

FEDERAL RESPONSIBILITIES FOR RESETTLING REFUGEES

*KENNETH BASCH**

INTRODUCTION

America is truly a country of immigrants. All Americans, except native American Indians, either came from abroad or descended from someone who did.¹ Refugees are immigrants entering the United States in flight from persecution.² They come from all parts of

* B.A., Tulane University, 1980; J.D., Washington University, 1983.

1. *The Refugee Act of 1979, S. 643: Hearing Before the Senate Judiciary Committee*, 96th Cong., 1st Sess. 2 (1979) (statement of Sen. Thurmond) [hereinafter cited as *Senate Judiciary Hearing*].

United States law holds numerous classifications for resident aliens. All aliens in the United States are classified either as immigrants or nonimmigrants. Immigrants are those aliens who intend to reside here permanently. They include persons desiring to reunite with their families, persons admitted into the country by reason of their special skills, and those permitted to remain for humanitarian reasons. *See generally* Portman, *Immigration Benefits Based upon Family Relationships*, ST. LOUIS B.J., Summer 1981, at 36, 38.

Nonimmigrants are aliens temporarily residing or visiting the United States. These include business visitors and tourists, students and their families, temporary workers and their families, exchange visitors (*e.g.*, visiting professors) and their families, company transferees, and crewmen. *See id.* Significant differences in the length of a permissible stay and eligibility for government benefit programs attach to the different entrant categories. *See generally* C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* §§ 2.1-2.54 (1981); A. MUTHARIKA, *THE ALIEN UNDER AMERICAN LAW* chs. IV, VIII, IX (1981).

2. American law defines a refugee as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded

the world.³ Thus, assimilation into American society is rarely the same for any two groups. Generally, they require English instruction, vocational training, and often license recertification.⁴ The cost

fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion
 Refugee Act of 1980, Pub. L. No. 98-212, § 201(a), 94 Stat. 102. This definition is identical to the United Nations definition, found in a Protocol to which the United States is a signatory. 1967 Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. The prior definition of "refugee" under American law discriminated against aliens from certain countries. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(42), 66 Stat. 163. Congress' intent in enacting the new definition was to remove this discrimination and provide a nonpolitical definition. S. REP. NO. 256, 96th Cong., 1st Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 142.

The Immigration and Nationalization Service (INS) has not fully implemented this intention. For example, in south Florida recently there has been a large influx of Cubans and Haitians. In asylum hearings, Cubans enjoy a presumption of proof that they are fleeing persecution, hence, are refugees under the statutory definition. Haitians, on the other hand, have a full burden of proof in their asylum claims. Consequently, Cubans regularly receive refugee status while Haitians rarely do. *See Caribbean Refugee Crisis: Cubans and Haitians, Hearings Before the Senate Judiciary Committee*, 96th Cong., 2d Sess. 16 (1980) (statement of Monsignor Bryan Walsh, Director of Catholic Charities, Archdiocese of Miami) [hereinafter cited as *Senate Hearing, Caribbean Refugee Crisis*]. *See also* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 519-526 (S.D. Fla. 1980) (discussing treatment of Haitians during asylum hearings). *Cf. Senate Hearing, Caribbean Refugee Crisis, supra*, at 34 (statement of Charles B. Renfrew, U.S. Asst. Att'y Gen'l that Cubans and Haitians are treated equally). As noted below, this treatment of Haitians has had a significant impact on the local governments in south Florida. *See infra* notes 20 & 23 and accompanying text.

See generally C. GORDON & H. ROSENFELD, *supra* note 1, § 2.24A; A. MUTHARIKA, *supra* note 1, ch. VIII at 138-326; Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1980); Comment, *Territorial Asylum in the Americas: Practical Considerations for Relocation*, 12 LAW. AM. 359 (1980).

3. In 1980 immigrants arrived from numerous countries, including Cuba, Haiti, El Salvador, Ethiopia, Iran, Nicaragua, Uganda, the Soviet Union, and the Indochinese region. *See* Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 627, 632 (1981).

From 1976 until 1980 the United States admitted an average of 567,000 immigrants annually. In 1981 an estimated 697,000 immigrants entered. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 660 (app. H) (1981) [hereinafter cited as SELECT COMMISSION REPORT].

4. *See* 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson that most recent Indochinese refugees have fewer skills and require longer periods of welfare assistance than earlier arrivals). *See also* *Hearings on H.R. 2142 Before the Subcommittee on Immigration, Refugees and International Law, House Committee on the Judiciary*, 97th Cong., 1st Sess. 5 (1981) (statement of Rep. Patterson that newer Indochinese refugees required more vocational and English instruction before becom-

for this assistance is immense.⁵

This Note focuses on who should bear these costs associated with refugee resettlement. Federalism issues arise because there are federal interests in refugee admissions⁶ and state and local government interests in providing government services, education, and public health.⁷ The Note first describes where refugees generally settle⁸ and the costs incurred by those communities.⁹ It then summarizes the refugee resettlement system,¹⁰ discussing the financial aid that the federal government provides to state and local governments.¹¹ Finally, it argues that since refugee affairs are a national concern, the federal government should bear all of the resettlement costs.¹²

ing employable) [hereinafter cited as *1981 Subcommittee Hearings on H.R. 2142*]; *id.* at 32 (statement of Rep. Danielson that new Indochinese refugees require more intensive vocational and English instruction to attain self-sufficiency); *Refugee Act of 1979, Hearings Before the Subcommittee on Immigration, Refugees, and International Law on H.R. 2816, House Committee on the Judiciary*, 96th Cong., 1st Sess. 278, 378 (1979) (statement of Oregon Governor Victor Atiyeh that new Indochinese refugees have fewer skills and English abilities than previous arrivals) [hereinafter cited as *1979 Subcommittee Hearings on H.R. 2816*]; Bach, *The New Cuban Immigrants: Their Background and Prospects*, MONTHLY LAB. REV., Oct. 1980, at 39, 40 (stating that the 1980 "freedom flotilla" arrivals, though more skilled than had been feared, have fewer skills than early Cuban immigrants; also noted that only five percent of new arrivals spoke English); Peirce, *Refugees and Cities: A Multi-Pronged Dilemma*, in SELECT COMMISSION REPORT, *supra* note 3, at 267-70 (app. C) (quoting San Jose Mayor Janet Gray Hayes, who referred to new Indochinese refugees as "peasants," requiring much more assistance than earlier refugees); *Trouble in Paradise*, TIME, Nov. 23, 1981, at 29-30 (the Cuban refugees who arrived in the 1960s were mostly middle-class professionals, whereas the new refugees have increased the welfare rolls by one-third).

5. For fiscal year 1980 the estimated total cost of refugee services borne by the federal, state, and local governments was \$1.7 billion. The estimate for 1981 is \$2.1 billion. These figures include federal expenditures outside the United States to aid refugees who are overseas. The figures do not include funds provided by private individuals and foundations. See U.S. DEP'T OF STATE, REPORT TO CONGRESS—U.S. COSTS ATTRIBUTABLE TO INTERNATIONAL AND DOMESTIC REFUGEE ASSISTANCE BORNE BY THE FEDERAL, STATE AND LOCAL GOVERNMENTS 4 (1980) [hereinafter cited as STATE DEP'T REPORT—REFUGEE ASSISTANCE COSTS], reprinted in *U.S. Refugee Programs, Hearings Before the Senate Judiciary Committee*, 96th Cong., 2d Sess. 153 (1980).

6. See *infra* notes 81-95 and accompanying text.

7. See *infra* notes 30-77 and accompanying text.

8. See *infra* notes 13-29 and accompanying text.

9. See *infra* notes 30-77 and accompanying text.

10. See *infra* notes 78-128 and accompanying text.

11. See *infra* notes 129-79 and accompanying text.

12. See *infra* notes 180-303 and accompanying text. This Note covers refugee-

I. IMPACT ON URBAN AREAS

Today refugees primarily settle in urban areas.¹³ Part of the reason for this overwhelming urban settlement has been a fundamental change in United States refugee resettlement policies. In 1975, the stated goal of American refugee resettlement policy was to scatter refugees evenly throughout the country.¹⁴ Today, however, resettlement

related problems and the responsibility of the federal government for these problems. It does not specifically cover the problems of undocumented aliens.

Undocumented aliens are foreigners who arrive in the United States without proper visas. Generally, they enter the country surreptitiously. The government can deport them for arriving without proper documents. *See, e.g.*, *Cavallaro v. Lehmann*, 264 F.2d 237 (6th Cir. 1959) (deported alien stowaway); *De Souza v. Barber*, 263 F.2d 470 (9th Cir. 1959) (deported alien who reentered the country without a visa, after previous deportation); *Grubisich v. Esperdy*, 175 F. Supp. 445 (S.D.N.Y. 1959) (deported alien who had fraudulently obtained reentry permit). *See also* C. GORDON & H. ROSENFELD, *supra* note 1, § 4.7k.

Undocumented aliens burden local communities in much the same way that refugees do. They are not eligible for government aid. *See* McAlvana & Siwulec, *The Alien's Eligibility for Federal Benefit Programs*, 12 CLEARINGHOUSE REV. 33 (1978). Thus, local communities frequently provide services for them without federal reimbursement. States and municipalities are unable to control the flow of undocumented aliens because the federal government controls entry at national borders. *See infra* note 123 and accompanying text. An analogous argument can be made, therefore, that the federal government is responsible for the welfare of undocumented aliens as well as for refugee resettlement costs. Accordingly, this Note makes extensive footnote references to the effects undocumented aliens have on local communities. For a summary of the government benefits to which undocumented aliens are entitled, see *infra* note 139.

13. Most refugees settle in cities (populations of 100,000 or more) or urban areas (populations of 2,500 to 99,999). In 1979, less than one percent of all entering immigrants stated an intention to settle in a rural area (areas with populations of less than 2,500). *See* SELECT COMMISSION REPORT, *supra* note 3, at 237 (Staff Report).

Even refugees with agricultural backgrounds tend to settle in urban areas. For example, in Iowa, Indochinese refugees from rural communities tended to move into urban centers, despite the expectations of Iowa officials that they would settle in Iowa's rural areas. The officials found that the agricultural skills the refugees developed in their home countries were too primitive to adapt to modern American agricultural techniques. 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 278 (statement of Kenneth Quinn, Foreign Service Officer assigned to Iowa Refugee Service Center).

The President of the United States' Conference of Mayors described the refugee situation in American cities as an "emergency." Peirce, *Refugees and Cities: A Multi-Pronged Dilemma*, in SELECT COMMISSION REPORT, *supra* note 3, at 267 (statement of Mayor Richard Carver). *See also* North & Martin, *Immigration and Employment: A Need for Policy Coordination*, MONTHLY LAB. REV., Oct. 1980, at 47; Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, reprinted in G. McCLELLAN, IMMIGRANTS, REFUGEES, AND U.S. POLICY 44, 49 (1981).

14. In 1975, Congress believed that scattering refugees would avoid overburden-

policy recognizes the advantages of "clustering" refugees into communities.¹⁵ These advantages include reducing the culture shock refugees generally experience on arrival in the United States¹⁶ and allowing them to retain their native culture.¹⁷ This new policy also recognizes that refugees have a natural tendency to cluster together with their own, establishing their own communities.¹⁸

Concentration of refugees in a few communities results in a disproportionate distribution of the costs of settlement.¹⁹ South Florida, for example, has been inundated with refugees from Cuba and Haiti.²⁰

ing any one area of the country. 1979 Subcommittee Hearings on H.R. 2618, *supra* note 4, at 276 (statement of Rep. Fish). See also SELECT COMMISSION REPORT, *supra* note 3, at 184-85 (Final Report and Recommendations); Note, *Federal Refugee Resettlement Policy: Asserting the States' Tenth Amendment Defense*, 8 HASTINGS CONST. L.Q. 877, 891 (1981).

15. 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 276 (statement of Rep. Fish).

16. *Id.* at 273 (statement of Iowa Governor Robert D. Ray).

17. *Id.* at 269.

18. This tendency is known as "secondary migration." Refugees who were settled throughout the country move, on their own initiative, to areas where established large communities from their native lands exist. For example, the government originally scattered the Indochinese throughout the country. Today approximately 70% live in just 11 states. California alone has over one-third of all Indochinese refugees in the country. 126 CONG. REC. H1524 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson). Nearly half the Indochinese arriving in Orange County, California are secondary or even tertiary refugees. 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 4 (statement of Rep. Patterson). See also 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 276 (statement of Rep. Fish). Thus, even if refugee resettlement policy still tried to scatter refugees, such efforts would be futile. For estimated statistics on secondary migration of Indochinese refugees, see SELECT COMMISSION REPORT, *supra* note 3, at 187 (Final Report and Recommendations).

19. See *infra* text accompanying notes 30-77.

20. In 1980, 39% of Dade County's population was Hispanic. This was up from 24% in 1970 and 5% in 1960. *Trouble in Paradise*, TIME, Nov. 23, 1981, at 22, 23. Over 60% of all Cubans entering the country intend to settle in Florida. SELECT COMMISSION REPORT, *supra* note 3, at 237 (Staff Report).

In the summer of 1980, approximately 130,000 Cubans arrived in south Florida as part of the "Freedom Flotilla." See *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1051 (N.D. Ga. 1981). It began in early April, 1980, when 10,000 dissidents jammed the Peruvian embassy in Havana, seeking asylum. N.Y. Times, Apr. 7, 1980, at 1, col. 2. The Cuban government then opened the harbor in Mariel, Cuba, and permitted anyone so desiring to leave. *Id.*, Apr. 22, 1980, at 7, col. 1 and Apr. 24, 1980, at 1, col. 2. These Cubans, and Haitians who arrived at approximately the same time, have a special immigration status labeled "Cuban-Haitian Entrant." *State Department Statement on Refugee Policy*, June 20, 1980, reprinted in N.Y. Times, June 21, 1980, at 8.

Of the Haitians who do not have "Entrant" status, the majority are undocumented

As a result, Miami has the highest immigrant²¹ to resident ratio in the nation.²² The resettlement costs borne by the Miami community have been astronomical.²³

aliens. Undocumented aliens are foreigners who arrive in the United States without proper visas. Generally, they enter the country surreptitiously. The INS can exclude and deport them. 8 U.S.C. § 1182(a)(2e) (1976). The Federal District Court for the Southern District of Florida, however, has enjoined the government from deporting Haitians. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980). The court there held that the INS's procedures for hearing the Haitians' asylum claims violated the due process and equal protection clauses. *Id.* at 532. Since the injunction, the INS has detained Haitians arriving here and seeking asylum. In a separate decision, the same district court enjoined the government from further detaining Haitian asylum applicants. *Louis v. Nelson*, 544 F. Supp. 1004 (S.D. Fla. 1982).

The effect this decision will have on south Florida is tremendous. As undocumented aliens awaiting determination of their asylum claims, the Haitians will be ineligible for government benefits. The local community, therefore, will be forced to absorb the newly-freed Haitians without federal assistance. See SELECT COMMISSION REPORT, *supra* note 3, at 52 (app. H) (statement of Roger Bel Pino, member of the Cuban-American Bar Association); *Senate Hearing, Caribbean Refugee Crisis*, *supra* note 2, at 12 (statement of Monsignor Bryan Walsh, Director of Catholic Charities, Archdiocese of Miami). Estimates indicate that 25,000 Haitians already live in south Florida. Precise statistics do not exist because many enter clandestinely. See *Trouble in Paradise*, *supra*, at 23, 29.

21. The term "immigrants" is broader in meaning than "refugees." Refugees are just one type of immigrant. See *supra* notes 1-2.

22. In 1978 the ratio of immigrants to resident population in Miami was 1:15. The second highest ratio, Elizabeth, New Jersey, was a distant 1:49. The next highest immigrant ratio cities were San Francisco, California; El Paso, Texas; Patterson, New Jersey; and New York, New York. North & Martin, *supra* note 13, at 48.

23. The yearly costs for health care and social services in Dade County attributable to refugees has been estimated at \$4.2 million. Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, at 60, reprinted in G. McCLELLAN, *supra* note 13, at 46. The costs to Dade County associated with the massive 1980 influx of both Cubans and Haitians have been estimated at \$30 million. *Trouble in Paradise*, *supra* note 20, at 29.

Dade County incurred more than just the costs of resettlement. When the crisis began, the county set up a processing center to receive the arriving Cubans and begin screening them. The federal government did not step in to operate the processing center for two weeks. Thus, Dade County spent local government funds for reception, before resettlement efforts even began. *Senate Hearing, Caribbean Refugee Crisis*, *supra* note 2, at 12-13 (statement of Monsignor Bryan Walsh, Director of Catholic Charities, Archdiocese of Miami). When President Carter decided to grant the Cuban arrivals a special status, he initially disqualified them from receiving any federal funds. *Id.* at 42 (statement of Sen. Kennedy). See also Wright, *The Development of Refugee Policy*, NATION'S CITIES WEEKLY, Aug. 11, 1980, at 3, reprinted in G. McCLELLAN, *supra* note 13, at 20, 24; Bach, *The New Cuban Immigrants: Their Background and Prospects*, MONTHLY LAB. REV., Oct., 1980, at 39. Subsequently, the Carter Administration announced that the new arrivals would be eligible for some federal aid. *Hearings on Refugee Admissions and Resettlement Program—Fiscal Year*

Orange County, California has also become a center for refugees. The influx of refugees there is primarily from Southeast Asia.²⁴ Over 50,000 Indochinese have already settled in Orange County and over 1000 more arrive every month.²⁵ The costs to Orange County relating to the refugee population are estimated at \$3 million annually.²⁶ Los Angeles County, California also has a growing Indochinese refugee population.²⁷ Additionally, that county has a significant undocumented alien population, primarily from Mexico.²⁸

These examples illustrate the growing numbers of refugees and their concentration in urban areas across the country.²⁹ As a result of

1981, *Before the House Committee on the Judiciary*, 96th Cong., 2d Sess., 130 (1980) (statement of Victor Palmieri, United States Coordinator for Refugee Affairs).

24. See 1981 *Subcommittee Hearings on H.R. 2142*, *supra* note 4, at 4-6 (statement of Rep. Patterson).

25. *Id.* at 4. The county has almost as many Indochinese refugees as the entire state of Texas. Texas, as a state, has the second largest Indochinese refugee population in the country. *Id.* at 32 (statement of Rep. Danielson). Texas had 37,000 Indochinese, Orange County had 29,000, and California as a whole had 160,000. *Id.*

26. Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, at 60, reprinted in G. McCLELLAN, *supra* note 13, at 46.

27. The county had over 50,000 as of October, 1980. 1981 *Subcommittee Hearings on H.R. 2142*, *supra* note 4, at 32 (statement of Rep. Danielson).

28. Accurate statistics on the number of undocumented aliens in Los Angeles are unavailable. Little doubt exists, however, that Los Angeles is home for a significant number of illegal aliens. See SELECT COMMISSION REPORT, *supra* note 3, at 114 (app. H) (statement of Thomas Hibbard, Board of Supervisors, Los Angeles County). Over half the kindergarten students in Los Angeles public schools speak Spanish as their native language. Hornblower, *A Magnet for Millions*, Wash. Post, July 4, 1980, at A1, col. 1. For a general explanation of undocumented aliens and this Note's coverage of them, see *supra* note 12.

29. In addition to the three examples, significant numbers of refugees live in New Jersey, see 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson); H.R. REP. NO. 1218, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3810, 3814; Oregon, see 1979 *Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 377-78 (statement of Oregon Governor Victor Atiyeh); *Senate Judiciary Hearing*, *supra* note 1, at 164-65 (statement of Leo T. Hegstrom, Director, Oregon Department of Human Resources); Iowa, see 1979 *Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 268-78 (statements of Iowa Governor Robert D. Ray and other Iowa officials), and other states. See generally SELECT COMMISSION REPORT, *supra* note 3, at 100 (app. H) (statement of Dr. Suzanne Dandry, Director, Arizona Department of Health Services); *id.* at 593 (statement of Mr. Minoru Yasui, Executive Director, Commission on Community Relations, City and County of Denver, Colorado); 1979 *Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 294 (statement of Edwin B. Silverman, Director, Governor's Information Center for Asian Assistance, Illinois); *id.* at 280-82 (statement of Michigan Governor William G. Milliken); *id.* at 378-80 (statement of Minnesota Governor Albert H. Quie); *id.* at 291-92 (statement of Joseph

this concentration, local communities have had to increase public services, often at their own expense.

II. MAJOR COSTS TO LOCAL COMMUNITIES

A. Education

Public school enrollment in cities with refugee concentrations has soared.³⁰ Added costs stem not only from higher enrollment, but also from the special costs necessary to educate refugee children.³¹ These special costs arise from the need for qualified bilingual instructors, special teaching materials, extra classroom space, extra buses, and more support services.³² The most recent arrivals have little formal schooling, and thus require remedial programs.³³ Educational authorities estimate the additional costs for educating refugee children

H. Ryu, Coordinator, Indochinese Refugee Assistance Program, New York Department of Social Services); *Senate Judiciary Hearings*, *supra* note 1, at 160-63 (statement of Ms. Hellen B. O'Bannon, Secretary, Pennsylvania Department of Public Welfare); *id.* at 166-70 (statement of Comm'r Jerome Chapman, Texas Department of Human Resources); *1979 Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 290 (statement of Guy Lusk, Director, Division of Financial Services, Virginia Department of Welfare).

30. From April 1980 to August 1980, about 10,000 new Cuban refugee students entered the Dade County Public School System. That number is enough to fill completely 10 elementary schools. From November 1979 to August 1980, over 300 new Haitian students enrolled in Dade County schools. That figure is increasing by approximately 50 new Haitian students per month. In the Union City, New Jersey, Public School System, 1000 new students were expected—an increase of 13%. The state of Illinois expected 1720 new students for the 1980-1981 school year. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3814-15.

At the same time, Indochinese student enrollment is also increasing. The influx of Indochinese refugees increased during the summer of 1980, and about 40% of the arriving refugees were school-age children. From 1977 until 1979 the number of Indochinese refugee children almost doubled. *Id.* See also *Trouble in Paradise*, *supra* note 20, at 22, 29.

31. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 6-8, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3815-17. See also SELECT COMMISSION REPORT, *supra* note 3, at 58 (app. H) (statement of Dr. Leonard Britton, Deputy Superintendent, Dade County Public Schools).

32. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3815. See also SELECT COMMISSION REPORT, *supra* note 3, at 58 (app. H) (statement of Dr. Leonard Britton, Deputy Superintendent, Dade County Public Schools).

33. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3815-16. See also *1981 Subcommittee Hearings on H.R. 2142*, *supra* note 4, at 5 (statement of Rep. Patterson).

to be at least \$1000 per child annually.³⁴ These added costs usually continue for at least three years after a refugee child has arrived.³⁵

B. Health Care

Health costs also represent a significant burden on local communities. At one hospital in Miami, for example, a Haitian baby is born every six hours, each at local taxpayers' expense.³⁶ Indochinese refugees receive medical examinations before leaving Asia for the United States.³⁷ Nevertheless, they need extensive health care upon arrival.³⁸ The living conditions in the Haitian community in Dade County, for example, are so poor that they pose a public health hazard to the community at large.³⁹ Counties in California⁴⁰ and Ari-

34. Estimated costs varied. The Dade County Public Schools estimated an additional cost of \$1530 per refugee child for each child's first year in school. The additional costs for the second and third years would decrease to \$719 per child. The Pennsylvania Department of Education estimated the additional costs of \$3000 per student while the New Jersey Department of Education estimated additional costs of just \$933 per child. All the education officials agreed, however, that they did not have enough money to cover these extra costs. Indeed, in view of conservative fiscal policies, the school districts were being taxed to their limits just to maintain their educational quality levels for regular nonrefugee students. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3816.

35. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3816.

36. Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, at 60, *reprinted in* G. McCLELLAN, *supra* note 13, at 46.

37. The U.S. Public Health Service has found that:

[T]he medical screening received in Asia by refugees has been incomplete, and the results inconsistently reported [and in some instances, deliberately misrepresented]; . . . refugees are known to have health problems, some of them transmissible. All are in agreement that tuberculosis is the most important public health problem presented by the refugees.

U.S. PUBLIC HEALTH SERVICE, TEAM TO ASSESS THE HEALTH OF INDOCHINESE REFUGEES ON THE WEST COAST, REPORT TO THE SECRETARY, DEP'T OF H.E.W. (1979), *quoted in* Note, *supra* note 14, at 909.

38. 1981 *Subcommittee Hearings on H.R. 2142*, *supra* note 4, at 7 (statement of Rep. Vento).

39. Health conditions in the Haitian community are poor. The worst problem is malnutrition, though nearly as serious is the low level of vaccination against preventable diseases. Overcrowding and unsanitary facilities worsen these conditions. There is virtually no family planning and the birth rate is high because Haitians mistakenly believe that an American-born child will give them an advantage in their efforts to stay in the United States. Without improved medical conditions, the Haitian community presents a health hazard to the entire surrounding community. SELECT COMMISSION REPORT, *supra* note 3, at 59 (app. H) (statement of Dr. Robert E. Laurie, Deputy Director, Dade County Dep't of Health).

zona⁴¹ have suffered similarly.

Refugees incur incidental health costs that also increase the financial burden. In addition to physicians, supplies, and facilities, refugees frequently require translator assistance during examinations.⁴² Many of the most recent refugee arrivals have had little exposure to modern medical care,⁴³ so they also need special education and preventive health care programs.⁴⁴

C. Welfare

Authorities disagree about the number of refugees on welfare. Es-

40. In Los Angeles, the county government has paid many outstanding bills for undocumented Mexicans. Estimates of the future cost to the county run as high as \$100 million. This money will come from the county property tax. The county will receive no reimbursements from either the City or the State for these expenses. *Id.* at 114 (statement of Thomas Hibbard, Board of Supervisors, Los Angeles County).

Another problem in Los Angeles is a private hospital practice known as "patient dumping." Private hospitals and facilities turn away undocumented alien patients because they have no funds to pay for medical services. The private facilities transfer the patients to public facilities. In 1979 alone, 21,000 of these patients were transferred to Los Angeles County Hospitals. Dallek, *Health Care for Undocumented Immigrants: A Story of Neglect*, 14 CLEARINGHOUSE REV. 407, 408-09 (1980). See also County Health Alliance v. Board of Supers., No. C. 360546, slip op. (Cal. Super. Ct., Los Angeles County, June 24, 1981) (enjoining Los Angeles County from requiring indigent undocumented aliens from providing information to the INS regarding their immigration status as a condition to receiving medical care), reported in 15 CLEARINGHOUSE REV. 496 (1981).

41. The Arizona Department of Health Services estimates that health care for undocumented Mexicans in Arizona costs the State \$3.5 million annually. Undocumented aliens are rarely able to pay for the expenses themselves and the federal and state governments refuse to share the costs with impacted local communities. SELECT COMMISSION REPORT, *supra* note 3, at 100 (app. H) (statement of Dr. Suzanne Dandoy, Arizona Dep't of Health Services). An Arizona hospital recently asked the federal government to assume its management because it had lost a substantial amount of money providing services to undocumented Mexicans who were unable to pay for the services. *Id.* (statement of Dr. Charles E. Cable, Administrator, Cochise County Hospital in Arizona).

42. 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 7 (statement of Rep. Vento).

43. See Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 508 (S.D. Fla. 1980) (describing the lack of health care in Haiti and the flight of the vast majority of Haitian physicians and nurses from Haiti); 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 7 (statement of Rep. Vento that the Indochinese refugees in Minnesota came from a society with few modern facilities).

44. SELECT COMMISSION REPORT, *supra* note 3, at 59 (app. H) (statement of Dr. Robert E. Laurie, Deputy Director, Dade County Dep't of Public Health, that Haitian arrivals have little health care or knowledge of health care).

timates of the percentage of Indochinese refugees receiving welfare range from thirty-six percent⁴⁵ to ninety percent.⁴⁶

Most officials, however, agree that the number of newer arrivals applying for welfare is increasing.⁴⁷ There are four main reasons for this increase. First, voluntary agencies⁴⁸ that resettle refugees now commonly register incoming refugees for welfare benefits immediately after their arrival⁴⁹ because processing takes four to six weeks.⁵⁰ Thus, refugees unable to find work during their first month will still have some secured income.⁵¹ Once they begin to receive cash benefits, however, they are less likely to accept entry-level jobs paying little more than welfare.⁵²

Second, refugees arriving today have fewer transferable skills and less education than earlier arrivals.⁵³ Consequently, they require

45. 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 235 (statement of Joseph A. Califano, Secretary of Health, Education, and Welfare).

46. 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson).

47. *Id.* Compare 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 245 (statement of Joseph A. Califano, Secretary for Health, Education, and Welfare, that, as of 1979, Cubans on welfare had reached an extremely low number) with *Trouble in Paradise*, *supra* note 20 (stating that the welfare rolls increased by one-third as a result of the 1980 refugee influx).

48. *See infra* notes 107-21 and accompanying text.

49. *See* SELECT COMMISSION REPORT, *supra* note 3, at 239-40 (app. C) (statement of Wells Klein, Director, American Council for Nationality Service).

50. *Id.*

51. If the welfare agencies shortened the delay, VOLAG's might discontinue their practice of immediate registration. *Id.*

52. *Id.* *See also* Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 273-76 (app. C) (suggesting that this VOLAG practice at early registration actually misleads refugees into the misconception that welfare is an acceptable alternative to employment). *See also* SELECT COMMISSION REPORT, *supra* note 3, at 189 (Final Report and Recommendations) (recommending a change in the welfare system to remove the incentives to stay on welfare).

53. *See* 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson that most recent Indochinese refugees have fewer skills, thus, require longer periods of welfare assistance than earlier arrivals); 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 5 (statement of Rep. Patterson that newer Indochinese refugees required more vocational and English instruction before becoming employable); *id.* at 32 (statement of Rep. Danielson that new Indochinese refugees require more intensive vocational and English instruction to attain self-sufficiency); 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 378 (statement of Oregon Governor Victor Atiyeh that new Indochinese refugees have fewer skills and English abilities than previous arrivals); Bach, *supra* note 23, at 40 (stating that the 1980 "freedom flotilla" arrivals, though more skilled than had been feared, showed fewer

longer periods for English instruction and vocational training.⁵⁴ Also, believing that the government provides welfare to enable them to attend English and vocational classes, many refugees remain in classes for extended periods, hoping to locate better jobs when they finally look for work.⁵⁵

Third, refugees who find work usually begin in low-paying, entry-level positions.⁵⁶ Many must apply for welfare to supplement these incomes.⁵⁷ This is especially common among the Indochinese refugees, who often arrive in large families with many dependents.⁵⁸

Fourth, medical benefits are often linked to welfare assistance. Therefore, many refugees stay on welfare beyond their period of actual need in order to retain medical benefits.⁵⁹ Although the reasons refugees seek welfare may vary, the effect is constant. Refugees on welfare indisputably burden the finances of state and local governments.⁶⁰ In 1981, state and local governments spent approximately

skills than early Cuban immigrants; also noted that only five percent of new arrivals spoke English); Peirce, *Refugees and Cities: A Multi-Pronged Dilemma*, in SELECT COMMISSION REPORT, *supra* note 3, at 267, 269 (app. C) (quoting San Jose Mayor Janet Gray Hayes, who referred to new Indochinese refugees as "peasants," requiring much more assistance than earlier refugees); *Trouble in Paradise*, *supra* note 20, at 29-30 (stating that the Cuban refugees who arrived in the 1960's were mostly middle-class professionals, while the new refugees have increased the welfare rolls by one-third).

54. *See supra* note 53. For many refugees, English instruction here is their first exposure to formal education. 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 7 (statement of Rep. Vento that the Hmong (a group of Indochinese) refugees in Minnesota were mostly illiterate in their own language, which is so primitive that it only developed an alphabet a few years ago).

55. *See* SELECT COMMISSION REPORT, *supra* note 3, at 241 (app. C) (statement of Wells Klein, Executive Director, American Council for Nationality Service, that the current structure of English and vocational training discourages refugees from looking for work immediately after arrival); Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 273-76 (app. C) (arguing that the current resettlement system misleads refugees on the role of welfare payments). *See also* Morin, *Troubled Refugees*, Wall St. J., Feb. 16, 1983, at 1, col 1.

56. 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 275 (statement of Iowa Governor Robert D. Ray).

57. *Id.* at 294 (statement of Edwin B. Silverman, Director, Governor's Information Center for Asian Assistance in Illinois).

58. *Id.*

59. *See* SELECT COMMISSION REPORT, *supra* note 3, at 190 (Final Report and Recommendations).

60. A Reagan Administration spokesman estimated that prolonging federal reimbursement to state and local governments for the costs of refugees on welfare would cost the federal government \$35 to \$55 million in 1981 and \$70 to \$110 million in

\$106.5 million for cash and medical benefits for refugees.⁶¹

The length of time refugees generally spend on welfare is also disputed. One federal study found that, on average, refugees spend nine months on welfare.⁶² A survey in Los Angeles County indicated, however, that the length of time ranges from twenty-five to forty-three months.⁶³

This time period is important in determining where the financial burden falls. Current federal legislation authorizes the federal government to reimburse state and local governments for all their expenditures on refugee welfare payments for the first three years a refugee is in the United States.⁶⁴ Also, the federal government pays more than half of the costs for all welfare programs, whether or not they involve refugees.⁶⁵ Therefore, after the three-year total reimbursement period, the federal government still pays more than half the welfare costs for refugees.⁶⁶ Many urban officials, however, believe that this three-year total reimbursement period is insufficient.⁶⁷

D. *Other Costs*

Many of the costs local communities incur are not measurable in

1982. The corollary of this estimate is that if the federal government does *not* extend reimbursement, state and local governments will be forced to cover these same costs. See 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 21 (statement of Wilford J. Forbush, Acting Deputy Undersecretary, Special Projects, Dep't of Health and Human Services). See also 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 290 (statement of Guy Lusk, Division of Financial Services, Virginia Dep't of Welfare).

61. STATE DEP'T REPORT—REFUGEE ASSISTANCE COSTS, *supra* note 5, at 156.

62. See SELECT COMMISSION REPORT, *supra* note 3, at 242 (app. C) (statement of Wells Klein, Executive Director, American Council for Nationality Service, citing a study conducted by the Department of Health, Education and Welfare).

63. The survey showed that primary refugees spent an average of 25 months on welfare while secondary refugees (see *supra* note 18) spent an average of 43 months on welfare. 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (statement of Rep. Danielson). See also SELECT COMMISSION REPORT, *supra* note 3, at 188 (Final Report and Recommendations) (finding that a significant number of refugees require welfare assistance for more than 36 months).

64. Refugee Act of 1980, Pub. L. No. 96-212, § 311(a)(2), 94 Stat. 102, 114. See *infra* notes 134-51 and accompanying text.

65. M. OZAWA, INCOME MAINTENANCE AND WORK INCENTIVES 17 (1982), citing McMillan & Bixby, *Social Welfare Expenditures, Fiscal Year 1978*, 43 SOC. SECURITY BULL. 5-7 (1980). See *infra* note 144.

66. M. OZAWA, *supra* note 65, at 17.

67. See *infra* note 151.

financial terms, but are sociological in nature. Nevertheless, they are a significant addition to the major costs of education, health care, and welfare payments.⁶⁸

Refugees may be responsible for as much as half of the violent crimes in Miami, which now has the country's highest murder rate.⁶⁹ Furthermore, refugees have clashed with other minority groups.⁷⁰ Resentment arises because domestic minorities often believe that refugees receive more benefits than the domestic poor.⁷¹ Therefore, there have been scattered outbreaks of violence between refugees and these other minority groups.⁷²

Additionally, refugee concentrations adversely affect unemployment rates⁷³ in labor markets, overburdened before they arrived.⁷⁴ In these same communities, low-cost public housing shortages have also resulted from refugee concentrations.⁷⁵ Miami, for example, has not had any new public housing projects for over twenty years,⁷⁶ so some refugees there still live in tents underneath highways.⁷⁷

III. THE REFUGEE RESETTLEMENT SYSTEM

State and local governments have little control over the number of

68. See *supra* notes 30-63 and accompanying text.

69. See *Trouble in Paradise*, *supra* note 20, at 23.

70. Scanlan, *supra* note 3, at 622-23 n.50; Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, at 60, reprinted in G. McCLELLAN, *supra* note 13, at 49.

71. See Slonim, *Freedom Flotilla from Cuba: Will the Harbor Stay Open?*, 66 A.B.A. J. 823, 824 (1980). Doris Meissner, Deputy Associate Attorney General, noted that after the 1980 Cuban influx the political atmosphere was far from ideal for accepting the new refugees. *Id.* at 824. See also Peirce, *Refugees and Cities: A Multi-Pronged Dilemma*, in SELECT COMMISSION REPORT, *supra* note 3, at 267 (app. C).

72. See, e.g., Chaze, *Refugees: Stung by a Backlash*, U.S. NEWS & WORLD REP., Oct. 13, 1980, at 60, reprinted in G. McCLELLAN, *supra* note 13, at 49 (describing a rock-throwing incident between Chicanos and Indochinese refugees); Scanlan, *supra* note 3, at 622-23 n.50 (noting tensions between Cubans and the local communities where they have settled and between Indochinese and Hispanics in Los Angeles).

73. In Miami, the unemployment rate rose from 5.7% to an estimated 13% as a result of the 1980 Cuban-Haitian influx. See *Trouble in Paradise*, *supra* note 20, at 29.

74. See North & Martin, *supra* note 13.

75. 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 5 (statement of Rep. Patterson).

76. *Caribbean Refugee Crisis*, *supra* note 2, at 10-11 (statement of Most Reverend Edward A. McCarthy, Archbishop of Miami).

77. See *Trouble in Paradise*, *supra* note 20, at 22.

refugees settling in their communities. Three basic reasons explain this. First, the federal government has absolute plenary power over refugee admissions.⁷⁸ Therefore, state and local governments are preempted from acting. Second, the bureaucratic system for settling refugees in the United States does not provide for state or local government input.⁷⁹ Third, geography and prior resettlement patterns affect where refugees settle.⁸⁰

A. Federal Government's Plenary Power Over Refugee Admissions

The Constitution expressly grants to Congress the power to regulate immigration.⁸¹ The Supreme Court has consistently interpreted this power as absolute.⁸² In the *Chinese Exclusion Case*,⁸³ the Court held that control over immigration was an incident of sovereignty.⁸⁴ As sovereign, the federal government has the power to establish national policies concerning immigration.⁸⁵

In *Kleindienst v. Mandel*,⁸⁶ the Court again recognized this absolute power,⁸⁷ holding that Congress can bar or condition an alien's entry for any reason it sees fit.⁸⁸ The Court stated that since control over immigration is peculiarly political, the judiciary generally should defer to Congress on matters concerning immigration.⁸⁹

More recently, in *Fiallo v. Bell*,⁹⁰ the Court refused to review congressional decisions regarding alien admissions. At issue was the

78. U.S. CONST. art. I, § 8. See *infra* note 81. See also *infra* notes 82-95 and accompanying text.

79. See *infra* notes 96-121 and accompanying text.

80. See *infra* notes 122-25 and accompanying text.

81. U.S. CONST. art. I, § 8, cl. 4, states in part: "The Congress shall have the power. . . [t]o establish a uniform Rule of Naturalization."

82. *United States v. Macintosh*, 283 U.S. 605, 615 (1931). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 277-78 (1978).

83. 130 U.S. 581 (1889).

84. *Id.* at 606-07.

85. *Id.* See also *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (Congress could hold an excluded alien indefinitely without a hearing); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1908) (Congress could prohibit persons from bringing in aliens with contagious diseases).

86. 408 U.S. 753 (1972).

87. *Id.* at 765-66. See also cases cited *id.* at 766 n.6.

88. *Id.* at 766.

89. *Id.* at 766-67.

90. 430 U.S. 787 (1977).

constitutionality of a section of the Immigration and Nationality Act⁹¹ that granted special immigration status to children who sought entry by virtue of their relationship to their mothers. The Act denied a similar preference status to illegitimate children who sought entry through their natural fathers.⁹² Despite the implications on due process and equal protection, the Court upheld the statute, finding that Congress' power to control immigration is subject to an extremely narrow standard of judicial review.⁹³

These cases illustrate Congress' absolute power over immigration. States and local communities, therefore, cannot interfere with the flow of refugees from abroad, even if they have the available means.⁹⁴ Once a refugee arrives in the United States, however, it is unclear what power Congress has to regulate his or her resettlement.⁹⁵

B. *The System For Refugee Resettlement*

1. Government Agencies

As many as nine government agencies may take part in one refugee's journey from his or her native country to the United States.⁹⁶

91. 8 U.S.C. § 1101(b) (1976).

92. 8 U.S.C. § 1101(b)(1)(D) (1976) defines "child" as an "unmarried person under twenty-one . . . who is . . . an illegitimate child . . . through whom . . . benefit is sought by virtue of the relationship of the child to its natural mother." *Id.*

93. 430 U.S. at 796.

94. *See also* *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) ("Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.") (dictum); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (dictum); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete than it is over [immigration]"); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 452 (S.D. Fla. 1980).

95. U.S. CONST. art. I, § 8, grants Congress the power to regulate naturalization, but does not indicate how Congress may regulate alien activities. *See* L. TRIBE, *supra* note 82, at 283, *citing* *Fiallo v. Bell*, 430 U.S. 787 (1977) and *Matthews v. Diaz*, 426 U.S. 67 (1976). *See also* Note, *supra* note 14, at 913-14 (suggests that Congress regulates refugee resettlement under the spending power).

96. In addition to the four agencies described in the text, others play minor roles in resettling refugees. The Agriculture Department administers the food stamp program and the School Lunch and Breakfast Program. In 1980, Agriculture Department expenditures for refugees totaled \$126 million, and was expected to cost \$211.6 million in 1981. STATE DEP'T REPORT—REFUGEE ASSISTANCE COSTS, *supra* note 5, at 168. The Commerce Department administers the National Sea Grant Program (for

Four of those agencies, however, play the major roles in admission and resettlement.

The State Department is responsible for major policy formulation and American cooperation with international refugee organizations.⁹⁷ It also houses refugees who are still abroad.⁹⁸ For the years 1975 to 1979, State Department appropriations for refugees exceeded \$500 million.⁹⁹

The Justice Department participates primarily in admissions. The Immigration and Naturalization Service (INS), a subdepartment of the Justice Department,¹⁰⁰ screens refugees who apply for admission while abroad.¹⁰¹ It also conducts hearings for refugees who seek asylum after arrival in the United States.¹⁰²

The Department of Health and Human Services administers the various welfare¹⁰³ and special assistance programs¹⁰⁴ for which refu-

commercial fishermen) and the Minority Business Development Administration. The cost attributable to refugees from these two programs was approximately \$600,000 for both 1980 and 1981. *Id.* The Department of Housing and Urban Development (HUD) manages Public Housing and § 8 Housing. HUD estimates that 5500 refugee families were living in such developments in 1980 and that an additional 5600 families would move into such housing in 1981. The costs were \$12.2 million for 1980 and an expected \$27.6 million for 1981. *Id.* The Labor Department participates in refugee resettlement through its Job Corps, Comprehensive Employment and Training, and Federal-State Employee Service programs. Relative to refugee eligibility, participation has been low. Nevertheless, refugee costs for these programs cumulatively totaled about \$106 million for 1980 and 1981 combined. *Id.* Finally, the Defense Department assists the State Department in housing and transporting refugees while they are still abroad. *See Note, supra* note 14, at 888 n.73.

97. The Department of State oversees the Interagency Committee on Refugee Affairs, which replaced the Office of Refugee and Migration Affairs and is responsible for formulating and implementing refugee policy as well as working with international organizations. STAFF OF SENATE JUDICIARY COMMITTEE, 96TH CONG., 1ST SESS., U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 15-17 (Comm. Print 1979) [hereinafter cited as SENATE JUDICIARY COMMITTEE PRINT].

98. *See Note, supra* note 14, at 888 n.73, citing J. TAFT, D. NORTH & D. FORD, REFUGEE RESETTLEMENT IN THE U.S.: TIME FOR A NEW FOCUS 33-39 (1979).

99. *Note, supra* note 14, at 888 n.73, citing U.S. COMPTROLLER GENERAL, RESPONSE TO THE INDOCHINESE EXODUS—A HUMANITARIAN DILEMMA 100 (1979).

100. 8 U.S.C. § 1551 (1976).

101. *See* 8 C.F.R. § 100.4 (1981).

102. *See Note, The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1127-29 (1980). For description of the INS hearings for Haitian asylum applicants, *see Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 519-26 (S.D. Fla. 1980).

103. *See infra* notes 139-43 and accompanying text.

104. *See infra* notes 146-51 and accompanying text.

gees are eligible. To coordinate the various Health and Human Services programs in which refugees participate, the Department now has an Office of Refugee Resettlement.¹⁰⁵ The Department also provides medical examinations to refugees before they enter the United States.¹⁰⁶

Finally, the Department of Education plays a vital role in resettlement. It implements the Refugee Educational Assistance Act of 1980, which provides funds for general assistance and special instruction to affected educational districts.¹⁰⁷

The system of refugee resettlement in the United States relies heavily on the assistance of various voluntary agencies (VOLAG's).¹⁰⁸ Although VOLAG's are usually private, nonprofit organizations,¹⁰⁹ one state has an official agency that is a VOLAG.¹¹⁰

VOLAG's aid the INS and the State Department overseas by helping to identify eligible refugees.¹¹¹ Agency representatives then send reports on incoming refugees to the American Council of Voluntary Agencies,¹¹² which meets twice a week in New York.¹¹³ At the meetings, the Council matches incoming refugees to individual VOLAG's.¹¹⁴

105. Refugee Act of 1980, Pub. L. No. 96-212, § 311(a)(2), 94 Stat. 102, 111 (to be codified at 8 U.S.C. § 1521).

106. See STATE DEP'T REPORT—REFUGEE ASSISTANCE COSTS, *supra* note 5, at 167.

107. See *infra* notes 161-63 and accompanying text.

108. See SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 17.

109. *Id.* at 18. VOLAG's are often affiliated with religious organizations, e.g., Lutheran Immigration and Refugee Service, Church World Service, U.S. Catholic Conference, Council of Jewish Federations. *U.S. Refugee Programs, Hearings Before the Senate Judiciary Committee*, 96th Cong., 2d Sess. (1980); or ethnic groups, e.g., American Foundation for Czechoslovakian Refugees, Hebrew Immigration Aid Society. *Id.*

110. Iowa has its own state agency, the Iowa Refugee Service Center, as a VOLAG. *1979 Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 274 (statement of Iowa Governor Robert D. Ray).

111. See SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 18.

112. See *Senate Judiciary Hearing*, *supra* note 1, at 46-47 (report of American Council of Voluntary Agencies for Foreign Service).

113. See Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 274 (app. C).

114. *Id.* See also Note, *supra* note 14, at 889. Generally the Council will assign incoming refugees who have relatives in the United States to the same VOLAG that resettled their relatives. Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 274 (app. C).

After receiving data on the individual refugees assigned to them, VOLAG's locate a sponsor, usually an individual, single family, or a group.¹¹⁵ The VOLAG and the sponsor then arrange for a variety of services, such as English language training, school registration, housing, cash and medical assistance, and employment counseling.¹¹⁶ Although these individual sponsors are under no legal obligation to fulfill the responsibilities that they undertake, they usually honor them as moral obligations.¹¹⁷

VOLAG's, frequently understaffed, rely heavily on volunteers.¹¹⁸ The State Department provides limited funds to help finance these programs.¹¹⁹ A VOLAG contracts with the State Department to pro-

115. See SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 18.

116. *Id.*; Note, *supra* note 14, at 890. Not all VOLAG's provide the same services, however. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 18. For example, the Iowa Refugee Service Center does not agree to accept a refugee until it has arranged for a sponsor, housing, and a job. Consequently, the number of refugees on welfare in Iowa has been far below the national average, and the number of refugees moving from Iowa after being settled there is equally low. Many VOLAG's do not make these arrangements in advance, resulting in higher welfare costs. 1979 *Subcommittee Hearings on H.R. 2816*, *supra* note 4, at 273-74 (statement of Iowa Governor Robert D. Ray); Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 274 (app. C). Although Iowa's success has been formidable, it is not necessarily an example other refugee-impacted areas could duplicate. First, Iowa has more control over refugee admissions because its state agency is a VOLAG. Thus, the Iowa government decides how many refugees Iowa will resettle. In contrast, other areas rarely receive notice when their local VOLAG's agree to accept new refugees. The state and local governments, therefore, know neither when nor how many refugees will arrive in any given time period. They usually do not discover how many refugees have arrived until the refugees apply for welfare. See SELECT COMMISSION REPORT, *supra* note 3, at 593 (app. H) (statement of Minoru Yasui, Executive Director, Commission on Community Relations, City and County of Denver); Peirce, *Refugees: A Multi-Pronged Dilemma*, in SELECT COMMISSION REPORT, *supra* note 3, at 267-70 (app. C).

The second advantage Iowa enjoys that other areas lack is favorable geography. Considering Iowa's central location and its distance from refugee sources, it is highly unlikely that Iowa will ever experience a major demographic movement. South Florida, on the other hand, finds itself inundated with refugees because of its location. Texas and California have large undocumented alien populations, partially due to geography. See *infra* note 122 and accompanying text.

117. Note, *supra* note 14 at 890. The Select Commission on Immigration and Refugee Policy, however, has advocated improvement of the sponsor selection process to ensure responsible sponsors. SELECT COMMISSION REPORT, *supra* note 3, at 193 (Final Report and Recommendations).

118. See Shearer, *Refugee Resettlement: Not Why, But How*, in SELECT COMMISSION REPORT, *supra* note 3, at 274 (app. C).

119. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 18-19.

vide certain resettlement assistance in exchange for an amount of money determined on a per capita basis.¹²⁰ The State Department funds do not cover all of the VOLAG's expenses, however.¹²¹

C. *The Effect of Geography on Refugee Resettlement*

Geography is a major factor in determining refugee resettlement. This is particularly true in areas that are physically proximate to the refugee source.¹²² The entry states are dependent on the federal government to protect their borders from clandestine, illegal entry.¹²³

A related geographical factor is the tendency for refugees to settle within established communities of people from their homelands, regardless of the economic opportunities in the area.¹²⁴ In California, for example, as many as one-half of the Indochinese arriving every month come from other parts of the United States, where VOLAG's originally resettled them.¹²⁵

D. *Consequences of the Refugee Resettlement System*

The cumulative consequence of these factors is that a few communities disproportionately bear the burden of absorbing the majority of entering refugees. These communities have virtually no control over the refugee influx. Local officials, accordingly, experience difficulty in planning necessary programs.¹²⁶ Many officials complain that

120. In 1979, the amount was \$250 per refugee and \$350 per Indochinese refugee. *Id.* In 1980, the amount per refugee was \$300. In the midst of the Cuban refugee crisis, however, the federal government began offering \$2000 to sponsors willing to resettle the new arrivals. N.Y. Times, Sept. 26, 1980, at 34, col. 1.

121. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 18-19.

122. South Florida has numerous Cuban and Haitian refugees as a result of the "Freedom Flotilla." *See supra* note 20. The primary source of Texas' undocumented alien population is Mexico.

123. Telephone interview with Martha Allen, Texas Attorney General's Office (Jan. 17, 1983). *See also* Plyler v. Doe, 102 S. Ct. 2382, 2398-99 (1982) (stating that the federal "naturalization" power, coupled with plenary federal authority over foreign relations and international commerce, gives the federal government exclusive authority for admission of aliens to the United States).

124. *See supra* note 18.

125. 126 CONG. REC. H1525 (daily ed. Mar. 4, 1980) (remarks of Rep. Danielson). *See supra* note 18.

126. *See* SELECT COMMISSION REPORT, *supra* note 3, at 593 (app. H) (statement of Minoru Yasui, Executive Director, Commission on Community Relations, City and County of Denver).

they receive inadequate, if any, forewarning before refugees arrive.¹²⁷ As a result, local refugee programs are often inadequate.¹²⁸

IV. AID COVERED BY THE FEDERAL GOVERNMENT

A. *Current Federal Programs*

The federal government has actively supported refugee assistance programs for over thirty years.¹²⁹ The Migration and Refugee Assistance Act of 1962¹³⁰ authorized federal funds for continuous financial assistance to refugees.¹³¹ The Act also provided funds for the United Nations High Commissioner for Refugees and the Intergovernmental Committee for European Migration.¹³² Congress has initiated various refugee programs benefiting specific groups under the budget authorizations of the 1962 Act.¹³³

127. *See Senate Judiciary Hearing, supra* note 1, at 165 (complaint of Leo T. Hegstrom, Director, Oregon Department of Human Resources, that the federal government failed to warn Oregon of incoming refugees, and "[a]s a result, staff and program accommodations were rushed, compromising both their responsiveness and their effectiveness").

128. *Id.*

129. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 5.

130. Pub. L. No. 87-510, 76 Stat. 121 (1962).

131. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 38.

132. *Id.* The United Nations High Commissioner for Refugees (UNHCR) was established in 1951 to coordinate international refugee programs and seek solutions to world refugee crises. The UNHCR interviews all refugees in refugee camps and determines where each refugee wants to settle. It then relays this information to the appropriate government agencies of the desired country of settlement (the INS in the case of the United States). *See UNITED STATES COMMITTEE FOR REFUGEES, 1980 WORLD REFUGEE SURVEY, reprinted in U.S. Refugee Programs, Hearing Before the Senate Judiciary Committee, 96th Cong., 2d Sess. 355-59 (1980).* The Intergovernmental Committee for European Migration (ICEM) transports refugees from refugee camps to their new home countries. Founded in 1952, ICEM has moved 1.6 million refugees. Despite the word "European" in its name, it is an international organization with worldwide participation. *See id.* at 385. *See also* Note, *supra* note 14 at 889 n.76.

133. For example, after the 1962 Act, the Cuban Refugee Program, founded with Presidential contingency funds, began to receive appropriations from Congress. The program provided financial assistance, educational services, employment counseling and training, and transportation assistance to locations of resettlement. By June, 1976, 465,000 of approximately 665,000 Cuban refugees had taken advantage of the program, which is based in the Cuban Refugee Emergency Center in Miami. The program's long duration was a subject of much debate. It is gradually being phased out. *See SENATE JUDICIARY COMMITTEE PRINT, supra* note 97, at 38-39. *See also* S. REP. No. 256, 96th Cong., 1st Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & AD.

Congress promulgated the Refugee Act of 1980¹³⁴ to eliminate an unpredictable ad hoc system for admitting¹³⁵ and resettling refugees.¹³⁶ The Act established the Office of Refugee Resettlement within the Department of Health and Human Services to execute the federal government's role in refugee resettlement.¹³⁷ The Director of the Office has the authority to provide funds to public and private agencies resettling refugees.¹³⁸

Under the Act, refugees¹³⁹ are eligible for Aid to Families with

NEWS 141, 152 (stating that current refugee assistance programs set durational limits to avoid the perpetual tendency of the Cuban Program).

The Indochinese Refugee Program, established in 1975, also received funds through the 1962 Act. The funds were used for evacuation, temporary housing prior to entering the United States, and resettlement after arrival. Again, the primary services provided were educational programs (both language and vocational), and cash, medical, and social assistance. See SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 40-41. There have also been appropriations under the 1962 Act to aid Soviet and other refugees. *Id.* at 42.

134. Pub. L. No. 96-212, 94 Stat. 102 (1980).

135. The procedure of refugee admissions is, in itself, a broad subject beyond the scope of this Note. See generally C. GORDON & H. ROSENFELD, *supra* note 1, § 2.24A; Scanlan, *supra* note 3; Note, *supra* note 102.

136. S. REP. NO. 256, 96th Cong., 1st Sess. 11, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 151. See also 10 DEN. J. INT'L L. & POL'Y 155 (1980); 21 HARV. INT'L L.J. 742 (1980).

137. 8 U.S.C. § 1521 (Supp. V 1981).

138. *Id.*

139. Undocumented aliens living in American communities receive very few of these benefits. Undocumented aliens are eligible for insurance-based benefits such as Workers' Compensation and Disability and Retirement Insurance, but they are generally not eligible for public assistance benefits such as welfare, food stamps, and Medicaid. See 45 C.F.R. § 233.50 (1981); A. MUTHARIKA, *supra* note 1, ch. IV at 77; McAlvana & Siwulec, *supra* note 12.

Federal benefit programs are limited to United States citizens, permanent resident aliens, or aliens "otherwise permanently residing in the United States under color of law." 45 C.F.R. § 233.50 (1981). Although a plain meaning interpretation of the regulation tends to exclude undocumented aliens from federal program benefits, the language has been broadly interpreted. In *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978), the Second Circuit held that "permanently residing under color of law" includes undocumented aliens who have legally entered the country but have illegally remained. These people are entitled to AFDC benefits if the INS is not contemplating deportation. 553 F.2d at 850-51.

Thus, undocumented aliens may be eligible for a variety of federal benefit programs. Nonetheless, the burden they place upon local communities is similar to the burden caused by refugee resettlement. See *supra* notes 12, 40 & 41.

Unemployment compensation is limited to aliens "lawfully admitted for permanent residence . . . or otherwise permanently residing in the United States under color of law." 26 U.S.C. § 3304(a)(14)(A) (1976). Courts tend to interpret this language nar-

Dependent Children (AFDC),¹⁴⁰ Medicaid,¹⁴¹ Supplemental Security Income (SSI),¹⁴² and food stamps.¹⁴³ State agencies administering these programs pay refugees as they would pay any citizen. The federal government then reimburses the states for their entire expense,¹⁴⁴ including reasonable administrative fees.¹⁴⁵

The Act also authorizes funds for initial resettlement,¹⁴⁶ vocational training,¹⁴⁷ English instruction,¹⁴⁸ child welfare,¹⁴⁹ and cash and medical assistance.¹⁵⁰ Furthermore, it limits federal reimbursement for cash and medical assistance in the first three years after a refu-

rowly. *See, e.g.*, *Alonso v. State*, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975) (denied unemployment compensation to an alien who refused to provide information regarding his immigration status; court rejected plaintiff's claim that the state was preempted by federal immigration law from requiring such information), *cert. denied*, 425 U.S. 903 (1976); *Duenas-Rodriguez v. Industrial Comm'n*, 199 Colo. 95, 606 P.2d 437 (1980) (en banc) (undocumented alien was not entitled to unemployment compensation); *Legiani v. Board of Review*, 169 N.J. Super. 72, 404 A.2d 318 (1979) (aliens with no legal work authorization are disqualified from obtaining unemployment compensation). *See generally* A. MUTHARIKA, *supra* note 1, ch. IV at 92-93. The right of undocumented alien children to attend public schools is now clearly established. *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

140. 8 U.S.C. § 1522(e)(4) (Supp. V 1981). Authority for the AFDC program is codified at 42 U.S.C. §§ 601-644 (1976). *See also* S. REP. NO. 256, 96th Cong., 1st Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 151.

141. 8 U.S.C. § 1522(d)(4) (Supp. V 1981). Authority for Medicaid is codified at 42 U.S.C. §§ 1396-1397f (1976).

142. 8 U.S.C. § 1522(e)(4) (Supp. V 1981). Authority for Supplemental Security Income is codified at 42 U.S.C. § 1381-1385 (1976).

143. 7 C.F.R. § 273.4(a) (1982).

144. The federal government currently pays for over half of all these programs for all citizens. The Refugee Act's provisions, therefore, authorize reimbursement for the share that the federal government would not normally cover. *See 1979 Subcommittee Hearings on H.R. 2816, supra* note 4, at 236 (statement of Secretary of Health, Education, and Welfare Joseph A. Califano). *See also* 45 C.F.R. § 400.62 (1982) (new Department of Health and Human Services regulations covering refugees). With AFDC, states set their own levels for benefits; then the federal government matches state contributions. Hence, the benefits vary from state to state. The federal government pays for about 55% of the Medicaid program, and for the entire cost of the food stamp program. *See M. OZAWA, supra* note 65, at 17.

145. 8 U.S.C. § 1522(d)(2).

146. *Id.* § 1522(b)(1)(A)(ii) (Supp. V 1981).

147. *Id.* § 1522(c).

148. *Id.*

149. *Id.* § 1522(d)(2)(A).

150. *Id.* § 1522(e)(1).

gee's entry into the country.¹⁵¹

Refugee children are unquestionably entitled to free public education.¹⁵² The Refugee Education Assistance Act of 1980¹⁵³ provides

151. *Id.* New Department of Health and Human Services regulations provide that the federal government will reimburse states for all of the assistance provided to refugees through the AFDC, adult assistance, Medicaid, and SSI programs, for the first 36 months each eligible refugee spends in the United States. Refugees who do not meet all the AFDC, SSI, or adult assistance program requirements, but meet the AFDC need standard for their state of residence, are eligible for "refugee cash assistance," a special program. Similarly, refugees ineligible for Medicaid, but meeting the requisites of individual states' medically needy programs, or meeting the requisites of individual states' AFDC programs (for states that do not have medically needy programs), are eligible for "refugee medical assistance," also a special program. Federal reimbursement for state contributions to the refugee cash assistance and refugee medical assistance programs is limited to the first 18 months after a refugee has arrived in the United States. If a state or local government has a program for all its citizens that uses state and/or local funds exclusively, then the federal government will reimburse the state or local government for all assistance provided to refugees for their second 18 months in the United States. 47 FED. REG. 10,849 (1982) (to be codified at 45 C.F.R. § 400.62).

Originally, the Refugee Act of 1980 limited the time for reimbursement to two years. The Carter Administration supported a two-year limit because it believed this would provide incentives to states to assimilate refugees as quickly as possible and would be fairer to citizens not eligible for the special refugee benefits. *See 1979 Subcommittee Hearings on H.R. 2816, supra* note 4, at 234-35 (statement of Secretary of Health, Education, and Welfare Joseph A. Califano). Congress extended the period to three years after considerable testimony opposing the two-year limit. *See, e.g., id.* at 271-72 (statement of Iowa Governor Robert D. Ray that two years is insufficient); *id.* at 378 (letter of Oregon Governor Victor Atiyeh to the House Subcommittee stating that two years is insufficient); *id.* at 379 (recommendation of Minnesota Governor Albert H. Quie for minimum three-year reimbursement period); *id.* at 281 (statement of Michigan Governor William G. Milliken that two years, or any across-the-board limit, is inappropriate); *id.* at 292 (recommendation of Joseph H. Ryu, Coordinator, Indochinese Refugee Assistance Program, New York Department of Social Services, that the reimbursement period last three to five years); *id.* at 288 (statement of Kyle S. McKinsey, Deputy Director, California Department of Social Services, that differences in background of refugees made any across-the-board time limit inappropriate); *1981 Subcommittee Hearings on H.R. 2142, supra* note 4, at 77-78 (statements of Harvey Ruvin, Dade County Commission; Robert J. Orth, Chairman, Board of County Commissioners, Ramsey County, Minnesota; Bruce Nestande, Orange County, California Supervisor; and Eddy S. Tanaka, Los Angeles County, California Department of Public Services, that there are no hard, reliable statistics on how long it takes for refugees to achieve self-sufficiency).

The Select Commission on Immigration and Refugee Policy has recommended an extension of the three-year limitation in certain circumstances. *See SELECT COMMISSION REPORT, supra* note 3, at 188 (Final Report and Recommendations).

152. 8 U.S.C. § 1522(d) (Supp. V 1981) (authorizes federal government to reimburse local governments for expenses incurred in educating refugee children).

grants to the state and local educational agencies,¹⁵⁴ and provides assistance to such agencies for adult refugee programs.¹⁵⁵ Congress originally promulgated the Act to deal with the immense impact caused by the huge influx of Cubans and Haitians¹⁵⁶ in 1980,¹⁵⁷ and the recent Indochinese arrivals.¹⁵⁸ Congress broadened the Act in late 1981,¹⁵⁹ however, to cover all refugees.¹⁶⁰

The Education Act authorizes funds through three basic programs. First, Title II provides funds for general assistance to local school districts.¹⁶¹ Title III then covers supplementary educational programs such as English instruction, special materials, and specially trained instructors.¹⁶² Finally, Title III also authorizes funds for adult education programs.¹⁶³

153. Pub. L. No. 96-422, 94 Stat. 1799 (1980), *amended by* Consolidated Refugee Education Assistance Act, Pub. L. No. 97-35, § 541-47, 95 Stat. 458 (1981).

154. Pub. L. No. 96-422, §§ 201, 301, 94 Stat. 1801, 1803 (1980).

155. *Id.* § 401, 94 Stat. at 1807.

156. *See* H.R. REP. NO. 1218, 96th Cong., 2d Sess. 1, 3-4, (1980) *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3810, 3812-13. *See also supra* note 20.

157. *See* H.R. REP. NO. 1218, 96th Cong., 2d Sess. 1, 3-4 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3810, 3812-13. *See also* 126 CONG. REC. S13493-97 (daily ed. Sept. 25, 1980) (remarks of Sen. Williams).

158. Pub. L. No. 96-422, § 301, 94 Stat. 1803 (1980). *See also* H.R. REP. NO. 1218, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3813.

159. Consolidated Refugee Education Assistance Act, Pub. L. No. 97-35, §§ 541-547, 95 Stat. 458 (1981).

160. *Id.* § 543(a)(1)(B). The amendments define "eligible participant" as any lawfully admitted refugee, parolee, applicant for asylum (this group includes Cuban/Haitian Entrants), or alien granted indefinite leave to stay in the United States. Pub. L. No. 97-35, § 543(a)(1)(B), 95 Stat. at 459 (1981). A parolee is an alien admitted under the Refugee Act of 1980, Pub. L. No. 96-212, § 203(f)(3), 94 Stat. 108. For further information on parolees, *see* C. GORDON & H. ROSENFELD, *supra* note 1, at 2-188.1 to 2-188.5.

The amendments also extend the duration of the Act. Originally, the Act authorized payments for only three years: 1981; 1982; and 1983. The 1981 amendments extend the Act indefinitely, but limit capitation for each refugee to the first three years after entry. *Id.*

161. Pub. L. No. 96-422, § 201, 94 Stat. at 1801, *as amended by* Pub. L. No. 97-35, § 544(a), 95 Stat. at 460 (1981). Under the Act, the Secretary of Education sets a formula to determine how much each educational agency will receive. The Act authorized a ceiling of \$400 per student for 1981. *Id.*, 95 Stat. at 461.

162. Pub. L. No. 96-422, § 301, 94 Stat. at 1803, *as amended by* Pub. L. No. 97-35, § 545, 95 Stat. at 462 (1981). The Act authorized a ceiling on the formula for this section at \$700 per student.

163. Pub. L. No. 97-35, § 546, 95 Stat. at 463 (1981). Current appropriations for the Act are \$5 million for fiscal year 1982, \$7.5 million for 1983, and \$10 million for

Although the Refugee Education Assistance Act provides much needed relief to state and local education agencies, it fails to cover the total cost of educating new refugee children. Some state and local education agencies estimate that costs will exceed \$1500 per student for the first year each student enrolls in school.¹⁶⁴ The maximum amount authorized under the Act, however, is \$1100 per student for the first year.¹⁶⁵ Authorized funds for the second and third years decrease considerably.¹⁶⁶

In response to the unexpected mass immigration of over 100,000 Cubans in the spring and summer of 1980,¹⁶⁷ President Carter did not exercise the emergency provisions of the Refugee Act of 1980.¹⁶⁸ Instead, the President conferred on the new arrivals the distinct status of "Cuban-Haitian Entrant."¹⁶⁹ This status created a great deal of confusion concerning the Entrants' eligibility for government aid. Because the Entrants were not refugees,¹⁷⁰ they were initially ineligible for benefits under the Refugee Act of 1980.¹⁷¹ In October, 1980,

1984. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 25, 95 Stat. 450 (1981).

164. The estimates vary. Dade County expects additional costs for refugee students to be \$1530 per student for the student's first year in school, and \$719 per child in each of the next two years. Pennsylvania expects the added cost to run \$3000 more per student, while New Jersey estimates that \$933 per child extra will be sufficient. See H.R. REP. NO. 1218, 96th Cong., 2d Sess. 7, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3810, 3816.

165. This represents \$400 from Title II and \$700 from Title III. See *supra* notes 162-163.

166. See *supra* notes 161-162.

167. See *supra* note 20.

168. See *supra* notes 134-38 & 140-51 and accompanying text.

169. Congress did not unanimously support the President's action. Senator Kennedy, for example, believed that the President should have admitted the 1980 Cuban refugees under the Emergency Provisions of the Refugee Act of 1980. See Letter from Senator Kennedy to President Carter (May 20, 1980), reprinted in 126 CONG. REC. S6436-37 (daily ed. June 6, 1980). Cf., *Hearings on Refugee Admissions and Resettlement Programs—Fiscal Year 1981 Before the House Committee on the Judiciary*, 96th Cong., 2d Sess. 177 (1980) (State Department statement that the Refugee Act's provision were not intended for, and were too cumbersome to use in, the circumstances of a mass, uncontrolled, direct exodus to the United States). For a general discussion of the special status, see *supra* note 20.

170. See *supra* note 20.

171. See Scanlan, *supra* note 3, at 622-23. See also Bach, *supra* note 23; Wright, *The Development of Refugee Policy*, NATION'S CITIES WEEKLY, Aug. 11, 1980, at 3, reprinted in G. MCCLELLAN, *supra* note 13, at 20, 24. For a summary of the benefits refugees generally receive, see *supra* notes 129-66 and accompanying text.

however, Congress authorized the President to provide the Entrants with refugee benefits.¹⁷² This action freed \$100 million in appropriated funds for cash, medical, social and educational assistance.¹⁷³

B. *The Reagan Administration Proposal—The Omnibus Immigration Control Act*

In October, 1981, Senator Strom Thurmond introduced the Omnibus Immigration Control Act¹⁷⁴ on behalf of the Reagan Administration.¹⁷⁵ Title III of the Act, the Cuban-Haitian Temporary Resident Status Act of 1981,¹⁷⁶ proposes to exclude Cuban-Haitian Entrants from all federal benefit programs for which they are currently eligible.¹⁷⁷ The proposal also gives the Attorney General discretion to grant work permits.¹⁷⁸ The Act presents the danger that some Entrants may not receive work authorization while also being ineligible for federal benefit programs. Thus, the potential cost to state and local governments,¹⁷⁹ and the direct effect on the Entrants them-

172. Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(a)(1), 94 Stat. 1799, 1809. See also 45 C.F.R. § 401 (1982).

173. See President Carter's Remarks on Signing the Refugee Education Assistance Act of 1980 into Law, 16 WEEKLY COMP. PRES. DOC. 2155, 2156 (Oct. 10, 1980). Cuban-Haitian Entrant children are entitled to attend public schools, and their school districts now benefit from the Education Assistance Act. Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501, 94 Stat. 1799, 1809. See *supra* notes 153-63 and accompanying text.

174. S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. S11992 (daily ed. Oct. 22, 1981). Representative Rodino introduced the House version on the same day. The text of the proposed Act is reprinted *id.* at S11993-S12002.

175. In the 1982 State of the Union Address, 18 WEEKLY COMP. PRES. DOC. 76-83 (Jan. 26, 1982), President Reagan outlined a proposal to redraw the parameters of federal-state relations. The proposed "new federalism" would shift complete responsibility to the states for the AFDC and food stamp programs. See *infra* text accompanying notes 180. If this proposal is enacted, the impact on refugee resettlement could be significant. The new federalist system would separate the authority that determines refugee admissions in the federal government from the authority that would determine the resettlement program in the states. A cohesive refugee program is unlikely under such a system.

176. 127 CONG. REC. S11994-96 (daily ed. Oct. 22, 1981).

177. S. 1765, § 301(e), 97th Cong., 1st Sess., 127 CONG. REC. S11995 (daily ed. Oct. 22, 1981).

178. *Id.* § 301(b), 127 CONG. REC. S11993-11994 (daily ed. Oct. 22, 1981).

179. Title I of the Proposed Act, Temporary Resident Status for Illegal Aliens, authorizes the Attorney General to grant temporary resident status to undocumented aliens who entered the country before January 1, 1980. Such aliens would be ineligible for all federal benefits. Thus, the costs that currently fall upon state and local

selves, is enormous.

V. THE FEDERAL GOVERNMENT SHOULD FULLY BEAR THE COSTS OF REFUGEE RESETTLEMENT

A. *The Tenth Amendment*

1. Developments Until 1976

The tenth amendment is the constitutional source for "federalism," a term used to indicate the dual sovereignty of American government.¹⁸⁰ Essentially, the tenth amendment invests in the states all the powers of sovereignty that the constitution does not delegate to the federal government.¹⁸¹ Throughout American history the scope of the tenth amendment limitation on federal power has varied.¹⁸²

The Supreme Court threatened the strength of the tenth amendment in *United States v. Darby*.¹⁸³ At issue was the constitutionality of the Fair Labor Standards Act,¹⁸⁴ in which Congress attempted to mandate a national minimum wage. The Court upheld the statute as a valid exercise of the commerce power,¹⁸⁵ and interpreted the tenth amendment to be "but a truism that all is retained which has not been surrendered."¹⁸⁶

In *Maryland v. Wirtz*,¹⁸⁷ the tenth amendment reached its weakest

governments for such items as education and medical services would continue to burden the state and local governments. S. 1765, § 101, 97th Cong., 1st Sess., 127 CONG. REC. S11993 (daily ed. Oct. 22, 1981).

180. See generally L. TRIBE, *supra* note 82, §§ 5-1 to 5-22; LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982).

181. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

182. See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Maryland v. Wirtz*, 392 U.S. 183 (1968); *United States v. Darby*, 312 U.S. 100 (1941); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (held states have standing to sue pursuant to the tenth amendment); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (held that the tenth amendment did not limit Congress' power to charter a bank, though the Constitution did not expressly grant Congress this power).

183. 312 U.S. 100 (1941).

184. Pub. L. No. 75-718, 52 Stat. 1060 (1938).

185. 312 U.S. at 116.

186. *Id.* at 124.

187. 392 U.S. 183 (1968).

point. The Fair Labor Standards Act, again at issue, had originally excluded states from its provisions.¹⁸⁸ By amendments in 1961¹⁸⁹ and 1966,¹⁹⁰ however, Congress expanded the definition of "employer" to include the states. Maryland and twenty-seven other states challenged this extension of the Act's coverage.¹⁹¹ The Court upheld the amended Act, refusing to exempt state-run schools and hospitals from the minimum wage provisions. The Court noted that these institutions could potentially handle a wide variety of goods in commerce.¹⁹²

2. *National League of Cities and Hodel*

In 1976,¹⁹³ the Court revitalized the tenth amendment in *National League of Cities v. Usery*.¹⁹⁴ There, the Supreme Court struck down a congressional attempt to extend the Fair Labor Standards Act to state and municipal governments.¹⁹⁵ A four-vote plurality held that Congress could not disturb the states in areas of "integral governmental functions."¹⁹⁶ Although the Court did not precisely define "integral governmental function,"¹⁹⁷ it cited, as illustrative,¹⁹⁸ *Coyle v. Smith*.¹⁹⁹ *Coyle* held that Congress could not compel a territory to

188. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 3(d), 52 Stat. 1060. The Act defined "employer" to exclude ". . . the United States or any State or political subdivision of a State. . . ." *Id.*

189. 29 U.S.C. § 206 (Supp. II 1964).

190. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831.

191. 392 U.S. at 187.

192. *Id.* at 201.

193. The Court had initially signaled a retreat from the extreme view of *Wirtz v. United States*, 421 U.S. 542 (1975) (the tenth amendment does limit the power of Congress over States, though not over private parties).

194. 426 U.S. 833 (1976).

195. *Id.* at 840. The Court considered the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55.

196. 426 U.S. at 851.

197. In the *National League* plurality opinion, "integral governmental function" went by at least four different names. The opinion referred to "functions essential to separate and independent existence," *id.* at 845; "essential governmental decisions," *id.* at 850; "integral governmental functions," *id.* at 851; and "traditional governmental functions," *id.* at 852.

198. *Id.* at 845.

199. 221 U.S. 559 (1911).

move its capital as a prerequisite to statehood.²⁰⁰ Moreover, the plurality provided an exemplary list of government functions that were within its definition of "integral governmental function": fire prevention; police protection; sanitation; public health; and parks and recreation.²⁰¹ Significantly, Justice Blackmun, concurring, agreed with what he described as the plurality's "balancing approach."²⁰² The plurality opinion, however, made no mention of a balancing approach. As a result, lower courts²⁰³ are confused regarding the proper test to apply in tenth amendment cases.²⁰⁴

In 1981, the Supreme Court reinterpreted the doctrine announced in *National League of Cities v. Hodel v. Virginia Surface Mining and Reclamation Association*²⁰⁵ upheld challenged provisions of the Surface Mining Control and Reclamation Act of 1977,²⁰⁶ which establishes minimum standards for states to apply when administering individual mining programs.²⁰⁷ The Court framed a three-part test

200. *Id.* at 574.

201. 426 U.S. at 851.

202. *Id.* at 856 (Blackmun, J., concurring). Justice Blackmun stated that the federal government still retains power in areas where the federal interest in regulating is "demonstrably greater and where state . . . compliance with imposed federal standards would be essential." *Id.*

203. *See, e.g.,* Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 206 (M.D. Tenn. 1979) (since Blackmun's concurrence was the swing vote, it could not be ignored; therefore, it was impossible to apply any test emanating from the *National League* opinions). *See also* Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398, 407-09 (9th Cir. 1981) (applied Blackmun's balancing test and upheld § 306 of the Railroad Revitalization Act as a legitimate means to achieve a constitutional goal under the commerce power—revitalizing the nation's rail system); United Transp. Union v. Long Island R.R., 634 F.2d 19, 24, 29 (2d Cir. 1980) (applied Blackmun's balancing approach and found that a local, state-owned commuter rail service was an integral government function not subject to federal regulation).

204. Commentators who have analyzed the *National League* opinion generally oppose the balancing approach. *See, e.g.,* Matsumoto, National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation, 1977 ARIZ. ST. L.J. 35, 71 n.193; Michelman, State's Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 YALE L.J. 1165, 1193 (1977); Schwartz, National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus, 46 FORDHAM L. REV. 1115, 1134 (1978); Tushnet, Constitutional and Statutory Analyses in the Law of Federal Jurisdiction, 25 U.C.L.A. L. REV. 1301, 1338, 1340 (1978). *But see* Horowitz, The Autonomy of the University of California Under the State Constitution, 25 U.C.L.A. L. REV. 23, 33 (1977).

205. 452 U.S. 264 (1981).

206. 30 U.S.C. § 1201 (Supp. III 1979).

207. 452 U.S. at 289.

to apply the holding of *National League of Cities*.²⁰⁸ First, the challenged regulation must regulate "States as States."²⁰⁹ Second, the regulation must address a subject that is indisputably an "attribute of State sovereignty."²¹⁰ Third, a State's compliance with the federal regulation must directly impair its ability to "structure integral operations in areas of traditional governmental functions."²¹¹ In a footnote, the Court incorporated the Blackmun balancing approach from *National League of Cities*,²¹² noting that even if a state satisfied the three-part test, an overriding federal interest could still overcome the tenth amendment challenge.²¹³ The Court found that the challenged statute applied to private individuals and businesses, and therefore failed the first element of the test.²¹⁴

3. Relating the Tenth Amendment to Refugee Resettlement

Congress controls the admission of all aliens pursuant to its "naturalization" power.²¹⁵ Once an alien has entered the country, however, this constitutional power loses force. It is, therefore, unclear what power Congress exercises when resettling refugees. The Refugee Act of 1980,²¹⁶ and the Refugee Education Assistance Act of 1980,²¹⁷ primarily rely upon the spending power.²¹⁸ While Title II of

208. *Id.* at 287-88.

209. *Id.* (quoting *National League*, 426 U.S. at 854).

210. 452 U.S. at 288 (quoting *National League*, 426 U.S. at 845).

211. 452 U.S. at 288 (quoting *National League*, 426 U.S. at 852).

212. *See supra* note 206.

213. 452 U.S. at 288 n.29.

214. 452 U.S. at 288, 293. The plaintiffs had argued first, that federally established minimum standards within which the states could administer their own programs were coercive; and second, that the Act usurped the states' police power to control land use. *Id.* at 289. The Court held that the area of regulation was within commerce, so that federal law preempted state law under the supremacy clause. *Id.* at 290. It further held that Congress could displace state exercises of the police power when exercising the commerce power. *Id.*

215. U.S. CONST. art. I, § 8, cl. 4. *See supra* notes 86-99 and accompanying text.

216. Pub. L. No. 96-212, 94 Stat. 102 (1980). *See supra* notes 134-51 and accompanying text.

217. Pub. L. No. 96-422, 94 Stat. 1799 (1980). *See supra* notes 153-68 and accompanying text.

218. The spending power authorizes Congress "[t]o lay and collect taxes . . . [and] to . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. *See Note, supra* note 14, at 913-14.

In some legislation, Congress has expressly indicated that it was acting in the interest of national security. *See SENATE JUDICIARY COMMITTEE PRINT, supra* note 97, at

the Refugee Act of 1980,²¹⁹ concerning admissions, is based upon the "naturalization" power,²²⁰ the balance of the Act concerns the welfare of refugees and local communities after entry.²²¹ Hence, these sections are probably enacted under the spending power.

The Refugee Education Assistance Act of 1980 was also enacted pursuant to the spending power. First, it arose from the House Committee on Education and Labor, thus evidencing no connection to foreign policy or national security.²²² Moreover, the entire Act is devoted to aiding school districts experiencing the impact of high refugee enrollment.²²³ Therefore, refugee resettlement programs are exercises of Congress' spending power and are thus subject to the limits of that power.

The applicability of *National League of Cities* and *Hodel* to refugee resettlement is indirect. First, both decisions applied to the commerce power. While they are not strictly limited to commerce power regulation, it is unclear which congressional powers they affect. Second, the source of the power Congress exercises when resettling refugees is also unclear, though usually it is the spending power.²²⁴

In *National League of Cities*, the Court expressed no opinion on whether the tenth amendment would limit the spending power as well as the commerce power.²²⁵ Justice Brennan, dissenting in *National League of Cities*, clearly believed that the Court's tenth amendment limit on the commerce power did not extend to congressional

38. The Report notes that the provisions of the Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 and the 1976 Foreign Relations Authorization Act, Pub. L. No. 94-141, 89 Stat. 771, both contain provisions that affect foreign relations. SENATE JUDICIARY COMMITTEE PRINT, *supra* note 97, at 38. The 1962 Act authorizes contributions to the United Nations High Commissioner for Refugees and the Intergovernmental Committee for European Migration. *See supra* note 140. The 1976 Act established the U.S. Emergency Refugee and Migration Assistance Fund. *Id.* Because they affect foreign relations, Congress enacted these acts under its national security power.

219. Pub. L. No. 96-212, §§ 201-02, 94 Stat. 102, 102-09 (1980).

220. U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization." *Id.*

221. Pub. L. No. 96-212, §§ 301-401, 94 Stat. 109-18 (1980).

222. *See* H.R. REP. No. 1218, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3810.

223. *See supra* text accompanying notes 156-160.

224. *See supra* text accompanying notes 216-23.

225. 426 U.S. at 852 n.17.

actions under the spending power.²²⁶

Courts have been reluctant to apply tenth amendment limitations to other powers.²²⁷ In *Steward Machine Co. v. Davis*,²²⁸ the Supreme Court held that Congress may place restrictions or conditions on the use of money it appropriates to states and local governments pursuant to the spending power, so long as such conditions are not coercive.²²⁹ Recent lower court decisions, however, apply this standard inconsistently.²³⁰

At one end of the spectrum, some courts²³¹ hold that conditions on appropriations are never coercive. For example, in *Oklahoma v. Schweiker*²³² the District of Columbia Circuit Court analyzed the limits on Congress' power to condition dispersal of federal funds.²³³

226. *Id.* at 880 (Brennan, J., dissenting).

227. *See, e.g.*, *Walker Field Pub. Airport Auth. v. Adams*, 606 F.2d 290 (10th Cir. 1979) (dictum) (refused to extend tenth amendment to the spending power); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979) (refused to apply tenth amendment to the war power); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116 (6th Cir. 1978) (refused to extend tenth amendment's application to include the fourteenth amendment).

228. 301 U.S. 548 (1937) (upheld the Social Security Act of 1935, which established a system with incentives to induce states to establish unemployment compensation systems). For a historic review of Supreme Court decisions on limiting the spending power, see Note, *Federal Grants and the Tenth Amendment: "Things As They Are" and Fiscal Federalism*, 50 *FORDHAM L. REV.* 130, 139-42 (1980) [hereinafter cited as Note, *Federal Grants*]. *See generally* Note, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 *AM. U.L. REV.* 726 (1977) [hereinafter cited as Note, *New Safeguards*]; Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 *NW. U.L. REV.* 293 (1975); Note, National League of Cities, *The Tenth Amendment, and the Conditional Spending Power*, 21 *URB. L. ANN.* 217 (1981) [hereinafter cited Note, *Conditional Spending Power*]; Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 *WASH. & LEE L. REV.* 1133 (1977).

229. 301 U.S. at 585.

230. *See infra* notes 231-62 and accompanying text.

231. *See, e.g.*, *American Fed'n of Labor v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (dictum) (citing *Steward Machine Co.* for the proposition that incentives never equal coercion); *Oklahoma v. Harris*, 480 F. Supp. 581, 588 (D.D.C. 1979) (since compliance with "pass through" provisions of Social Security Act was optional, it did not coerce states); *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1028-31 (D.D.C.), *aff'd*, 598 F.2d 311 (D.C. Cir. 1978) (upheld National Flood Insurance Program, stating that Congressional inducements offered to states to achieve legitimate national goals are within the spending power). *See also* Note, *Federal Grants*, *supra* note 228, at 144-46.

232. 655 F.2d 401 (D.C. Cir. 1981).

233. *Id.* at 405-11.

The court found that the Supreme Court had not yet articulated any limits.²³⁴ Although the court believed that some limit might exist,²³⁵ it held that the "pass-through" provisions of the Social Security Act²³⁶ were within the scope of Congress' spending power.²³⁷ The court stated that judicial limits on Congress' power to spend money would involve the judiciary in the legislative process.²³⁸

In considering whether the tenth amendment limited Congress' spending power²³⁹ the *Schweiker* court first distinguished *National League of Cities* on two grounds. First, it noted that *National League of Cities* dealt with the commerce power.²⁴⁰ Thus, it found that *National League of Cities* did not apply to the spending power.²⁴¹ Second, the court distinguished the challenged act in *National League of Cities* from the statutory provisions challenged in *Schweiker*.²⁴² The Fair Labor Standards Act at issue in *National League of Cities* left the states with virtually no discretion in its implementation.²⁴³ The Social Security Act provisions at issue in *Schweiker*, however, merely required states to maintain their current programs.²⁴⁴ The court noted that prior decisions had upheld more cumbersome conditions on federal funds.²⁴⁵

In *New Hampshire Department of Employment Security v. Marshall*,²⁴⁶ the First Circuit reached a similar result through different

234. *Id.* at 406.

235. *Id.* The court noted that the Supreme Court has not only failed to enunciate the standards, but has specifically declined the opportunity to do so in *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Lau v. Nichols*, 414 U.S. 536 (1974); and *United States v. Butler*, 297 U.S. 1 (1936). 655 F.2d at 406.

236. 42 U.S.C. § 1382f (1976). These provisions guarantee to recipients of Supplemental Security Income automatic cost-of-living increases in their benefits. *Id.*

237. 655 F.2d at 406.

238. *Id.* at 410.

239. *Id.* at 411-14.

240. *Id.* at 411.

241. *Id.* at 412.

242. *Id.* at 412-13.

243. *Id.* at 412.

244. *Id.* at 412-13.

245. *Id.* at 413. The court cited *Lau v. Nichols*, 414 U.S. 563 (1974) (required an elimination of language barriers); *Rosado v. Wyman*, 397 U.S. 397 (1970) (state-defined need levels must incorporate cost of living increases), and several district court opinions that ordered changes in state decision making processes. 655 F.2d at 413.

246. 616 F.2d 240 (1st Cir.), *cert. denied and appeal dismissed*, 449 U.S. 806 (1980).

analysis. The court there observed that *National League of Cities* could be interpreted as holding either that the tenth amendment is superior to the commerce clause,²⁴⁷ or that the tenth amendment prohibits federal infringement on the states' integral government functions.²⁴⁸ Relying on the second interpretation, the court found the evidence of impairment of state sovereignty to be insufficient.²⁴⁹ Thus, the court upheld the Federal Unemployment Tax Act,²⁵⁰ which contains requirements that states must satisfy to enable employers within their jurisdiction to receive federal tax credits.²⁵¹ This decision leaves open the possibility that a state could invalidate a spending power statute by demonstrating infringement of state sovereignty.²⁵²

At the other end of the spectrum, at least one judge²⁵³ and a few commentators²⁵⁴ have expressed the view that few states and local governments cannot afford to turn down "optional" federal grants offered through the spending power. Therefore, grants with burden-

247. *Id.* at 248.

248. *Id.*

249. *Id.* at 249.

250. 26 U.S.C. §§ 3301-3311 (1976).

251. *Id.* § 3304.

252. *But see* North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) (the "coercive" effect of state compliance with the federal statute did not constitute coercion because the economic effect was insufficient), *aff'd mem.*, 435 U.S. 962 (1978).

While the *Schweiker* court and the *Marshall* court differed in their approaches to the question of how far Congress can go in conditioning federal spending, other courts have sidestepped the issue and decided cases on procedural grounds. *See, e.g.*, Walker Field Pub. Airport Auth. v. Adams, 606 F.2d 290 (10th Cir. 1979) (dismissed a claim challenging the federal condition in a grant, holding that the Court of Claims had exclusive jurisdiction; the court also noted that optional grants are never coercive); County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1188-89 (D.D.C. 1977) (under 26 U.S.C. § 7421(a), the Anti-Injunction Act, the court did not have jurisdiction to decide on the plaintiffs' allegation that the Unemployment Compensation Amendments of 1976 infringed upon state sovereignty as ultra vires actions Congress exercised under the spending power), *aff'd*, 631 F.2d 767 (D.C. Cir.), *cert. denied*, 449 U.S. 837 (1980). *See also* Note, *Conditional Spending Power*, *supra* note 228, at 228-32.

253. Walker Field Pub. Airport Auth. v. Adams, 606 F.2d 290, 298-300 (10th Cir. 1979) (McKay, J., dissenting).

254. *See generally* Michelman, *supra* note 204, at 1172; Note, *Federal Grants*, *supra* note 228, at 146-52; Note, *Conditional Spending Power*, *supra* note 228, at 232, 236-37; Note, *supra* note 14, at 906-08; Note, *New Safeguards*, *supra* note 228, at 742 n.117.

some conditions effectively coerce compliance, thus violating the limits of the spending power under *Steward Machine*²⁵⁵ and infringing on integral state functions under *National League of Cities*.²⁵⁶

4. Applying the *Hodel* Test to Refugee Resettlement

As mentioned above, *Hodel* clarified the proper test for a tenth amendment challenge to congressional action.²⁵⁷ First, the challenged regulation must regulate "States as States."²⁵⁸ Admittedly, federal refugee admission and resettlement policies do not directly regulate states. Federal policies in this area, however, have forced some states and localities to absorb an extraordinary number of aliens.²⁵⁹ This, in turn, has forced state and local governments to restructure their government operations to address the new problems that arise.²⁶⁰ Although this regulation is indirect, it certainly affects "States as States," since it affects the manner in which they provide government services.²⁶¹

Second, federal regulation must address a subject that is indisputably an "attribute of state sovereignty."²⁶² Federal refugee resettlement policies affect state sovereignty in the areas of budget control and public health.²⁶³ In the area of budget control, federal refugee resettlement policies rely on state welfare programs.²⁶⁴ For the first three years that refugees receive welfare benefits, the federal government pays all related expenses. Thereafter, the state and federal government share the costs.²⁶⁵ Thus, states still absorb just under half the cost of welfare programs for refugees who have been in the

255. See *supra* note 228 and accompanying text.

256. See *supra* note 197 and text accompanying notes 198-204.

257. See *supra* text accompanying notes 208-11.

258. 452 U.S. at 287-88.

259. See *supra* notes 14-18 and accompanying text.

260. See 1981 Subcommittee Hearings on H.R. 2142, *supra* note 4, at 58-60 (statement of Bruce Nestande, Supervisor, Orange County, California).

261. At least two commentators believe that the freedom to provide government services is the essence of an "integral governmental function." See Michelman, *supra* note 204, at 1172; Tribe, *National League of Cities and the Right to Government Services*, 90 HARV. L. REV. 1065 (1977).

262. 452 U.S. at 288.

263. See *infra* notes 279-80.

264. See *supra* notes 45-67 and accompanying text. Refugees initially receive welfare benefits to ensure that their basic needs are met.

265. See *supra* note 144 and text accompanying notes 64-66.

United States for more than three years.²⁶⁶ Hence, when federal refugee policies increase the number of recipients on the welfare rolls,²⁶⁷ the states are responsible for part of the added cost.²⁶⁸ Moreover, federal regulations often condition state participation in federal programs,²⁶⁹ and the conditions sometimes force states to pay higher benefits than they otherwise would.²⁷⁰

In the area of public health, inferior health conditions in some refugee settlements threaten communities with large refugee populations.²⁷¹ Local officials must sponsor programs to combat the problem. In short, federal policies regarding refugee admissions and resettlement result in immense costs to certain states and localities, thus taxing their ability to provide government services to their citizens.²⁷² These burdens inevitably infringe on "attributes of state sovereignty."

The third element of the *Hodel* test is that state compliance with federal regulation must directly impair the states' ability to "structure integral operations in areas of traditional functions."²⁷³ The Supreme Court attempted to define this element in *United Transpor-*

266. See *supra* note 144.

267. The federal government determines who to admit to the country. It also has a role in determining where the refugees locate. See *supra* text accompanying notes 78-93.

268. Although the states are reimbursed for the first three years, refugees may be eligible for welfare benefits for a longer time. See *supra* notes 62-63.

269. See, e.g., *Shea v. Vialpando*, 416 U.S. 251 (1974) (the federal statute requires state agencies to take into account all transportation expenses when determining the eligibility requirements for Aid to Families with Dependent Children). See also Note, *supra* note 14, at 908-09.

270. See Note, *supra* note 14, at 909. The author notes that in 1979, 600 families in Los Angeles County received federally funded aid under the state AFDC program, even though they did not meet the state standard of need. These families qualified because a federal law prohibits discontinuation of benefits to employed refugees. *Id.*, citing CALIFORNIA COMMISSION ON HUMAN RESOURCES, REPORT OF FINDINGS TO THE GEN. ASSEMBLY (1979).

271. See *supra* note 39.

272. Because most localities have limited revenues, essential programs and those receiving some federal funding receive priority in budget decisions. Remaining funds go to less significant programs. Because the refugee programs are federally supported and many serve basic human needs, these programs receive priority. Government services for citizens, aside from the welfare and social services programs, therefore, tend to lose resources.

273. 452 U.S. at 288.

*tation Union v. Long Island Railroad Co.*²⁷⁴ Noting the difficulty in determining whether a federal law impairs areas of traditional state functions, the Court relied on which branch of government had performed the function previously.²⁷⁵ The Court also indicated a need to determine whether federal regulation in this area would endanger the separate existence of the state.²⁷⁶ Evaluating these factors, the Court found the Railway Labor Act²⁷⁷ could be applied to a state-owned railroad.²⁷⁸

States could use the same arguments to develop the third element of the test that they would use with the second. Federal policies regarding refugee admissions and resettlement directly affect states' operations in the areas of government services and public health. Because states have traditionally provided these services²⁷⁹ and each state must regulate its own budget to maintain a separate existence,²⁸⁰ federal regulation should be precluded by the *Hodel* test. But even assuming, *arguendo*, that a state met all three elements of the *Hodel* test, the federal government could still overcome a state's tenth amendment claim by showing a greater federal interest.²⁸¹ The federal interest in refugee admissions is substantial. Foreign relations require a uniform, national policy on this subject. Moreover, there is no question that, constitutionally, the federal government has exclusive, plenary power over the admission of all aliens.²⁸² Thus, the federal interest in refugee admissions may be greater than state

274. 102 S. Ct. 1349 (1982).

275. *Id.* at 1354.

276. *Id.* at 1354-55, citing *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). At issue in *Long Island* was the regulation of state owned passenger railroads. Because the federal government has regulated railroads in interstate commerce since 1862 (*see* 102 S. Ct. at 1355 n.13), the Court held that operation of a railroad is not an integral operation in an area traditionally immune from federal regulation. *Id.* at 1354.

277. 45 U.S.C. § 151 (1976).

278. 102 S. Ct. at 1356.

279. States traditionally have been responsible for public health. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

280. In *Walker Field v. Adams*, 606 F.2d 290 (10th Cir. 1979), Judge McKay observed that current state budgets are virtually stretched to the breaking point. *Id.* at 298-99 (McKay, J., dissenting). Given the various public services that states traditionally provide to their citizens (*see National League*, 426 U.S. at 851), control over a state budget is arguably an integral governmental function.

281. 452 U.S. at 288 n.29.

282. *See supra* notes 81-95 and accompanying text.

tenth amendment interests. The state functions on which federal policies infringe, budget control and public health maintenance, may be inferior to the federal government's power to regulate the admission of aliens.²⁸³ Assuming that there is an overriding federal interest, however, state and local governments still suffer injuries as a consequence of federal policy. Full compensation from the federal government to state and local governments, for all the costs relating to refugees would reduce this burden.²⁸⁴

B. *Policy Considerations*

As shown above, the federal refugee policies burden state and local communities. Congress recognized this when it enacted the Refugee Act of 1980²⁸⁵ and the Refugee Education Assistance Act of 1980.²⁸⁶ The Senate Committee Report accompanying the Refugee Act of 1980²⁸⁷ demonstrates Congress' belief that the federal government "clearly has a responsibility to assist States and local communities in resettling the refugees—assisting them until they are self-supporting and contributing members of their adopted communities."²⁸⁸ The Committee expected that Title III of the Act,²⁸⁹ which provides federal reimbursement for refugee expenses, would accomplish this goal.²⁹⁰ Local officials working with refugees, however, complain that this goal has not been achieved.²⁹¹

283. Application here of Blackmun's balancing approach (*National League*, 426 U.S. at 856 (Blackmun, J., concurring)) would permit federal regulations concerning refugees. Since the federal government brings the refugees into the country, the federal interest in their welfare is great. State compliance with these federal standards is essential to ensure that refugee needs are met. Hence, on balance, the federal policies should prevail.

284. See SELECT COMMISSION REPORT, *supra* note 3, at 188 (Final Report and Recommendations).

285. Pub. L. No. 96-212, 94 Stat. 102 (1980).

286. Pub. L. No. 96-422, 94 Stat. 1799 (1980).

287. S. REP. NO. 256, 96th Cong., 1st Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141.

288. *Id.* at 10, 1980 U.S. CODE CONG. & AD. NEWS at 151.

289. See *supra* notes 144-51 and accompanying text.

290. S. REP. NO. 256, 96th Cong., 1st Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 151.

291. See 1979 Subcommittee Hearings on H.R. 2816, *supra* note 4, at 288 (statement of Kyle S. McKinsey, Deputy Director, California Department of Social Services, that Indochinese refugees in California are often not self-sufficient within 24 or 36 months); *id.* at 292 (statement of Joseph H. Ryu, Coordinator, Indochina Refugee

The House Committee Report accompanying the Refugee Education Assistance Act of 1980²⁹² demonstrates that the House Committee on Education and Labor believes refugee expenses are a federal responsibility.²⁹³ Other officials ranging from the President²⁹⁴ to local politicians²⁹⁵ have also stated that the cost of refugee resettlement should be a national expense. Public sentiment and federalism support the idea that the federal government should fully compensate state and local governments for the costs of refugee resettlement.

C. Solutions

The solutions to the problem of refugee resettlement costs are legislative. Although the congressional reports demonstrate a congressional intent for full federal financing of refugee resettlement,²⁹⁶ subsequent legislation has not implemented that intent.²⁹⁷ State and

Assistance Program, New York State Department of Social Services, that refugees need three to five years to integrate into American society). *Cf. id.* at 290-99 (statement of Guy Lusk, Director, Division of Financial Services, Virginia Department of Welfare, that most refugees in Virginia receive welfare benefits for less than 24 months); *id.* at 294 (statement of Edwin B. Silverman, Director, Governor's Information Center for Asian Assistance, that at the end of three years most refugees in Illinois have become self-sufficient).

292. H.R. REP. NO. 1218, 96th Cong., 1st Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3817.

293. The Committee firmly believes that these State and local educational agencies should not be required to absorb on their own the enormous costs generated by a situation completely beyond their control . . . the huge flow of Cuban, Haitian and Indochinese refugees is primarily a result of federal refugee policies; therefore, the Federal Government has a responsibility to carry as much of the financial burden as possible.

Id.

294. *See* Remarks on Signing the Refugee Education Assistance Act of 1980 into Law, 16 WEEKLY COMP. PRES. DOCS. 2155, 2156 (Oct. 20, 1980) (statement of President Carter that the Cuban-Haitian resettlement problem was a national problem for which he assumed full responsibility).

295. *See, e.g., 1979 Subcommittee Hearings on H.R. 2816, supra* note 4, at 272 (statement of Iowa Governor Robert D. Ray, that it would be more just to insure that the costs are spread equally throughout the country); *id.* at 380 (statement of Minnesota Governor Albert H. Quie that refugees are here as a result of national, not state, policies); SELECT COMMISSION REPORT, *supra* note 3, at 55 (app. H) (position of Dewey W. Knight, Jr., Assistant County Manager, Dade County, Florida, that it is the federal government's responsibility to make policy, but local tax funds should not be used on international issues).

296. *See supra* notes 287, 288, & 292 and accompanying text.

297. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which limits federal reimbursement for cash and medical assistance to three years.

local governments still bear many of the costs associated with refugees.²⁹⁸ Congress should amend the refugee legislation to state more precisely its intent to cover all the expenses associated with refugee resettlement. The appropriate federal agencies should then promulgate concise regulations stating what aid is available to state and local governments. Recognizing the finite limits of state and local government budgets and the inconsistencies in refugee influx, the reimbursement system should be as expeditious as possible.

Judicial remedies for refugee-impacted states and local communities are scarce. As noted above,²⁹⁹ there is a tenable tenth amendment argument that federal refugee policies interfere with integral state government functions. Considering the tenor of the courts when dealing in the area of foreign policy,³⁰⁰ however, this argument is not likely to succeed. There are also tenable, though strained, tort³⁰¹ and fifth amendment³⁰² arguments.

CONCLUSION

The costs related to refugees and undocumented aliens are essentially a national responsibility. The federal government exercises full control over all alien admissions. A few state and local governments

298. See *supra* notes 30-77 and accompanying text.

299. See *supra* notes 273-84 and accompanying text.

300. See L. TRIBE, *supra* note 82, at 227.

301. San Diego County, California, attempted a novel argument to try to recover funds from the federal government for refugee and undocumented alien expenses. The County sued the INS under the Federal Tort Claims Act, 28 U.S.C. § 2860 (1976), for negligent enforcement of the immigration laws. The Federal District Court for the Southern District of California dismissed the case without an opinion. The Ninth Circuit affirmed, also without opinion. 655 F.2d 1051 (9th Cir. 1981), *cert. denied*, 455 U.S. 1081 (1982). Telephone interview with Phillip Kossy, San Diego County Attorney's Office (Jan. 18, 1983).

Also, although the Act waives immunity for certain torts, compensable injuries generally include only those for which a private person would also be liable. *Indian Towing v. United States*, 350 U.S. 61, 68-69 (1955). Therefore, public injuries may not be recoverable under the Act. See I L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 212 (1981).

302. An argument could be made under the fifth amendment's just compensation clause. U.S. CONST. amend. V, cl. 4. A municipality or state that has diverted considerable resources to aid refugees or undocumented aliens could argue that such diversion constituted a "taking" under the fifth amendment. Again, this theory is tenuous at best. Decisions defining "taking" for fifth amendment purposes generally do not include this type of action within the scope of the fifth amendment. See generally L. TRIBE, *supra* note 82, § 4-5; I L. JAYSON, *supra* note 301, § 212.05.

however, have been forced to carry a disproportionate share of the financial burden. The judiciary seems reluctant to interfere in refugee resettlement because of the unquestioned plenary power the federal government has to oversee all foreign affairs.³⁰³ Thus, the remedy to this dilemma is legislative. If Congress fails to address the problems facing refugee-impacted and undocumented alien-impacted areas, however, the courts should provide remedies for these injustices.

303. At least one court, however, has taken an active role in the general area of alien admissions. *See Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980) (enjoined the INS from proceeding with deportation proceedings against Haitian refugees until the INS improved its procedures). On appeal, the Fifth Circuit modified, finding this injunctive relief to be overbroad in some respects. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982).