, 52nd Leg. Sess. (Ariz. 2016).

274. H.B. 2370, 52nd Leg. Sess. (Ariz. 2016).

275. S.J.Res. 467, 109th Gen. Assemb. (Tenn. 2016).

276. *SJR 0467*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SJR0467&GA=109> (last visited Nov. 30, 2016).

277. See Adrian Mojica, *Gov. Haslam Passes on Signing UT Office of Diversity Defunding, Refugee Resettlement Bills*, FOX17 (May 20, 2016), <http://fox17.com/news/local/gov-haslam-passes-on-signing-ut-office-of-diversity-defunding-refugee-resettlement-bills>.

278. *Id.*

has authorized the State's Lieutenant Governor to appoint the Thomas More Law Center, a nonprofit public interest law firm that specializes in supporting conservative causes, to represent the state.<sup>279</sup> The State House, however, has yet to approve this appointment.<sup>280</sup> Therefore, whether the state will indeed file a lawsuit against the federal government remains to be seen. If it does so, it will be following in the footsteps of two failed attempts by sister states.

### 3. *State litigation*

Thus far, two states—Texas and Indiana—have sought to challenge the Obama Administration's refugee settlement policies in federal court. In both cases, the states lost before the cases went to trial. The Texas lawsuit, *Texas Health and Human Services Commission v. United States*,<sup>281</sup> began in November 2015 when ORR prepared to place a Syrian family in the state.<sup>282</sup> Texas Attorney General Ken Paxton filed suit in federal district court in Dallas, seeking a temporary restraining order and a preliminary injunction to prevent the Syrian family from settling in Texas.<sup>283</sup> The state claimed that the federal government had failed to adequately consult with state officials in advance of the placement and that this was indicative of a wider pattern and practice that injured the state. Texas argued that the State Department, ORR, Department of Health and Human Services, and other federal agencies had violated the Refugee Act of 1980 by failing to consult with state officials before resettling refugees.<sup>284</sup> The state also contended that the VOLAG, the International Rescue Committee, had breached its contract with the state by allowing the placement of the Syrian family to go ahead.<sup>285</sup> Texas argued that the federal government and the VOLAG had “left Texas uninformed about

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279. Joel Ebert, *Outside Counsel Selected for Tennessee's Refugee Resettlement Lawsuit*, TENNESSEAN (Oct. 17, 2016, 3:24 PM), <http://www.tennessean.com/story/news/politics/2016/10/17/outside-counsel-selected-tennessees-refugee-resettlement-lawsuit/92291522>.

280. *Id.*

281. No. 3:15-CV-03851-N (N.D. Tex. June 15, 2016) (granting the defendants' motions to dismiss).

282. Plaintiff's Verified Original Complaint at 5, *Tex. Health & Human Servs. Comm'n*, No. 3:15-CV-03851-N, 2015 WL 7769167.

283. *Id.* at 9.

284. *Id.* at 6–7.

285. *Id.* at 7–8.

refugees that could well pose a security risk to Texans and without any say in the process of resettling these refugees.”<sup>286</sup>

In December 2015 and February 2016, the U.S. District Court for the Northern District of Texas denied the requests for the temporary restraining order and preliminary injunction, ruling that Texas’s argument that “terrorists could have infiltrated the Syrian refugees and could commit acts of terrorism” in the state was “largely speculative hearsay.”<sup>287</sup> In June 2016, the district court granted the International Rescue Committee’s and federal defendants’ motions to dismiss the case for failure to state a claim upon which relief can be granted.<sup>288</sup> The court found that Texas lacked standing to enforce the Refugee Act’s requirement that the federal government engage in advance consultation with the states.<sup>289</sup> The court concluded that neither the Refugee Act, nor the Administrative Procedure Act, nor the Declaratory Judgment Act provided a cause of action for the state.<sup>290</sup> The court also ruled that Texas had failed in its pleadings to provide sufficient facts to establish that the International Rescue Committee had breached its contract with the state.<sup>291</sup> The VOLAG and its community-based organization affiliates therefore prevailed against the state.

In Indiana, a different community-based organization, Exodus, also won a lawsuit against the state. In November 2015, in the wake of the Paris attacks, Indiana Governor and Vice President-elect Mike Pence issued a directive stating that

[i]n the wake of the horrific attacks in Paris, effective immediately, I am directing all state agencies to suspend the resettlement of additional Syrian refugees in the state of Indiana pending assurances from the federal government that proper security measures have been achieved. . . . Unless and until the state of

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286. *Id.* at 3.

287. *Tex. Health & Human Servs. Comm’n*, 2015 WL 10990245, at \*1 (N.D. Tex. Dec. 9, 2015) (denying the state’s request for a temporary restraining order); *see also Tex. Health & Human Servs. Comm’n*, 166 F. Supp. 3d 706, 709 (N.D. Tex. 2016) (denying the state’s request for a prelim injunction).

288. *Tex. Health & Human Servs. Comm’n*, slip op. at 1 (N.D. Tex. June 15, 2016), <http://www.nilc.org/wp-content/uploads/2016/06/TexasHHSC-v-US-granting-motion-to-dismiss-2016-06-15.pdf>.

289. *Id.* at 5–6.

290. *Id.* at 6–14.

291. *Id.* at 14–15.

Indiana receives assurances that proper security measures are in place, this policy will remain in full force and effect.<sup>292</sup>

In order to follow through on the directive and “suspend the resettlement of additional Syrian refugees,” Governor Pence instructed the state voluntary agencies to withhold the funding owed to the community-based organizations working with refugees in Indiana.<sup>293</sup> One such organization was Exodus. At the time Governor Pence’s directive went into effect, Exodus had been in the process of placing a Syrian family in Indiana.<sup>294</sup> The state voluntary agency informed Exodus that no further funding would be forthcoming at that time and Exodus re-routed the family to Connecticut.<sup>295</sup> Exodus asked the state for clarification about whether it could continue to place refugee families in Indiana. State officials informed Exodus that only non-Syrian refugees would be welcome in the state, so they would only receive federal funding via the state voluntary agency for refugees who were not Syrian nationals. Exodus filed suit in U.S. District Court for the Southern District of Indiana, seeking a preliminary injunction to enjoin the state’s withholding of the funds on the basis of the refugees’ nationality.<sup>296</sup>

On February 29, 2016, the court in *Exodus Refugee Immigration, Inc. v. Pence*<sup>297</sup> granted Exodus’s request for injunctive relief, ruling that Governor Pence’s directive clearly violated the Equal Protection clause of the Fourteenth Amendment because it discriminated on the basis of national origin.<sup>298</sup> By withholding funding only from Syrian nationals, Indiana denied equal protection of the laws to those nationals.<sup>299</sup> The

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292. See 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> (quoting then-Governor Pence).

293. *Exodus Refugee Immigr., Inc. v. Pence*, No. 16-1509, 2016 WL 5682711, at \*2 (7th Cir. Oct. 3, 2016).

294. Michael E. Miller, *ACLU Sues Indiana Gov. Mike Pence, Demands State Accept Syrian Refugees*, WASH. POST (Nov. 24, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/24/aclu-sues-indiana-gov-mike-pence-demands-state-accept-syrian-refugees>.

295. *Id.*

296. Complaint for Declaratory and Injunctive Relief at 12, *Exodus Refugee Immigr., Inc. v. Pence*, 165 F. Supp. 3d 718 (S.D. Ind. 2016) (No. 1:15-cv-1858), 2015 WL 7567921.

297. 165 F. Supp. 3d 718 (S.D. Ind. 2016), *stay denied*, 2016 WL 1222265 (S.D. Ind. Mar. 29, 2016), *aff’d*, 2016 WL 5682711 (7th Cir. Oct. 3, 2016).

298. *Id.* at 723–24.

299. *Id.*

court further found that the state’s justification for withholding the funding on national security grounds was utterly unavailing:

Although the State says it has a compelling reason for doing so—the safety of Indiana residents—the withholding of federal grant funds from Exodus that it would use to provide social services to Syrian refugees in no way furthers the State’s asserted interest in the safety of Indiana residents.<sup>300</sup>

The district court’s ruling focuses upon the Equal Protection issue in large part because, in addition to Exodus’s valid constitutional claim, it also had a clear statutory basis for relief. The INA, as amended by the Refugee Act, includes an anti-discrimination provision, which expressly prohibits discrimination on the basis of national origin in the distribution of funds to refugees, which is exactly what Indiana had done in this case.<sup>301</sup>

Moreover, the district court’s ruling also touched upon the field and obstacle preemption doctrine that is the hallmark of the United States Supreme Court’s immigration federalism jurisprudence.<sup>302</sup> The district court noted that by withholding federal funding from Exodus, the state was both intruding upon a field of law occupied by the federal government and preventing the federal government from achieving one of its legitimate goals—the safe and effective placement of refugees.<sup>303</sup>

On October 3, 2016, the United States Court of Appeals for the Seventh Circuit affirmed the district court’s issuance of the preliminary injunction.<sup>304</sup> Writing for a unanimous panel, Judge Posner agreed with the district court’s equal protection analysis and stated that Governor Pence’s policy of “targeting Syrian refugees is discrimination on the basis of nationality.”<sup>305</sup> The court also tacitly endorsed the district court’s preemption analysis, noting that “[f]ederal law does not allow a governor to deport to other states immigrants he deems dangerous; rather he should communicate his fears to the Office of Refugee Resettlement.”<sup>306</sup> In the Part that

300. *Id.*

301. *Id.* at 724, 726–28.

302. *See Arizona v. United States*, 132 S. Ct. 2492, 2498, 2500–01 (2012) (defining the parameters of both field and obstacle preemption and explaining how the parameters apply absolutely in immigration-related cases).

303. *See Exodus*, 165 F. Supp. 3d at 723–24.

304. *Exodus Refugee Immigration, Inc. v. Pence*, No. 16-1509, 2016 WL 5682711, at \*3 (7th Cir. Oct. 3, 2016).

305. *Id.*

306. *Id.* at \*2.

follows, the Article discusses the limitations that preemption doctrine places upon state actions with respect to refugee placement, while proposing that, nonetheless, there may be room for greater state engagement with the refugee resettlement process.

### III. THE PERILS AND POSSIBILITIES OF REFUGEE FEDERALISM

*“That’s the price of leadership. Maybe Franklin Roosevelt was thinking about that when he locked up the Japanese American citizens, who were good neighbors and put them in camps. But it was a bad decision and it wasn’t consistent with who we are as a country and we look back at that now and say you know, we lost our way. It’s really easy to lose your way in moments like this in moments like this when we are so fearful.”*

—Washington Governor Jay Inslee<sup>307</sup>

*“America was built on the values of acceptance and compassion . . . . And that’s exactly what we should be showing to these poor families who are fleeing unimaginable violence . . . . We should be asking how we can help, not how we can divide and give in to fear and hatred.”*

—Vermont Governor Peter Shumlin<sup>308</sup>

As the discussion in Part II of this Article demonstrates, these nascent attempts at state engagement in refugee- and asylee-related rulemaking are precarious. This is particularly true of anti-refugee and anti-asylee measures introduced by states claiming that an influx of these migrants threatens their economic well-being or national security. As yet, many gubernatorial executive orders have proven to be completely ineffectual, and many state legislative bills have died in committee. No state has prevailed in a lawsuit challenging the placement of refugees or asylees within its borders, and it seems highly unlikely that Tennessee will succeed where Texas and Indiana have failed.<sup>309</sup> This is no accident. Longstanding legal doctrines preclude the states from taking actions that control immigrant admission and exclusion, committing that role to the federal

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307. See *What Is Your Governor Saying?*, *supra* note 1.

308. *Id.*

309. This is a fact that the Attorney General of Tennessee himself tacitly acknowledged in November 2015. See Herbert H. Slattery III, St. of Tenn. Off. of the Att’y Gen., Opinion No. 15-77 (Nov. 30, 2015), at 5–6, <http://www.tn.gov/assets/entities/attorneygeneral/opinions/op15-77.pdf> (noting that states lack a veto power over a federal decision to locate refugees within their borders).

government.<sup>310</sup> Unlike other areas of federal immigration law, however, refugee law *does* envisage a role for state governments and agencies in refugee and, by extension, asylee settlement—albeit a limited one.<sup>311</sup> This Part of the Article therefore analyzes the options that states may have to play a more active role in the refugee-resettlement process. First, it describes the firm constitutional limits that prevent states from promulgating laws and developing policies designed to exclude refugees—characterized as “exclusionary lawmaking.” It argues that this is not merely a legally required check on state power but also sound public policy because of the perils inherent in allowing state animus against newcomers to become enshrined in state law. Then, the Article discusses the as-yet underexplored opportunities for states to play a more active role in the refugee resettlement process, insofar as that role is designed to further refugee inclusion—characterized as “inclusionary lawmaking.” Through the latter, this Article proposes, it may be possible to realize more fully the possibilities of refugee federalism.

#### A. *The Constitutional Limits on State Exclusionary Lawmaking*

Under longstanding United States Supreme Court doctrine, sub-federal governmental actors are precluded from promulgating laws or instituting policies that interfere with the federal government’s plenary powers over the exclusion of immigrants from the United States. In its most recent ruling on this issue, *Arizona v. United States*,<sup>312</sup> which was published on June 25, 2012, the Court held that federal law preempted several key provisions of Arizona’s controversial Support Our Law Enforcement and Safe Neighborhoods Act (“S.B. 1070”).<sup>313</sup> Lawmakers designed S.B. 1070 to give state officials new powers over immigrants residing in the state. It created new state misdemeanors for being unlawfully present

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310. See generally *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (reaffirming the traditional doctrinal understanding of the national government as a “single sovereign” in charge of “a comprehensive and unified system to keep track of aliens within the Nation’s borders”); see also Elias, *supra* note 21, at 703 (arguing that *Arizona* opens the door for a new “immigration federalism,” giving states and localities opportunities to engage in inclusionary, rather than enforcement, regulation).

311. See 8 U.S.C. § 1522(a)(2)(A) (2012) (requiring the federal government to consult with the states about refugee placement).

312. 132 S. Ct. 2492 (2012).

313. *Id.* at 2497, 2510; see Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of Ariz. Rev. Stat. Ann. tits. 11, 13, 23, 28, and 41).

and working without authorization in the state, and it authorized state law enforcement personnel to question, detain, and arrest those whom they believed to be undocumented immigrants solely on that basis.<sup>314</sup> In striking down various provisions of S.B. 1070, the Court held that Arizona's new scheme was preempted because the federal government wholly occupied the field of immigration regulation and because the state's actions posed an obstacle to the operation of a unified federal scheme.<sup>315</sup> The Court emphasized the federal government's "broad, undoubted[,] . . . fundamental[,] . . . and complex" power over immigration regulation, based on the Naturalization Clause and its inherent power as the national sovereign to control and conduct foreign relations, in which the migration of foreign nationals to the United States was thoroughly implicated.<sup>316</sup> After the *Arizona* ruling, legal scholars and other commentators concurred in their assessments that the federal government's primacy over immigration rulemaking had been reasserted.<sup>317</sup> To the extent that state laws designed to control the inflow of refugees to their jurisdictions serve as tools of immigrant exclusion, they are therefore clearly preempted under the Court's *Arizona* doctrine.

Advocates who favor refugee-exclusionary or asylee-exclusionary provisions in state law might attempt to argue that any such laws designed to limit refugee resettlement in a particular town, state, or region, do not pose a barrier to federal immigration laws concerning immigrant admission to or exclusion from the country.<sup>318</sup> Rather, they might argue, such laws are permissible "alienage laws" that only

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314. 2010 Ariz. Sess. Laws at 456, 457.

315. *Arizona*, 132 S. Ct. at 2510.

316. *Id.* at 2498–99. The court also states that "[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities." *Id.* at 2499.

317. See Abrams, *supra* note 21, at 601 (arguing that the *Arizona* court implicitly endorsed the plenary power doctrine, which provides great deference to the federal government on immigration matters because of the issue of national sovereignty); Elias, *supra* note 21, at 703 (referring to *Arizona* as a "watershed" moment); Gulasekaram & Ramakrishnan, *supra* note 21, at 2123–41 (discussing the new federalism approach to immigration law); Guttentag, *supra* note 21, at 1–2 (explaining that the Civil Rights Act of 1870 is "an essential component of the Federal framework" that limits sub-federal immigration laws through preemption); Johnson & Spiro, *supra* note 21, at 100, 105 (stating that "*Arizona* establishes a regime of negotiated federalism"); McKanders, *supra* note 21, at 334 ("The federal government claims exclusivity in the area of immigration law and policy.").

318. See generally Fandl, *supra* note 164.

involve state regulation of individuals already present in the United States who happen to be foreign nationals.<sup>319</sup> Under longstanding doctrine, either the federal government or states may enact alienage laws, which determine the rights, privileges, and obligations of non-citizens present in the United States.<sup>320</sup> Thus, states may pass legislation in the exercise of their police powers that has an outsize effect on the safety and well-being of their immigrant residents, including refugees and asylees. Indeed, this rationale provides the legal justification for the three alternate models of state administration of refugee programs—direct state-administered programs, Wilson-Fish “alternative” programs, and the public-private partnership model.<sup>321</sup> Yet, it is hard to see how state executive orders or legislation designed to ban refugees and asylees from state territory would survive even the most cursory constitutional challenge. Even in the exercise of their police powers to engage in alienage rulemaking, states may not discriminate against immigrants—including refugees and asylees—on the basis of their race, religion, or national origin.<sup>322</sup> In each of the instances of

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319. For an illuminating perspective on alienage lawmaking, see David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 120 (2013), for an argument that *Arizona* is an “alienage” case, rather than an “immigration” case.

320. For example, in a series of cases, the Court recognized the power of a state to restrict the devolution of real property to non-citizens based on a state’s broad authority to regulate real property within its borders. See *Frick v. Webb*, 263 U.S. 326, 333–34 (1923) (noting that the exercise of such power does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment); *Webb v. O’Brien*, 263 U.S. 313, 321–22 (1923) (same); *Porterfield v. Webb*, 263 U.S. 225, 232–33 (1923) (same); *Terrace v. Thompson*, 263 U.S. 197, 216–18 (1923) (same). Another typical alienage law might, for example, specify that only United States citizens may be employed in state-funded jobs, such as public school teaching. See Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLIN L. REV. 51, 78–80 (1985) (describing a law prohibiting noncitizens from public schoolteacher positions unless manifest an intent to apply for citizenship, which was upheld by *Ambach v. Norwick*, 441 U.S. 68 (1979)). For an alternative account of the distinctions between immigration laws and alienage laws, see Gulasekaram & Ramakrishnan, *supra* note 21, at 2083–90.

321. See discussion *supra* Section I.C (noting that states’ participation in the federal refugee resettlement program is voluntary, and discussing the three types of programs); see also 45 C.F.R. § 400.301 (2015) (allowing states to withdraw from the resettlement program and authorizing the program director to designate a third party to manage the program in lieu of the state).

322. See *Chamber of Commerce v. Whiting*, 563 U.S. 582, 606 (2011) (Roberts, C.J., opinion) (noting that state alienage laws do not necessarily conflict with federal

refugee exclusionary rulemaking discussed in this Article, states have singled out certain groups of asylees—i.e., Central American women and children—and refugees—i.e., Syrians and Iraqis—for adverse treatment on the basis of their country of origin or, in the case of some Middle Eastern refugees, their Muslim religion.<sup>323</sup> Such an approach is clearly unconstitutional on equal protection grounds.

The constitutional limits on state governments' efforts to prevent federally-approved refugees from resettling in their jurisdictions on the basis of those refugees' race, nationality, or religion, are clear and unambiguous. Those limits are also normatively desirable. In the run-up to the 2016 presidential election, incendiary statements exaggerating the threat posed by immigrant newcomers—in particular, refugees—were part of the daily political discourse.<sup>324</sup> Even if such statements have little basis in fact, they are nonetheless pervasive and obviously hold some appeal for the electorate.<sup>325</sup> In

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laws prohibiting discrimination); *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976) (permitting Congress, and not the states, to discriminate between classes of aliens with respect to access to social welfare programs); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that states are not permitted to discriminate in the granting of benefits between aliens and citizens); *Takashi v. Fish & Game Comm'n*, 334 U.S. 410, 418–20 (1948) (rejecting a state agency's authority to deny a fishing license on the basis of citizenship status); *Truax v. Raich*, 239 U.S. 33, 42–43 (1915) (prohibiting a state from passing a quota on the number of aliens permitted to work in that state).

323. See discussion *supra* Part II. President-elect Donald J. Trump has been the strongest and most visible advocate of banning all Muslims from the United States. See, e.g., Philip Rucker, Jose A. DelReal, & Isaac Stanley-Becker, *Trump Pushes Expanded Ban on Muslims Entering the U.S.*, WASH. POST (June 13, 2016), [https://www.washingtonpost.com/politics/trump-pushes-expanded-ban-on-muslims-and-other-foreigners/2016/06/13/c9988e96-317d-11e6-8ff7-7b6c1998b7a0\\_story.html](https://www.washingtonpost.com/politics/trump-pushes-expanded-ban-on-muslims-and-other-foreigners/2016/06/13/c9988e96-317d-11e6-8ff7-7b6c1998b7a0_story.html) (quoting Trump as stating that, if elected, he would “suspend immigration from areas of the world where there’s a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats”); see also Antonia Blumberg, *Donald Trump’s Proposed Muslim Ban Has Not Aged Well: A Timeline*, HUFFINGTON POST (Oct. 10, 2016, 6:25 PM), [http://www.huffingtonpost.com/entry/the-evolution-of-trumps-proposed-muslim-ban\\_us\\_57fbf1cde4b068ecb5e0edb5](http://www.huffingtonpost.com/entry/the-evolution-of-trumps-proposed-muslim-ban_us_57fbf1cde4b068ecb5e0edb5) (listing several of Trump’s statements about his call for a Muslim ban and noting how it evolved throughout the campaign).

324. See Rucker, DelReal & Stanley-Becker, *supra* note 323 (noting the highly-charged, racial rhetoric of Trump).

325. See Abigail Abrams, *Terrorism Attacks Since 9/11 Have Involved U.S. Citizens, Not Immigrants, Despite GOP Debate Claim*, IB TIMES (Dec. 16, 2015, 11:58 AM), <http://www.ibtimes.com/terrorism-attacks-911-have-involved-us-citizens-not-immigrants-despite-gop-debate-2228202> (drawing attention to the number of terrorist attacks in the United States committed by U.S. citizens despite political

this political climate, it is all too easy to imagine lawmakers seeking to appeal to voters by engaging in ever more draconian measures against vulnerable asylee and refugee populations in their states. It would, however, be a mistake to conclude that all state lawmaking affecting refugee communities is necessarily impermissible and undesirable. As the discussion that follows demonstrates, there may still be ways in which states can productively engage in rulemaking affecting the refugees and asylees in their jurisdictions.

*B. The Statutory Possibilities for State Inclusionary Lawmaking*

The INA, as amended by the Refugee Act, explicitly acknowledges the role of the states in refugee resettlement. As described in detail in Section I.C of this Article, the statute expressly provides for a process of regular consultation between the federal government, state voluntary agencies, and VOLAGs.<sup>326</sup> Specifically, the statute states in relevant part that “[w]ith respect to the location of placement of refugees within a State, the Federal agency . . . shall, consistent with such policies and strategies and to the maximum extent possible, take into account recommendations of the State.”<sup>327</sup> State and local governments are given the opportunity to comment on “the intended distribution of refugees among the States and localities before their placement in those States and localities.”<sup>328</sup> A key goal of the consultation process is to ensure that a refugee is not initially placed or resettled in an area that is “highly impacted . . . by the presence of refugees or comparable populations unless the refugee has a spouse, parent, sibling, [or child] residing in that area.”<sup>329</sup> The statutory language anticipates both that states will be engaged in a consultative process, within which they may make their recommendations to the federal government, and that the

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rhetoric otherwise); Daniel L. Byman, *Do Syrian Refugees Pose a Terrorism Threat*, BROOKINGS INST. (Oct. 27, 2015), <https://www.brookings.edu/blog/markaz/2015/10/27/do-syrian-refugees-pose-a-terrorism-threat> (discussing the misplaced attention on refugees from Syria as potential risks and suggesting that a less discriminatory screening process be implemented). *But see* Russell Berman, *A New Threat to the Syrian Refugee Program*, ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/01/the-arrest-of-iraqi-refugees-on-terrorism-charges/423339> (discussing the arrest of two refugees from Iraq in the United States on terrorism-related charges).

326. *See supra* Section I.C.

327. 8 U.S.C. § 1522(a)(2)(D) (2012).

328. § 1522(a)(2)(A).

329. § 1522(a)(2)(C)(i) (prescribing regulations by the Director after consultation with such agencies and governments).

federal government will “to the maximum extent possible” take the states’ recommendations into account.<sup>330</sup>

In practice, the statutory mandate in the INA requiring the federal government to consult with the states has been interpreted to afford states a narrowly proscribed role, limited to regularly-scheduled informational meetings and little more.<sup>331</sup> ORR hosts quarterly meetings, where state voluntary agencies are invited, at which it shares data on forthcoming refugee placements, the availability of federal funding for the resettlement program, historical employment outcomes for resettled refugees and asylees, etc.<sup>332</sup> In addition to the ORR meetings, representatives of state and local governments meet regularly with the local affiliates of VOLAGs to discuss, amongst other topics, the proportion of the area’s population that are refugees and other immigrants and the attendant burden on social services, such as education, health care, and employment-seeking assistance.<sup>333</sup> But, states are not given advance information about the individual circumstances of refugees likely to be resettled within their borders, and the states have no opportunity to express preferences about refugees’ suitability or characteristics for resettlement. There is certainly no aspect of the current consultative process that would provide states with the opportunity to veto the placement of refugees within their borders. As a consequence, some commentators dismiss the statutorily-mandated consultative process as an indication of how little impact states currently may have upon the settlement of refugees and asylees.<sup>334</sup> These commentators point to the fact that, beyond attending these consultative meetings, the role of the states is

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330. § 1522(a)(2)(D).

331. See, e.g., Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Law Is Clear: States Cannot Reject Syrian Refugees*, WASH. POST (Nov. 19, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/11/19/the-law-is-clear-states-cannot-reject-syrian-refugees> (stating that “federal law contemplates a role for states and state agencies in the refugee resettlement process, but that role is limited to advice-giving and consultation”); *The Role of States in the Refugee Resettlement Process*, FED’N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/the-role-of-states-in-the-refugee-resettlement-process> (last visited Nov. 30, 2016) (advocating for states to take a more active role than they currently do).

332. OFFICE OF REFUGEE RESETTLEMENT, STATISTICAL ABSTRACT FOR REFUGEE RESETTLEMENT STAKEHOLDERS 20 (2014), [https://www.acf.hhs.gov/sites/default/files/orr/statistical\\_abstract\\_for\\_refugee\\_resettlement\\_stakeholders\\_508.pdf](https://www.acf.hhs.gov/sites/default/files/orr/statistical_abstract_for_refugee_resettlement_stakeholders_508.pdf).

333. See *id.* at 21.

334. See Gulasekaram & Ramakrishnan, *supra* note 331 (“[S]tates cannot actually stop Syrian refugees from settling within their borders.”).

limited to serving as a conduit for funding and access to services.<sup>335</sup> As such, they argue, there is little scope for innovative state action.<sup>336</sup> I disagree. The existence of a constitutional bar to exclusionary rulemaking does not preclude innovative inclusionary lawmaking by the states.<sup>337</sup> In the context of refugee- and asylee-related executive orders, legislation, and ordinances, the current statutory scheme provides ample flexibility and opportunity for state and local experimentation with measures intended to foster immigrant inclusion. This, I believe, is where the true, and as yet under-explored, possibilities of refugee federalism lie.

States have yet to fully exploit the opportunity within the existing consultative process to make recommendations to the federal government about refugee admission, selection, and integration. This flows from the basic premise that states may be able to identify in advance locations where refugees and asylees in general—and specific communities of refugees and asylees, in particular—would be especially welcome and useful.<sup>338</sup> Rather than approaching these consultative meetings as a venue in which to report to the federal government that certain communities have “reached capacity” and cannot absorb any more newcomers, states should instead consult with local communities to prepare them to lobby *for* the resettlement of refugees in locations where they could have a positive economic and social impact on. This lobbying could occur with respect to the pool of refugees already screened and cleared by the federal government for resettlement in the United States. Alternatively, it could be used in advance of such clearance, with the goal of informing the priorities that the federal government sets when deciding which potential refugee applicants overseas to shepherd through the application process.<sup>339</sup> Both ORR and the states have traditionally viewed the state

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335. *Id.*

336. *Id.*

337. See Elias, *supra* note 21, at 703 (calling for a “new immigration federalism” in which states and localities focus on opportunities to pass immigration measures that are inclusionary).

338. This approach would dovetail with many of the preexisting goals of ORR’s coordinated placement program. See *Coordinated Placement*, OFF. REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/orr/programs/coordinated-placement> (last visited Nov. 30, 2016) (stating that the agency’s goals are to “facilitate and ensure refugee self sufficiency and integration”).

339. This approach has been adopted with great success by the government of Canada. Their “Provincial Nominee Program” allows the provinces to set priorities for the types of newcomers they are most interested in welcoming, so that they can prioritize new community members whose skills will best complement those of

role in the consultative process as passive—allowing the states an opportunity to check the federal government agencies when they might impose too great a burden on the states but not granting the states the opportunity to take the initiative themselves.<sup>340</sup> By shifting to a proactive role—that is not predicated on vetoing refugee or asylee settlement but, rather, on advocating for the placement of newcomers who are particularly desirable for a given state—the states would be more able to successfully pursue the oft-stated goal of promoting their own economic prosperity and safeguarding the interests of their communities.

Moreover, the very fact that the states enjoy such autonomy in the provision of educational and social services to “qualified immigrants,” including refugees and asylees, allows them to develop their own state-specific—and therefore locally-appropriate—responses to the needs of their own communities. Since the passage of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>341</sup> states have been responsible, in large part, for determining the degree to which refugees and asylees may access a number of government benefits. Immediately after the Act was passed, many immigrants were precluded from receiving federal welfare benefits during their first five years in the United States.<sup>342</sup> Subsequent revisions exempted “humanitarian immigrants”—i.e., refugees and asylees—from this five-year waiting period, allowing them access to Medicaid, the Children’s Health Insurance Program, and Temporary Assistance for Needy Families.<sup>343</sup> Many refugees and asylees, however, continue to rely on *state*-funded programs for a variety of supplemental social benefits.<sup>344</sup>

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existing residents. See *Evaluation of the Provincial Nominee Program*, GOV’T CAN., <http://www.cic.gc.ca/english/resources/evaluation/pnp/section3.asp> (last updated Jan. 24, 2012). For a comparative analysis of the Provincial Nominee Program, see Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders*, 39 YALE J. INT’L L. 37, 71–78 (2014).

340. See Gulasekaram & Ramakrishnan, *supra* note 331.

341. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

342. See Lauren E. Moynihan, Note, *Welfare Reform and the Meaning of Membership: Constitutional Challenges and State Reactions*, 12 GEO. IMMIGR. L.J. 657, 659–62 (1998).

343. See *id.* at 660 n.19; see also PEW CHARITABLE TRUSTS, MAPPING PUBLIC BENEFITS FOR IMMIGRANTS IN THE STATES 5–6 (2014), <http://www.pewtrusts.org/~media/assets/2014/09/mappingpublicbenefitsforimmigrantsinthestatesfinal.pdf> (indicating the differences in state resources provided to immigrants and the states which provide supplementary funding to federal benefits).

344. See PEW CHARITABLE TR., *supra* note 343, at 6–7 (explaining the supplementary benefits immigrants may receive from the state).

Alongside more longstanding forms of assistance, such as supplemental security income programs, some states are now beginning to develop programing specifically designed to foster the inclusion of refugees and asylees.<sup>345</sup> The programs involve healthcare provisions, educational assistance, and even free or low-cost legal services.<sup>346</sup> In California, as discussed in Section II.B, the state now provides funding to support the legal representation of unaccompanied immigrant children seeking asylum.<sup>347</sup> In New York, similarly, the state regularly apportions additional funding to provide English as a second language instruction to refugees and asylees resident in the state.<sup>348</sup> The recent passage of the federal Workforce Innovation and Opportunity Act<sup>349</sup> also created further opportunities for states to develop and fund their own education and training initiatives to support refugees and asylees. The Act provides states with the opportunity to engage in programs that are designed specifically to assist those who are English-language learners, people with low levels of literacy, and “individuals facing substantial cultural barriers.”<sup>350</sup> The states are responsible for allocating their own funding to support such programs, but the federal Act provides a useful framework to those states, nonetheless. One could justly view each of these “alienage” measures—involving financial assistance, legal services, healthcare, and educational support as a form of

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345. See, e.g., Melanie Mason, *California Gives Immigrants Here Illegally Unprecedented Rights, Benefits, Protections*, L.A. TIMES (Aug. 11, 2015, 7:58 AM), <http://www.latimes.com/local/california/la-me-california-immigrant-rights-20150811-story.html> (discussing measures introduced in California to assist asylum seekers); James L. Seward, *What Benefits Can Illegal Aliens Receive?*, N.Y. ST. SENATE, <https://www.nysenate.gov/newsroom/articles/james-l-seward/what-benefits-can-illegal-aliens-receive> (last visited Nov. 30, 2016) (discussing benefits in New York for assist asylum seekers); NAT’L CONFERENCE OF STATE LEGISLATURES, TUITION BENEFITS FOR IMMIGRANTS 1–4 (July 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> (detailing states’ tuition benefits, or lack thereof, for immigrants through different mechanisms, such as in-state tuition, university benefits, and financial aid).

346. See sources cited *supra* note 345.

347. See Press Release, Office of Governor Edmund G. Brown Jr., *supra* note 245.

348. See, e.g., A8290A, 2015–16 Leg. Sess. (N.Y. 2015) (directing the state’s Commissioner of Education to distribute certain funds “for the purposes of educating either unaccompanied minors or [certain other] English language learners”).

349. Pub. L. 113-128, 128 Stat. 1425 (2014).

350. *Id.* § 3(24)(I), 128 Stat. at 1434; see also Michael Fix, *How “They” Become “We”*, AM. PROSPECT (Aug. 9, 2016), <http://prospect.org/article/how-‘they’-become-‘we’> (discussing recent congressional measures on education that should benefit immigrants).

inclusionary refugee federalism. There is, therefore, ample opportunity for states to develop these and other programs to foster the inclusion of refugees and asylees in their communities.

#### CONCLUSION

*“[T]o stand up there with swagger, and say ‘I’m going to prevent the wrong people from entering my state’ to me is just ludicrous . . . I trust our churches and nonprofit refugee organizations to make the determination about what’s appropriate and the social costs involved with bringing in people who are indigent refugees.”*

—Minnesota Governor Mark Dayton<sup>351</sup>

*“I understand that immigration and refugee resettlement are authorized under federal law . . . [but] . . . [i]nstead of Congress rubber-stamping this program each year, we ask that [President Barack Obama] and Congress work with states and governors thoroughly to review this process and how states are affected.”*

—Idaho Governor C.L. “Butch” Otter<sup>352</sup>

During the last three years, the influx of asylum seekers from the Central American nations of El Salvador, Honduras, and Guatemala and refugees from the Middle Eastern countries of Syria and Iraq has prompted a variety of differing responses from state and local governments. Some state lawmakers have responded with anger and fear, claiming that these refugees and asylees are a drain on their financial resources and pose a threat to their citizens’ safety and security. The response of these lawmakers has been to issue proclamations or introduce legislation designed to ban refugees and/or asylees from settling in their jurisdictions. Other state administrations have stressed their desire to welcome and care for these newcomers. They have issued executive orders, passed legislation, and promulgated ordinances to do just that. Both responses constitute, in their own ways, varying approaches to “refugee federalism.” But the latter is constitutionally permissible, while the former is not.

As this Article has discussed, refugee- and asylee-exclusionary lawmaking is perilous both because of the ugly social and moral

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351. *What Is Your Governor Saying?*, *supra* note 1.

352. *Id.*

implications of such an approach and because it is unlawful. Banning refugees and asylees admitted to the United States from settling in a particular state on the basis of their national origin or religious beliefs would violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.<sup>353</sup> Further, the INA, as amended by the Refugee Act, expressly gives the executive branch broad discretion to resettle refugees anywhere in the nation, without reference to state governments.<sup>354</sup> More generally, the Supreme Court's immigration federalism doctrine firmly establishes that the federal government enjoys unassailable primacy in all areas of law pertaining to exclusionary actions against immigrants, a group that naturally includes both refugees and asylees.

Refugee- and asylee-inclusionary lawmaking is, in contrast, an area rife with as-yet underexplored possibilities. The Refugee Act creates a consultative mechanism that allows states to confer with the federal government about refugee resettlement. Thus far, the consultative process has been largely limited to states informing the federal government when they believe that they have "reached capacity" in certain locations and no longer have the resources to support the arrival of further newcomers. There are, however, various opportunities inherent in the existing consultative process for states to proactively solicit the placement of refugees whose presence would potentially enhance, rather than strain, the resources of local communities. Moreover, the consultative process could be modified to permit states to have some degree of input as the federal government sets its overall priorities for refugee resettlement, beginning with the process of setting priorities for the selection of aspiring refugees to submit to the rigorous U.S. pre-migration screening process. Furthermore, state governments have the opportunity, in the free exercise of their right to engage in "alienage" lawmaking, to promulgate laws and regulations and to initiate policies designed to promote refugee or asylee integration. Since November 2015, many state officials have expressed their concern for

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353. See sources cited *supra* note 322; see also Vladeck, *supra* note 22 (arguing that states' bans on accepting refugees violate both the Fourteenth Amendment and federal laws that provide federal authorities the power to admit or bar refugees).

354. 8 U.S.C. § 1157(b) (2012); see also Gulasekaram & Ramakrishnan, *supra* note 331 (asserting that federal law does not permit states to override federal refugee decisions); Vladeck, *supra* note 22 (emphasizing the President's explicit power under the Refugee Act to admit refugees).

and solidarity with refugees and asylees.<sup>355</sup> In the months and years ahead, those expressions have the opportunity to develop into tangible legal and policy commitments.

Refugee federalism is a dynamic, evolving area of law. President-elect Trump and his Administration will assume office in January 2017. Thereafter, we may see sweeping changes in many aspects of immigration law, including laws and regulations pertaining to refugees and asylees. State lawmakers are uniquely positioned to respond to such changes. If the federal government pursues policies designed to deter refugee resettlement or exclude asylum-seekers, state officials may, nonetheless, still have the opportunity to promote continued inclusion and acceptance of these vulnerable populations who have fled persecution to seek a safe haven in the United States. In short, it is now more important than ever that state governments avoid the perils and embrace the possibilities of refugee federalism.

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355. See Victor, *supra* note 212 (quoting Governor Tom Wolf of Pennsylvania, Governor Dannel Malloy of Connecticut, and Governor Peter Shumlin of Vermont in their welcoming of refugees to their respective states).