

# American University Law Review

---

Volume 67 | Issue 1

Article 4

---

2017

## Can We Act Globally While Thinking Locally? Responding to Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*

Kit Johnson

University of Oklahoma College of Law, [kit.johnson@ou.edu](mailto:kit.johnson@ou.edu)

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/aulr>



Part of the [Immigration Law Commons](#)

---

### Recommended Citation

Johnson, Kit (2017) "Can We Act Globally While Thinking Locally? Responding to Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*," *American University Law Review*. Vol. 67 : Iss. 1 , Article 4. Available at: <https://digitalcommons.wcl.american.edu/aulr/vol67/iss1/4>

This Response is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

---

## Can We Act Globally While Thinking Locally? Responding to Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*

### Abstract

In *The Perils and Possibilities of Refugee Federalism*, Professor Stella Burch Elias skillfully exposes both the dangers and the opportunities presented by state responses to the resettlement of refugees within their borders. She concludes that states are prohibited from excluding refugees from their territory, but she argues that states have a previously untapped opportunity to legislate at the local level in an effort to promote the integration of refugees into their communities.

This Response does not challenge those conclusions. Rather, this Response seeks to provide context to the idea of refugee federalism by further discussing the problem, acknowledged by Professor Elias, that, legal or not, states are successfully avoiding the placement of refugees within their borders. Additionally, this Response attempts to articulate a concern that increasing state involvement regarding the selection of refugees may exacerbate the nimbyism that already pervades the treatment of refugees in the United States.

## RESPONSE

### CAN WE ACT GLOBALLY WHILE THINKING LOCALLY? RESPONDING TO STELLA BURCH ELIAS, *THE PERILS AND POSSIBILITIES OF REFUGEE FEDERALISM*

KIT JOHNSON\*

*In The Perils and Possibilities of Refugee Federalism, Professor Stella Burch Elias skillfully exposes both the dangers and the opportunities presented by state responses to the resettlement of refugees within their borders. She concludes that states are prohibited from excluding refugees from their territory, but she argues that states have a previously untapped opportunity to legislate at the local level in an effort to promote the integration of refugees into their communities.*

*This Response does not challenge those conclusions. Rather, this Response seeks to provide context to the idea of refugee federalism by further discussing the problem, acknowledged by Professor Elias, that, legal or not, states are successfully avoiding the placement of refugees within their borders. Additionally, this Response attempts to articulate a concern that increasing state involvement regarding the selection of refugees may exacerbate the nimbyism that already pervades the treatment of refugees in the United States.*

---

\* Associate Professor, *University of North Dakota School of Law*, J.D., *University of California, Berkeley School of Law*. I am thankful for the thoughtful feedback and insights of Eric E. Johnson. © 2017 Kit Johnson.

## TABLE OF CONTENTS

Introduction .....	218
I. The Problem of Effective State Anti-Refugee Measures. ....	220
A. Preemption of Exclusionary Lawmaking .....	221
B. Success of Exclusionary Lawmaking.....	224
II. The Problem of State Selection of Refugees.....	227
Conclusion .....	230

## INTRODUCTION

In recent years, state lawmakers have sought to expand their role regarding the resettlement of refugees within their borders.<sup>1</sup> Most have sought to limit or eliminate refugee placement in their communities, though some states have actively promoted their welcomeness to refugees.<sup>2</sup> In *The Perils and Possibilities of Refugee Federalism*, Professor Stella Burch Elias aptly christens this wave of state lawmaking “refugee federalism.”<sup>3</sup>

Professor Elias’s Article is both timely and important. Donald Trump thrust the issue of refugee resettlement in the United States to the forefront of national debate during his 2016 presidential campaign.<sup>4</sup> That rhetoric resonated in states that sought to craft local legislation regarding refugees.<sup>5</sup> In her Article, Professor Elias not only

1. See Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 353, 391 (2016) (exploring the rise of “refugee federalism,” where states use gubernatorial decrees, legislation, and litigation, to either limit or support the settlement of refugees and asylees within their territory).

2. *Id.* This Response uses the phrase “refugees and asylees” interchangeably with “refugees.” Refugees and asylees are both defined by the Immigration and Nationality Act (INA) § 101(a)(42). 8 U.S.C. § 1101(a)(42) (2012). They differ largely in terms of the location from which they seek U.S. aid—overseas (refugees) or at/within our borders (asylees).

3. Elias, *supra* note 1, at 358 (defining refugee federalism as “the engagement of state governmental actors in lawmaking pertaining to refugees and asylees”).

4. See, e.g., Kit Johnson, *Local Coverage of Trump’s Minnesota Pitch*, IMMIGRATIONPROF BLOG (Nov. 8, 2016), <http://lawprofessors.typepad.com/immigration/2016/11/local-coverage-of-trumps-minnesota-pitch.html> (discussing a newscaster’s smiles, laughter, and cheers in the course of covering a rally where candidate Trump promised the crowd that “[a] Trump administration will not admit any refugees without the support of the local community where they are being placed”).

5. See, e.g., Kit Johnson, *North Dakota Legislators Introduce Anti-Refugee Bill*, IMMIGRATIONPROF BLOG, (Jan. 20, 2017), <http://lawprofessors.typepad.com/immigration/2017/01/north-dakota-proposes-anti-refugee-bill.html> (discussing a

identifies and describes this surge of state lawmaking, she comprehensively defines the legal boundaries that ought to cabin such efforts.<sup>6</sup> That is, she offers well-needed guidance to states regarding what they can and cannot do in the name of refugee resettlement.<sup>7</sup> Professor Elias thereby makes a significant contribution to the field, one that builds substantially on her prior work exploring more broadly “new immigration federalism.”<sup>8</sup>

Anti-refugee state statutes, Professor Elias explains, likely run afoul of federal constitutional law, and that, in turn, renders them ineffective.<sup>9</sup> While Professor Elias’s legal analysis is persuasive on this point, it is important to acknowledge that, despite legal hurdles, states have been successful in forestalling the placement of refugees. And that success is a significant downside to refugee federalism as it is evolving in practice.

Professor Elias explains that, in contrast to anti-refugee legislating by states, state efforts to welcome and integrate resettled refugees are legally permissible.<sup>10</sup> She emphasizes that states have great flexibility when it comes to taking the initiative to offer an array of refugee services. Professor Elias’s pathmarking work in this vein helps pave the way for innovative local lawmaking. But caution is called for. The idea that states should be allowed to lobby for the resettlement of refugees where they could have a “positive economic and social impact” at the state level is another potentially troubling aspect of refugee federalism, because states

---

proposed North Dakota bill that would track the state’s “absorptive capacity” for refugees and allow local governments to petition for, and the governor to execute, a moratorium on refugee resettlement); *Nationwide Anti-Refugee Legislation by State*, ACLU (last visited Oct. 23, 2017), <https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-refugee-legislation-state> (providing a map of states that attempted to prevent lawfully admitted refugees from settling in their territories).

6. See Elias, *supra* note 1, at 403–05 (noting that states and the federal government may pass alienage laws, but “it is hard to see how state executive orders or legislation designed to ban refugees and asylees from state territory would survive even the most cursory constitutional challenge”).

7. *Id.* at 407–08 (discussing the framework for inclusionary state lawmaking related to refugees).

8. See Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 704–05 (2013) (defining the “new immigration federalism” as interactive multigovernmental rulemaking pertaining to immigrants and immigration at the state level, including rulemaking intended to foster immigrant inclusion).

9. Elias, *supra* note 1, at 405.

10. See *id.* at 409 (stating that these efforts are “where the true . . . possibilities of refugee federalism lie”).

could exercise such power in a way that would advance local interests to the detriment of national goals, and perhaps should be expected to do so.

While this Response expresses concerns about the vision of refugee federalism, it bears pointing out that Professor Elias's Article has already gained a real-world track record of helping to minimize refugee federalism's perils. In January 2017, the North Dakota state legislature introduced a bill to determine the state's "refugee absorptive capacity" and to authorize a moratorium on refugee resettlement in the state upon a showing that cities could not absorb additional refugees.<sup>11</sup> Activists opposing the bill used Professor Elias's Article to craft written testimony to argue both that refugees do not pose a security threat because they are carefully vetted before they ever enter the United States and that the state bill impermissibly conflicted with federal law.<sup>12</sup> Ultimately, the bill was revised to become an unfunded "legislative management study of refugee resettlement in North Dakota"<sup>13</sup>—a clear victory for the activists.<sup>14</sup>

This Response recognizes and celebrates the distinct value of Professor Elias's Article. It offers modest critiques that center on the success of state anti-refugee measures and the concerning ramifications of increased state involvement in the selection of refugees. Part I discusses state anti-refugee measures, addressing both the law at issue and the questions raised by state successes that fly in the face of legal prohibitions. Part II examines the great potential for misconduct that arises if states are allowed a say as to which refugees should join their communities.

## I. THE PROBLEM OF EFFECTIVE STATE ANTI-REFUGEE MEASURES

States do not have unfettered discretion to legislate in the area of immigration.<sup>15</sup> That is because the "[p]ower to regulate immigration

---

11. Johnson, *supra* note 5; see H.B. 1427, 65th Legis. Assemb. (N.D. 2017).

12. See E-mail from Murray Sagsveen, Vice Chair, Bd. of Dirs., Lutheran Soc. Servs. of N.D., to author and Stella Burch Elias (Feb. 3, 2017, 21:15 MST) (on file with author) (providing an update on the legislative hearing for the North Dakota bill and noting the reliance on Professor Elias's Article by the bill's opponents).

13. See N.D. H.B. 1427; S. JOURNAL, 65th Leg. Sess. 1018–19 (N.D. 2017) (reporting the passage of the bill).

14. See E-mail from Anna Marie E. Stenson, Immigration Att'y, Minn.-N.D. Chapter of the Am. Immigration Lawyers Ass'n (Feb. 6, 2017, 10:08 MST) (on file with author) (hypothesizing that "the raw emotion of the refugees and former refugees who testified carried the day").

15. See Kit Johnson & Peter J. Spiro, Debate, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100, 105 (2012) (debating the limits of

is unquestionably exclusively a federal power.”<sup>16</sup> State laws that interfere with the federal government’s power over immigration are therefore preempted. That does not, however, mean such state laws are “completely ineffectual.”<sup>17</sup>

In this Part, I begin by addressing the federal power over immigration and the preemption of state laws in conflict with that power. I then tackle the issue of how states successfully interfere in this realm, despite the legal obstacles in place.

#### A. *Preemption of Exclusionary Lawmaking*

The federal government alone has the authority to determine who should be admitted into and removed from the United States.<sup>18</sup> Individual states have no analogous power.<sup>19</sup>

Despite this lack of authority, some states have engaged in what Professor Elias dubs “exclusionary lawmaking.”<sup>20</sup> Through executive orders, gubernatorial decrees, legislation, and litigation, states have worked to keep asylees and refugees from settling within their borders.<sup>21</sup> In a nutshell, such efforts are legally unavailing<sup>22</sup> because federal law is the “supreme Law of the Land.”<sup>23</sup> When states attempt to usurp the federal government’s exclusive authority over immigration law and policy, those efforts are federally preempted.<sup>24</sup>

As Professor Elias notes, one of the principal justifications underlying preemption in the immigration context focuses on foreign

---

state and local lawmaking regarding undocumented migrants in the wake of the Supreme Court holding in *Arizona v. United States*, 567 U.S. 387 (2012)).

16. *DeCanas v. Bica*, 424 U.S. 351, 354–55 (1976).

17. Elias, *supra* note 1, at 402.

18. *See* INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3) (2012) (“Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or . . . removed from the United States.”); *see also* *DeCanas v. Bica*, 424 U.S. 351, 354–55 (1976) (“a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,” is the type of regulation of immigration that is “unquestionably exclusively a federal power”).

19. Johnson & Spiro, *supra* note 15, at 102 (citing *Arizona*, 567 U.S. at 408) (explaining that states may not set their own immigration policies).

20. Elias, *supra* note 1, at 403.

21. *Id.* at 401 (citing *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 905 (7th Cir. 2016)).

22. *Id.* at 401–02 (citing *Exodus Refugee Immigration, Inc.*, 838 F.3d at 904–05).

23. U.S. CONST. art. VI, cl. 2.

24. Johnson & Spiro, *supra* note 15, at 104; Elias, *supra* note 1, at 401.

affairs.<sup>25</sup> The Supreme Court has explained that because “a country’s treatment of non-citizens within its borders can gravely affect foreign relations,”<sup>26</sup> the federal government must be able to speak “with one voice” in dealing with other nations.<sup>27</sup> If a foreign government perceives—rightly or wrongly—that a host government has wronged its citizens, the consequences can be grave, “sometimes even leading to war.”<sup>28</sup> Therefore, local interference is not legally tolerated.

These are exactly the issues at stake with states’ exclusionary lawmaking. States cannot be allowed to deride nations by declaring their citizens unwelcome and characterizing such individuals as potential security threats.<sup>29</sup> Declarations of this sort threaten our relations around the globe.

The case of Farmers Branch, Texas is illustrative.<sup>30</sup> A suburb of Dallas, Farmers Branch passed three housing ordinances in three years, each with the goal of preventing undocumented immigrants from living in rental housing within city limits.<sup>31</sup> With unabashed

---

25. See Elias, *supra* note 1, at 404.

26. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 525 (5th Cir. 2013) (en banc) (citing *Arizona v. United States*, 567 U.S. 387, 395 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 62–68 (1941)).

27. *Arizona*, 567 U.S. at 409; see *id.* at 395 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”).

28. *Davidowitz*, 312 U.S. at 64.

29. See Elias, *supra* note 1, at 380 (quoting Texas Governor Greg Abbott’s direction to the state’s resettlement program “not to participate in the resettlement of any Syrian refugees in the State of Texas” on the grounds that they lack guarantees that “Syrian refugees will not be a part of terroristic activity”); see also Jamie Lovegrove, *South Carolina Gov. Henry McMaster Wants to Halt Refugee Resettlements from Countries in Trump Travel Ban*, POST & COURIER (Aug. 30, 2017), [http://www.postandcourier.com/politics/south-carolina-gov-henry-mcmaster-wants-to-halt-refugee-resettlements/article\\_4384b72a-8d03-11e7-bfef-3b4944cfd976.html](http://www.postandcourier.com/politics/south-carolina-gov-henry-mcmaster-wants-to-halt-refugee-resettlements/article_4384b72a-8d03-11e7-bfef-3b4944cfd976.html) (reporting on a speech by South Carolina Governor Henry McMaster in which he discussed the threat of “terrorists in the world” and said, “We want no refugees from Iran, Libya, Somalia, Sudan, Syria[,] or Yemen, just like President Trump said, until those procedures can be made safe, sound[,] and secure.”).

30. See Johnson & Spiro, *supra* note 15, at 101 (discussing housing ordinances that the city of Farmers Branch passed to exclude undocumented immigrants).

31. *Id.* at 100–01. Farmers Branch is by no means the only city to have enacted anti-immigrant housing ordinances. Hazleton, Pennsylvania enacted the first such ordinance in 2006. See HAZLETON, PA., ORDINANCE 2006-18 (2006) (stating that the purpose of the ordinance is “to be free of the debilitating effects” of illegal immigrants). Fremont, Nebraska, adopted a similar ordinance in 2010. See FREMONT, NEB., ORDINANCE NO. 5165 (2010).



nimbyism, one member of the Farmers Branch city council publicly stated that the ordinances “sent a message to people who aren’t in the country legally, Farmers Branch is not the place for you,”<sup>32</sup> and further admitted that the ordinances were aimed at “reduc[ing] the illegal immigrant population in Farmer’s Branch.”<sup>33</sup> This language is very similar to that of states engaged in exclusionary lawmaking designed to “halt the placement of any new refugees”<sup>34</sup> and “suspend the resettlement of additional . . . refugees.”<sup>35</sup>

Landlord and tenant groups challenged Farmers Branch, and courts repeatedly and consistently found the city’s ordinances preempted by federal law.<sup>36</sup> The federal district court that initially heard the case found the city’s ordinances—which hindered noncitizens from renting property in the city—to impermissibly restrict the admission and residence of noncitizens and, therefore, found the ordinances preempted by federal law.<sup>37</sup> The initial Fifth Circuit panel agreed, noting that Farmers Branch’s efforts to exclude undocumented immigrants from its community ran afoul of the federal government’s prerogative of deciding who has the right to live in the United States.<sup>38</sup> Ultimately, the case was reheard *en banc*, and while the Fifth Circuit once again found the local law preempted by federal law, this time it did so without focusing on admission and resettlement.<sup>39</sup> Instead, the court focused on criminal provisions of the ordinance that conflicted with federal law.<sup>40</sup>

The Farmers Branch litigation provides an interesting case study for exclusionary laws and federal preemption. Factually, the laws seeking to bar the settlement of undocumented aliens within Farmers Branch directly parallel the exclusionary laws highlighted by Professor Elias. And, just

---

32. *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 805 n.4 (5th Cir. 2012), *aff’d on reh’g*, 726 F.3d 524 (5th Cir. 2013) (en banc).

33. *Id.* at 806. Other officials echoed this language. *Id.* (noting that the Farmers Branch city attorney stated that the goal of the ordinances was to “reduce the number of illegal immigrants in Farmers Branch”).

34. Elias, *supra* note 1, at 355 (quoting Arizona Governor Doug Ducey).

35. *Id.* at 360 (quoting then Indiana Governor Mike Pence).

36. See *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 841 (N.D. Tex. 2010), *aff’d*, 675 F.3d 802 (5th Cir. 2012), *aff’d on reh’g*, 726 F.3d 524 (5th Cir. 2013) (en banc); see also Johnson & Spiro, *supra* note 15.

37. *Villas at Parkside Partners*, 701 F. Supp. 2d at 855.

38. *Villas at Parkside Partners*, 675 F.3d at 810–11.

39. *Villas at Parkside Partners*, 726 F.3d at 526.

40. *Id.*

as the Farmers Branch ordinances were found to be preempted by federal law, so too have state efforts to exclude refugees been found preempted.<sup>41</sup>

B. *Success of Exclusionary Lawmaking*

While states do not have the legal authority to pass laws regarding whether refugees and asylees should be allowed to settle in their territory, states' efforts in this area have not been fruitless. Despite the legal hurdles, states have achieved a great deal on the exclusion front.

Take Wyoming. As Professor Elias highlights, Wyoming does not have a refugee resettlement program.<sup>42</sup> It is, in fact, the only state without one.<sup>43</sup> As a result, zero refugees are directly resettled in Wyoming.<sup>44</sup> The refugees who find their way to Wyoming do so because of jobs, school, or family.<sup>45</sup> The lack of a refugee resettlement program in Wyoming is not due to oversight or neglect. It is by design. Wyoming has no established resettlement program because, according to one state lawmaker, "just a small change in the demographics here could upset the Wyoming economy [and] the Wyoming culture . . . . We have to take care of Wyoming's own first."<sup>46</sup> By staying aloof, the

---

41. See Elias, *supra* note 1, at 400–01 (citing *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718 (S.D. Ind. 2016)) (noting that the U.S. District Court for the Southern District of Indiana found Indiana's state ban on refugee resettlement and funding for community organizations serving refugees preempted because "the state was both intruding upon a field of law occupied by the federal government and preventing the federal government from achieving one of its legitimate goals—the safe and effective placement of refugees").

42. Elias, *supra* note 1, at 375.

43. See *The Modern West 21: Wyoming's Immigrants and Refugees*, WYO. PUB. MEDIA, (Mar. 23, 2017), <http://wyomingpublicmedia.org/post/modern-west-21-wyomings-immigrants-and-refugees> [hereinafter *The Modern West 21*] (noting that despite a large immigrant population, Wyoming is the only state without a refugee resettlement program).

44. See Ben Neary, *Gov. Matt Mead Calls on President to Halt Refugee Program*, CASPER STAR TRIB. (Nov. 17, 2015), [http://trib.com/news/state-and-regional/gov-matt-mead-calls-on-president-to-halt-refugee-program/article\\_4e856e5b-fd7d-5452-984d-64773c99d542.html](http://trib.com/news/state-and-regional/gov-matt-mead-calls-on-president-to-halt-refugee-program/article_4e856e5b-fd7d-5452-984d-64773c99d542.html) (stating that attempts to start a refugee program in Wyoming have been met with public criticism); see also U.S. DEP'T OF STATE, REFUGEE ARRIVALS BY STATE FROM OCTOBER 1, 2016 THROUGH MAY 31, 2017 1 (2017), <https://static1.squarespace.com/static/580e4274e58c624696efadc6/t/5936ce6946c3c496baa4ccbf/1496764011135/Arrivals+by+State++Map%286.5.17%29.pdf> (reporting that no refugees were resettled in Wyoming from October 1, 2016 to May 31, 2017).

45. See *The Modern West 21*, *supra* note 43 (discussing the ways in which immigrants and refugees typically enter Wyoming).

46. *Id.* (interview with State Senator Scott Clem).

Equality State<sup>47</sup> has managed to successfully avoid what should be a national obligation to care for displaced persons. And it has done so without drafting a single piece of exclusionary legislation that might be subject to preemption analysis.

Other states have had success in different ways. As Professor Elias notes, the federal government's decision to house Central American asylum seekers in remote facilities in Artesia, New Mexico, and Karnes City, Texas, was made in direct response to protests in Arizona, New Mexico, Michigan, and Virginia where residential centers were initially planned.<sup>48</sup> Oklahoma was also successful in having the state's sole shelter for unaccompanied minors shut down.<sup>49</sup> Particularly emblematic of how legality often fails to translate to reality, the State of Indiana successfully kept one Syrian family from resettling in the state, even though its plan to suspend resettlement entirely was ultimately enjoined in court.<sup>50</sup>

Consider the human context of these states' exclusionary efforts. Refugees and asylees are individuals who, by definition, have been or would be persecuted in their home country because of politics, religion, nationality, race, or group membership.<sup>51</sup> To put it more plainly, they have been chased from their homes and have nowhere else to go.<sup>52</sup>

---

47. The "Equality State" is a recognized nickname of the State of Wyoming. See, e.g., *In re Neely*, 390 P.3d 728, 764 (Wyo. 2017) (referring to Wyoming as the "Equality State"); *Haagensen v. State ex rel. Wyo. Workers' Comp. Div.*, 949 P.2d 865, 871 (Wyo. 1997) (same); *Weaver v. Mitchell*, 715 P.2d 1361, 1369 (Wyo. 1986) (same). In addition, "Equal Rights" is the official state motto. WYO. STAT. ANN. § 8-3-107 (2017).

48. Elias, *supra* note 1, at 384–85. Note that this sort of victory was not limited to states. The small inland city of Murrieta, California, managed to turn away three buses of asylum seekers and have them re-routed to another state facility on the Mexican border. See James Nye, "Return to Sender!" *Hundreds of Furious Californian Protestors Block Road to Buses Carrying 140 Illegal Immigrant Women and Children—Forcing Them to Turn Back to Border Post*, DAILY MAIL (July 1, 2014), <http://www.dailymail.co.uk/news/article-2677429/Return-sender-Hundreds-furious-protestors-block-road-buses-carrying-140-women-children-illegal-immigrants-force-border.html>.

49. See Kit Johnson, *A Victory for Oklahoma Governor Over Immigrant "Daycare,"* IMMIGRATIONPROF BLOG (Aug. 8, 2014), <http://lawprofessors.typepad.com/immigration/2014/08/a-victory-for-oklahoma-governor-over-immigrant-daycare.html> (noting that the Governor of Oklahoma started a petition to garner support for shutting down the facility).

50. Elias, *supra* note 1, at 400.

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

52. See *id.* (defining a refugee as an individual "who is unable or unwilling to return to" his or her home country); 8 C.F.R. §§ 208.13(c)(2), 208.15 (2017) (detailing that an individual cannot be considered a refugee if they have "firmly resettled" in a third country by receiving "an offer of permanent resident status, citizenship, or some other

Consider also the global context of states' exclusionary efforts. Refugees and asylees admitted to the United States represent a minute portion of the global refugee population, which at present numbers nearly 22.5 million people.<sup>53</sup> Annually, the United States takes in far less than 100,000 refugees—that is, less than 0.005% of those in need.<sup>54</sup> Other countries take in far more.<sup>55</sup> Meanwhile, the United States is the world's wealthiest nation, accounting for around twenty-five percent of global GDP,<sup>56</sup> and is the world's third largest in geographic

type of permanent resettlement"); *see also* Warsan Shire, *Home*, GENIUS, <https://genius.com/Warsan-shire-home-annotated> (last visited Oct. 23, 2017) ("no one leaves home until home is a sweaty voice in your ear / saying- / leave, / run away from me now / i dont know what i've become / but i know that anywhere/ is safer than here").

53. *See Figures at a Glance*, UNHCR (June 19, 2017), <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

54. *See* NADWA MOSSAD, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2015 I (Nov. 2016), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf) (reporting that a total of 69,920 refugees were admitted to the United States in 2015). In September of 2016, President Obama set the target number of refugee admissions for fiscal year (FY) 2017 at 110,000. *See* Juliet Eilperin, *White House Raises Refugee Target to 110,000*, WASH. POST (Sept. 14, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/14/white-house-plans-to-accept-at-least-110000-refugees-in-2017>. When President Trump took office in January 2017, he reduced the FY 2017 target to 50,000. *See* Exec. Order No. 13,769, § 5(d), 82 Fed. Reg. 8979 (Fed. 1, 2017) (stating that admitting refugees in excess of 50,000 would be "detrimental to the interests of the United States"). That cap was met in July, and the total number of refugee admissions for FY 2017 will exceed that 50,000 goal. *See* Abigail Hauslohner, *U.S. Surpasses Trump Administration's Cap on Refugee Admissions*, WASH. POST (July 12, 2017), [https://www.washingtonpost.com/national/us-surpasses-cap-on-refugee-admissions/2017/07/12/dbb8e98e-672a-11e7-a1d7-9a32c91c6f40\\_story.html](https://www.washingtonpost.com/national/us-surpasses-cap-on-refugee-admissions/2017/07/12/dbb8e98e-672a-11e7-a1d7-9a32c91c6f40_story.html). President Trump has authorized a refugee admission cap for FY 2018 of 45,000. Presidential Determination on Refugee Admissions for Fiscal Year 2018, 82 Fed. Reg. 49,083 (Sept. 29, 2017). This new figure came after the Department of Homeland Security recommended a cap of 40,000. *See* Julie Hirschfeld Davis & Miriam Jordan, *White House Weighs Lowering Refugee Quota to Below 50,000*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/politics/trump-refugee-quota.html> (reporting that Stephen Miller, President Trump's senior advisor for policy has advocated lowering the target number to 15,000, which is less than fifteen percent of President Obama's FY 2017 goal).

55. *See, e.g., Ten Countries Host Half of World's Refugees: Report*, ALJAZEERA (Oct. 4, 2016), <http://www.aljazeera.com/news/2016/10/ten-countries-host-world-refugees-report-161004042014076.html> (listing the following ten countries: Jordan, Turkey, Pakistan, Lebanon, Iran, Ethiopia, Kenya, Uganda, Democratic Republic of Congo, and Chad).

56. *See Gross Domestic Product 2016*, WORLD BANK I (Apr. 17, 2017), <http://databank.worldbank.org/data/download/GDP.pdf> (listing the United States GDP for 2016 as \$18.5691 trillion).

area.<sup>57</sup> Given this bounty, and considering the United States' economic, social, and political interconnectedness with the world,<sup>58</sup> one could easily say that the United States' limited acceptance of refugees amounts to a shirking of our global burden-sharing obligations.<sup>59</sup>

This means that state anti-refugee efforts add a new layer of shirking to an already ungenerous American policy towards individuals who have fled their homes only because it was unsafe to remain.<sup>60</sup> As explained above, states do not legally have a leg to stand on when it comes to interfering with the national effort to resettle refugees.<sup>61</sup> When they interfere nonetheless, the result is ignoble.

Squarely confronting the effectiveness of states' shirking forces us to question the role that states should play in dealing with refugees and asylees. And it should cause us to consider whether the system itself should be reformed in a way that the federal government might demand proportional and consistent treatment of refugees across states.

## II. THE PROBLEM OF STATE SELECTION OF REFUGEES

States' actions with regard to refugees and asylees are not all exclusionary. Many states are exploring the possibilities of what Professor Elias terms "inclusionary lawmaking."<sup>62</sup> While such a trend is positive in numerous ways, there are nonetheless reasons why those sympathetic to the cause of displaced persons might be chary of the inclusionary side of refugee federalism. In this Part, I discuss why.

---

57. See *The World Factbook: Country Comparison: Area*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html> (last visited Oct. 23, 2017) (ranking nations of the world by geographic area).

58. Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1237 (2014) (defining the interconnectedness theory of global welfare as the belief that "the gains and losses of each member of the global community would count just as much as those of U.S. citizens").

59. *Id.* at 1239.

60. I find the words of Twitter contributor @erpruc on point: "[A]sk not what your community can do for you; ask what your community can not do for anyone else." @erpruc, TWITTER, (Aug. 3, 2012), <https://twitter.com/erpruc/status/231430038694789120>. Her sarcastic quip came out of a 2012 Twitter conversation on the topic of #inspirationalNIMBY, involving mash-ups of well-known inspirational quotes with NIMBY flair. See David Alpert, *Inspirational Quotes Turn NIMBY*, GREATER GREATER WASH. (Aug. 4, 2012), <https://ggwash.org/view/28550/inspirational-quotes-turn-nimby>.

61. See *supra* notes 29–40 and accompanying text (discussing how federal immigration law preempts state attempts to regulate immigrants and refugees).

62. Elias, *supra* note 1, at 403, 407–09.

Professor Elias shows state inclusionary measures to be “underexplored opportunities” that are not only lawful but often laudable.<sup>63</sup> As examples of inclusionary lawmaking that fall within the zone of clearly acceptable state action, she highlights state programs offering financial assistance, educational support, health care, and legal help to refugees and asylees.<sup>64</sup> These are measures that may not only support refugees and asylees as they are resettled in a state, but also might induce secondary migration—the movement of refugees and asylees into a state after their initial resettlement elsewhere. In either case, programs that expand the availability of social services are well within the states’ lawful spending powers.<sup>65</sup>

More saliently, Professor Elias perceives a special role for the application of state expertise in a way that can inure to the benefit of both refugees and states. She suggests that “states may be able to identify in advance locations where refugees and asylees in general—and specific communities of refugees and asylees, in particular—would be especially welcome and useful.”<sup>66</sup> She sees an untapped opportunity for states to express “preferences about refugees’ suitability or characteristics for resettlement.”<sup>67</sup> States might, she argues, be in a good position to identify and advocate for “newcomers who are particularly desirable for a given state.”<sup>68</sup>

While the upside identified by Professor Elias is clear, there are grounds for caution. Inclusionary means may have exclusionary outcomes. Giving states an effective means of choosing which refugees and asylees they will take inevitably implicates a power to choose which refugees and asylees they will exclude.<sup>69</sup> A state that actively seeks to

---

63. *Id.* at 403.

64. *Id.* at 410–11.

65. As Professor Spiro notes, states also have discretion under federal law to deny such benefits to noncitizens. Johnson & Spiro, *supra* note 15, at 107.

66. Elias, *supra* note 1, at 409.

67. *Id.* at 408.

68. *Id.* at 410.

69. This is a power that states would very much like to have. *See, e.g.*, Letter from Scott Walker, Governor of Wis., to Donald J. Trump, President-Elect of the U.S. (Dec. 20, 2016), [https://walker.wi.gov/sites/default/files/Letter\\_to\\_President-elect\\_Donald\\_J\\_Trump.pdf](https://walker.wi.gov/sites/default/files/Letter_to_President-elect_Donald_J_Trump.pdf) (congratulating Mr. Trump on his election and suggesting principles of cooperation between Wisconsin and the federal government, including the following request: “We would like our state to have a broader role in determining how many refugees and from which countries . . .”); *see also* Lovegrove, *supra* note 29 (quoting South Carolina Governor Henry McMaster: “We want no refugees from Iran, Libya, Somalia, Sudan, Syria[,] or Yemen . . .”).

fill up its fair share of resettlement obligations with one category of refugees does so to the exclusion of what it might deem to be less desirable refugee groups.

This is not to say that it is impossible to view state preferences in a positive or pragmatic light. States might be more readily equipped to deal with Spanish-speaking students in the classroom as opposed to students who are Arabic-speaking because they already have Spanish-speaking staff in public schools.<sup>70</sup> Similarly, states might have a greater need for workers with experience in agricultural work due to labor shortages in that sector, rather than workers with experience in factory work due to job scarcity in that field, and that distinction might break down by country of origin.<sup>71</sup>

Regardless of such considerations, however, giving states a voice in the allocation of refugees is fraught with challenges. There will always be refugees who speak a language that is uncommon in the United States, and there will always be refugees who lack skills necessary for the U.S. job market. This is because, in contradistinction to other areas of immigration law, the United States does not accept refugees because of what they can offer to the country. Rather, the United States accepts refugees because it is the right thing to do, because the refugees are in need, because the contiguous nations that offered temporary aid are overwhelmed by the demand, and because we aspire to be a country that carries its share of global burdens.

Allowing states to pick and choose among admitted refugees opens the door to local decision-making based on race, religion, education, gender, and sexual orientation, among other criteria. That is to say, it invites exclusionary rather than inclusionary lawmaking. And states are prone to seize opportunities to engage in discriminatory conduct because they have a strong tendency to pass laws that benefit or simply

---

70. NANCY RHODES & INGRID PUFAHL, OBSERVATORIO REPORTS, AN OVERVIEW OF SPANISH TEACHING IN U.S. SCHOOLS: NATIONAL SURVEY RESULTS 8 (2017), [http://cervantesobservatorio.fas.harvard.edu/sites/default/files/002\\_informes\\_nr\\_spteaching.pdf](http://cervantesobservatorio.fas.harvard.edu/sites/default/files/002_informes_nr_spteaching.pdf) (noting that over three 10-year survey periods, “Spanish was taught in all [regions of the United States] by more than 90% of schools with foreign-language programs” whereas languages such as Arabic, Russian, and Hebrew were taught in “less than 3% [of schools] at all three points in time”).

71. Cf. Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don't Want the Job*, L.A. TIMES (Mar. 17, 2017), <http://www.latimes.com/projects/la-fi-farms-immigration> (finding that vineyards in California are suffering from a shortage of workers caused by fewer Mexicans willing to immigrate to America after a tightening of the security on the southern border).

appeal to their voting constituents.<sup>72</sup> Yet the issue of refugee resettlement is a national one involving a nonvoting population whose protection should be a matter of national concern.<sup>73</sup>

The different forms of inclusionary lawmaking identified by Professor Elias are amenable to distinction. On the one hand, lawmaking pertaining to the integration and upkeep of refugees and asylees—including their education and health care—seems both normatively desirable and legally permissible. On the other hand, lawmaking pertaining to the selection of refugees for admission to states raises questions about the role states should play in this area.

### CONCLUSION

Professor Elias's Article brings needed illumination to the phenomenon she has discerned as refugee federalism. She situates the current spate of state legislation regarding refugees in the context of international and federal law. She explains the role that states have traditionally played in the refugee arena, and she identifies the ways in which states have sought to expand their authority in this area—both by excluding and including migrants. Ultimately, Professor Elias concludes that although federal preemption presents a significant stumbling block to state efforts that would restrict the resettlement of refugees,<sup>74</sup> there is tremendous potential for states to engage in inclusionary lawmaking designed to promote the integration and acceptance of refugees.<sup>75</sup> It is a testament to the importance of her piece that Professor Elias's Article has already contributed to the real-world debate over the role of the states in this area.<sup>76</sup>

This Response attempts to build on the insights of Professor Elias, noting first that despite the constitutional hurdles to anti-refugee state lawmaking, states have nonetheless been successful in thwarting the

---

72. See Johnson & Spiro, *supra* note 15, at 111 (“Overwhelmingly, state and local lawmaking is politically lopsided *against* immigrants.”); see also Sara Rathod, *The Freak-Out over Syrian Refugees Is Continuing in These States*, MOTHER JONES (Feb. 26, 2016, 11:00 AM), <http://www.motherjones.com/politics/2016/02/anti-syrian-refugee-legislation-states> (reporting that more than half of America's governors announced anti-refugee policies following the San Bernardino terrorist attack).

73. See Johnson & Spiro, *supra* note 15, at 111 (arguing that States tend to focus on issues affecting their constituents, so a national solution is necessary).

74. Elias, *supra* note 1, at 412–13.

75. *Id.* at 413–14.

76. See *supra* note 12 and accompanying text (discussing how Elias's Article was cited in an argument against an anti-refugee North Dakota law).



resettlement of refugees. Second, this Response questions whether, if given the opportunity to be more involved in the choice of who to resettle, states are likely to act in an undesirable, exclusionary way.

In many ways, resettlement of refugees is a federal issue, implicating not only foreign relations, national security, and human rights, but also the fundamental cultural question of how America sees itself in the global community.<sup>77</sup> Yet resettlement is also a local issue, as every refugee will eventually make a home in a specific locality. On the front lines of relocation, states may have unique ideas about how to better resettle refugees. The federal government, in turn, should do a better job of listening to those ideas.

In seeing the great potential of state voices in the refugee context, we should not be blind to the propensity of states to engage in nimbyism—whether that takes the form of looking to avoid the problem of refugees altogether or to minimize discomfiture by seeking out “good” refugees.<sup>78</sup> State-interestedness is especially problematic in this arena because it may build on top of the national-nimbyism evident in our country’s refugee program as a whole. The United States accepts a shockingly small number of refugees each year, particularly when viewed in comparison to its capacity to help. To require those select few refugees who have been accepted into the United States to run the gauntlet of yet another layer of nimbyism at the state level is unacceptable.

Professor Elias’s Article provides keen insight into the important phenomenon of refugee federalism. This Response seeks to further the conversation about its perils and possibilities.

---

77. Johnson & Spiro, *supra* note 15, at 112.

78. See generally Amos Roberts, *We’re Quick to Label Refugees as Either ‘Good’ or ‘Bad,’ but They’re All Entitled to Protection*, GUARDIAN (June 27, 2017), <http://www.theguardian.com/commentisfree/2017/jun/28/were-quick-to-label-refugees-as-either-good-or-bad-but-theyre-all-entitled-to-protection> (“When it comes to refugees, we seem to delight in extremes that reinforce our own view of the world—so-called ‘bad’ refugees . . . who outrage the community, or ‘good’ ones, who enrich it.”).