Federal Refugee Resettlement Policy: Asserting the States' Tenth Amendment Defense

*By David N. Knudson**

With the fall of Saigon in 1975, America's direct military involvement in Vietnam and Southeast Asia ostensibly came to an end. As the United States pulled its final cadre of advisors out of the capital city, more than one million federal government employees and their dependents were left behind, as were tens of thousands of intelligence and security-related personnel.[1] Their loyalty and steadfast service had been premised in part on promises of continuing American support. Many argued that the United States had a continuing moral obligation to those who contributed to the war effort, whose loyalty would likely result in harsh treatment at the hands of the new Communist regime.[2] It was urged that America open her doors to these government and professional persons and their families.[3]

The installation of a new Vietnamese government did little to

---

* B.A., 1977, California State University, San Francisco; member, third year class.

1. *See The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 155 (1979) (statement of American Friends Service Comm.) [hereinafter cited as *1979 Senate Judiciary Comm. Hearings*].

2. *See Hearings on Indochina Refugees Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 56-58 (1975) (statement of Ambassador L. Dean Brown, Director, Interagency Task Force, Department of State) [hereinafter cited as *1975 House Judiciary Comm. Hearings*]. The events have been documented in F. SNEPP, DECENT INTERVAL (1977). *See also Greetings for Refugees: From Open Arms to Hostility*, U.S. NEWS & WORLD REP., May 5, 1975, at 22-23.

3. One argument favoring admission was that because of their education, these refugees would have little trouble adjusting to life in a new country. In 1975, however, there was a strong sentiment against Vietnamese refugees, based on American attitudes about the war in Vietnam and the then-current high unemployment statistics. A Gallup poll taken in May 1975, indicated that 54% of Americans were opposed to the admission of these refugees. TIME, May 19, 1975, at 9. *See generally* J. TAFT, D. NORTH & D. FORD, REFUGEE RESETTLEMENT IN THE U.S.: TIME FOR A NEW FOCUS 103-04 (1979) (report prepared for Social Security Admin., Dep't of HEW, by the New TransCentury Foundation, Washington, D.C.) [hereinafter cited as TRANSCENTURY FOUNDATION STUDY].

ameliorate living conditions for these people. Since the Communist takeovers of Vietnam, Cambodia and Laos, a steady stream of refugees has continued to flow from Southeast Asia.[4] In 1977 and 1978, the attention of the world was strikingly drawn to the plight of the "boat people,"[5] as thousands of refugees sought to escape their homelands on flimsy, overcrowded, often unseaworthy craft, many falling prey to hunger, rough seas, or pirates.[6] Escape was often effected with the approval of local government authorities by payment of gold and other valuables.[7] As the boat people were refused permission to land in other Southeast Asian countries, or, at best, were relocated in crowded, makeshift camps, humanitarians everywhere called upon wealthier nations to admit and resettle as many refugees as possible.[8]

---

4. *See 1975 House Judiciary Comm. Hearings, supra* note 2, at 56-58. Since 1975, it is estimated that more than 1.5 million refugees have fled their homeland in Indochina. CONG. RES. SERV., REPORT TO SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., WORLD REFUGEE CRISIS: THE INTERNATIONAL COMMUNITY'S RESPONSE 134 (Comm. Print 1979) [hereinafter cited as WORLD REFUGEE CRISIS].

5. *See U.S. Opens its Doors to the "Floating Refugees,"* U.S. NEWS & WORLD REP., Aug. 15, 1977, at 21. The number of boat refugees from Vietnam reached 60,000 per month by June 1979. WORLD REFUGEE CRISIS, *supra* note 4, at 135-37. Many boat people were induced to flee because of Communist resettlement plans to relocate them in "New Economic Zones" in remote parts of the country; cold weather, droughts, floods and crop diseases aggravated living conditions. In March 1978, 30,000 private businesses were closed by the government; six weeks later, a new currency was introduced. These actions prompted many businessmen to flee. *See* Elmer, *Nations Should Welcome the 'Boat People,'* Providence Evening Bull., Jan. 17, 1979, *reprinted in 1979 Senate Judiciary Comm. Hearings, supra* note 1, at 158.

6. U.S. NEWS & WORLD REP., Aug. 15, 1977, at 21; *Damn the Refugees and Full Speed Ahead,* COMMONWEAL, Sept. 1, 1978, at 549. One problem posed by the boat people occurred when a ship would "rescue" a boatload of refugees; often no country would accept them, and the captain was "stuck." *See* Note, *The Dilemma of the Sea Refugee: Rescue Without Refuge,* 18 HARV. INT'L L.J. 577 (1977) (considering aspects of the seaman's duty to rescue). In 1978, President Carter ordered the United States Navy to assist the boat people in spite of allegations that knowledge of such assistance would induce more refugees to abandon their homelands and take to the high seas. *See Refugee Crisis in Southeast Asia: Hearing Before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 7, 11 (July 26, 1979). The Navy has continued to assist Indochinese refugees. *Navy Ships Save 246 Vietnam Boat People,* S.F. Chronicle, Apr. 22, 1981, at 16, col. 1.

7. Payments of $2,000 or more in gold or dollars were often required. Many of these refugees were ethnic Chinese, often merchants in Vietnamese society, who came under increasing pressure from the new regime. WORLD REFUGEE CRISIS, *supra* note 4, at 137.

8. A major concern of United States refugee policy has been to secure cooperation of other countries in settling refugees. Other countries which have accepted Indochinese refugees include Australia, France, Norway, Belgium, New Zealand, Canada and Austria. Some countries have accepted a higher proportion relative to their populations—e.g., Australia has 104 refugees per 100,000; the United States has 25 per 100,000. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 38.

In response to the obligation owed to its former allies, and for humanitarian reasons, the United States has admitted more than 455,000 Southeast Asian refugees since 1975.[9] Refugees are admitted to this country and are relocated in new homes as a result of the coordinated efforts of no fewer than four departments of the executive branch,[10] and with the participation of a number of voluntary agencies.[11] Once within a given locality, refugees may qualify for state welfare and social service benefits.[12] Although current federal funding provides cash and medical assistance for only three years, after that time refugees may apply for available state welfare benefits where they reside.[13] Additionally, refugees may require special services in language training, education, and job assistance before they are able to become integrated into a state's social and economic structure.[14] State and local governments, faced with ever-increasing costs of providing services, are thus required to respond to the presence of refugees settled within a community under authority of the federal government.

This note will examine several ways in which federal refugee resettlement policy has a detrimental effect on the states: the impact of the use of state funds for refugee programs, the impact on the integral governmental functions of the states, and the problems created by the implementation of federal programs. Specifically, this note will explore federal refugee resettlement procedures in light of their effect on the powers reserved to the states under the Tenth Amendment of the Constitution, and will suggest procedures which may be less harmful to state sovereign interests.

I. A Survey of United States Refugee Policy

A. Historical Background

The United States has consistently advocated an open-door policy toward "the oppressed and persecuted of all nations and re-

9. *Refugees—Who Will Pay?*, S.F. Examiner, Mar. 30, 1981, at B2, col. 1. The estimate of Indochinese refugees resettled in the United States as of June 1, 1979, was 204,228. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 103 n.1. *See also 1979 Senate Judiciary Comm. Hearings, supra* note 1, at 29 (184,334 refugees estimated as of February 1979).

10. These are the Departments of State, Health and Human Services (formerly Health, Education and Welfare), Justice, and Defense. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 33-38. *See also* notes 73 & 83-87 and accompanying text *infra*.

11. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 39-42. *See also* note 74 *infra*.

12. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 59 (statement of Norman V. Lourie, Chairman, National Coalition for Refugee Resettlement).

13. *Id.* at 31.

14. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 43.

ligions whom we shall wellcome [sic] to a participation of all our rights and privileges."[15] Despite sporadic instances of overt racial hostility directed toward various immigrant groups,[16] no significant restrictions were placed on immigration until 1875 when the first act regulating immigration was passed.[17] By the end of World War I, the immigration foci had shifted from Northern and Western Europe to Southern and Eastern Europe;[18] in response to fears of "racial dilution" and calls for job preservation, the first "country of origin" quota laws were passed.[19] These quotas remained in effect until Congress passed the Immigration Amendments of 1965.[20]

---

15. Address by George Washington, New York, Dec. 2, 1783, *reprinted in* THE WRITINGS OF GEORGE WASHINGTON 254 (J. Fitzpatrick ed. 1938). A summary of United States refugee policy may be found in SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, 88-89 (1981) [hereinafter cited as SELECT COMMISSION REPORT].

16. In 1837, a recession in Europe brought large numbers of Irish and German immigrants to this country. The Native American Party ("Know-Nothings") appealed to Americans to "unite against foreign labor and not be ousted from their employment 'by cheapworking foreigners.'" *See generally* E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 1-48 (3d ed. 1975); J. WASSERMAN, IMMIGRATION LAW AND PRACTICE (1979).

17. Act of Mar. 3, 1875, 18 Stat. 477. *See* E. HARPER, *supra* note 16, at 5. Through the late 1800's, various "Chinese Exclusion Acts" were passed. The Chinese Exclusion Act of May 5, 1892, 27 Stat. 25 (1892), prohibiting Chinese from entering the United States and providing for deportation upon failure to obtain a certificate of residence was upheld in Fong Yue Ting v. United States, 149 U.S. 698 (1893). Other intense anti-alien sentiment was directed at Italians (late 1800's) and at Slavs (1930's). *See* E. HARPER, *supra* note 16, at 1-48.

18. *See generally* P. WANG, LEGISLATING NORMALCY: THE IMMIGRATION ACT OF 1924 (1975). Americans were motivated by a myriad of fears: a fear of racial dilution; a feeling that recent immigrants had actually hindered the country's war effort; an accusation of profit-seeking motives on the part of recent immigrants (many of whom had left the country after the first world war, taking with them considerable sums of money); and a fear of Communist and Bolshevist ideologies. *Id.* at 1-14.

19. Act of May 19, 1921, ch. 8, 42 Stat. 5; the Act was amended by the Immigration Act of 1924, ch. 190, 43 Stat. 153. The effect of these Acts was to limit the number of immigrants of any nationality to 3% of the foreign-born persons of that nationality living in the United States in 1910. This procedure favored Northern and Western European migrants. E. HARPER, *supra* note 16, at 11.

The immigration laws were substantially revised in 1952 by the McCarran Act, Pub. L. No. 92-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1503). These revisions, however, maintained the national-origins quota system. President Truman vetoed the bill for that reason, but his veto was overridden by Congress. *See* SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., REPORT ON U.S. IMMIGRATION LAW AND POLICY: 1952-1979, at 5-6 (Comm. Print 1979) [hereinafter cited as 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY].

20. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. By this time, it was recognized that the national-origins quota system was no longer desirable. The 1965 amendments and the history of the bill are summarized in 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, *supra* note 19, at 51-58; *see also* E. HARPER, *supra* note 16, at 38-42.

From 1875 until the period following World War II, refugees were given no special consideration; if they met the national-origins admission criteria established for other immigrants, they could be admitted. Following World War II, a number of congressional exceptions to the Immigration and Naturalization Act quota system permitted the admission of war refugees.[21] Acts such as the Displaced Persons Act of 1948,[22] the Refugee Relief Act of 1953,[23] and Acts of July 29, 1953,[24] September 3, 1954,[25] and September 2, 1958,[26] were temporary in nature, admitting groups of refugees from specific countries.[27] These refugees were not subject to the numerical quotas of the Immigration and Naturalization Act; Congress' continued admission of groups of refugees emphasized the ineffectiveness of the quota system in responding to changing world conditions.

The post-World War II period saw two major changes in immigration law. In 1952, the McCarran Act,[28] passed over the veto of President Truman,[29] continued the quota system, but made ma-

21. There were approximately 30 million displaced persons in Europe following World War II. The Truman Doctrine of Dec. 22, 1945, called for U.S. consular officials to give visa preference to refugees; voluntary agencies, in turn, agreed to meet all costs of settlement. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 6 (citing H. TRUMAN, THE PAPERS OF HARRY S. TRUMAN). For a discussion of the voluntary agencies, see note 74 and accompanying text *infra*.

22. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 *as amended by* Act of June 16, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96; Immigration and Nationality Act, ch. 477, 66 Stat. 163, 277 (1952).

23. Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, *as amended by* Act of Aug. 31, 1954, ch. 1169, 68 Stat. 1044 (permitting entry of war orphans, German expellees, Italian, Dutch and Greek refugees, and others). The Act also permitted visas for Far Eastern, Chinese and Arab refugees, a departure from previous immigration policy. 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, *supra* note 19, at 17. *See* Smith, *Refugees*, 367 ANNALS 45 (1966).

24. Act of July 29, 1953, ch. 268, 67 Stat. 229 (orphans).

25. Act of Sept. 3, 1954, ch. 1254, 68 Stat. 1145 (sheepherders from oversubscribed quota areas).

26. Act of Sept. 2, 1958, Pub. L. No. 85-892, 72 Stat. 1712 (victims of natural disasters in the Azores; Dutch-Indonesians).

27. *See* notes 22-26 and accompanying text *supra*. *See generally* 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, *supra* note 19, at 17-24. Congress continued such "omnibus" legislation into the 1960's with the enactment of Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650 (various groups), and Act of Oct. 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247 (backlogged preference cases). *Id.* at 44-45.

28. Immigration and Nationality (McCarran) Act, Pub. L. No. 92-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1503).

29. *See* note 19 *supra*. Truman derided the continuation of the quota system: "[T]his quota system keeps out the very people we want to bring in. It is incredible that [we are] enacting into law such a slur on the patriotism, the capacity, and the decency of a large part of our citizenry. . . .

jor revisions in the Immigration and Naturalization Act.[30] In 1965, the national-origins quota system was repealed[31] and replaced by a seven-category preference system emphasizing family reunification and the admission of refugees with desired skills.[32] Refugees, it should be noted, are in the seventh preference category, absent any factors which might place them in a higher category.[33]

In the context of refugee admissions, the most significant feature of the Immigration and Naturalization Act reform was the retention of the Attorney General's parole power.[34] Under sec-

---

. . . .

In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration." H. R. Doc. No. 520, 82nd Cong., 2d Sess. 4-5 (1952).

Truman had appointed a commission to study and evaluate the proposed legislation. Exec. Order No. 10,392, 3 C.F.R. 896 (1949-1953 Compilation) (1952). The presidential commission's report refuted the tenets underlying the McCarran Act, and concluded that "immigration policy should express a spirit of friendliness and generosity to the less fortunate people of the world." R. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-52, at 165 (1957). *See* U.S. PRESIDENT'S COMM'N. ON IMMIGRATION AND NATURALIZATION: WHOM WE SHALL WELCOME (1953).

30. Significant modifications included the elimination of race and sex as bars to immigration and the granting of a preference to skilled aliens. E. HARPER, *supra* note 16, at 21-22; 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, *supra* note 19, at 6-10.

31. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

32. Visas are made available within an overall limitation according to the following preference categories:

First Preference: Unmarried sons and daughters of U.S. citizens—20% of overall limitation.

Second Preference: Spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence—20% of overall limitation plus any numbers not required for first preference.

Third Preference: Professional persons, or those with specialized ability in science and the arts—10% of overall limitation.

Fourth Preference: Married children of U.S. citizens—10% of overall limitation plus any numbers not used by first three preferences.

Fifth Preference: Brothers and sisters of U.S. citizens 21 years of age or older—24% of overall limitation plus any numbers not used by prior preferences.

Sixth Preference: Skilled and unskilled workers in short supply—10% of overall limitation.

Seventh Preference: Refugees—6% of overall limitation.

1979 SENATE REPORT ON U.S. IMMIGRATION LAW AND POLICY, *supra* note 19, at 86. For a summary of the major provisions of the 1965 amendments, see *id.* at 56-58. Complete definitions of the seven preference categories are found in § 203(a) of the Immigration and Naturalization Act, 8 U.S.C. § 1153(a) (1976).

33. The 6% limitation (*see* note 32 *supra*) means that under the overall limitation of 290,000, only 17,400 refugees may be admitted in any one year. *But see* notes 34-39 and accompanying text *infra*.

34. Immigration and Naturalization Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976).

tion 212(d)(5), the Attorney General has discretion to admit refugees under temporary emergency conditions in the public interest.[35] Although it has been argued that the intent of this section was to provide relief in individual and urgent cases,[36] three large groups of refugees have been admitted under the parole power—31,870 Hungarian refugees in the years immediately following the 1956 Hungarian revolution;[37] nearly 420,000 Cuban refugees between 1961 and 1977;[38] and more than 450,000 Vietnamese, Cambodian and Laotian refugees from 1975 through 1980.[39]

The status of persons admitted under the parole power is tenuous and indeterminate.[40] As a result, legislation has been passed

---

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." *Id.*

35. *Id.*

36. HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, 88th Cong., 2d Sess. 108, 133 (1964). "[The parole statute] was intended as a remedy for individual hardship cases, no more, no less." *Id.* at 160 (remarks of Congressman Feighan). The development and use of the parole power is discussed in Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175, 177-82 (1975).

37. 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, *supra* note 19, at 18. An additional 6,130 Hungarian refugees were settled under the Refugee Relief Act of 1953. *See* note 23 *supra.*

38. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 66-67 (based on unpublished data compiled by the Immigration and Naturalization Service). Another 245,000 Cuban refugees came under other categories—as "visitors," later adjusting their status, or as regular immigrants, thus making the total number of Cuban refugees approach 675,000. *Id.*

39. Total parole admittees for the period exceed 554,000, not including 135,000 "special entrants" from Cuba and Haiti admitted in 1980, SELECT COMMISSION REPORT, *supra* note 15, at 93. *See also* note 71 *infra.* Other instances of the use of the parole power to admit groups of refugees are cited in Comment, *Extending the Constitution to Refugee-Parolees*, 15 SAN DIEGO L. REV. 139, 155 (1977); Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175, 180-81 (1975).

40. In Leng May Ma v. Barber, 357 U.S. 185 (1958), the Supreme Court ruled that a parole-admitted alien had not *entered* the country; as such, he was not entitled to significant statutory and constitutional rights which attach to aliens only upon entry. *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (parolees have a right only to that due process accorded to them by Congress); Kaplan v. Tod, 267 U.S. 228 (1925); Wong Hing Fun v. Esperdy, 335 F.2d 656 (2d Cir. 1964) (parolee is "outside" the United States and is not entitled to assert rights under the Constitution). The constitutional status of refugee-parolees is examined in Comment, *Extending the Constitution to Refugee-Parolees*, 15 SAN DIEGO L. REV. 139 (1977) (arguing that the holding in *Leng May Ma* should not

periodically to change the status of parolees to that of persons lawfully admitted.[41] The fact that such legislation has been repeatedly enacted is evidence that parolee status is not "temporary", but should be acknowledged as a necessary and regularly used provision of the immigration law to engender an immediate response to changing world conditions.[42]

B. America's Response to the Indochinese Refugee Problem

Almost immediately after the fall of Saigon, President Ford announced his intention to admit 150,000 refugees from Indochina.[43] Subsequently, Congress enacted the Indochina Migration and Refugee Relief Assistance Act of 1975[44] to hasten the settlement of refugees in this country.[45] Enacted within the framework of the Migration and Refugee Relief Assistance Act of 1962,[46] the 1975 Act gave the executive branch broad powers with regard to the admission of refugees to the states.

First, the Act appropriated 455 million dollars to be spent under the terms of the Migration and Refugee Assistance Act of 1962 for Cambodian and Vietnamese refugees.[47] Of this, a sizable

---

apply to groups of refugees admitted under the parole power). *See also* United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958) ("invitee" parolee should come under the protection of the Constitution, at least for revocation of parole; generally not followed). *Cf.* Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528 (1975) (status of refugees admitted under seventh preference category of the Immigration and Naturalization Act § 203(a)(7), 8 U.S.C. § 1153 (a)(7)). *See* note 32 *supra*.

41. Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (Hungarians); Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (Cubans); Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223 (Indochinese); Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (Indochinese).

42. Legislation to reform U.S. policy has recently been enacted by Congress. *See* notes 63-72 and accompanying text *infra*.

43. Gardner, *Congress Nears Final Action on Vietnam Aid*, 33 CONG. Q. WEEKLY REP. 835, 839 (1975). *See Greetings for Refugees: From Open Arms to Hostility*, U.S. NEWS & WORLD REP., May 5, 1975, at 22-23.

44. Pub. L. No. 94-23, 89 Stat. 87 (1975) (codified at 22 U.S.C. § 2601 (1979)).

45. The legislative history of the Indochina Migration and Refugee Assistance Act of 1975 may be found in H.R. REP. Nos. 197 & 230 and S. REP. No. 119, 94th Cong., 1st Sess. (1975).

46. Migration and Refugee Relief Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121. Enacted in response to the immigration of the large number of Cuban refugees, this Act was the first direct appropriation for refugee resettlement. Prior to this Act, refugee funding was available from the Mutual Security Contingency Fund, at the direction of the President. The 1962 Act separated refugee assistance from foreign aid legislation and provided a framework for federal assistance programs for refugees throughout the 1960's and 1970's.

47. Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, § 2,

portion was made available to state and local agencies as reimbursement for the costs of family assistance and medical benefits provided under the Aid to Families with Dependent Children (AFDC)[48] and Medicaid provisions[49] of the Social Security Act. In an accompanying bill, Congress appropriated 305 million dollars to the Department of State and 100 million dollars to the Department of Health, Education and Welfare (HEW) for the resettlement effort.[50] Second, the 1975 Act called for ongoing consultation between the President and various congressional committees, with periodic reports to Congress regarding the resettlement effort.[51]

During the initial phases of operation, refugee resettlement was coordinated by an inter-agency task force, with representatives from various executive departments; this task force controlled evacuation, reception and resettlement activities.[52] Later, as many refugees were admitted to the United States, the focus shifted: domestic responsibilities were transferred to HEW, while the State Department retained control of contracts with voluntary agencies and foreign operations.[53] In 1979, President Carter created the office of U.S. Coordinator for Refugee Affairs to provide policy oversight and coordination of both domestic and international matters.[54]

Since the passage of the 1975 Indochina Migration and Refugee Assistance Act, Congress has enacted additional legislation to facilitate the resettlement of refugees. Amendments in 1976[55] broadened the Act to include refugees from Laos; 1977 amendments adjusted the status of refugees previously admitted under the parole power to "lawfully admitted,"[56] once again disregarding the immigration and naturalization quotas.[57]

More significantly, the 1977 amendments instituted a proce-

89 Stat. 87.

48. 42 U.S.C. §§ 601-610 (1976).

49. 42 U.S.C. §§ 1396-97(f) (1976).

50. Act of May 23, 1975, Pub. L. No. 94-24, 89 Stat. 89.

51. Indochina Migration and Refugee Relief Assistance Act of 1975, Pub. L. No. 94-23, § 4, 89 Stat. 87.

52. *See* Exec. Order No. 11,860, 40 Fed. Reg. 22,121 (1975).

53. *See* 73 DEP'T STATE BULL. 133 (1976) (Task Force Report); 73 DEP'T STATE BULL. 208 (1976) (responsibility for refugee resettlement transferred to HEW); 72 DEP'T STATE BULL. 741 (1975).

54. *See generally* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 38-39, 126-27. Dick Clark was first appointed to that position.

55. Act of June 21, 1976, Pub. L. No. 94-313, 90 Stat. 691.

56. *See* note 40 *supra.*

57. Indochina Migration and Refugee Assistance Act of 1977, Pub. L. No. 95-145, 91 Stat. 1223 (Title I).

dure to phase down federal assistance to the states over a four-year period.[58] The asserted purpose of this phasedown was to extend federal assistance in an orderly manner so as to avoid undue impact on the states should the 1975 Act and its accompanying funding terminate.[59] It soon became apparent, however, that such cutbacks would cause severe hardships in many states, and in 1978 Congress suspended the four-year phase-down and temporarily returned to a 100% reimbursement level.[60] Congress, at the time, was made fully aware of the problem:

> [M]ost of these refugees have settled in a few geographic areas . . . . [The] national policy, however, creates grave fiscal problems in those states and localities where refugees have settled. . . .
>
> The basic premise behind the Indochinese Refugee Assistance Program [is] that the federal government, which determines immigration policies, should finance state and local programs. . . .
>
> Now, this federal assistance to lower levels of government is being phased out, on the assumption that the refugees are becoming setttled and are in less need of special programs. Yet the federal government is continuing to let new refugees in. . . . [The] conditions necessitating 100% federal financing . . . still exist.[61]

Congress' willingness to provide stop-gap relief in 1978 was coupled with a pledge to re-evaluate and attempt to reformulate federal immigration and refugee policy.[62] A sixteen-member Select Commission on Immigration and Refugee Policy was formed in October 1978[63] to recommend comprehensive legislation concerning treatment of illegal immigrants, to formulate immigration goals in the national interest, and to rewrite the Immigration and Naturalization Act to "make its administration more efficient, equitable and humane."[64]

In the meantime, however, legislation was introduced in the

---

58. *Id.* (Title II).

59. *See* S. REP. No. 95-471, 95th Cong., 1st Sess. 1 (1977).

60. Act of Oct. 30, 1978, Pub. L. No. 95-549, 92 Stat. 2066 (Title II).

61. 124 CONG. REC. H12,787 (daily ed. Oct. 13, 1978, pt. II) (remarks of Rep. Anderson).

62. *See id.* at H12,785-87.

63. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907; *see generally* 1979 SENATE REPORT ON IMMIGRATION LAW AND POLICY, supra note 19 at 1-2, 79-83; Fuchs, *The Select Commission on Immigration and Refugee Policy: Development of a Fundamental Legislative Policy*, 17 WILLAMETTE L. REV. 141 (1980) (Mr. Fuchs was the Executive Director of the commission).

64. Fuchs, *supra* note 63, at 144.

Senate[65] and in the House[66] to deal more directly with the refugee problem.[67] Conflicting provisions were resolved in committee and resulted in the passage of the Refugee Act of 1980.[68] Although the Act attempts to address state and local concerns more directly, to reflect cooperation with voluntary agencies,[69] and to delineate functions of various executive departments,[70] its lack of built-in controls to adequately respond to state concerns, particularly in emergency situations, remains a problem. Further, the problem of handling sudden influxes of large numbers of refugees has apparently not yet been resolved.[71] Although the report of the Select Commission, released in March 1981, recommended an increase in the total number of refugees to be admitted on a year-by-year basis, the members of the Commission still left unanswered questions concerning the problems caused by parole admissions.[72] Thus, the problems of parole admittees and the burdens thereby imposed

65. S. 643, 96th Cong., 1st Sess. (1979).

66. H.R. 2816, 96th Cong., 1st Sess. (1979).

67. *See* Silverman, *Indochina Legacy: The Refugee Act of 1980,* PUBLIUS, Winter 1980, at 27.

68. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Act accomplishes four basic objectives: (1) introduces a more universal and humanitarian definition of "refugee" in accordance with international standards; (2) raises the annual limitation on refugees from 17,400 to 50,000; (3) permits admission of additional refugees by the President in response to conditions of "grave humanitarian concerns," but only after consultation with Congress; and (4) provides federal support for cash, medical assistance and social services for a period of eighteen months following entry, and special services for another eighteen months. The House version, which more closely followed the wishes of the states, would have provided four years of federal funding. The provisions of the House and Senate versions are compared in Silverman, *supra* note 67, at 34-39.

69. Silverman, *supra* note 67, at 39.

70. *Id.* at 41.

71. Some shortcomings of the Act are discussed in Klement, *Carter Helps Refugee Law Flunk 1st Test,* NAT'L L.J., July 7, 1980, at 3, col. 1. In April and May 1980, Castro permitted more than 130,000 Cuban refugees to emigrate to the United States. Rather than operating within the provisions of the new Act, however, which requires consultation with Congress, President Carter created a special immigration category of "entrants," thus conferring indefinite parole status upon those in the "Cuban flotilla." In addition to the failure to adhere to the consultation provisions of the Act, Klement cites other flaws: first, the Act offers no clear guide to handling refugees who come directly to the United States rather than flee first to another country prior to entry. Second, defining refugees as those who have a "well-founded fear of persecution" fails to address the situation presented by "economic refugees" of Latin American countries. Finally, the new "entrants" are not "refugees" as defined in the Act. Thus, no federal refugee funding benefits flow under the provisions of the Act, and the costs of admitting these refugees are borne by state and local governments.

72. SELECT COMMISSION REPORT, *supra* note 15, at 158-60. Rather than impose restrictions on the number of refugees admitted, the Commission preferred the provisions of the 1980 Act, permitting the number of refugees to be admitted to be set in response to changing world conditions. *Id.*

upon the states remain.

C. Current Refugee Resettlement Procedures

The admission of refugees under the parole power and their eventual resettlement in the United States involves the coordination of four executive departments[73] and a number of voluntary agencies (VOLAGs).[74] The procedure currently followed is an out-

73. *See generally* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 33-39. The State Department has responsibility for the housing and transportation of the refugees while overseas, and for the formulation of national policy. Much of its work is in cooperation with international organizations such as the United Nations High Commissioner for Refugees (UNHCR), the Red Cross, and the Intercontinental Committee for European Migration (ICEM). *See* notes 76-81 and accompanying text *infra*. From 1975 to 1979, State Department appropriations for refugees totaled $513.1 million. U.S. COMPTROLLER GENERAL, RESPONSE TO THE INDOCHINESE EXODUS—A HUMANITARIAN DILEMMA 100 (1979).

The Justice Department assists the State Department in the selection process, and the Attorney General has the parole power to admit refugees. *See* notes 34-42 and accompanying text *supra*. The Immigration and Naturalization Service screens refugees both overseas and at ports of entry, and processes requests for changes of immigrant status.

The Department of Health, Education and Welfare (HEW) funds welfare, health and educational benefits to refugees. This takes the form of reimbursement to states for AFDC and Medicaid costs, although there are some directly funded programs. *See* notes 83-87 and accompanying text *infra*. *See generally* DEPT. OF H.E.W., ANNUAL REPORT OF H.E.W. ON THE INDOCHINESE REFUGEE ASSISTANCE PROGRAM (Dec. 31, 1978), *reprinted in 1979 Senate Judiciary Comm. Hearings, supra* note 1, at 234-396. From 1975 to 1979, HEW appropriations for refugee assistance totaled $505.2 million.

The Department of Defense assisted in the initial stages of the Indochinese Refugee program; generally, it has the resources to move large groups of refugees and house them until civilian agencies can take over. From April to December 1975, the Department of Defense was responsible for transporting 130,000 Indochinese refugees to temporary resettlement camps in the United States and Guam; later, they were settled throughout the country. The division of HEW into the Department of Health and Human Services and the Department of Education has realigned the provision of services to refugees. A recent summary may be found in SELECT COMMISSION REPORT, *supra* note 15, at 426-27 (the role of the federal government in immigration and refugee policy).

74. Voluntary agencies (VOLAGs) have been an integral part of refugee resettlement since World War II. Through contacts with people in local communities, the VOLAGs are able to raise funds and to generate support for refugee resettlement efforts. No VOLAG involved in Indochinese refugee resettlement is primarily Asian. Many are religious organizations (e.g., Church World Service, U.S. Catholic Conference). One state (Iowa) is a VOLAG; other states have been VOLAGs in the past, but are no longer active in that role. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 119. Other VOLAGs have been traditionally oriented toward particular ethnic groups (e.g., American Fund for Czechoslovak Refugees), but are now active in settling Indochinese refugees. "It is a continuing challenge to the resettlement agencies to adapt to the changing complexion of refugee movements in a manner which promotes cross-cultural appreciation rather than antipathy or paternalism." *Id.* at 42.

Under contracts with the State Department, VOLAGs currently receive from $300 to $500 per refugee; they are expected to match these grants with funds raised from other

growth of the one developed after the Second World War, which has assisted the settlement of more than two million refugees in the United States.[75]

1. *Pre-entry*

Initial processing procedures require the coordinated efforts of a number of international, governmental and voluntary agencies. All refugees are interviewed under the auspices of the United Nations High Commissioner on Refugees,[76] which ascertains a refugee's desired country of settlement. The primary determination of a refugee's admissibility is made by the United States Immigration and Naturalization Service (INS) in the country of origin or, in the case of Indochinese refugees, in one of the refugee camps in Southeast Asia. Refugees are assigned to categories of eligibility and then are approved for entry either under the regular immigration quotas or under the parole power of the Attorney General.[77]

Data are then prepared on the refugees by the Joint Voluntary Agency Representatives (JVAR) and are sent to the American Council of Voluntary Agencies in New York which distributes the cases among the various VOLAGs.[78] Generally, VOLAGs accept relatives of refugees previously settled by that agency, and other refugees are selected on the basis of offers of sponsorship.

A basic premise of United States refugee policy is that refugees are settled only when a sponsoring group or family can be found to assume responsibility for the refugee's integration into society. Once a VOLAG receives an assurance of sponsorship (by an individual or group), the refugees are transported to the United

---

sources. *Id.* at 119. The recognized advantages of using VOLAGs in resettlement include the VOLAGs' reliance on volunteers (resulting in decreased costs), their involvement of local groups in the resettlement process, and their non-political nature. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 46 (statement of American Council of Voluntary Agencies for Foreign Service, Inc.).

75. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 193.

76. Established in 1951, the office of the United Nations High Commissioner for Refugees (UNHCR) is charged with providing legal protection to refugees in general and with establishing a permanent solution to each refugee situation. The UNHCR coordinates refugee resettlement in various countries around the world. *See generally* WORLD REFUGEE CRISIS, *supra* note 4, at 269-84. Present estimates of the world's refugee population range from 8.1 to 10.8 million. *Id.* at 13. The office of the UNHCR is funded in part by the United Nations general budget and in part by voluntary contributions from member nations. United States funding is included under State Department appropriations. *See* note 73 *supra.*

77. *See* notes 32-36 and accompanying text *supra.*

78. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 46-47 (report of American Council of Voluntary Agencies for Foreign Service, Inc.).

States by the Intergovernmental Committee for European Migration (ICEM).[79] Funds for transporation are advanced by the VOLAGs and/or ICEM, but the refugees sign a promise to repay these costs.[80] Most of ICEM's funding, however, comes from contributions of member nations to the ICEM budget.[81]

2. Post-entry

Once within the United States, refugees are placed within a community by the VOLAGs who, with the sponsor, arrange for housing, schooling, employment, language training, and other needs. VOLAGs and sponsors, although not under a legal obligation, recognize their moral obligation to assist refugees and provide needed services.[82]

Of course, it is hoped that refugees eventually will be assimilated into their new communities and will become self-sufficient. Recognizing that this process will take time, the federal government makes aid available to refugees through the Department of Health and Human Services (HHS).[83] This aid is primarily given in the form of reimbursement to the states of 100% of the nonfederal costs of cash assistance and Medicaid benefits.[84] Additional funds are available for support services through grants to state and private agencies for special refugee services such as English training, employment counseling and training, and mental health services.[85] Funds are also made available to schools where

79. *Id.* According to its constitution, ICEM is "concerned with the migration of refugees for whom arrangements may be made between ICEM and the governments of the countries concerned." Its chief emphases are family reunification, refugee migration, and language training. WORLD REFUGEE CRISIS, *supra* note 4, at 296-300.

80. "[T]he refugee thereby retains his dignity, self-confidence and the idea that he carried some of the burden of his family's resettlement." *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 47. Although repayment may take years, the repayment rate is generally excellent. *Id.*

81. The United States' contribution to ICEM for 1978 was $11,434,000; total ICEM expenditures for Indochinese refugees were projected at $14.9 and $15.2 million for 1979 and 1980, respectively. WORLD REFUGEE CRISIS, *supra* note 4, at 299-300.

82. *See* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 119-20.

83. *Id.* at 118. This aid is approximately $2,950 per capita for HHS-sponsored programs.

84. Section 2(a)(2) of the Indochina Migration and Refugee Assistance Act of 1975 provides: "Funds appropriated under this Act shall be made available to State or local public agencies to reimburse them for the non-Federal share of costs under Titles IV and XIX of the Social Security Act. [42 U.S.C. §§ 601-44, §§ 1396-97(f)] for the provision of cash or medical assistance to aliens who have fled from Cambodia, Vietnam or Laos." 22 U.S.C. § 2601 (1976).

85. *See* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 113-16. HEW Special Project Grants and Purchase of Service Agreements are listed in DEPT. OF H.E.W., ANNUAL

there is a considerable refugee impact,[86] and programs provide funds for the settlement of "unaccompanied minors" (orphans).[87]

D. Effect of Federal Refugee Resettlement Policy

The legislative history of the 1975 Act evidences a dual awareness: first, the contribution of refugees to the development of the United States;[88] and second, the potentially detrimental impact of settling refugees in economically hard-pressed areas.[89] Thus, a stated goal of the Act was to disperse refugees throughout the country.[90]

There is evidence that Congress regarded the refugees as a federal responsibility. "Until the impact of the arrival of the Indochina refugees has been absorbed, the costs of assisting them in entering productive lives should be borne largely by the Federal government."[91] Thus federal funding was felt to be the "only rea-

---

REPORT OF H.E.W. ON THE INDOCHINESE REFUGEE ASSISTANCE PROGRAM 83-130 (Dec. 31, 1978), *reprinted in 1979 Senate Judiciary Comm. Hearings, supra* note 1, at 314-62.

86. *See* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 114-15. Identifiable Office of Education expenditures for refugees have virtually ceased, however. *Id.* at 125.

87. *Id.* at 116-18.

88. The Senate Report proclaimed, "One of the great strengths of this country is the diversity of its people. It is a nation of refugees. . . . Help to [Indochinese refugees] is in the finest tradition of America. There is no better way for Americans to reaffirm what this country stands for . . . ." S. REP. No. 94-119, 94th Cong., 1st Sess. 2-3 (1975).

89. *Id.* at 4; H.R. REP. No. 94-197, 94th Cong., 1st Sess. 4 (1975). Implicit in the legislative history is the assumption that the executive branch (specifically the Department of Health, Education and Welfare) would "develop procedures to insure that local communities will not be adversey [sic] affected by the resettlement of refugees." *Id.* at 10.

90. The intent was to avoid a repeat of the Cuban refugee influx, which resulted in approximately 750,000 refugees settling in Dade County, Florida, in and around the City of Miami from 1969 to 1977. *See* TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 66-69. The tremendous strain placed by Cuban refugees on local welfare systems was the impetus for increased federal funding; from 1969 to 1979, and including 1980 budget estimates, federal expenditures for Cuban refugee programs approached $1.4 billion, or about $1,861 per refugee. *See id.* at 70-80. Although in 1978 Congress finally approved a phase-down of the assistance program over the next six years, the continued ability of Dade County to circumvent cutbacks may be based in part on "fortuitous committee assignments of its legislators in Washington"—i.e., on the Senate and House Appropriations Committees. *Id.* at 84. The recent additional influx of more than 130,000 Cuban refugees in early 1980 has intensified the problem. *See generally Open Heart, Open Arms,* TIME, May 19, 1980, at 14-18; *Impatient for Freedom,* TIME, June 16, 1980, at 29; *The Welcome Wears Thin,* TIME, Sept. 1, 1980, at 8-10.

91. 123 CONG. REC. 33,067 (1977) (remarks of Sen. Cranston). The Select Commission on Immigration and Refugee Policy agreed: "If the United States intentionally admits a group of refugees, it should, in turn, help these people overcome any liabilities that are linked to their refugee status so that they can quickly become productive, participating members of society." SELECT COMMISSION REPORT, *supra* note 15, at 177.

sonable means of relief for State and local governments with more than their share of refugees."[92]

In spite of Congress' declared intent to settle refugees throughout the country and avoid burdening any one locale, the means adopted have not been adequately monitored. As a result, several states have received a substantially disproportionate share of the Indochinese refugee population,[93] due to initial settlement efforts and subsequent secondary migration.[94] The erratic nature of admissions and settlements[95] often has placed an increased burden on state administrative procedures, and the states have not been silent. Oregon, for instance, noting that it had received three times its proportionate share of refugees measured against its non-

92. 123 CONG. REC. 34,088 (1977) (remarks of Rep. McFall).

93. In 1980, the states with the largest Indochinese refugee populations were California (145,486), Texas (38,516), and Washington (19,774). SELECT COMMISSION REPORT, *supra* note 15, at 184. Louisiana, Pennsylvania and Virginia also received disproportionate shares. *See* DEPT. OF HEW INDOCHINA REFUGEE PROGRAM, REPORT TO THE CONGRESS (1978) (Table 2); the data are summarized in TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 179-87.

94. Secondary migration occurs when refugees move subsequent to resettlement; it is estimated that at least 20% of the refugees engage in secondary migration. Interview with Arnold Munoz, Deputy Director, Department of Social Services, State of California (November, 1979). An estimate of secondary migration from 1978 to 1979 is found in SELECT COMMISSION REPORT, *supra* note 15, at 187. Primary targets of secondary migration are existing refugee communities in Texas, Louisiana and Southern California. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 179-87. "Given the size of this secondary migration . . . it appears that a general dispersal policy may have been ill-advised . . . consideration should have been given to the development of clustered resettlement opportunities." *Id.* at 124. Such secondary migration makes estimating the number of refugees in any state nearly impossible. In 1979, for instance, the INS Alien Report showed 70,960 refugees in California, but INS estimates do not include secondary migrants; Department of Health, Education and Welfare officials, however, "unofficially estimated" that 110,000 refugees were within California. CALIFORNIA ASSEMBLY COMM. ON HUMAN RESOURCES, FINDINGS, (Sept. 1979) at 1. Secondary migration may be more prevalent in states with higher welfare benefit levels; secondary migrants are often less employable and need additional services. "The characteristics of . . . secondary migrants . . . present special problems for present and future resettlement efforts. Region IX [western U.S.] is getting the 'hard core' unemployed from other states—those who have found it particularly difficult to acquire the minimal language and job skill proficiencies." DEPT. OF H.E.W., REPORT TO THE CONGRESS, INDOCHINESE REFUGEE ASSISTANCE PROGRAM 74 (Dec. 31, 1978), *reprinted in 1979 Senate Judiciary Comm. Hearings, supra* note 1, at 234, 306. *See also Huge Rise in Refugees on Welfare Here,* S.F. Chronicle, Feb. 26, 1980, at 1, col. 6.

95. Refugees have been paroled into the United States in varying numbers—133,000 in the spring of 1975, 11,000 in 1976, 15,000 in 1977, and 7,000 during the first half of 1978. There have been subsequent parole admissions of 25,000 from June 1978 to May 1979, and the parole of an additional 21,875 was announced in December 1978. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 12 (statement of Dick Clark). Additional data may be found in SELECT COMMISSION REPORT, *supra* note 15, at 93. Even after admission to the United States, however, the early refugees were held at resettlement centers until sponsors could be found.

refugee population, complained, "the State of Oregon was unwittingly put in the position of having to respond after the fact to each new group of refugees to be admitted. As a result, staff and program accommodations were rushed, compromising both their responsiveness and their effectiveness."[96]

In addition to problems occasioned by disproportionate dispersal of refugees, current programs raise additional problems for the states. First, even though voluntary agencies obtain sponsors for refugees and provide other services, such sponsorship imposes no legal responsibility. In the event of withdrawal or cessation of support by the sponsor, or relocation by the refugee family, state and local welfare benefit systems must assume the burden of their support.[97]

Second, although INS requires the annual registration of refugees, it is apparent that a large number of refugees are not counted. Estimates of California's refugee population in 1979, for example, ranged from 70,960 (INS) to 110,000 (HEW unofficial estimate).[98] Thus, it is difficult to measure the need for cash assistance and for other refugee programs. Although state agencies usually have information on the number of refugees receiving cash assistance, without an accurate determination of the total number of refugees it is impossible to evaluate needs in terms of percentage of total population.[99]

A third factor which has an undetermined impact on the states is that HHS reimbursement is based on the benefits provided by a particular state's welfare programs. States have discretion to set requirements for welfare benefits in these programs; as

96. *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 165 (statement of Leo T. Hegstrom, Director, Oregon State Department of Human Resources).

97. *Id.* There are indications that because of the high level of assistance, many refugees are opting for continuing financial aid rather than entering the work force. *Id.* at 130. *See also* SELECT COMMISSION REPORT, *supra* note 15, at 181.

98. CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, FINDINGS (Sept. 1979) at 1. By 1981, nearly 40% of the nation's 455,000 Indochinese Refugees were settled in California. *Refugees—Who Will Pay?*, S.F. Examiner, Mar. 30, 1981, at B2, col. 1.

99. Although the *actual number* of refugees receiving assistance may be known, an underestimate of the total refugees in a state results in a distortion of the percentage needing assistance and lessens the state's ability to meet the needs of its refugee population as well as those of its other residents. "[T]here is no precise way to measure the movements of refugees within the United States. Particularly for states receiving significant refugee inflows from interstate migrations, such as California, Texas, Louisiana, or Washington, the population figures may be underestimated and the percentage receiving cash assistance overestimated." CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, FINDINGS (Sept. 1979) at 2, *quoting* U.S. COMPTROLLER GENERAL, RESPONSE TO THE INDOCHINESE EXODUS—A HUMANITARIAN DILEMMA (1979).

a result, the cash and medical benefits to which refugees are entitled may vary.[100] Whether refugees move from one state to another in order to take advantage of increased assistance benefits has not been determined. There are indications, however, that refugees seek shelter in more generous jurisdictions.[101] As a result, California and other states have requested a uniform federally administered cash and medical assistance program to relieve the increasing burden on the states.[102]

A final factor affecting states' abilities to meet increasing refugee demands has been the delay inherent in the federal funding and appropriations process along with a lack of predictability as to which funds may be available to implement necessary programs.[103] Because of uncertainties in funding, many states have been unable to set up programs in language and vocational training, since these often involve contracts with private agencies. Although these are the very programs needed to make refugees self-sufficient, less than 20% of the available funds are invested in such human resource development.[104]

In hearings on the Indochinese Refugee Program, the California Assembly Committee on Human Resources commented on these problems: "There can be no program development and planning with uncertainties in federal authorization or appropriation for the program, or uncertainties in the number of refugees needing cash assistance and social services."[105] The indecision and in-

100. In 1979, California's AFDC monthly grant to a family of four was $487; in Illinois, the state program provided $267. DEPT. OF H.E.W., CHARACTERISTICS OF STATE PLANS FOR AFDC (4/78), data compiled by Calif. Assembly Comm. on Human Resources (Sept. 14, 1979).

101. *See Huge Rise in Refugees on Welfare Here*, S.F. Chronicle, Feb. 26, 1980, at 1, col. 6, noting that in San Francisco, 17% of the refugees on welfare had lived in other states, and 45% of those were not previously receiving aid.

102. CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, RECOMMENDATIONS AND FINDINGS ON THE INDOCHINESE REFUGEE ASSISTANCE PROGRAM 4 (1979) (R. Alatore, Chmn.). The presence of high welfare benefits is only one factor in secondary migration, however. Guam and Hawaii, for example, with generous welfare policies, have not experienced significant secondary migration, while Texas and Louisiana, with "frigid welfare policies," have had a significant amount. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 130 n.34.

103. For instance, Congress has authorized funds for education of Indochinese children but has not appropriated them in recent years; there was a five-month interruption in HEW-IRAP funding in the winter of 1978; when plans for a phase-down in funding, *see* notes 58-61 and accompanying text *supra*, were dropped, funding was authorized only through September, 1979; many voluntary agencies did not receive placement grants from State Department funds for refugees placed in the spring and summer of 1979. TRANSCENTURY FOUNDATION STUDY, *supra* note 3, at 125.

104. *Id.* at 43-45, 124-25.

105. CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, RECOMMENDATIONS AND FINDINGS

definiteness of federal funding for state refugee programs has seriously impaired states' abilities to meet the demands of an indeterminate refugee population and, to a lesser extent, their nonrefugee population, for necessary social services.

Although Congress expressly declared an intent to avoid an adverse impact on the states in settling the refugees,[106] it has been unsuccessful. Its attempt to disperse refugees widely has led to more secondary migration, as refugees move to states (particularly California, Louisiana and Texas) which have a larger Indochinese population, milder, more favorable climate, and perhaps better welfare benefits.[107] By refusing to appropriate funds for needed programs, Congress has left the states unable to help refugees become self-sufficient through English language training and job opportunity programs.[108]

In addition, certain refugee populations by their very nature increase the states' burdens. The most recent refugee parolees are less educated than their predecessors; most do not speak English, and many are illiterate in their native language.[109] Public health facilities are now being taxed by the influx of people with tuberculosis and other tropical diseases.[110] The magnitude of such adverse impacts on the states raises federalism questions—that is, to what extent are the states protected from actions of the federal government which impose enormous financial and social burdens on the states and impede or impair the functioning of necessary state programs?

ON THE INDOCHINESE REFUGEE ASSISTANCE PROGRAM 1 (1979) (R. Alatore, Chmn.). "[D]elays in the federal appropriation bill have made the Indochina Refugee Assistance Program a *nightmare* to administer." *Id.* (emphasis added).

106. *See* notes 89-92 and accompanying text *supra.*

107. *See* notes 93-102 and accompanying text *supra.*

108. *See* notes 103-05 and accompanying text *supra.* The Select Commission Report acknowledged these problems and weaknesses as well as others, noting generally that many communities do not receive the financial assistance necessary to cover the increased burdens placed by refugees on community services, and that dependence on cash assistance programs prevents refugees from becoming self-sufficient within three years. SELECT COMMISSION REPORT, *supra* note 15, at 181-84.

109. CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, RECOMMENDATIONS AND FINDINGS ON THE INDOCHINESE REFUGEE ASSISTANCE PROGRAM 3 (1979). It is estimated that fewer than 10% of the refugees currently entering the United States speak English, thus decreasing their chances of finding employment.

110. *See* CALIF. ASSEMBLY COMM. ON HEALTH, EXCERPTS FROM HEARING ON HEALTH PROBLEMS OF INDOCHINA REFUGEES (Aug. 10, 1979), and COMMITTEE RECOMMENDATIONS. *See also* notes 214-18 and accompanying text *infra.*

II. The Tenth Amendment as a Basis for Enforcing State Rights

The Constitution envisioned a federal system of states, each retaining vestiges of individual sovereignty, but delegating specific powers to the federal government.

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.[111]

"Federalism" is descriptive of a dual system of government, in which power is divided between the states and the national government, based upon the premise that the powers of the federal government are "enumerated"—that is, specifically granted to it by the Constitution—and that those powers not so delegated are reserved to the states.[112] Recently, the Supreme Court observed:

> "Our Federalism" . . . is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[113]

The Tenth Amendment[114] has been called a representation of the understanding the Framers had of the proper balance between federal and state interests in the government[115]—one which left the states free to experiment and thus to provide variety within the federal system.[116] In modern Constitutional jurisprudence, however, the import of the Tenth Amendment has been dismissed with the comment that it "states but a truism that all is retained

---

111. THE FEDERALIST No. 51 (J. Madison).

112. *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

113. Younger v. Harris, 401 U.S. 37, 44 (1971).

114. "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.

115. United States v. Darby, 312 U.S. 100, 124 (1941).

116. The policy of experimentation has long been acknowledged: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

which has not been surrendered."[117] Thus, for more than forty years it has not been a vehicle for protecting state interests.

Commentators have noted a trend in recent Supreme Court decisions showing greater deference to state interests.[118] This correlates, perhaps, with increasing public disenchantment with centralized power and with the resulting desire for more autonomous local governmental systems.[119] Decisions such as *Edelman v. Jordan*,[120] *Younger v. Harris*,[121] *Oregon v. Mitchell*,[122] *Dandridge v. Williams*,[123] and others,[124] reflect the Court's increasing deference to state autonomy, leading to its most recent articulation of Tenth Amendment rights in *National League of Cities v. Usery*.[125] The remainder of this note will consider the implications of this case upon federal refugee resettlement legislation and upon the broader issue of federal-state conflicts inherent in federally funded programs.[126]

---

117. United States v. Darby, 312 U.S. 100, 124 (1941).

118. *See generally* Tribe, *Unravelling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977); Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C. L. REV. 763 (1980).

119. Tribe, *supra* note 118, at 1068-69.

120. 415 U.S. 651 (1974) (Eleventh Amendment bars retroactive liability for damages payable from the state treasury).

121. 401 U.S. 37 (1971) (federal courts are precluded by considerations of equity, comity and federalism from enjoining pending state criminal prosecution except in extraordinary circumstances). *See also* the extension of *Younger* in Samuels v. Mackell, 401 U.S. 66 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Juidice v. Vail, 430 U.S. 327 (1977).

122. 400 U.S. 112 (1970) (18 year-old minimum-age requirement of 1970 voting rights amendment not valid for state and local elections).

123. 397 U.S. 471 (1970) (state may impose limit on maximum monthly grant under AFDC).

124. *See* Tribe, *supra* note 118, at 1068-69, nn.18 & 19 and cases cited therein; Beaird & Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 47 (1976).

125. 426 U.S. 833 (1976).

126. In examining state sovereignty in the federal-state counterbalance, the Court recently has been blurring the lines between the Tenth and Eleventh Amendments. Under the Eleventh Amendment, state sovereignty embraces the entire scope of state activity and determines when suit may be brought against a state in federal court. "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." In re Ayers, 123 U.S. 443, 505 (1887). *See also* Edelman v. Jordan, 415 U.S. 651 (1974). In contrast, a state's Tenth Amendment sovereignty more properly might be considered its "affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority," Fry v. United States, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting), and should be compared to rights of individuals as limitations on Congressional authority. *See,*

A. *National League of Cities v. Usery*

In 1976, the Supreme Court gave new teeth to the Tenth Amendment. In *National League of Cities v. Usery*,[127] the Court struck down Congress' extension of the Fair Labor Standards Act (FLSA)[128] to state and municipal governments, ruling that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause]."[129]

Justice Rehnquist, writing for a four-vote plurality, held that the effect of the amendments was to "substantially restructure traditional ways in which local governments had arranged their affairs,"[130] an impermissible interference with "the integral governmental functions of [state and local governments]."[131] The FLSA amendments would have required the states to apply federal minimum wage and overtime standards to state employees. The Court found significant the increased costs to the states,[132] and the fact that the increase in wages might necessitate curtailment or elimination of state and local programs and services.[133]

The Court affirmed the sovereign rights of the states:

---

e.g., United States v. Jackson, 390 U.S. 570 (1968) (Sixth Amendment right to jury trial); Leary v. United States, 395 U.S. 6 (1969) (Fifth Amendment due process guarantees).

While the Eleventh Amendment generally applies in suits by a citizen against a state, recent cases in which it has been asserted have also referred to "the residuum of sovereignty" preserved by the Tenth Amendment. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 291 (1977); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); National League of Cities v. Usery, 426 U.S. 833 (1976). One author has concluded that due to "historical accident," "the eleventh amendment has served as a pseudonym for a great many tenth amendment cases." Heldt, *The Tenth Amendment Iceberg*, 30 HASTINGS L.J. 1763, 1795-96 (1979). However, *National League of Cities* provides a basis for the Court to develop and expand the rights of states. *See id.* at 1796.

127. 426 U.S. 833 (1976).

128. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, originally did not apply to states and their political subdivisions. In 1974, however, the Act was amended, and the wage, hour and equal pay provisions were made applicable to the states. Pub. L. No. 93-259, 88 Stat. 55 (1974).

129. 426 U.S. at 852 (footnote omitted). The commerce clause is one of the enumerated powers of article I, section 8 of the Constitution, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. 1, § 8, cl. 3.

130. 426 U.S. at 849. Justice Rehnquist was joined by Justices Stewart and Powell and by Chief Justice Burger. Justice Blackmun concurred in a separate opinion. 426 U.S. at 856. *See* notes 152-53 and accompanying text *infra*.

131. 426 U.S. at 851.

132. *Id.* at 846.

133. *Id.* at 847.

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[134]

Citing *Coyle v. Smith,*[135] the Court noted attributes of state sovereignty such as the power to locate the seat of state government and the power to structure its government in a particular way.[136] To the extent that the amendments disrupted "integral governmental functions," they were invalid.[137]

Certain areas of traditional governmental services are specifically within the states' sovereign sphere, the opinion noted. These areas include fire prevention, police protection, sanitation, public health, and parks and recreation.[138] "Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens."[139]

The Court summarily overruled *Maryland v. Wirtz,*[140] which had upheld the extension of the FLSA to state-operated hospitals, public schools and public health care institutions. By so doing, the Court implied that these functions are also within the scope of the states' Tenth Amendment protection.[141] In fact, Rehnquist admitted that the functions listed were "obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments,"[142] thus allowing for future judicial expansion and modification.[143]

Justice Brennan dissented,[144] protesting the Court's decision

---

134. *Id.* at 845.

135. 221 U.S. 559 (1911) (Congress could not condition Oklahoma's admission to the Union upon a promise not to relocate the state capitol).

136. 426 U.S. at 845.

137. *Id.* at 851.

138. *Id.*

139. *Id.*

140. 392 U.S. 183 (1968).

141. *See* Amersbach v. City of Cleveland, 598 F.2d 1033, 1036 (6th Cir. 1979), discussed in text accompanying notes 174-89 *infra.*

142. 426 U.S. at 851, n.16.

143. Since its decision in *National League of Cities,* the Court has done little to clarify its definition. *See* notes 250-61 and accompanying text *infra.*

144. 426 U.S. at 856 (Brennan, J., dissenting). Justice Brennan was joined by Justices White and Marshall; Justice Stevens filed a separate dissenting opinion. 426 U.S. at 880 (Stevens, J., dissenting).

as being without precedent. The decision, he claimed, totally undermined traditional commerce clause jurisprudence, and was "an abstraction without substance, founded neither in the words of the Constitution nor on precedent."[145] He challenged the Court's assertion that the Tenth Amendment is a limitation on congressional exercise of delegated powers[146] and termed the decision "a transparent cover for invalidating a congressional judgment with which they [the majority] disagree"[147] and "an *ipse dixit* reflecting nothing but displeasure with a congressional judgment."[148] Brennan attacked the integral governmental function test as conceptually unworkable[149] and chastized the majority for its failure to make any meaningful distinctions between state-operated railroads (not integral)[150] and state-operated schools, hospitals, and police and fire departments.[151]

Justice Blackmun, although joining the majority opinion, filed a brief concurrence,[152] acknowledging the possibly troublesome implications noted by Justice Brennan, but viewing the majority opinion as "adopt[ing] a balancing approach, [which] does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[153] However, it has been noted that nowhere in the majority opinion was there any reference to a "balancing approach."[154]

B. The Aftermath of *National League of Cities*

The scope of the holding in *National League of Cities* has been limited. It is the only Supreme Court decision invalidating congressional action on Tenth Amendment principles. One writer has hoped it will remain the only one,[155] fearing that further invali-

145. *Id.* at 860.

146. *Id.* at 862, *citing* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

147. 426 U.S. at 867 (footnote omitted).

148. *Id.* at 872.

149. *Id.* at 880.

150. The majority expressly refused to overrule United States v. California, 297 U.S. 175 (1936), which upheld congressional regulation under the commerce clause of a state-operated railroad. 426 U.S. at 854-55 n.18.

151. 426 U.S. at 880 (Brennan, J., dissenting).

152. *Id.* at 856 (Blackmun, J., concurring).

153. *Id.*

154. *See* notes 248-50 and accompanying text *infra.*

155. Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

dation of congressional legislation could lead to a crisis reminiscent of the *Lochner* era where the Court repeatedly invalidated New Deal economic legislation on substantive due process grounds.[156] Although lower federal courts have tended to limit the decision to its facts,[157] refusing to abandon traditional concepts of commerce clause jurisprudence and federal supremacy,[158] state courts have embraced it as an affirmation of their inherent authority and power.[159]

---

156. *See id.* at 176-82. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 397-404 (1978). *See also* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Lochner v. New York, 198 U.S. 45 (1905).

157. *See, e.g.,* North Carolina *ex rel* Morrow v. Califano, 445 F.Supp. 532 (E.D.N.C. 1977), *aff'd* 435 U.S. 962 (1978) (National Health Planning Act requiring state to establish and restructure agencies held not a significant enough infringement on state sovereignty, even though state constitution would have to be amended); New Hampshire Dep't of Employment Security v. Marshall, 616 F.2d 240 (1st Cir. 1980) (Federal Unemployment Tax Act amendments not a prohibited infringment under *National League of Cities*); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978) (equal pay provisions may be extended to states; *National League of Cities* held to apply only to minimum wages and hours); Newark Teachers' Ass'n v. Newark City Bd. of Educ., 444 F. Supp. 1283 (S.D. Ohio 1978) (specific enforcement by court of arbitration promise is not a prohibited interference under *National League of Cities*). *But see* Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978) (*National League of Cities* seen as evidencing greater respect for states as states; power of Congress and federal courts to interfere is limited).

158. The broad scope of Congress' power to regulate commerce has been established since 1824. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Under the commerce power, almost any activity may be regulated even if it is only indirectly related to interstate commerce. Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant denying service to blacks); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (racial discrimination in motel accomodations affects commerce); United States v. Darby, 312 U.S. 100 (1941) (regulation of wages); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

159. *See, e.g.,* State v. Rosenthal, 93 Nev. 36, 559 P.2d 830, *appeal dismissed,* 434 U.S. 803 (1977). "We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment." 93 Nev. at 40, 559 P.2d at 836; Townsend v. Clover Bottom Hospital & School, 560 S.W. 2d 623 (Tenn.), *cert. denied,* 436 U.S. 948 (1978) (*National League of Cities* followed).

State courts have been perhaps even more solicitous of state sovereign interests. Mossman v. Donahey, 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976), decided two months prior to *National League of Cities,* reached a similar result based upon Eleventh Amendment law, although one of the justices acknowledged the existence of Tenth Amendment issues. *Id.* at 18-19, 346 N.E. 2d at 315 (Brown, J., concurring).

Finally, states' rights advocates, in some instances, have deified the Tenth Amendment:

"[T]his amendment is one of the most important and sacred Rights of all, albeit the most neglected and shunned as if it were a plague, by not only the lowest in an invidious bureaucracy but by the highest in a sometime Sleepy Hollow judiciary." *In re* Goalen, 30 Utah 2d 27, 512 P.2d 1028 (1973), *appeal dismissed* 414 U.S. 1148 (1974). "When the Liberty bell rings it is to remind that the individual State, not a federal or administrative agency, or a federal judge is supreme." *Id.* at 31, 512 P.2d at 1030 (opinion by Henriod, J., holding that the state's interest in controlling marriage and its prisons precluded an incarcerated felon's assertion of lack of due process when he was denied permission to marry).

A number of commentators have explored the limitation on federal commerce clause regulation announced in *National League of Cities*.[160] Some have examined the concept of state sovereign immunity in relation to other congressional enactments.[161] The elusive "balancing test" Justice Blackmun discerned in the majority opinion has likewise received attention.[162] Perhaps the broadest interpretation of the decision cites it as supporting an individual's constitutional rights to "affirmative governmental protection in meeting basic human needs of physical survival and security, health and housing, employment and education,"[163] admittedly, "a surprising [result] that leads in directions the Justices do not seem to have intended or anticipated."[164]

Regardless of its reputation as a "maverick" decision, *National League of Cities* is significant as the only recent decision enunciating principles of state sovereignty. In today's political climate, where recent trends indicate a shifting away from centralized federal influence toward local and state control,[165] the possible

160. *See generally* Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?* 1976 SUP. CT. REV. 161; Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation,* 1977 ARIZ. ST. L.J. 35; Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereign Redivivus,* 46 FORDHAM L. REV. 1115 (1978); Note, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B.U. L. REV. 178 (1977); Note, *The Tenth Amendment is a Limitation on Congress' Power over Commerce,* 25 U. KAN. L. REV. 424 (1977); Note, *Federalism and the Commerce Clause:* National League of Cities v. Usery, 62 IOWA L. REV. 1189 (1977); Note, 25 EMORY L. J. 937 (1977); Comment, 30 RUTGERS L. REV. 152 (1976).

161. A number of notes and comments apply the principles of *National League of Cities* to specific federal legislation. *See, e.g.,* Comment, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism,* 89 HARV. L. REV. 1883 (1976) [hereinafter cited as *Municipal Bankruptcy*]; Note, *Toward New Safeguards on Conditional Spending: Implications of* National League of Cities v. Usery, 26 AM. U. L. REV. 726 (1977) (discussing Federal Flood Control) [hereinafter cited as *Safeguards on Conditional Spending*]; Note, *Constitutionality of Federal Regulation of Municipal Securities Issuers: Applying the Test of* National League of Cities v. Usery, 51 N.Y.U. L. REV. 982 (1976); Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665 (1977).

162. *See* Beaird & Ellington, *supra* note 124, at 73; notes 248-61 and accompanying text *infra.*

163. Tribe, *supra* note 118, at 1066 (footnote omitted).

164. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L. J. 1165, 1166 (1977).

165. Gelfand, *supra* note 118, at 764, 847; Tribe, *supra* note 118, at 1068-69. In his inaugural address, President Reagan announced, "It is my intention . . . to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people." PUB. PAPERS, 1 U.S. CODE CONG. & AD. NEWS XII, March 1981. *But cf.* Trippett, *State's Rights and Other Myths,* TIME, Feb. 9, 1981, at 97-98 (discussing the failures of other Presidents in meeting that goal).

extension and adaptation of *National League of Cities* by the courts to other areas is not unforeseeable. Therefore, the balance of this note will explore some of the possible ramifications of *National League of Cities* on the issue of refugee resettlement.

III. *National League of Cities* and Refugee Resettlement

In analyzing federal legislation as a possible infringement on state sovereignty under the Tenth Amendment after *National League of Cities,* the salient issues are these: first, what is an "essential," "traditional" or "integral" governmental function which will give rise to Tenth Amendment immunity?[166] Second, should congressional legislation enacted under constitutional grants of power other than the commerce clause[167] be subjected to the same state sovereignty limitations enunciated in *National League of Cities*?[168]

A. Integral State Function

An examination of congressional legislation affecting the resettlement of Indochinese refugees to see if it interferes with state sovereignty involves an analysis of the affected state functions to determine whether or not they meet a rather nebulous standard. In *National League of Cities,* the Court variously characterized this standard as encompassing "functions essential to [the] separate and independent existence" of local governments,[169] activities of the "States *qua* States,"[170] "integral government functions,"[171] and "traditional governmental functions."[172]

The most comprehensive approach to the definition of integral state function[173] is found in the Sixth Circuit's holding in *Amersbach v. City of Cleveland.*[174] In *Amersbach,* employees of the Cleveland Department of Port Control, which operated the munici-

166. *See* notes 134-39 and accompanying text *supra.*

167. *National League of Cities* was a limitation on Congress' Commerce power. *See* notes 127-33 and accompanying text *supra.*

168. *See* notes 224-47 and accompanying text *infra.*

169. 426 U.S. at 845, *quoting* Coyle v. Smith, 221 U.S. 559, 580 (1911).

170. 426 U.S. at 847.

171. *Id.* at 851.

172. *Id.* at 852.

173. This analysis will use the term "integral state function," realizing that such functions also apply to local governments.

174. 598 F.2d 1033 (6th Cir. 1979).

pal airport, sued the city to recover back wages under the Fair Labor Standards Act (FLSA). The Sixth Circuit affirmed the dismissal by the district court, ruling that the operation of the Cleveland-Hopkins International Airport was in fact an integral operation of city government and that *National League of Cities* exempted the city from the FLSA.[175]

The court interpreted *National League of Cities* as applying to "those situations where it can be shown that (1) a congressional enactment (in the exercise of commerce clause powers) operates to displace, regulate or significantly alter (2) the management, structure or operation of (3) a traditional or integral governmental function."[176]

The court noted the traditional governmental functions affirmed in *National League of Cities,*[177] those implicitly included by its overruling of *Wirtz*;[178] and then examined a number of activities which had been held not to meet the integral state function test.[179] Noting that *National League of Cities* permitted an expansion of integral state functions to meet changing times,[180] the court articulated elements by which such protected governmental functions might be identified:

---

175. *Id.* at 1034, 1038.

176. *Id.* at 1035-36 (footnotes omitted). The court admitted that it viewed the holding in *National League of Cities* as "creating an affirmative defense against compliance with congressional enactments or regulations which intrude into the protected area of state sovereignty." *Id.* at 1035 (citing Marshall v. Owensboro-Daviess County Hospital, 581 F.2d 116, 120 (6th Cir. 1978)).

177. 598 F.2d at 1036 (fire prevention, police protection, sanitation, public health, and parks and recreation).

178. *Id.* (public schools, hospitals, and health care institutions). The court also acknowledged that the licensing of drivers was an integral state function. *See* United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978).

179. 598 F.2d at 1037, citing, *inter alia,* Massachusetts v. United States, 435 U.S. 444 (1978) (operation of a police helicopter); Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (supplying of electrical service); Public Serv. Co. of N.C. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir., 1979) (state-owned oil and gas business). The court in *Amersbach* also considered state activities which had been found not to be immune from the federal taxing power: New York v. United States, 326 U.S. 572 (1946) (bottling and sale of mineral water); Allen v. Regents, 304 U.S. 439 (1938) (public corporation formed to operate state athletics program); Ohio v. Helvering, 292 U.S. 360 (1934) (running a liquor business). *Id. See also* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700-01 (1st Cir. 1977) (telephone company ownership); Woods v. Homes & Structures of Pittsburgh, Kan., Inc., 489 F. Supp. 1270 (D. Kan. 1980) (issuance of government bonds); Standard Oil Co. of Calif. v. Agsalud, 442 F.Supp. 692 (N.D. Cal. 1977) (regulation of private health insurance plans).

180. 598 F.2d at 1037 (citing National League of Cities, 426 U.S. at 880 (Brennan, J., dissenting), for the proposition that the majority opinion failed to articulate a specific test for integral state functions).

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.[181]

Applying its standard, the court concluded that the administration of a municipal airport was, indeed, an integral state function.[182]

Other federal courts have found the existence of an integral state function in a state's right to license drivers,[183] to operate its prisons,[184] to regulate land use[185] and, generally, in its administrative and judicial processes.[186] Although the attitude of most federal courts has been to limit *National League of Cities* to FLSA cases,[187] an alleged infringement on an integral state function occasionally arises when a court is considering an exercise of congressional power under a provision of the Constitution other than the commerce clause.[188] Whether the power involved is that afforded by the commerce clause, or is an exercise of some other congressional power, the objective criteria of *Amersbach* provide a workable methodology for examining state functions and the exercise of federal power.[189]

---

181. *Id.* It should be noted that the court's list of factors is not intended to be exhaustive; rather, the elements listed are representative. *Id.* Nor should the absence of one or more of these elements foreclose the finding of an integral state function. It seems likely that a public hospital, for instance, should not be excluded merely because the government is not the principal provider of health services (i.e., there are a number of private hospitals); indeed, public health is specifically deemed "integral" in National League of Cities, 426 U.S. at 851.

182. Since an airport must be maintained by a municipal or other governmental unit, and since 473 of the 475 commercial airports in the United States were being operated by public governmental agencies, the court reasoned that it "would have difficulty concluding that . . . the maintenance of a municipal airport is not an integral function of government." 598 F.2d at 1038.

183. United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

184. Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979).

185. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980).

186. Oklahoma v. Federal Energy Reg. Comm'n, 494 F. Supp. 636 (W.D. Okla. 1980).

187. *See* note 157 *supra.*

188. *See, e.g.,* Peel v. Florida Dep't of Transportation, 600 F.2d 1070 (5th Cir. 1979); Camacho v. Public Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978) (both courts applying *National League of Cities* to congressional action under the war power).

189. For a recent application of the *Amersbach* test, see Woods v. Homes & Structures of Pittsburgh, Kan., Inc., 489 F. Supp. 1270, 1296-97 (D. Kan. 1980) (issuance of government bonds not a traditional state function).

B. The Integral State Function Test and Refugee Resettlement

Much of the assistance provided to refugees falls into the general categories of welfare benefits and public health services. Distribution of welfare benefits indeed seems to be an integral state function under the criteria set forth in *Amersbach.*[190] The assistance benefits the community as a whole, is undertaken for public service, is provided principally by government, and is in response to a community-wide need. Since a large portion of the funding is derived from the federal government, however, a question arises concerning whether or not such activities are in fact "state" functions.

The provision of welfare benefit funds to the states was originally struck down by the Court as an encroachment upon state sovereignty.[191] The states, it was argued, were "coerced" into adopting programs which met *federal* criteria.[192] During the post-depression New Deal era, however, the Court, perhaps fearful of an unprecedented attack on its authority,[193] adopted a broad construction of Congress' power to spend for the general welfare,[194] and has consistently upheld such programs. An analogy often used is that Congress is engaging in "carrot and stick federalism"[195] because states voluntarily participate in such programs, and are free to withdraw if they so choose.[196]

Increased federal aid to, and increased reliance on federal monies by state and local governments[197] have occasioned criti-

190. 598 F.2d at 1037. *See* text accompanying note 181 *supra.*

191. *See, e.g.,* United States v. Butler, 297 U.S. 1 (1936).

192. *Id.* at 71.

193. In response to Supreme Court decisions blocking President Roosevelt's New Deal legislation, the President proposed the appointment of as many as six new justices to the Supreme Court, one for each justice over seventy years of age then sitting. Stern, *The Commerce Clause and the National Economy, 1933-46,* 59 HARV. L. REV. 645, 677 (1946); Leuchtenberg, *The Origins of Franklin D. Roosevelt's Court Packing Plan,* 1966 SUP. CT. REV. 347.

194. Helvering v. Davis, 301 U.S. 619, 640 (1937).

195. *See, e.g.,* Gelfand, *supra* note 118, at 845-46.

196. In an early case, the Court observed: "[T]he powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject." Massachusetts v. Mellon, 262 U.S. 447, 480 (1923). *See also* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (receipt of highway funds conditioned on compliance with the Hatch Act not coercive), "Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion," *id.* at 143-44; Oklahoma v. Harris, 480 F. Supp. 581 (D.D.C. 1979) (Social Security noncompulsory, therefore not coercive).

197. For example, federal grants-in-aid to state and local governments rose from $7.0

cism.[198] State treasuries, on which local governments must often rely, are limited.[199] Conditional grants which require that local governments match federal funding amounts sometimes necessitate the diversion of funds away from certain services and programs; thus, funding some programs in this manner may directly affect the local decision-making process.

> [I]t is no longer realistic to believe that the state or local government can choose either to accept federal money and comply with the condition or to refuse the money on the ground that the conditions attached represent an intrusion on state sovereignty. . . . To refuse the money would be to deny a substantial number of state citizens desperately needed public assistance.[200]

Where the services *are* provided by local governments, whether from their own or from federal funds, such services may come under the rubric of an integral (or essential) state function.

> "[E]ssentiality" would consist not in any unique content or intrinsic importance ascribed to the services that local governments typically provide, but rather in the simple fact . . . that certain services *are,* with authorization from and possibly by mandate of the state, provided by local governments . . . . Since all these services can be, have been, and are now being privately provided, provision of them by local governments must mean that the electorate has concluded that such services ought to be provided *collectively,* . . . irrespective of any individual's inability or unwillingness to pay for them out of private income.[201]

---

billion in fiscal year 1960 to $80.3 billion in fiscal year 1978, and were budgeted at $85.02 billion for 1979. Whelan & Smith, *Contracts Under Grants-in-Aid—An Aspect of United States Federal-State-Local Relations,* 6 HASTINGS CONST. L.Q. 751, 758 n.21 (1979), citing OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1979, SPECIAL ANALYSIS H, TABLE H-7, at 187 (1978).

198. *See* Furman, *Impact of Federal Subsidies on State Functions,* 43 A.B.A.J. 1101 *passim* (1957), *citing* COMMISSION ON INTER-GOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS (June 1955) (the Kestenbaum Commission). Even at that date, the author considered the problems inherent in federal funding of state and local activities: first, that the nature of such activities whets public appetite for such services, *id.* at 1103-04; second, the problems created by diversion of state resources when federal programs require matching funds, *id.* at 1104; and finally, the problems arising when states begin to perform functions previously handled by private sources, *id.* at 1101. Compare Furman's warning of states becoming "hollow shells" within twenty-five years, *id.* at 1145, with this statement from Maryland v. Wirtz, 392 U.S. 183 (1968): "[The Court has] ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.' " *Id.* at 196 (quoted in National League of Cities, 426 U.S. at 842).

199. *See* Edelman v. Jordan, 415 U.S. 651, 666 n.11 (1974).

200. *Safeguards on Conditional Spending, supra* note 161, at 742 n.117.

201. Michelman, *supra* note 164, at 1177 (footnote omitted). *Compare* NLRB v. Highview, Inc., 590 F.2d 174, 178 (5th Cir. 1979), agreeing that "the care of the aged, the sick and the indigent is a traditional function of government," *with* Justice Rehnquist's

Thus, the source of funding for state and local projects and the conditions attached to continued funding, although directly affecting such services, should not bar assertion by a state of its Tenth Amendment rights.

The Court recently has begun to affirm states' interests in controlling the distribution of welfare benefits. As long as the process does not operate in an invidious or irrational manner,[202] a state may decide how it will distribute its available public welfare resources.[203] "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[204] In other words, it is a function of state governments to decide how funds are to be allocated among those who are to receive them. The Court has further noted that "[t]he State . . . has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level."[205]

Payments made to refugees under the Aid to Families with Dependent Children (AFDC) and Medicaid programs illustrate federal regulation of a state's ability to control disbursement of welfare benefits.[206] Although AFDC is funded in large measure by the federal government on a matching-fund basis,[207] participating states must submit AFDC plans in conformity with the Act and the regulations promulgated thereunder by HHS.[208] States are given broad discretion in determining the standard of need and

---

reference to "traditional governmental functions" in National League of Cities, 426 U.S. at 852.

202. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972).

203. *See* Michelman, *supra* note 164, at 1167-69.

204. Dandridge v. Williams, 397 U.S. 471, 487 (1970). Such recognition of state determination is achieving a growing acceptance with the Court. In Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1978), for example, the Court noted that "in a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school." *Id.* at 101.

205. Geduldig v. Aiello, 417 U.S. 484, 496 (1974).

206. Such programs are often described as "a scheme of cooperative Federalism"; however, it is generally acknowledged that states have some discretion to determine the *level* of benefits. *See* Dandridge v. Williams, 397 U.S. 471, 478-80 (1970); King v. Smith, 392 U.S. 309, 316 (1968). *But see* text accompanying note 200 *supra*.

207. In 1976, federal aid to state and local public welfare programs was $13.9 billion. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPROVING URBAN AMERICA: A CHALLENGE TO FEDERALISM 85 (1976). *See generally* Durchslag, *Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on* Dandridge v. Williams, 26 CASE W. RES. L. REV. 60 (1975).

208. *See* Shea v. Vialpando, 416 U.S. 251, 253 (1974).

level of benefits;[209] however, federal regulations may govern some situations. For instance, federal law prohibits discontinuation of benefits for refugees who are working more than 100 hours per month.[210] In 1979, in Los Angeles County, California, about 600 families (2,500 persons) received aid who would not have otherwise qualified under the state's AFDC program.[211] Based on 1979 California AFDC monthly benefits of $487 for a family of four, this represents an additional expenditure for those recipients of more than $3.5 million per year.[212] To the extent that the state must allocate funds to qualify for matching federal monies, there is clearly a significant impact on the state's own programs, the administration of which may be considered integral state functions.[213]

In addition to the infringment on sovereignty occasioned by conditional grants requiring allocation of local funds and federal regulations which may override state determination and distribution of benefits, refugee resettlement policies raise significant cost considerations in the public health services sector.[214] The Immigration and Naturalization Act specifies certain health conditions for which a refugee may be denied entry.[215] Health screening is performed prior to a refugee's departure for the United States, but questions have been raised about the effectiveness of the screening procedures:

> [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.[216]

---

209. Shea v. Vialpando, 416 U.S. 251, 253 (1974). *See also* New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 410-12 (1973); Burns v. State Dep't of Social & Health Serv., 20 Wash. App. 585, 581 P.2d 1069 (1978) (interaction of state and federal regulations under AFDC program).

210. CALIF. ASSEMBLY COMM. ON HUMAN RESOURCES, FINDINGS (Sept. 14, 1979).

211. *Id.* at 2. This represents 26% of the family cases in Los Angeles.

212. While the amount seems large, it should be noted that although *National League of Cities* cited cost effects, the essential criterion seems to be that state and local governments either would have had to alter programs significantly or to discontinue them together. 426 U.S. at 846-48.

213. As special federal refugee funding is phased out or discontinued, refugees who have not become self-sufficient will become dependent upon local welfare systems at an increased cost to state and local governments. *State May Inherit Big Welfare Bill for Refugees,* S.F. Chronicle & Examiner, Feb. 15, 1981, at B1, col. 1.

214. Public health is unquestionably an "integral governmental function" under *National League of Cities. See* 426 U.S. at 851.

215. Immigration and Naturalization Act § 212(a), 8 U.S.C. § 1182(a) (1975).

216. CALIF. ASSEMBLY COMM. ON HEALTH, INDOCHINESE REFUGEE RESETTLEMENT PRO-

The relatively high rate of positive tuberculin tests of Indochinese refugees has a significant impact:

> Providing [necessary] added preventive and therapeutic services will clearly add to the cost of tuberculosis control in the areas receiving large numbers of refugees. . . . In the case of San Francisco County tuberculosis control program, the increased service demand due to *current* Indochinese refugee immigration is estimated at 20 to 25 percent above usual levels. The potential sources for financing these added costs . . . are not readily apparent.[217]

The control of infectious disease by public health agencies has long been recognized as a governmental function. It seems unreasonable to suppose that the population would want to risk an increased incidence of contagious disease; yet if state and local governments must appropriate funds to these interests, the inevitable conclusion is that "diversion of state funds from [other] state programs . . . must have occurred."[218]

Thus, current refugee resettlement policies may "impair the ability of the states to function," as did the legislation struck down in *National League of Cities,* by interfering with "integral governmental functions." The conditioning of federal funding on state and local "matching funds" severely limits the state's ability to decide how its limited funds will be allocated. Regulations attached to federal grants, even though not "coercive,"[219] may increase administrative and other costs. The introduction of a large number of refugees into a community affects the state's ability to provide needed public health services for native residents. Finally, the inefficiency and delay of Congress in appropriating promised funds

---

GRAM, HEALTH COMM. RECOMMENDATIONS (1979), at 2, quoting U.S. PUBLIC HEALTH SERV., TEAM TO ASSESS THE HEALTH OF INDOCHINESE REFUGEES ON THE WEST COAST, REPORT TO SECRETARY, DEPT. OF H.E.W. (June 14, 1979). The ineffectiveness of pre-entry health screening is apparent. In Orange County, California, for example, between February and July, 1979, twelve active tuberculin cases were diagnosed in newly arrived refugees; San Francisco reported twenty-nine cases. By failing to identify such problems, the federal program raises questions about how many such cases have not been identified.

217. *Id.* at 7.

218. Whelan & Smith, *Contracts Under Grants-in-Aid—An Aspect of United States Federal-State-Local Relations,* 6 HASTINGS CONST. L.Q. 751, 764-65 n.44 (1979).

219. It is generally asserted that cases such as United States v. Butler, 297 U.S. 1 (1936), which held an act of Congress to be "coercion" in its application to the states, were overruled by Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). Justice Cardozo's opinion in *Steward,* however, does not rule out the possibility that an exercise of congressional power could be coercive. In order to find coercion, there must be a showing that such laws are "weapons of coercion, destroying or impairing the autonomy of the states." *Id.* at 586. "[T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact." *Id.* at 590.

prevents state and local governments from acting expeditiously to meet needs within local communities. The public health interest is clearly an "integral state interest" within the scope of *National League of Cities,* and thus forms a basis for assertion of the state's Tenth Amendment interests.

It is important to note also that the introduction of a large ethnic population has a direct impact on individual citizens or residents, who may experience a decrease in welfare benefits, health services, a decline in the quality of the educational system, or other detrimental impacts on community services.[220] The impact of refugees on the job market and on available housing may likewise be significant.[221] Further, refugee resettlement has sparked incidents of overt hostility directed against refugees, including rioting and damage to property, resulting, perhaps, in a necessary diversion of police and fire protection resources in response to such actions.[222]

In this context, Professor Tribe's thesis seems especially appropriate:

> [P]olicy-based legislation by Congress that endangers the provision of certain traditional services, . . . is constitutionally problematic not because it strikes an unacceptable balance between national and state interests as such, but because it hinders and may even foreclose attempts by states or localities to meet their citizens' legitimate expectations of basic government services.[223]

Whether the state is asserting its own affirmative defense of sovereignty, or is asserting the claims of its citizens, refugee resettlement legislation, viewed in this context, is likewise "constitutionally problematic," and deserves recognition and consideration

---

220. *See* Soiffer, *Huge Rise in Refugees on Welfare Here,* S.F. Chronicle, Feb. 26, 1980, at 1, col. 6, noting that a 400% increase in the number of Indochinese refugees on welfare prevented the city from processing applications within 45 days as required by law, and noting indirect costs to health service and school systems. *Id.* at 20, col. 1-2. *See generally* SELECT COMMISSION REPORT, *supra* note 15, at 184.

221. *See The Welcome Wears Thin,* TIME, Sept. 1, 1980, at 8-10, noting problems with housing, jobs, crime, schools, and backlash directed towards Cuban refugees in Florida.

222. *See The Not-So-Promised Land?,* TIME, Sept. 10, 1979, at 24; *Louisiana: Vietnam Fallout,* NEWSWEEK, Sept. 11, 1978, at 36 (citing incidents in Kansas City, Missouri, Augusta, Maine and Pensacola, Florida); *In Louisiana: The Legacy of a Parish Boss Lives On,* TIME, Aug. 28, 1978, at 4-5.

223. Tribe, *supra* note 118, at 1076 (footnote omitted). One Senator commented on the inequity: "I do not see how we as elected officials can tell the American taxpayer that vitally important domestic programs will have to be reduced or terminated yet at the same time pass legislation which will require that billions of dollars be spent over the coming years on an open-ended refugee program." *1979 Senate Judiciary Comm. Hearings, supra* note 1, at 71 (prepared statement of Sen. Huddleston).

from judges and legislators alike.

C. Beyond the Commerce Power

In determining whether federal refugee resettlement legislation is limited under the Tenth Amendment, one must consider the extent to which the Court's holding in *National League of Cities* may be extended beyond Congress' power to regulate commerce. The Court offered no opinion about exercises of congressional authority under the spending power or the Fourteenth Amendment;[224] as a result, many lower courts have been reluctant to extend *National League of Cities* to these (or other) powers.[225] However, state sovereignty limitations have been considered in relation to Congress' war power,[226] its power to implement the Fourteenth Amendment,[227] and to a limited extent, the spending power.[228] Conclusions about the application of Tenth Amendment sovereignty considerations to refugee benefits may depend upon the source of congressional power under which such legislation is enacted.

Under the Constitution, Congress is explicitly granted the power to regulate immigration.[229] If refugee resettlement and funding legislation is an exercise of that power, the states would have little or no basis on which to argue Tenth Amendment immunity, since there is no reservation of that power under the Constitution. In addition, the Court has deferred to Congress and to the executive branch when making decisions affecting immigration, noting that such decisions may implicate relations with foreign powers

224. In a footnote, the Court stated, "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17.

225. See, *e.g.*, Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978).

226. *See* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979); Camacho v. Pub. Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978).

227. Following the Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), lower courts have held that there is no Tenth Amendment limitation on an exercise of congressional power under section five of the Fourteenth Amendment. *See* Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978); Usery v. Charleston County School Dist., 588 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Instr. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied* 430 U.S. 946 (1977). *See generally* Beaird & Ellington, *supra* note 124, at 66-69.

228. Walker Field, Colo. Pub. Airport Authority v. Adams, 606 F.2d 290 (10th Cir. 1979).

229. "The Congress shall have the Power . . . [t]o establish an uniform rule of Naturalization . . . ." U.S. CONST. art. I, § 8, cl. 4. *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

and must remain responsive to changing political and economic circumstances.[230] It is necessary, however, to separate the admission of aliens from the provision of benefits through state welfare systems. Once aliens are admitted for permanent residency, there are fewer foreign relations implications; conversely, there is a significant increase in federal interaction with, and burdens placed upon, the states.[231]

It is difficult to identify the source of power Congress intends to exercise in appropriating funds for refugee resettlement. Enactments under the Social Security Act, the basis for AFDC and Medicaid benefits for refugees, are couched in terms of "the general welfare," as was the 1962 legislation which first made welfare benefit funds available to Cuban refugees.[232] The 1962 Act was an extension of the provisions of the Mutual Security Act of 1954.[233] Although the purpose and statements of the 1954 Act are couched in terms of "common defense, foreign policy and security," perhaps indicative of spending for defense, there is also significant reference to "general welfare," thus implying congressional action under the spending power.[234] Further, legislative history of the Foreign Assistance Act of 1961,[235] the immediate precursor of the 1962 Act, indicates a legislative intent to assist state and local public agencies and to continue programs of assistance which are in

230. *See* Mathews v. Diaz, 426 U.S. 67, 79-82 (1976). This case would seem to raise issues regarding parole-admitted aliens. Plaintiffs were paroled Cuban refugees who challenged the constitutionality of a five-year residency requirement for Medicare Part B benefits (42 U.S.C. § 1395*o* (2)(b)(1976)). The Court noted that while states were prohibited by the Fourteenth Amendment from denying aliens state welfare benefits (citing Graham v. Richardson, 403 U.S. 365 (1971)), a comparable classification by the federal government "is a routine and normally legitimate part of its business." *Id.* at 85. But the Court had no occasion to address the federal-state conflict in an area outside the Fourteenth Amendment which might provide a basis for state sovereign immunity.

231. The domestic implications of refugee policy were expressly addressed by the Select Commission on Immigration and Refugee Policy. In objecting to the placement of the office of U.S. Coordinator for Refugee Affairs in the State Department, the commission noted that placement in the State Department, "a department primarily concerned with international issues, belies the intention of the Refugee Act. It fails to emphasize the true proportions of foreign and domestic policy concerns in the development and implementation of refugee policy." To tie the office of U.S. Coordinator for Refugee Affairs to the State Department was "likely to limit the role of the office because of the *many-sided domestic aspects* of refugee and asylee programs." SELECT COMMISSION REPORT, *supra* note 15, at 199 (emphasis added).

232. *See* Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121.

233. Mutual Security Act of 1954, ch. 937, 68 Stat. 832.

234. *See* [1954] U.S. CODE CONG. & AD. NEWS 3175.

235. Act of Sept. 4, 1961, Pub. L. No. 195, 75 Stat. 424.

the interest of the United States.[236] Since Indochinese Refugee Assistance Program funding to the states is provided under the 1962 Act, coupled with general welfare benefit legislation, it would also seem to be an exercise of the congressional spending power, rather than of the power to regulate immigration.

The Court generally has given a broad reading to the spending power.[237] Justice Brennan's dissent implies that Congress could effect the same result as that struck down in *National League of Cities* "by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards."[238] But if congressional action under the spending power is not subject to any considerations of state sovereignty, the result seems problematic: If there is a significant impairment of integral state functions, then the " 'limits on the power of Congress to override state sovereignty' [announced in *National League of Cities*] will prove nonexistent."[239]

If, then, the appropriation of funds for refugee resettlement is an exercise of the spending power, it should be noted that:

> [A] conditional grant forces states and localities to choose between either refusing to give up attributes of sovereignty and forfeiting benefits or abandoning their constitutionally mandated sovereignty in order to accept such benefits. The budgetary constraints faced by most states and localities compel them to accept the latter choice. If, as *Usery* holds, the constitutional principle of state sovereignty prevents Congress from acting under its commerce power to impose certain federal policies on state and local governments, it is difficult to conceive of any doctrinal basis for allowing the violation of this constitutional principle under the

---

236. *See* S. REP. No. 989, 87th Cong., 1st Sess. (1961); H.R. REP. No. 1066, 87th Cong., 1st Sess. (1961), *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 1791.

237. *See* Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Vermont v. Brinegar, 397 F. Supp. 606 (D. Vt. 1974); Gelfand, *supra* note 118, at 819-22. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and Helvering v. Davis, 301 U.S. 619 (1937), which form the basis for upholding modern congressional spending legislation, are criticized in *Safeguards on Conditional Spending*, *supra* note 161, at 738-46; *see also* Willcox, *Invasions of the First Amendment through Conditioned Public Spending*, 41 CORNELL L.Q. 12 (1955); Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW.U.L. REV. 293, 298-300 (1975).

238. National League of Cities v. Usery, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting).

239. Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1132 (1978). The author suggests that this should not be the case. "Was it truly necessary for the Court to march the king's men up the hill in a commerce clause case only to offer to march them down ignominiously if the spending power were instead invoked?" *Id.*

spending power.[240]

A few courts have acknowledged the problem of conditional funding as a violation of state sovereignty under *National League of Cities.* In *Walker Field, Colorado Public Airport Authority v. Adams,*[241] the Tenth Circuit observed that "[i]t may be that some conditions imposed under the spending power of Congress would exceed constitutional limits," but in that case the court found no violation which would merit consideration of claims of state sovereignty.[242]

Another case, *Camacho v. Public Service Commission,*[243] although it dealt with Congress' war power, seemed to interpret *National League of Cities* to encompass not only the commerce power, but all Article I powers.[244] This construction seems reasonable, particularly if the Tenth Amendment is viewed as an affirmative limitation on Congress:[245]

> The essence of that constitutional concept is that there must be institutional encumbrances on government intrusion into individual liberty as well as restraints on direct and discrete intrusions. These constitutional concerns about restraints on governmental power through institutional structure are grounded not only in the Tenth Amendment but also in the "structural assumptions of the Constitution as a whole."[246]

Thus it seems that limitations upon federal intrusion into areas of state sovereignty should not be confined to the *National League of Cities* commerce clause setting. Although certain areas

---

240. *Safeguards on Conditional Spending, supra* note 161, at 744-45.

241. 606 F.2d 290 (10th Cir. 1979).

242. *Id.* at 297. Justice McKay dissented, arguing that the issue should have been addressed. "[I]t is clear that the federally mandated alteration of state government function . . . is precisely the kind condemned in *National League of Cities* . . . . The time has long since passed when the mere formality of choice should satisfy constitutional requirements." *Id.* at 298.

243. 450 F. Supp. 231 (D.P.R. 1978).

244. The court felt that the importance of *National League of Cities* "lies in the standards by which the courts will evaluate Congress' use of 'the necessary and proper' clause of Article I. If the Congressional enactment 'will impermissibly interfere with the integral governmental functions of these (the states) bodies' [citing *National League of Cities,* 426 U.S. at 851], then it will be deemed invalid." Id. at 234. *See also* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979); New York v. United States, 574 F.2d 128 (2d Cir. 1978) (considering application of *National League of Cities* to congressional exercise of the war power).

245. For a discussion of the Tenth Amendment as an affirmative limitation on the powers of Congress, see note 126 *supra.*

246. Walker Field, Colo. Pub. Airport Authority v. Adams, 606 F.2d 290, 299 (10th Cir. 1979) (McKay, J., dissenting), *quoting* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 301 (1978) (footnote omitted).

of power have been withheld from the states by an affirmative grant of power to Congress under the Constitution, this does not necessarily mean that there are no Tenth Amendment limits on Congress' spending for the general welfare. As has been indicated, there is a strong argument for extending the rationale of Tenth Amendment immunity to *any* exercise of congressional power under the necessary and proper clause.[247] Whether refugee resettlement legislation is passed under the spending power, under the power to regulate immigration, or under any other Article I power, the courts should not be precluded from applying close scrutiny in order to determine if a possible infringement on state sovereignty has taken place.

D. Balancing the Interests

Justice Blackmun's concurrence emphasized that he understood the Court to be adopting a "balancing approach,"[248] which would not prohibit federal intrusion "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[249] But the Rehnquist opinion failed to formulate any sort of balancing test.[250] Lower courts have recognized the significance of the balancing test, but have had little guidance in its implementation.[251]

Examining the two extremes, a test is easily developed: federal interference with an integral state function which impairs the ability of the states to function in the federal system will be deemed unconstitutional; when a strong federal policy or overriding national interest exists, however, the legislation will be valid.[252] Although a few instances of judicial balancing exist,[253] no clearly as-

247. Camacho v. Public Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978).

248. National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring). *See* notes 152-54 and accompanying text *supra*.

249. *Id.*

250. *Id.* at 879-80 (Brennan, J., dissenting).

251. *See, e.g.*, Tennessee v. Louisville & Nashville R.R., 478 F. Supp. 199 (M.D. Tenn. 1979). "Since Justice Blackmun's concurrence was the swing vote in the ultimate holding in *National League of Cities*, it is impossible to discern what test, if any, was established for analyzing congressional exercises of power pursuant to the Commerce Clause." *Id.* at 206. The court then looked to the judicial tests employed prior to *National League of Cities* as outlined in Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) and Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), *followed in* Arizona v. Atchison, Topeka, & Santa Fe R.R., No. 78-655, slip op. (D. Ariz., 1979).

252. *See* Beaird & Ellington, *supra* note 124, at 60.

253. *See, e.g.*, Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (Veteran's Reemployment Rights Act); Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980) (Surface Mining Control & Reclamation Act); Jordan v.

certainable standard has emerged to determine when and under what situations the federal interest may prevail, once Tenth Amendment limitations have been asserted.

Many writers have constructed methodologies for applying a *National League of Cities* balancing approach.[254] One author proposes a dual test:[255] first, a requirement of process—that is, that the states have an active part in any federal regulation contrary to their interests,[256] and second, the consideration of the substantive accomodation of state interests, including consideration of less restrictive alternatives.[257] If a highly intrusive or restrictive alternative characterizes the regulation, there must be a determination that this degree of intrusiveness is required to implement federal policy.[258] This "least restrictive" test thus imposes upon Congress an obligation to make a clear statement of its objectives and insures that the state interests are adequately considered.[259]

Another effective approach would be to balance the congressional interest in its exercised power against a state's Tenth

---

Mills, 473 F. Supp. 13 (E.D. Mich. 1979) (federal policy underlying antitrust laws balanced against state's interest in administering prisons); Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976).

254. *See, e.g., Safeguards on Conditional Spending, supra* note 161, at 747-69; Note, *The Constitutionality of Federal Regulation of Municipal Securities Issuers: Applying the Test of* National League of Cities v. Usery, 51 N.Y.U. L. REV. 982, 1007-20 (1976); Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665, 669-80 (1977).

255. *Municipal Bankruptcy, supra* note 161, at 1891-1905.

256. This approach may be flawed in its implicit assumption that the legislative process adequately considers and accommodates the interests of the states. Given the present size of Congress and the emergence of well-funded lobbyists, there may not necessarily be adequate consideration of state interests. *See* Tribe, *supra* note 118, at 1071: "[T]he political safeguards of Federalism may . . . [not] . . . provide adequate protection to state interests. . . . [S]tate concerns . . . are not always uniform throughout the country . . . the state's interests may not be accurately represented . . . because representatives' views on any question will be shaped by a number of often conflicting political pressures . . . reapportionment decisions have rendered the districting process largely mechanical . . . and a given state's interest will not necessarily be easy to recognize." *Id.* at 1071-72.

257. *Municipal Bankruptcy, supra* note 161, at 1891-95.

258. *Id.* In a case prior to *National League of Cities,* the District of Columbia Circuit Court observed that "the Tenth Amendment may prevent Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available." District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975).

259. *Cf.* Walker Field, Colo. Pub. Airport Authority v. Adams, 606 F.2d 290, 300 (10th Cir. 1979) (McKay, J., dissenting). "[T]he concepts of institutional integrity embodied in the federal structure and so strongly reaffirmed in *National League of Cities* are sufficiently important to require, at a minimum, that the federal program employ the *least intrusive method* which will satisfy its responsible spending duties and that the stipulation be relevant to the primary purpose of the spending proposal." *Id.* (emphasis added).

Amendment right to "structure its integral operations."[260] Thus the court should ask whether the federal policy to be advanced is essential to the protection of constitutional guarantees, and whether it could be effected by less intrusive means. This approach would protect state sovereignty to the maximum extent, yet give courts the flexibility to respond to changing factual situations.[261]

For the purposes of any balancing test, the federal and state interests must be identified. State interests in the area of refugee resettlement include maintaining control over the allocation and budgeting of its available resources in order to provide necessary governmental services to its populace as effectively and economically as possible, maintaining control over decision-making processes in the functioning of its governmental agencies, and in general, maintaining its "separate and independent existence" in the federal system.[262] The federal interests include acting upon the nation's moral obligation to the Indochinese,[263] seeing that federal funds are properly administered,[264] and having refugees settled and integrated into the various local communities as expeditiously as possible.[265]

Another very strong federal interest is recognized by the Court in the traditional deference it affords the legislative and executive branches in their dealings with aliens.[266] The Court has emphasized the need for the political branches of the government to be able to respond flexibly to changing world conditions. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of govern-

260. Beaird & Ellington, *supra* note 124, at 72-73. Such an analysis is consistent with First Amendment cases, where the Court maximizes the protection of individual rights, and permits only the least intrusive infringements essential to protect a compelling federal interest. *See* Street v. New York, 394 U.S. 576, 590-93 (1969); United States v. O'Brien, 391 U.S. 367 (1968). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in the First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975).

261. See examples of permissive intrusion listed by Justice Stevens in National League of Cities v. Usery, 426 U.S. at 880 (Stevens, J., dissenting). In addition, in a Tenth Amendment context, supremacy problems may more clearly arise. Beaird & Ellington, *supra* note 124, at 73.

262. *See* National League of Cities v. Usery, 426 U.S. at 851 *quoting* Coyle v. Smith, 221 U.S. 559, 580 (1911).

263. *See* notes 1-5 and accompanying text *supra.*

264. *See, e.g.,* North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 534-35 (E.D.N.C. 1977), *aff'd,* 435 U.S. 962 (1978).

265. *See* notes 93-102 and accompanying text *supra.*

266. *See* Mathews v. Diaz, 426 U.S. 67 (1976).

ment."[267] Arguably, these same "contemporaneous policies" apply to refugees, but there are some important distinctions. First, once refugees are admitted into the United States for permanent residence, foreign relations seem less significant than do domestic policies.[268] Second, it has already been noted in *National League of Cities* that Congress' commerce power was not allowed to override the states' Tenth Amendment interest.[269] By analogy, neither should the spending power be allowed to do so,[270] for there may be a sound argument for impressing Tenth Amendment limitations on all article I powers as an "interpretation of the necessary and proper clause."[271] Third, the maintenance of the federal structure of government appears to be a vital consideration behind the decision in *National League of Cities.*[272] Thus, on balance, there seems to be little basis for denying states the right to assert a Tenth Amendment defense against the power of Congress to spend for the general welfare in the context of admission and resettlement of refugees.

IV. Conclusion

Refugee resettlement legislation raises questions about the acceptable federal-state balance. It may create an interference with integral state functions if a state is forced to provide some services at the expense of others; accordingly, funds from one state project must be allocated to others.[273] Such inefficient, haphazard and disjointed settlement procedures interfere with the ability of local governments to provide services for both refugees and their own citizens.[274]

Imposing a "least intrusive" regulation requirement on Congress, insuring that federal legislators adequately consider state interests and requiring a "clear statement" of federal policy and the power underlying it, would enable the courts to review legislation

267. *Id.* at 81 n.17.

268. *See* SELECT COMMISSION REPORT, *supra* note 15, at 199, *quoted in* note 231 *supra* recognizing the domestic aspects of refugee policies.

269. National League of Cities v. Usery, 426 U.S. at 842; *see* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (war power).

270. *See* notes 238-40 and accompanying text *supra.*

271. Camacho v. Public Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978). *See* notes 243-45 and accompanying text *supra.*

272. *See* 426 U.S. at 841-52.

273. *See* notes 206-18 and accompanying text *supra.*

274. *See* notes 93-96 and accompanying text *supra.*

effectively.[275] If a federal policy for refugee resettlement were clearly defined, and if the state interests were adequately considered, it would be possible to determine whether implementation of the policy might be effected in ways that would not intrude upon the states' sovereign interests.

Whether the Court is ready at this time to consider such a strong attack upon federal prerogatives is doubtful. In the context of conditional spending programs, federal interests would likely be found to outweigh state sovereignty considerations. A contrary ruling would drastically alter established programs and intergovernmental relations. "It is difficult to discuss so critical and fundamental a question so calmly. . . . [B]ecause it lies at the heart of our constitutional system, to decide it wrongly is to alter the whole structure and operation of our government—for good or for evil."[276]

Given the strong federal interest in the regulation of immigration, the Court is not likely to invalidate refugee resettlement programs out of hand. The potential impairment of state sovereign interests, however, argues for the imposition of a "least intrusive" test upon such legislation in order to preserve state control of essential state services and programs.

In addition, steps should be taken by Congress to bolster the accountability of voluntary agencies so that they maintain contact with newly arrived refugees. A more comprehensive system of registration would enable government agencies to address the problems of secondary migration. Unequivocal and timely appropriation of funds by Congress to the states will prevent the latter from being forced to divert available funds from established areas of need. Recent legislation,[277] while responsive to some of these concerns, does not adequately protect the state interests involved.[278] If this country is to continue to open its doors to politi-

275. *See* notes 255-61 and accompanying text *supra.*

276. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 174 (1911).

277. For a discussion of the Refugee Act of 1980, see notes 62-72 and accompanying text *supra. See generally 1979 Senate Judiciary Comm. Hearings, supra* note 1; Silverman, *supra* note 67, at 34-41.

278. As noted, after a given period of time, the states are responsible for the full costs. *1979 Senate Judiciary Comm. Hearings, supra* note 1; at 31. *See generally id.* at 160-72. Local governments have clearly voiced their preference: "When the Federal government pursues a policy whereby refugees are admitted to this country, and when such refugees then create special demands upon state and local governments, then those state and local governments so affected should be fully reimbursed by the federal government for the cost of meeting such demands for so long as such demands exist." *Id.* at 171 (policy position, County of San Diego). *See Refugees—Who Will Pay?*, S.F. Examiner, Mar. 30, 1981, at B2,

cal and other refugees, care must be taken lest efforts to aid refugees undermine the balance between state and federal interests, to the eventual detriment of the refugees' new homeland.

col. 1, noting increased costs to the State of California of $9 million in 1981 and $23 million in 1982 if federal funding was not extended beyond April 1, 1981.