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Forced Federalism: States as Laboratories of Immigration Reform

KEITH CUNNINGHAM-PARMETER*

Ever since Justice Louis Brandeis characterized states as laboratories of democracy, judges and scholars have championed the ability of states to offer a diverse array of solutions to complex national problems. Today, proponents of enhanced immigration restrictions apply the same rationale to state immigration laws. This Article challenges the assertion that states can serve as valuable laboratories of immigration reform.

States that enact their own immigration laws do not internalize costs or yield replicable results—two conditions needed for viable experimentation. When states internalize costs, other jurisdictions can effectively evaluate outcomes. Replication occurs when states take diverse approaches to common problems. Unfortunately, current state immigration laws do not meet these criteria because states operate in a system of “forced federalism”: a division of power between the two levels of government in which subnational jurisdictions attempt to force the federal government to accept state-defined immigration enforcement schemes. But as states thrust their chosen levels of immigration control on the federal government, their potential to innovate on immigration matters is quite restricted. Essentially, forced federalism limits states to a narrow set of enforcement decisions based on federally defined norms—far from the type of diverse testing associated with true innovation and replication.

Today’s state immigration experiments also fail to internalize costs—another condition of successful subnational tests. Restrictionist states that encourage unauthorized immigrants to resettle in other jurisdictions export the economic damage they claim illegal immigration causes. In addition to economic spillovers, laboratory states export social costs to the nation by fundamentally altering the concept of a shared national identity. For example, when immigrants flee restrictionist states in order to avoid racial profiling or harassment, the national commitment to values such as egalitarianism and nondiscrimination is weakened. These harms are not confined to restrictionist states alone but are felt by the nation as a whole.

Not all subjects are ripe for local experimentation and not all tests produce valid results. Despite the appealing image of states as laboratories, today’s immigration experiments will not advance the nation’s ongoing search for sounder immigration policies.

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INTRODUCTION

Immigration law is undergoing an unprecedented upheaval. The states, displeased with decades of lax enforcement at the federal level, have taken immigration matters into their own hands. In response to the widespread perception that the federal government cannot or will not control the border, state legislatures are now furiously enacting immigration-related laws, with stricter enforcement schemes predicted to come. These attempts to wrestle control of enforcement decisions from...
the federal government have cast into doubt the doctrinal core of immigration law: federal exclusivity.

The field has not experienced such a dramatic shift in power since the nineteenth century. During that time—the so-called "lost century" of immigration law—states ruled supreme. In the absence of federal immigration laws, the states established their own criteria for excluding and removing undesirable immigrants and enforced those criteria through quarantines, inspection laws, and criminal codes. In 1875, the Supreme Court struck down a series of state enactments and ushered in a new era of federal preeminence over immigration law that remained in place until recently.

A new spate of legislation at the subnational level has once again placed the states at the center of the national immigration debate. Various states have enacted new immigration laws that: make the transporting of unauthorized immigrants a state felony, require local police to ascertain the immigration status of suspects, and establish a toll-free hotline for citizens to report sightings of unauthorized immigrants. Even when courts enjoin some of these laws, local police continue to arrest suspects for violating federal immigration regulations.

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3. Id. at 1883 (listing different categories of state immigration laws).


6. ARIZ. REV. STAT. ANN. § 11-1051(B) (Supp. 2010); UTAH CODE § 76-9-1003 (2011) (requiring police officers to verify the immigration status of vehicle passengers when there is a reasonable suspicion to believe that the vehicle contains unauthorized immigrants). But see United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), aff'd, 641 F.3d 339 (9th Cir. 2011) (enjoining portions of the Arizona law).

7. S.C. CODE ANN. § 8-30-10 (Supp. 2010); see also Savage, supra note 1, at A4 (summarizing claims that South Carolina's immigration law was the strictest yet).


This continued state activity ensures that the issue of immigration federalism will remain in our legal consciousness for the foreseeable future. Ever since Justice Brandeis characterized states as laboratories of democracy, judges and scholars have championed the ability of states to offer a diverse array of solutions to complex national problems. Today, proponents of enhanced immigration restrictions apply the same rationale to state immigration laws. They describe states as policy innovators that represent the future of immigration enforcement. This Article challenges the assertion that states can serve as valuable laboratories of immigration reform. I begin by examining the states' current position within the system of immigration federalism. According to federalism scholars, states can behave like “servants” or “sovereigns” in their interactions with the federal government. “Sovereigns” are autonomous policymakers, while “servants” are cooperative partners that implement federal programs. I explain how states have played each of these roles at various points in the nation's immigration history. But neither role accurately depicts the current system. Today, states that enact their own immigration laws are not federal servants because they act independently—and often over the

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16. See id. at 1258-59 (discussing the states’ ability to innovate while acting as uncooperative servants).
expressed objection—of the federal government. Conversely, they are not sovereigns because their enforcement policies remain tightly hemmed in by federally defined norms. Even though they claim to act in harmony with congressional objectives, the United States does not seek their help. Neither sovereigns nor servants, these states are immigration interlopers.

Recent state immigration laws operate in a system I call "forced federalism": a division of power between the two levels of government in which states attempt to dictate their own immigration enforcement schemes to the federal government. As Part I explains, the level of immigration control a state selects within forced federalism can range from no control in the case of sanctuary states to maximum control in the case of restrictionist states. But as states attempt to force the federal government to accept their chosen level of immigration control, their potential to innovate on immigration matters remains quite limited. Unlike true sovereigns that can set their own admissions criteria or true servants that receive broad delegations of power to creatively implement federal norms, the intermeddlers of forced federalism cannot do either. Rather, the states' options under forced federalism remain restricted to a narrow set of enforcement decisions—far from the type of diverse testing associated with true innovation.

Having introduced in Part I a theoretical framework for evaluating state immigration laws, I outline in Part II the requisite conditions for successful experimentation. Drawing from the scholarship on experimental federalism, I explain why two concepts—internalization and replication—are crucial conditions for successful state-based tests. State experiments that internalize costs—social, economic, and political—provide useful data on outcomes for outside policymakers to evaluate. Likewise, if several states engage in novel experiments on the same subject, they can produce a broad range of policy options, any one of which other states or the federal government can choose to replicate. The latter half of Part II explains how these principles have played prominent roles in the Supreme Court's jurisprudence on immigration federalism.

Part III explains why current state immigration laws that operate within forced federalism cannot fully internalize costs or yield replicable results. Beginning with the restrictionist case, I concede that laboratory states internalize some of the costs of their tests. For example, if businesses boycott a state or if consumer prices increase because of state restrictions, those costs are borne entirely within the state, thereby enhancing the apparent validity of the experiment. There are, however, other externalities that lie just beneath the surface. The acknowledged

17. See, e.g., Kris W. Kobach, Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration, 22 GEO. IMMIGR. L.J. 459, 483 (2008) ("[S]tates are only permitted to act in ways that are in harmony with federal law and consistent with congressional objectives.").
purpose of restrictionist measures is to encourage the mass exodus of unauthorized immigrants; I explain why most of these immigrants will resettle in other states rather than return to their countries of origin. As such, laboratory states export to their sister states the economic damage they claim illegal immigration causes. In addition, states that enact restrictive immigration legislation demand additional resources from the federal government to assist with verifying the status of suspects and prosecuting them for state-created immigration crimes. This, in turn, produces additional externalities by requiring the federal government to reallocate resources away from nonexperimenting states.

Beyond economic and policy spillovers, state-based experiments give rise to serious social externalities as well. Laws enacted in restrictionist states have already achieved their goal of motivating some unauthorized immigrants, most of whom are Latino, to leave these states. Likewise, so-called “sanctuary states”—states that refuse to cooperate with federal efforts and therefore operate at the opposite end of forced federalism—might attract citizens or legal residents who fear racial profiling or refuse to live in a state with never-ending border patrols. Although a variety of social and cultural factors already contribute to this type of racial and ideological sorting, Americans continue to maintain a shared belief in certain values such as egalitarianism, nationalism, and tolerance for diversity. The prospect of immigrants marching toward welcoming states while concerned citizens march in the opposite direction threatens to weaken these fundamental precepts of a shared national identity. By definition, states cannot internalize the social costs of redefining the national community.

More functionally, the federal government cannot replicate the results emerging from these experiments. As explained in Part II, replication requires that states engage in diverse experiments that yield an array of policy options from which state and federal legislators may select. But this novelty requires a level of diversity and competition in ideas that is not achievable within the current system of forced federalism. Both sanctuary states and restrictionist states are hamstrung in the options they can pursue. For example, they cannot issue visas based on local labor needs or delay deportation actions based on humanitarian concerns. Because states do not act as sovereigns, their pursuit of reform within forced federalism is limited to a very narrow set of decisions related to the level of cooperation they will or will not provide on enforcement matters. Although the success or failure of these local decisions might provide some marginal benefit to the federal


government, the information that emerges from these laboratories is far removed from the major immigration-related decisions the federal government faces. Examples of these include whether to tighten border security, expand the nation's guestworker program, or grant amnesty to unauthorized immigrants. In short, because state experiments fail to internalize costs or yield adoptable results, they cannot help answer the most important questions that dominate the national debate over immigration reform. Given these structural deficiencies, the nation should proceed cautiously before embracing this model of experimentation.

I. MOVING TOWARD FORCED FEDERALISM

A. TWO MODELS OF INNOVATION

States tend to occupy two roles within our federalist system. One role allows them to act as sovereigns that compete with the federal government. Under this model—commonly dubbed “dual federalism”—states are described as isolated entities that possess their own spheres of influence. The allocation of responsibilities between the two levels of government is entirely static; power is either centralized through national policies or reserved for the states. The states and federal government do not collaborate with one another, but instead exist as competitive coequals. The Supreme Court has championed this version of federalism at times, pointing to constitutional limitations placed on Congress's enumerated powers as evidence of the states' “inviolable sovereignty.” According to the Court, dual federalism preserves the states' “dignity,” thereby enabling them to exercise “concurrent authority over the people.”

21. See Bulman-Pozen & Gerken, supra note 15, at 1258 (examining the extent of state powers within dual federalism).
24. Id. at 442–44 (summarizing the Supreme Court's defense of the sovereignty model).
In contrast to the autonomy model, cooperative federalism describes states less like sovereigns and more like federal servants. This system takes a more pragmatic approach to the day-to-day operations of government, explaining how state and federal powers intermingle constantly. For example, most states spend a great deal of time implementing and administering federal programs in order to obtain funding or to avoid displacement in particular fields. States work with and under the supervision of federal authorities, although the extent of such oversight varies considerably among programs. Overall, the nature of these interactions is integrative rather than adversarial.

Proponents of state innovation often invoke the sovereignty model. According to those who support decentralized control, states that act in their sovereign capacities are more likely to enact different laws that produce evidence about the effectiveness of separate programs. Thus, states should maintain independent powers, especially over inherently local matters, in order to maximize the sovereign’s unique potential to innovate.

More recent scholarship on experimental federalism has explored the ways in which states can exercise their creative urges even under a system of cooperative federalism. As servants of the federal government, states are constantly enforcing federal rules or developing their own regulations based on federally established guidelines. Although this arrangement might appear to narrow the states’ choices, states actually maintain a wide degree of discretion in the process. For example, by exercising delegated powers, states can express preferences for particular enforcement strategies based on local needs and resources.
Likewise, in developing rules that respond to national guidelines, states can decide whether to meet minimum federal standards or exceed such floors. Thus, proponents of cooperative federalism assert that fifty different servants working at the behest of the federal government are quite likely to take nonuniform approaches to national problems and, therefore, innovate.35

The servant model, though, does not always facilitate innovation. For example, if Congress attaches elaborate restrictions to spending offers, the states' room to maneuver is quite limited. As such, these federal servants will innovate only when given broad mandates that enable flexibility and a free exchange of information.36 The "bounded discretion" of this approach allows states to engage in diversified, yet constrained experimentation.37 As explained below, the states have exercised authority within each of these systems—dual federalism and cooperative federalism—at various points in the nation's immigration history.

B. SOVEREIGNS, SERVANTS, AND IMMIGRATION FEDERALISM

Given broad judicial pronouncements regarding federal supremacy over immigration matters, it might appear that states cannot act like immigration sovereigns or servants. After all, the Supreme Court has strictly forbidden states from determining "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."38 According to the Court, the federal government maintains exclusive, plenary authority over these questions of "pure" immigration law. In fact, the federal government's domain in the field is so extensive that the Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."39

But states were not always immigration bystanders. In the past, the states did not passively defer to federal commands, but were actively involved in decisions related to admissions and exclusions. More recently, some states have begun to behave like federal servants that work cooperatively with the federal government on immigration enforcement. These developments not only explain the states' changing roles within immigration federalism, they form the historical foundation for today's system of forced federalism.

35. See, e.g., Schapiro, supra note 33, at 8–9 (arguing that interactive federalism "may produce a broader variety of potential solutions" than other systems).
37. See Caminker, supra note 25, at 1079 (challenging the conventional claim that commandeering deters state-based innovation).
1. Immigration Sovereigns

Long before the federal government became involved in immigration enforcement, the states acted as immigration sovereigns. In his groundbreaking research on early immigration laws, Gerald Neuman convincingly disproved the common claim that immigration law began only when Congress acted in the late nineteenth century.40 Despite these findings, many lawyers, scholars, and judges continue to assume that the nation's first century was marked by "unimpeded immigration" in which huddled masses of foreigners freely crossed borders without interference from either level of government.41 Although this account fairly accurately describes Congress's laissez-faire approach to immigration law throughout the nation's early history, the states assumed a much more active role during this period.42

Throughout the nation's first century, states enacted their own immigration laws, criminal codes, and public health restrictions to prevent undesirable immigrants from entering their jurisdictions. For example, Connecticut, Maryland, New Jersey, New York, Pennsylvania, South Carolina, and Virginia prohibited foreign criminals from becoming state residents.43 Other states demanded security payments from shippers that transported foreign nationals.44 In addition, some states attempted to remove undesirable immigrants by offering them conditional pardons or simply returning them "to the place or country from which they came."45

The federal government did very little to displace these early state immigration laws. For example, while some states prohibited foreign criminals from entering their borders as early as 1787, Congress did not enact a similar ban until 1875.46 Likewise, although the federal

40. See Neuman, supra note 2, at 1834 (explaining how states regulated transborder movements during the nineteenth century).
41. Id. at 1834–35.
43. Neuman, supra note 2, at 1842 (noting that states enforced these provisions by penalizing persons responsible for transporting convicts, rather than the convicts themselves); see also Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. Rev. 1557, 1568–69 (2008) (explaining how these measures were utilized to prevent the entry of undesirable outsiders).
44. Neuman, supra note 2, at 1842–49 (discussing various state attempts to charge transporters of immigrants).
45. Id. at 1845–52 (arguing that these removal proceedings helped appease growing nativist sentiments during the mid-nineteenth century); see also Michael A. Olivas, Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications, 35 Va. J. Int'l L. 217, 221–22 (1994) (discussing the deference afforded to the states in establishing entry requirements); Kunal M. Parker, State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts, 19 Law & Hist. Rev. 583, 638–39 (2001) (discussing early efforts in Massachusetts to deport indigent immigrants).
46. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (restricting the immigration of convicted criminals and prostitutes); see Karl Manheim, State Immigration Laws and Federal Supremacy, 22 Hastings
government began deporting immigrants for crimes of moral turpitude in 1917, the states had been banishing convicted criminals since the 1700s.47

These early divisions of power resembled in many ways a system of dual federalism. With the federal government uninterested or unwilling to enact legislation that comprehensively regulated immigration matters, the states assumed control by utilizing their reserved police powers.48 As predicted by proponents of dual federalism, this autonomy produced a variety of nonuniform control measures. For example, some states attempted to exclude nearly every type of criminal immigrant, while others took a more limited approach by excluding only certain immigrants convicted of specific crimes.49 Likewise, some states focused their enforcement efforts on the immigrants themselves, whereas others attempted to penalize third parties who transported immigrants across borders.50 Thus, the sovereignty model allowed each state to decide whom to admit and the means to achieve locally defined admissions criteria.51

The Supreme Court ended these early immigration experiments in the late nineteenth century when it announced that the federal government maintained broad, exclusive immigration powers.52 After a series of decisions expanding the federal government’s province over immigration matters, the states morphed from sovereigns to bystanders.53 This division of power remained intact for over a century. Throughout

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47. Neuman, supra note 2, at 1842-45 (noting that many states eventually prohibited banishment as a formal matter); see also Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases, 113 HARV. L. REV. 1908-9 (2000) (discussing the history of banishment in the colonies); Stumpf, supra note 43, at 1577 (examining the federal government’s approach to removal during the nineteenth century).

48. See Huntington, supra note 13, at 819-20 (asserting that Congress enacted immigration legislation not because of a perceived constitutional mandate, but because of ongoing social and political changes in the United States); see also Spiro, supra note 14, at 1628 (describing the “federal legislative vacuum” during the nineteenth century that enabled states to regulate immigration matters).

49. See Neuman, supra note 2, at 1842 (comparing Connecticut’s more limited ban to those in other states).

50. Id. at 1883-84 (discussing several categories of state immigration laws).

51. Manheim, supra note 46, at 956 (“[The states] purported to determine for themselves which aliens were suitable for admission and which were not . . . .”).

52. See Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Henderson v. Mayor of N. Y., 92 U.S. 259, 274 (1875); see also Karla Mari McKanders, Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It, 39 LOV. U. CM. L.J. 1, 14 n.82 (2007) (discussing the shift in immigration power that occurred during the late nineteenth century).

53. Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889); see also Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567, 612-13 (2008) (explaining how the notion of federal exclusivity took hold during the late nineteenth century).
the twentieth century, the federal government acted as a self-declared immigration sovereign. Although some states passed laws during this period that attempted to alter certain immigration-related incentives, very few states enacted legislation designed to enforce federal immigration standards directly.

Despite the dramatic shift of power from the states to the federal government during the nineteenth and twentieth centuries, dual federalism's preeminence in the field continued. Just as the nineteenth century was marked by de facto state control over immigration law, the twentieth century was marked by federal exclusivity in the same area. Although the roles occupied by the two levels of government changed, the basic federalist structure remained the same. Whether it was state control during the nation's first century or federal control more recently, both eras in immigration law contained the hallmarks of dual federalism: separately reserved spheres of influence with minimal overlap of authority between the two levels of government.

2. Immigration Servants

Dual federalism's hold on immigration enforcement began to loosen at the end of the twentieth century. In 1996, Congress amended the Immigration and Nationality Act ("INA") to authorize the federal government to enter into agreements with state and local law enforcement agencies to investigate, apprehend, and detain residents for suspected immigration violations. Although this change did not alter the federal government's exclusive control over admissions decisions, it enabled subnational law enforcement units to exercise delegated enforcement powers. Pursuant to these delegations, local police officers

54. See Huntington, supra note 13, at 820 (arguing that the Constitution does not mandate federal exclusivity over all immigration matters).
55. See Manheim, supra note 46, at 954–55 (discussing state-based alienage discrimination in employment and public benefits); Rodriguez, supra note 53, at 569–70 (discussing the states' "occasional" activity in these areas during the twentieth century). California's Proposition 187, which prohibited unauthorized immigrants from obtaining nearly all state services, marked the most prominent subnational immigration-related law prior to the current period. See Motomura, Federalism, supra note 10, at 1365–67 (summarizing the law and arguing that it reflected a renewed state interest in controlling illegal immigration); see also League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (enjoining the enforcement of various provisions of the law); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995) (same).
functioned as immigration agents who could take custody of immigrants and gather evidence against them for prosecution or removal.\textsuperscript{59}

No state accepted Congress's invitation to engage in this form of cooperative enforcement until 2002 when Florida signed an agreement with U.S. Immigration and Customs Enforcement ("ICE").\textsuperscript{60} Since then, the states' interest in cooperative federalism has increased substantially.\textsuperscript{61} Currently, ICE works with seventy-one law enforcement agencies in twenty-five states and has deputized over one thousand state and local officials as immigration agents.\textsuperscript{62} ICE argues that the growing popularity of these arrangements shows how "a shared approach to immigration enforcement can benefit [local] communities."\textsuperscript{63}

These state-federal immigration agreements might seem like perfect opportunities for states to innovate within a system of cooperative federalism. In theory, states working under an agreement with ICE should be able to serve federally defined goals while developing unique enforcement techniques based on local expertise.\textsuperscript{64} But only certain models of cooperative federalism foster this type of state-based innovation. As noted above, states will offer creative solutions to national problems within a system of cooperative federalism only when they receive broadly delegated powers that allow them to exercise a high level of discretion.\textsuperscript{65}

Yet a number of restrictions in the INA ensure that state officials will behave more like cloned federal agents than creative implementers. For example, the INA requires that state police officers receive and adhere to federal training on immigration enforcement while carrying out their functions as deputized immigration agents.\textsuperscript{66} In addition, federal

\textsuperscript{59.} See Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 ALB. L. REV. 179, 196 (2006) (arguing that the power delegated to local police through cooperative agreements is broader than their inherent authority to conduct immigration arrests).


\textsuperscript{61.} See Stumpf, supra note 43, at 1594–95 (explaining how concurrent enforcement efforts accelerated after September 11, 2001).


\textsuperscript{64.} See Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 IOWA L. REV. 243, 250 (2005) (discussing the "state-federal partnerships" of cooperative federalism).

\textsuperscript{65.} See supra Part I.A and accompanying discussion of the conditions necessary to stimulate innovation within a system of cooperative federalism.

\textsuperscript{66.} 8 U.S.C. § 1357(g)(2) (2006); see also Yule Kim, The Limits of State and Local Immigration Enforcement and Regulation, 3 ALB. Gouv'T L. REV. 242, 251–52 (2010) (discussing the limited enforcement discretion given to localities under cooperative federalism); McKanders, supra note 52, at 42–44 (same).
officials must supervise and direct state officers in order to ensure compliance with federal norms.\textsuperscript{67} But the closer that states adhere to federal policy, the less likely they are to venture in innovative directions.\textsuperscript{68}

This is not to say that granting local officials unfettered discretion in enforcing immigration regulations is any more desirable. In fact, the limited evidence available suggests that even when hemmed in by federal restrictions, some local officers have engaged in racial profiling and failed to carry out the stated federal goal of arresting criminal immigrants.\textsuperscript{69} The point is that the recent shift toward cooperative federalism on enforcement matters cannot facilitate the kind of unencumbered decisionmaking that proponents of delegated powers describe. Rather, the constrained nature of the states' enforcement authority severely limits the innovative potential of these shared state-federal enforcement efforts.\textsuperscript{70}

3. Experiments in Forced Federalism

As they did in the early nineteenth century, states and localities have once again injected themselves into immigration control measures without seeking the federal government's permission.\textsuperscript{71} In contrast to states that enter into cooperative agreements with ICE, many state legislatures today do not seek federal approval before engaging in their own brands of immigration enforcement. Curiously, proponents of state immigration laws draw from very different theories of federalism to describe the recent turn of events. In touting the virtues of state immigration laws, they mix claims of autonomy with claims of collaboration, thereby making confusing and often contradictory assertions of power that contain elements of dual federalism's reserved powers and cooperative federalism's delegated powers. According to one account, state officers engaged in aggressive immigration enforcement

\begin{itemize}
\item \textsuperscript{67} 8 U.S.C. § 1357(g)(3) (2006); see also Kobach, supra note 59, at 197–99 (summarizing the training and supervision federal officials provide to law enforcement officers).
\item \textsuperscript{68} Kim, supra note 66, at 254 (describing the limited role federal law contemplates for the states in immigration enforcement).
\item \textsuperscript{69} See, e.g., DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., THE PERFORMANCE OF 287(g) AGREEMENTS 23–24 (2010) (discussing allegations of civil rights violations against local agencies involved in cooperative enforcement); NAT'L IMMIGRATION LAW CTR., MORE QUESTIONS THAN ANSWERS ABOUT THE SECURE COMMUNITIES PROGRAM 4–5 (2009) [hereinafter NAT'L IMMIGRATION LAW CTR., SECURE COMMUNITIES] (discussing problems with enforcement decisions undertaken pursuant to cooperative immigration agreements); NAT'L IMMIGRATION LAW CTR., UTAH: GOING DOWN ARIZONA'S UNCONSTITUTIONAL PATH 1 (2011) (arguing that Utah's recent immigration law "promote[s] racial profiling for law enforcement in a wide variety of scenarios").
\item \textsuperscript{71} Rick Su, A Localist Reading of Local Immigration Regulations, 86 N.C. L. REV. 1619, 1633–64 (2008) (comparing early local immigration laws to today's attempts to directly enforce federal immigration law).
\end{itemize}
are simply exercising their inherent police authority to control crime and protect the public.\footnote{See, e.g., John Ashcroft, Attorney Gen., U.S. Dep't of Justice, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (arguing that states have the inherent authority to conduct arrests for civil and criminal immigration violations); Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 13 (Apr. 3, 2002), available at http://www.aclu.org/files/ACF27DA.pdf ("States have inherent power, subject to federal preemption, to make arrests for violation of federal law."); see also Kobach, supra note 59, at 199-219 ("The source of this authority flows from the states' status as sovereign governments possessing all residual powers not abridged or superseded by the U.S. Constitution.").} In short, they are archetypal sovereigns that possess autonomous powers reserved for them by the Tenth Amendment. In other instances, however, proponents of local control describe states as federal assistants that do nothing more than enforce the laws already on the books.\footnote{Id.; see also John Schwartz & Randal C. Archibold, A Law Facing a Tough Road Through the Courts, N.Y. TIMES, Apr. 28, 2010, at A17 (summarizing Kris Kobach's contention that Arizona's immigration law provides an example of "perfect concurrent enforcement" with federal law).} Their "cooperative enforcement" of immigration norms assists the federal government in achieving the shared goal of combating illegal immigration.\footnote{See, e.g., Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens . . . .") (internal citations omitted).} According to this alternate account, states are merely helpful servants that operate within a system of cooperative federalism.\footnote{See, e.g., Ariz. Rev. Stat. Ann. § 11-1051(E) (Supp. 2010) (relying on federal immigration determinations to enforce state law).}

Unfortunately, neither portrayal accurately describes the new divisions of power created by today's state immigration laws. Local efforts to enforce immigration laws do not reflect a dual federalist model because laboratory states are not allowed to act like sovereigns on immigration matters. In fact, the opposite is true: The Supreme Court has clearly placed immigration authority within the federal government's exclusive domain.\footnote{See Bulman-Pozen & Gerken, supra note 15, at 1266 ("Because the master delegates responsibility, the servant has discretion in choosing how to accomplish its tasks and which tasks to} Thus, even as restrictionist states depict themselves as pure immigration sovereigns, they rely heavily on federal immigration laws to define state-proscribed conduct—far from the type of unencumbered power that genuinely independent subnational actors exercise within dual federalism.\footnote{See Bulman-Pozen & Gerken, supra note 15, at 1266 ("Because the master delegates responsibility, the servant has discretion in choosing how to accomplish its tasks and which tasks to} The model of cooperative federalism is also inapposite. Although states may claim to behave like federal servants, the assistance they offer does not derive from delegated powers—the hallmark of cooperative federalism.\footnote{See Bulman-Pozen & Gerken, supra note 15, at 1266 ("Because the master delegates responsibility, the servant has discretion in choosing how to accomplish its tasks and which tasks to}
reached into a murky regulatory zone that lies somewhere between immigration law and police authority to assert control over immigration enforcement.\textsuperscript{79}

Recent state immigration laws have created a system I call "forced federalism." As with other theories of federalism, forced federalism describes allocations of power between the two levels of government. According to this theory, the states are neither servants nor sovereigns but instead immigration intermeddlers. In contrast to dual federalism, which involves reserved powers, and cooperative federalism, which involves delegated powers, forced federalism involves demanded powers. The states now insist on having a seat at the table on immigration enforcement decisions, even though the federal government has not invited them.

The uncertain powers that states possess under forced federalism differ from the clearer lines of authority that other models of federalism demarcate. Under existing theories, power is either allocated to one level entirely or exercised concurrently. In contrast, the zone of authority states command within forced federalism is more dynamic and less defined. As such, the source and scope of the states' authority within forced federalism constantly expands and contracts as courts produce differing pronouncements on the permissibility of the states' immigration-related conduct. Clearer divisions may eventually come to the field. For example, Congress might explicitly authorize the states to engage in parallel enforcement or the Supreme Court may broadly oust them from the field. With either occurrence, more recognizable systems of federalism will emerge, thereby providing states with a less ambiguous regulatory space in which to operate.

Several recent subnational immigration laws demonstrate forced federalism in action. Many states now require police officers to verify the immigration status of suspects or detainees.\textsuperscript{80} For example, Arizona requires police officers to determine the immigration status of any individual stopped, detained, or arrested where there is reasonable suspicion to believe that the person is an unauthorized immigrant.\textsuperscript{81} Law enforcement officers in Utah must verify the immigration status of vehicle occupants when there is reasonable suspicion to believe that the

\textsuperscript{79} See Aoki et al., supra note 57, at 490 (discussing the tension between the states' police power and the federal government’s plenary power over immigration law).

\textsuperscript{80} See Rodriguez, supra note 53, at 591-92 (summarizing direct enforcement actions in Georgia, Oklahoma, Colorado, and Arizona); see also Huntington, supra note 13, at 799-804 (discussing various categories of state immigration laws).

vehicle is transporting unauthorized immigrants. Police in North Carolina and Georgia must verify the immigration status of any person detained for committing a felony. Missouri broadly requires status checks of all persons confined to jail. At the city and county level, local officials have ordered police officers and sheriffs to identify and arrest individuals for immigration violations.

Other states have amended their penal codes to criminalize immigration-related conduct. For example, Georgia, Oklahoma, South Carolina, and Utah have made transporting unauthorized immigrants a state felony. Arizona recently criminalized the failure to carry an alien registration card. Some states and localities regulate illegal immigration in more indirect ways. For example, localities in California, Florida, Georgia, Pennsylvania, Missouri, and Texas have enacted ordinances that prohibit landlords from housing unauthorized immigrants. Many states require private employers to electronically verify the immigration status of new employees or penalize businesses that hire unauthorized

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85. See Pham, supra note 60, at 970 (explaining the origins of local restrictionist policies); see also Stumpf, supra note 43, at 1598 (discussing local attempts to exercise nondelegated immigration powers).
86. Ga. Code Ann. § 16-11-200 (2011) (creating a state felony for transporting eight or more unauthorized immigrants); Okla. Stat. Ann. tit. 21, § 446 (West Supp. 2011); S.C. Code Ann. § 16-9-460 (Supp. 2010); Utah Code § 76-10-2901 (2011) (creating a third-degree felony for encouraging or inducing any immigrant to enter or reside in the state illegally); see also Colo. Rev. Stat. § 18-13-128 (2011) (creating a state felony for transporting eight or more unauthorized immigrants); Huntington, supra note 13, at 803 (discussing states that have amended their penal codes to create immigration-related crimes); McCormick, supra note 5, at 341-42 (criticizing Oklahoma’s immigration law).
immigrations. Even though courts have struck down a large number of the foregoing provisions, state legislation in this area continues unabated.

The federal government has rejected many of these state-defined levels of immigration control. For example, President Barack Obama’s Justice Department clearly signaled its displeasure with forced federalism when it sued Arizona for enacting legislation that required local police to ascertain the immigration status of suspects. Other administrations, which at times have encouraged local cooperation, have expressed displeasure with forced federalism as well. For example, President George W. Bush’s Justice Department sued Illinois for enacting legislation that prohibited businesses from using an online system to verify the immigration status of new employees. As with Arizona, this litigation resulted in an injunction that halted the state’s immigration experiment. Although Arizona and Illinois operated at different ends of forced federalism, each state sought to define its own level of immigration cooperation without first seeking federal permission. Illinois refused to participate in the federal government’s online verification program, and Arizona foisted unwanted help on the federal government. In each case, the Justice Department opposed states that attempted to declare the amount of assistance they would offer on enforcement matters.


92. See Jill Keblawi, Comment, Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?, 53 Cath. U. L. Rev. 817, 817-18 (2004) (explaining how the Department of Justice’s position on inherent authority changed with administrations); see also Pham, supra note 60, at 974-75 (discussing claims of inherent authority).


94. Id. at *2 (holding that the Illinois law frustrated congressional purposes).
Because courts have failed to explain clearly the propriety of these assertions of power, the states’ ability to assert their chosen levels of immigration cooperation remains unknown. Consider the issue of whether local police officers can arrest suspects for committing civil immigration violations. The Tenth Circuit has held that federal law provides a “clear invitation” for police to make such arrests, while the Ninth Circuit has found “no opportunity for state activity” in this area. Until recently, a similar circuit split existed on the issue of state requirements involving electronic employment verification. The Tenth Circuit held that an Oklahoma law requiring businesses to electronically verify the immigration status of new employees violated the Supremacy Clause by interfering with congressional design, whereas the Ninth Circuit found that a nearly identical Arizona law was not preempted. The Supreme Court resolved this dispute in Chamber of Commerce v. Whiting, holding that Arizona’s law was “entirely consistent” with federal objectives. Although the Whiting Court brought some clarity to the field by allowing states to employ their own immigration verification systems, many other state enforcement powers remain shrouded in forced federalism’s ambiguity. For example, in addition to judicial disagreements over whether local police officers can arrest suspects for noncriminal federal immigration violations, courts have issued inconsistent rulings on whether states and localities can punish people who “harbor” or “transport” unauthorized immigrants. In short, the courts’ preemption rulings have resulted in a disorderly jumble that continues to obscure forced federalism’s boundaries.

In the midst of this confusion, states continue to formulate new immigration regulations. But the fact that these assertions of power are made within a system of forced federalism severely limits the potential for

95. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999).
96. Gonzales v. City of Peoria, 722 F.2d 468, 474–75 (9th Cir. 1983).
99. 131 S. Ct. at 1985; see also infra Part II.C.3 and accompanying analysis of Whiting.
meaningful immigration experimentation. Although states operating within forced federalism oscillate between claims of autonomy and dependence, the actual space between these two poles is quite small. For example, states are clearly prohibited from setting their own criteria for immigrant admissions. Likewise, they cannot exclude or remove immigrants from their territory as they did when they acted as immigration sovereigns during the nineteenth century. Given the federal government’s exclusive authority over pure immigration law, states are left with a small menu of enforcement options. Essentially, they can attempt to define the level of control they will exercise (or refuse to exercise) in enforcing federally defined norms. But none of these decisions will result in the rich array of solutions and data offered by other theories of federalism.

The foregoing discussion explains why forced federalism limits the subjects of permissible state experimentation. But it does not explain how these experiments might proceed, assuming states operate within the small experimental zone that forced federalism reserves for them. Thus, even if states engage in a limited number of enforcement-based experiments, could those tests produce valuable data for the rest of the nation? Do immigration experiments export costs to sister states and the federal government? The following Part considers these questions.

II. THE CONDITIONS OF EFFECTIVE EXPERIMENTATION

Arguments in favor of decentralized government often tout the virtues of experimental federalism without examining the requirements for effective state-based testing. Any analysis of the conditions necessary for successful experimentation begins with Justice Brandeis’s famous description of states as laboratories. He wrote, “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.”

According to Justice Brandeis, our federalist system should encourage those experiments that produce unique and varied outcomes (“novel”) without generating negative externalities that harm the rest of the nation (“without risk”). The terms “internalization” and “replication” capture each of these concepts. Experiments that fail to internalize their costs

102. See Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (“Any concurrent state power that may exist is restricted to the narrowest of limits . . . .”).
103. See Spiro, supra note 14, at 1636 (acknowledging the “complete disparity between state and federal power” on pure immigration decisions).
104. Neuman, supra note 2, at 1841 (discussing how states engaged in immigration regulation prior to 1875).
106. See id.
generate risk because they force other states and the federal government
to pay for tests they do not control and cannot effectively evaluate.
Conversely, the nation benefits from states that pay for their own
experiments while producing replicable results. Such outcomes are more
likely to occur if each state approaches the same problem from different
vantages. Novel experiments occurring simultaneously in many different
jurisdictions yield useful data on the success and failure of each
approach. Observers can then discard the failed experiments and
replicate the successes.

This Part explains why the concepts of internalization and
replication are crucial factors for identifying high-value experiments.
Drawing from federalism scholarship and the Supreme Court's
federalism jurisprudence, it explains why states that externalize the
negative consequences of their policies will tend to overproduce
inefficient regulations, while failing to offer replicable solutions to
national problems. The Supreme Court considered these factors in three
of its most important decisions involving state immigration experiments.
In *Hines v. Davidowitz*, the Court struck down a Pennsylvania law that
externalized harm to immigrants by forcing them to carry state-issued
alien registration cards.\(^{107}\) In *De Canas v. Bica*, the Court allowed
California to enact an employment verification requirement that was
relatively novel at the time and, therefore, had the potential for
replication.\(^{108}\) Most recently, the Court upheld Arizona's new
immigration verification law in *Chamber of Commerce v. Whiting*,
holding that Arizona's parallel system of immigration enforcement did
not export costs to legal residents or the nation.\(^{109}\) The concepts of
internalization and replication not only animate these decisions, they
establish normative criteria for determining when states should be
allowed to experiment.

A. **INTERNALIZING COSTS**

The concept of internalization begins with the rather uncontroversial
proposition that states should pay for the experiments they undertake.
The primary justification for this claim, of course, is that it would be
unfair to force one state to absorb the costs of another state's tests.
Beyond basic notions of equity, however, a more practical rationale is at
play: States that internalize costs shed light on the validity of their
experiments. Without knowing the real price of a particular test, the
results of the experiment provide little information for future use. Thus,

\(^{107}\) 312 U.S. at 56.

\(^{108}\) 424 U.S. 351, 360-62, 365 (1976) (noting that unlike in *Hines*, which involved an extensive
federal regulatory scheme that conflicted with Pennsylvania's law, federal law at the time had
expressed only a "peripheral concern with employment of illegal entrants").

just as meaningful scientific data derive from controlled environments, policy experiments are most valuable when they account for cost variables."

Economists define externalization as a process in which actors involved in an activity fail to realize the activity's costs or benefits, thereby creating spillover problems. Environmental regulation is probably the most familiar example of legislative attempts to curb negative externalities. According to the traditional account, states are not well equipped to control environmental emissions because of their enormous incentives to export pollution. If these states were allowed to externalize the costs of pollution they would enjoy the economic benefits of certain industries through jobs and taxes without incurring the environmental and health damage associated with those activities. On the reverse side, the recipients of downwind pollution would not be compensated for the negative externalities imposed on them by out-of-state interests. As such, federal environmental regulation seeks to avoid a "structural failure" in which those states with lax enforcement fail to realize the harmful effects of their experiments. These principles are so firmly established that even environmental scholars who generally question the need for federal control of environmental regulations concede that spillover problems pose a significant challenge to decentralization.

Negative externalities can extend beyond economic and physical injuries to more intangible harms. For example, the discriminatory practices of one state may produce social and psychological harm felt by...

110. See Barry Friedman, Valuing Federalism, 82 MINN. L. REV. 317, 398 n.342 (1997) (examining the similarities between policy experimentation and medical research).


112. I use the words "externality" and "spillover" interchangeably. Some economists make small distinctions between the terms. See Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. REV. 1353, 1355 n.5 (2006) (employing the same convention).


114. See Pettys, supra note 111, at 498 ("Pollutants . . . provide an equally familiar illustration of negative externalities.").


nonresidents who, though not directly affected by the discriminatory policies, are distressed by living in a country where such practices occur.\textsuperscript{117} The reverse is true as well. States can create intangible positive spillovers for nonresidents. For example, the knowledge that one state is protecting endangered species or preserving certain natural wonders may yield an "existence value" for outsiders who benefit emotionally from these out-of-state activities.\textsuperscript{118} These intangible externalities are notoriously difficult to measure; psychological harm cannot be easily reduced to dollar values or other objective measures.\textsuperscript{119} But even if they do not clearly factor into economic models, such externalities can impose significant social costs on third parties. As such, any analysis of the extraterritorial harm caused by state experiments should at the very least attempt to consider the role played by intangible spillovers.

Economists posit that actors are naturally drawn to behaviors that produce negative externalities.\textsuperscript{120} This tendency harms both outsiders and the cost-exporting actors who become less able to make appropriate cost-benefit determinations when they externalize.\textsuperscript{121} As such, a state will tend to overprovide regulations with negative externalities, even if those regulations fail to meet local needs.\textsuperscript{122} Conversely, jurisdictions are less likely to invest in policies that generate positive spillovers for nonresidents.\textsuperscript{123} In short, both positive and negative externalities skew regulatory incentives, thereby resulting in welfare losses.\textsuperscript{124}

The nation's federalist system is designed to prevent the spillover problems discussed above. As Roderick Hills has stated, "The whole point of the federal scheme is to suppress states' creativity, which might consist only of creatively achieving benefits for their own citizens at the

\textsuperscript{117} See Pettys, supra note 111, at 498 (examining intangible externalities).
\textsuperscript{118} See Donald J. Boudreaux et al., Talk Is Cheap: The Existence Value Fallacy, 29 ENVTL. L. 765, 768 (1999) (summarizing the argument that outsiders enjoy psychological gains from environmental protections); see also Jonathan H. Adler, Jurisdictional Mismatch in Environmental Federalism, 14 N.Y.U. ENVTL. L.J. 130, 143 (2005) ("[T]he existence of Yellowstone National Park provides benefits to all American citizens for which Wyoming and Montana are not compensated . . .").
\textsuperscript{119} See Pettys, supra note 111, at 498 (discussing the difficulty of measuring intangible externalities).
\textsuperscript{120} See Neil S. Siegel, Commandeering and Its Alternatives: A Federalism Perspective, 59 VAND. L. REV. 1629, 1644 (2006); Sovacool, supra note 23, at 418–19 (arguing that states and industries are less likely to produce positive externalities).
\textsuperscript{122} Id. (discussing the federal government's natural ability to internalize costs); see also Bruce L. Hay, Conflicts of Law and State Competition in the Product Liability System, 80 GEO. L.J. 617, 617 (1992) (explaining how cost-exporting states "make[] all worse off").
\textsuperscript{124} See Sovacool, supra note 23, at 419 (discussing externalities and welfare losses in the context of environmental regulation).
expense of nonresidents.” As such, the Supreme Court’s federalism jurisprudence often focuses on identifying state experiments that minimize extraterritorial harms. Justices have championed the virtues of state-based innovation in a wide range of areas such as affirmative action, medical marijuana, DNA testing, capital punishment, discrimination, gun control, and assisted suicide. Amidst these discussions, the Supreme Court often explains why internalization is a necessary component of successful experimentation. For example, Justice Kennedy has closely scrutinized federal legislation that generates spillover problems for the states. Just as local experiments may fail to internalize losses, Congress may improperly export costs to states and localities. Thus, when Congress passed the Gun-Free School Zones Act, which prohibited gun possession within 1000 feet of schools, Justice Kennedy criticized the “territorial operation” of the law, which would dramatically alter the day-to-day activities of some neighborhoods, while barely impacting others. According to Justice Kennedy, this uneven exportation of externalities to the states undermined the “utility of our federalism.”

Internalization also played a key role in the Court’s discussion of medical marijuana laws in Gonzales v. Raich. When the Court upheld Congress’s ban on medical marijuana against a voter-approved initiative in California, Justice O’Connor was critical of extending Congress’s Commerce Clause authority to matters involving local medical discretion. Describing innovation as “[o]ne of federalism’s chief virtues,” she found no evidence that California’s law substantially interfered with economic activities outside the state. According to Justice O’Connor, because California internalized the social and economic costs of its experiment, the Court should have respected this

133. Lopez, 514 U.S. at 581 (Kennedy, J., concurring).
134. Id. at 583.
135. Id. at 581–83 (discussing “considerable disagreement” between states and localities about the best methods for deterring gun violence in schools).
137. Id. at 42 (O’Connor, J., dissenting).
138. Id. at 42–43 (noting the lack of proof that medical marijuana use substantially affects interstate commerce).
"express choice by some States...to regulate medical marijuana differently."

In short, federalism scholars and the Supreme Court have repeatedly described internalization as a necessary component of effective state experiments. But internalization alone is insufficient to achieve the kinds of state-to-state and state-to-federal policy transfers described by the laboratory model. Such outcomes occur only when experiments satisfy a second condition: replication.

B. Replicating Results

Even if state experiments internalize all costs, other governmental bodies still must be able to duplicate the results of these tests. As such, replication relates to an experiment's value beyond a laboratory state's borders. Internalization and replication are interdependent concepts. Experiments that internalize costs produce measurable data that third parties can assess. But even if the results are clear, sister states still require additional information to distinguish successful policies from failures. Laboratory states tend to develop this data when they take diverse approaches to shared national problems, thereby enabling outsiders to identify and repeat effective techniques. In short, internalization ensures that state experiments yield accurate data, while replication relates to the diversity of the data produced.

In theory, states can and ought to approach complex problems from diverse perspectives. Because needs and preferences differ significantly between states and regions, local approaches to shared problems should differ as well. Thus, decentralized decisionmaking is said to bring lawmakers "closer to the people" who will enact locally responsive legislation. Although this process is lauded for enhancing political accountability and general welfare, the more important value from the perspective of experimentation is the production of competing policies. If states approach common problems by matching policies to local preferences, the nation should expect to gain knowledge from laboratory states much more rapidly than if policies develop from a centralized source only.

139. Id. at 56-57.
140. See Harvey S. Perlman, Products Liability Reform in Congress: An Issue of Federalism, 48 OHIO ST. L.J. 503, 507 (1987) (arguing that replication occurs when states make "comparative measurement[s] of the consequences produced by a variety of plausible reforms").
141. See Peter S. Menell, Regulating "Spyware": The Limitations of State "Laboratories" and the Case for Federal Preemption of State Unfair Competition Laws, 20 BERKELEY TECH. L.J. 1363, 1374 (2005) (describing the ability of state experiments to produce "independent data for assessing alternative policies").
143. See Dorf, supra note 32, at 60-61 (arguing that knowledge develops rapidly through state
The concept of replication has both horizontal and vertical components. Replication occurs horizontally when sister states borrow from, modify, and improve upon the programs of laboratory states. Vertical replication occurs when the federal government adopts a state program, or vice versa. The federal government has frequently engaged in vertical replication. From health care, to education policy, to welfare benefits, to environmental regulations, Congress modeled many of today's federal policies after state experiments. This approach provides the United States with a low-risk opportunity to survey a variety of adoptable options by isolating the harm caused by failed experiments to laboratory states.

The Supreme Court has repeatedly discussed the value of horizontal and vertical replication in its federalism jurisprudence. For example, when the Court evaluated affirmative action policies in Grutter v. Bollinger, it explained why state universities should be allowed to pursue a wide range of admissions policies in order to provide information to sister states. The Grutter Court praised those states that prohibited affirmative action, stating that “[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.” Although the Court ultimately permitted states to carry out certain narrowly tailored, race-conscious admissions policies, it expressed the hope that someday, horizontal replication would derive only from race-neutral policies.

experimentation); Sovacool, supra note 23, at 434–36 (discussing arguments in favor of decentralized decisionmaking).

144. Caminker, supra note 25, at 1078 (examining how policies develop at both levels of government); see also Paul Diller, Intrastate Preemption, 87 B.U. L. REV. 1113, 1129 (2007) (discussing the concepts of vertical and horizontal replication in the context of local experimentation).

145. See Althouse, supra note 12, at 1745–46 (arguing that state-to-state replication represents one of the “most appealing reason[s]” for limited federal power).

146. Engel, supra note 113, at 182–83 (arguing that the laboratory metaphor applies to both types of innovation).

147. See Kuehn, supra note 113, at 2383 (observing that a great deal of federal environmental law is modeled after state legislation); see also Benjamin J. Beaton, Note, Walking the Federalist Tightrope: A National Policy of State Experimentation for Health Information Technology, 108 COLUM. L. REV. 1670, 1671 n.5 (2008) (discussing the role of vertical replication in the development of welfare and education policy).

148. Perlman, supra note 140, at 507 (“The adverse consequences of misconceived solutions at the state level are confined to that state.”).

149. See, e.g., Johnson v. Louisiana, 406 U.S. 366, 376 (1972) (Powell, J., concurring) (describing “the need for ... innovations that grow out of diversity”); see also Fed. Power Comm’n v. E. Ohio Gas Co., 338 U.S. 464, 488–89 (1950) (Jackson, J., dissenting) (“Congress may well have believed that diversity of experimentation in the field of regulation has values which centralization and uniformity destroy.”).


151. Id. at 342 (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

152. Id. at 342–43.
In the context of criminal appeals, Justice Alito recently declined to extend a federal right to DNA testing to prisoners, citing the need for policy innovation at the state level. He noted that nearly every state had already enacted its own framework for DNA testing and that the law and science in this area were in flux. Justice Alito argued that states should be allowed to experiment with these issues before any vertical replication occurred. This approach to replication in the context of DNA testing mirrored Justice O'Connor's previous reluctance to announce a constitutional right to physician-assisted suicide in Washington v. Glucksberg. She noted that various states had undertaken different procedures to provide terminally ill patients with palliative care. Those local determinations involved delicate questions such as how to define terminal illness and voluntary consent. According to Justice O'Connor, the Court should not interrupt states that had undertaken "the challenging task of crafting appropriate procedures for safeguarding liberty interests" because early federal intervention might limit the potential to replicate these experiments either horizontally or vertically.

C. THE SUPREME COURT'S ASSESSMENT OF STATE IMMIGRATION LAWS

The foregoing discussion underscores the central role that timing plays in legal debates over policy replication. According to the Supreme Court, states should be allowed to cultivate data on the effectiveness of different approaches before replication occurs. If no clear solution has emerged, the Court will be extremely reluctant to insert itself into local policy developments. The Court has applied these same principles to immigration experiments. In fact, the concepts of internalization and replication helped shape the boundaries of permissible state conduct in the Court's most important rulings on state immigration laws.

1. Hines v. Davidowitz: Exporting Costs to Citizens and Immigrants

In 1939, Pennsylvania enacted legislation requiring immigrants to register with the state each year. The law also compelled noncitizens to carry an alien identification card at all times and present it to police upon

154. Id. at 2326–29.
156. Id. at 738.
157. Id. at 737 (internal quotation marks and citations omitted); see also Althouse, supra note 12, at 1752 (describing Justice O'Connor's desire to refrain from "clutter[ing] experimentation with a judicially designed solution").
158. See Bix, supra note 116, at 55 (summarizing the Supreme Court's fear that finding a right to physician-assisted suicide would end early-stage experimentation by states).
An immigrant’s failure to do so exposed him or her to imprisonment and fines.\textsuperscript{161} One year later, Congress imposed similar requirements on immigrants through the Alien Registration Act, which authorized the federal government to collect and catalog the names and fingerprints of immigrants living in the United States.\textsuperscript{162}

Bernard Davidowitz, a citizen and resident of Pennsylvania, sued the state alleging that he was “of foreign appearance and [spoke] English with a noticeable foreign accent.”\textsuperscript{163} Davidowitz feared that the Pennsylvania law would cause him embarrassment and expose him to “constant questioning by police officers.”\textsuperscript{164} After a lower court enjoined the law,\textsuperscript{165} the Supreme Court reviewed its constitutionality.

In \textit{Hines v. Davidowitz}, the Supreme Court discussed the externalities generated by Pennsylvania’s new registration system. The Court said, “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”\textsuperscript{166} Citing a previous instance when the Court had struck down a California law designed to control Chinese immigration, the Court asked, “If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?”\textsuperscript{167} Just as California’s law had provoked international ire, Pennsylvania’s registration system could give rise to a similar conflict that would harm the nation as a whole. For example, Pennsylvania’s law required foreign nationals to provide the state with their name, age, employer, and “characteristics or appearance.”\textsuperscript{168} The \textit{Hines} Court explained how foreign visitors might be offended by these requirements.\textsuperscript{169} As a subnational entity, Pennsylvania would not pay for the harm to international relations caused by its registration requirements.\textsuperscript{170}

Pennsylvania’s law created spillover problems not only for the federal government, but for citizens and residents as well. The \textit{Hines} Court maintained that treaty obligations prevented “injurious discrimination in either country against the citizens of the other.”\textsuperscript{171} If
states were allowed to enact their own immigration registration systems, then U.S. citizens might enjoy fewer rights abroad. As the *Hines* Court stated:

Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one.\(^\text{72}\)

In addition to exporting costs to travelers, Pennsylvania’s registration system would expose naturalized citizens like Mr. Davidowitz to repeated police questioning. The *Hines* Court took particular issue with the requirement that immigrants carry alien registration cards and produce them on demand.\(^\text{73}\) Explaining how the law implicated the “personal liberties of law-abiding aliens,” the Court feared that such a system “would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.”\(^\text{74}\)

Beyond the negative externalities it generated, the Pennsylvania law presented no opportunity for replication. As the Supreme Court noted, “The basic subject of the state and federal laws is identical—registration of aliens as a distinct group.”\(^\text{75}\) When Pennsylvania enacted its law in 1939, several other states and localities already had registration systems of their own.\(^\text{76}\) Congress allowed those experiments to percolate briefly, and proceeded to adopt key components of some when it enacted the federal Alien Registration Act.\(^\text{77}\) By the time the Supreme Court reviewed Pennsylvania’s law, vertical replication had already occurred, and, therefore, Pennsylvania’s registration system presented no opportunity for further policy development.

In *Hines*, the Supreme Court rejected a state immigration law that failed to internalize costs or produce replicable results. Thirty-five years later, the Court encountered a different state-based attempt to control immigration. This time, the presence of both conditions resulted in an enthusiastic endorsement of state experimentation.

2. **De Canas v. Bica: Allowing Self-Contained Immigration Trials**

Long before the federal government required businesses to check the immigration status of recently hired employees, California enforced its own verification system. In 1971, California amended its labor code to

\(^{172}\) Id. at 65–66.
\(^{173}\) Id. at 71 n.32 (explaining how such requirements can lead to “tyranny and intimidation”).
\(^{174}\) Id. at 74, 71.
\(^{175}\) Id. at 61.
\(^{176}\) Id. at 61–62 n.8 (observing that some states and various municipalities had “recently undertaken local alien registration”).
\(^{177}\) Id. at 72–73 (discussing congressional debate over registration requirements).
state, "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The following year, two legal residents of California filed a complaint against an employer for hiring unauthorized immigrants.

The state trial court dismissed the lawsuit on preemption grounds, and the appellate court affirmed. In *De Canas v. Bica*, the Supreme Court held that Congress had not expressly or impliedly preempted states from regulating employment relationships involving unauthorized immigrants. According to the *De Canas* Court, the goal of California's verification system was internal: California sought to "protect workers within the State." But even if a state enacts legislation designed to help resident workers, the law can still create spillover problems for the federal government if it effectively seizes control of national immigration policy. Thus, opponents of the law argued that the means used to achieve California's local objective hampered federal enforcement. The *De Canas* Court disagreed, holding that California had not redirected federal resources or otherwise altered immigration policy but had simply enacted legislation designed to govern employment relationships within the state. Because the verification system had only a "speculative and indirect impact on immigration," the state law did not cause the federal government to lose regulatory control over immigration matters. In other words, the *De Canas* Court found that California's law generated no spillover problems—in the form of economic harm or policy redirection—for the federal government.

The *De Canas* Court expressed concern for a different type of externality. In contrast to California’s internalized experiment, the Court explained how the federal government’s ongoing failure to control the border had exported significant harms to the Golden State: "Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." Although these empirical claims remain

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181. Id. at 356; see also id. at 363 ("[T]he state law [was] fashioned to remedy local problems.").
182. See Brief of Respondents, De Canas v. Bica, 424 U.S. 351 (1975) (No. 74-882), 1975 WL 173815, at *9 (arguing that California's law "could expel masses of aliens not entitled to lawful residence to other states and across international borders").
184. See id. at 355.
185. Id. at 356-57.
subject to vigorous debate, the De Canas Court’s focus on externalization was clear. According to the Court, California was attempting to address a local problem—"the deleterious effects on its economy resulting from the employment of illegal aliens"—that the federal government had created by failing to control the border. California’s residents paid the price of federal underenforcement in the form of depressed wages and other "perceived evils" of illegal immigration. Thus, in contrast to the speculative nature of the externalities created by California’s law, the federal government’s weak border enforcement exported quantifiable costs to the state’s economy and workforce.

The De Canas Court’s discussion of internalization differed sharply from Hines. Unlike Pennsylvania’s registration system, California’s law did not “impose[] burdens on aliens lawfully within the country,” but actually worked to improve employment prospects for legal residents. Thus, although Pennsylvania’s law exported harms to immigrants and citizens by exposing them to ongoing police surveillance, California’s verification system was “designed to protect the opportunities of lawfully admitted aliens for obtaining and holding jobs, rather than to add to their burdens.”

After describing the law’s low spillover costs, the De Canas Court addressed the issue of replication. At the time De Canas was decided, at least two other states had enacted immigration verification systems similar to California’s. Reflecting on congressional inaction in this area, the De Canas Court stated, “Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.” Ten years after De Canas, Congress enacted the Immigration Reform and Control Act (“IRCA”) of 1986, which established a national immigration verification system that mirrored previous state models. The different opportunities for vertical replication presented in Hines and De Canas help explain the outcomes in each case. At the time Hines was decided, Congress had already

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186. See infra Part III.A and accompanying discussion of the debate over immigration externalities.
188. De Canas, 424 U.S. at 357.
189. Id. at 363.
190. Id. at 358 n.6.
192. De Canas, 424 U.S. at 360 n.9 (emphasis added).
replicated Pennsylvania's law, thereby undermining the value of additional state testing. In contrast, no national employment verification system existed when the Supreme Court decided *De Canas*. Because vertical replication had not yet taken place, the *De Canas* Court easily allowed California to proceed with its experiment.

3. Chamber of Commerce v. Whiting: Going the “Extra Mile” to Avoid National Harm

Thirty-five years after its decision in *De Canas*, the Supreme Court reviewed another state regulation involving unauthorized immigrant workers. In 2007, Arizona enacted the Legal Arizona Workers Act, which prohibited employers from hiring unauthorized immigrants. In addition, the state law required employers to electronically verify the immigration status of new hires and denied business licenses to companies that employed unauthorized immigrants.

In *Chamber of Commerce v. Whiting*, the Supreme Court held that federal law did not prohibit Arizona from enforcing its own immigration verification rules. In doing so, the *Whiting* majority focused on the externalities, or lack thereof, created by the state's immigration experiment. The Court found that Arizona's verification law did not interfere with federal priorities or otherwise expose residents to elevated rates of discrimination. In other words, the state law was acceptable from the perspective of experimental federalism because it did not export costs to citizens or the United States.

The *Whiting* Court found that the federal government's employment verification requirements could "operate[] unimpeded" even with Arizona's parallel system in place. The United States had contended that Arizona's law would weaken the government's ability to centralize immigration enforcement decisions. Writing for the majority, Chief Justice Roberts observed that "our" system of federalism necessarily entails "some departure from homogeneity" and that Arizona's law maintained uniformity as best as possible by incorporating federal immigration standards.

Just as Arizona's immigration regulations exported no costs to the federal government, the *Whiting* Court found that the law did not harm legal residents either. Critics had argued that Arizona's verification rules would cause employers to avoid hiring "foreign-looking" or "foreign-

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196. 131 S. Ct. at 1970.
197. Id. at 1983.
198. Id. at 1979.
199. Id. at 1980.
"sounding" individuals. Latinos and other lawful permanent residents often bear the brunt of this form of discrimination. Acknowledging these concerns, Chief Justice Roberts noted that federal and state laws already prohibited businesses from making employment decisions based on an employee’s race or national origin. According to the Whiting Court, these existing antidiscrimination protections were sufficient to prevent Arizona from externalizing harms to lawful residents.

The Court’s cost analysis relied upon several questionable empirical assumptions. For example, as Justices Breyer and Sotomayor noted in dissent, the electronic verification system utilized by Arizona is filled with errors, and such misclassifications disparately impact particular cultural groups. In addition, despite the Whiting majority’s hopeful forecast, the United States will almost certainly absorb some of the costs created by Arizona’s verification law as more states and localities enact laws that demand verification information from the federal government. Likewise, Congress’s goal of centralizing immigration verification decisions cannot be reconciled with the patchwork of state and local laws that will expand after Whiting.

Although the Whiting Court addressed internalization—one condition of valid experimentation—it failed to discuss the concept of replication in any detail. Such an analysis would have revealed that Arizona’s experiment will not provide the nation with much helpful information. Arizona’s immigration law addresses a topic (employment verification) that the federal government has already addressed comprehensively. While acknowledging this fact, the Whiting majority underplayed the monumental shift in immigration verification requirements that had occurred after De Canas. When the Court sanctioned California’s immigration law in De Canas, Congress had not yet banned employers from hiring unauthorized immigrants, thereby expressing only “a peripheral concern with employment of illegal entrants.” Accordingly, the likelihood of replication—the chance to learn from state experiments involving immigration verification—was high in De Canas. But ten years after De Canas, Congress passed the IRCA and “forcefully made combating the employment of illegal aliens

200. Id. at 1990 (citing Gen. Accounting Office, Report to the Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination 3, 37, 80 (1990)).
201. Id. at 1989 (Breyer, J., dissenting) (citing H.R. Rep. No. 99-682, pt. 1, at 56 (1986)).
202. Id. at 1984–85 (majority opinion) (“The most rational path for employers is to obey the law—both the law barring the employment of unauthorized aliens and the law prohibiting discrimination—and there is no reason to suppose that Arizona employers will choose not to do so.”).
203. Id.
204. Id. at 1991 (Breyer, J., dissenting) (discussing errors within the federal electronic database); id. at 2003 (Sotomayor, J., dissenting) (endorsing Justice Breyer’s critique of the federal database).
205. Id. at 2000 (Sotomayor, J., dissenting).
central to the policy of immigration law." Thus, by the time the Supreme Court reviewed Arizona’s verification law in 2011, the Court faced “a legal landscape... significantly changed” by the IRCA. As such, the breadth of the federal scheme left little room for Arizona to innovate.

In fact, the state law’s Lack of originality played a key role in the Whiting decision. As Chief Justice Roberts noted, Arizona’s verification requirements “closely track[ed] IRCA’s provisions in all material respects.” Further, the Court praised Arizona for going “the extra mile” by utilizing the federal definition of “unauthorized alien” in the state statute and relying exclusively on federal immigration determinations. Although Arizona’s law deviated from certain federal requirements by mandating electronic verification and raising the stakes for wayward employers, these changes merely tinkered with the existing federal framework. The state law did nothing to alter the fundamental components of the federal system: workplace verification based on employee-provided information.

On the other hand, if Arizona had been bolder with its verification requirements (for example, by mandating biometric scans of new employees) courts would have quickly struck down the law. And so goes the quandary of forced federalism: The more that states increase the potential for replication through creative endeavors, the less likely that courts will allow such tests to proceed. Even with these strictures in place, however, past Supreme Court decisions had at least considered whether state laws broke some distinct ground on immigration matters. For example, the De Canas Court sanctioned California’s law because it governed employment relationships in a way that the federal government had not, whereas the Hines Court struck down Pennsylvania’s law because it was nearly identical to the existing federal scheme. The Whiting decision marked a stark break from this trend by ignoring the concept of replication altogether.

A few lessons can be learned from reading Hines, De Canas, and Whiting in conjunction: In determining the permissibility of various state immigration laws, the Supreme Court has strongly disapproved of experiments that export harms to the federal government or legal

210. Whiting, 131 S. Ct. at 1971 (comparing the definitions contained in the INA with those contained in the Legal Arizona Workers Act).
residents. In contrast to its continuous demand for internalization, the Court has been less consistent in scrutinizing state immigration laws for uniqueness or diversity. In addition to highlighting the trends and contradictions in the Court’s state immigration rulings, the concepts of internalization and replication help resolve one of the defining issues of today’s immigration debate: whether local experiments can advance national immigration goals.

III. EVALUATING CURRENT EXPERIMENTS

What is the value of state-based immigration experimentation? From sanctuary states to restrictionist states, immigration laboratories are now experimenting with numerous enforcement systems. This Part examines the usefulness of these tests. Analyzing current state immigration laws in light of the criteria outlined above, it considers whether states can reach their innovative potential under a system of forced federalism.

A. EXISTING EXTERNALITIES: THE COSTS OF FEDERAL UNDERENFORCEMENT

Those who support local enforcement of immigration laws assert that states suffer the most from the federal government’s failure to control the border.213 Their argument focuses on spillovers—that the nation’s failed immigration policies export significant costs to the states, while doing relatively little damage to federal finances. Although this claim remains disputed, it must be assessed before the externalities of state immigration laws can be evaluated. After all, state enforcement may generate externalities, but the significance of those costs has meaning only in relation to the externalities created by the status quo.214 Thus, analyzing the harms generated by federal underenforcement informs the relative costs of state control.215

Proponents of local immigration control argue that the growth of the unauthorized population harms states more than the federal government because of disproportionate social service costs.216 Although

213. See, e.g., Kris W. Kobach, Remark, Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society, 36 Hofstra L. Rev. 1323, 1324 (2008) (“Without question, the most significant force driving action at the state and local level is a fiscal one.”); see also Gulasekaram, supra note 83, at 1444 (summarizing the states’ frustration with federal underenforcement of immigration laws).

214. See Hills, supra note 125, at 27 (arguing that courts should protect the country from cost-exporting states only if such protection is worth the price of federal gridlock that comes from centralization).


most immigrants arrive in the United States through legal channels, the percentage of the unauthorized population, relative to the overall immigrant population, has increased dramatically during the last several decades.217 Currently, thirty percent of immigrants residing in the United States lack legal status.218 The total number of unauthorized immigrants has risen to over eleven million people, constituting a four-fold increase since 1980.219

Peter Schuck is a leading proponent of the view that illegal immigration impacts states more than the federal government.220 He acknowledges that “[i]llegal immigration . . . confers significant benefits on almost all concerned”221 but argues that those benefits are distributed unevenly between the two levels of government. Schuck describes a “fiscal mismatch under which most tax revenues generated by immigrants, both legal and illegal, flow to Washington . . . while almost all of the costs . . . are borne locally.”222 This mismatch harms some states more than others.223 Roughly half of all unauthorized immigrants in the United States live in four states: California, Florida, New York, and Texas.224 But these numbers are changing. Shifting migration patterns have caused the unauthorized populations in many states to grow significantly.225 According to restrictionists, as these trends continue and unauthorized immigrants reside in more jurisdictions, an increasing number of states will suffer from illegal immigration’s fiscal drain.

Although they differ on the net effects of immigration, economists generally agree that the federal government suffers less (or gains more) than the states from illegal immigration.226 There are several reasons why a growing unauthorized population might benefit the federal

caused by illegal immigration).

218. Id.
219. PEW HISPANIC CTR., HISPANICS AND ARIZONA’S NEW IMMIGRATION LAW 2 (2000); see also PASSEL & COHN, supra note 217, at 1 (noting that the number of new unauthorized immigrants entering the United States declined recently but that the overall number of unauthorized residents remains at historically high levels).
220. See Schuck, supra note 34, at 80 (discussing the fiscal impact of illegal immigration); see also Huntington, supra note 13, at 805 n.70 (examining arguments regarding the uneven distribution of costs among levels of government).
222. Schuck, supra note 34, at 80.
223. See, e.g., Kobach, supra note 17, at 462-63 (arguing that the political and fiscal problems created by illegal immigration remain concentrated in a few states); Schuck, supra note 34, at 79-80 (same).
224. PASSEL & COHN, supra note 217, at 1–2 (noting that two-thirds of unauthorized immigrants reside in eight states).
225. Id. at 2 (discussing changing migration patterns).
Immigrants are generally younger than the native populations of the industrialized countries to which they move, meaning that they help prevent workforce declines and contribute to retirement systems burdened by aging populations. For example, in the United States, unauthorized immigrants pay $7 billion into Medicare and Social Security funds each year, most of which they never claim. Some economists cite these revenue sources as evidence of a “fiscal windfall” for the federal government, while others maintain that illegal immigration still causes net harm to the federal budget.

Conclusions are even less clear at the state level. Like all residents, unauthorized immigrants consume public services such as emergency health care, law enforcement assistance, and public education. Those favoring state immigration laws correctly note that states and localities provide these services. Although unauthorized immigrants pay for many of these local expenditures through consumption taxes, studies have reached opposite conclusions as to the net effect of the tax receipts generated by unauthorized immigrants. The Congressional Budget Office (CBO) recently released the most comprehensive analysis of the impact of illegal immigration on state and local budgets. After reviewing twenty-seven studies on the subject, the CBO concluded that unauthorized immigrants have a negative (though modest) impact on state and local budgets because they consume more in services than they provide revenue for state and local governments.
Although other studies have found that illegal immigration significantly benefits state budgets, these empirical questions already have been answered in the public's mind. Roughly three-quarters of Americans believe unauthorized immigrants harm the economy by failing to pay taxes and utilizing services at hospitals and schools.

If indeed states bear the financial brunt of the nation's failed immigration policies, this outcome might explain the federal government's failure to enforce existing immigration laws. As noted above, economic theory posits that all things being equal, policymakers over-engage in activities that yield negative externalities and avoid legislation that creates positive spillovers. Thus, according to this theory, federal policymakers would be drawn to an immigration scheme that ensures federal tax receipts generated by illegal immigration, while forcing the states to pay for services consumed by unauthorized immigrants. Under such a system, the federal government would have very little economic incentive to control the border or enact legislation that would result in a more equitable division of expenses. The less that voters force politicians to pay for these cost-exporting policies, the more likely legislators will continue to support the status quo.

Critics of today's state immigration laws tend to ignore the externalities produced by the existing system of underenforcement. This is a mistake. Without knowing the price of federal inaction, the relative price of state immigration laws will remain unknown as well. More important, discounting the costs of the status quo means disregarding the primary motivation for today's restrictionist efforts. This inhibits a meaningful evaluation of the claims made on both sides of the immigration debate. State enforcement models may generate externalities, but those externalities might pale in comparison to current

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235. Id. at 3 (noting the difficulty in generating precise estimates on the fiscal impact of illegal immigration).
237. See Randal C. Archibold & Megan Thee-Brennan, Poll Finds Serious Concern Among Americans About Immigration, N.Y. TIMES, May 4, 2010, at A15 (summarizing poll results showing strong support for immigration reform).
238. See Agrawal, supra note 216, at 759 (“The federal government appears to have adopted an agenda to shift the risks and the costs of illegal immigration to the states.”).
239. See supra Part II.A and accompanying discussion of the incentives created by externalization.
241. See Gulasekaram, supra note 83, at 1473 (considering whether the concentration of costs at the local level has led to an increase in subnational immigration legislation).
242. See Pettys, supra note 111, at 499 (discussing political incentives to enact policies that generate high externalities).
costs. Or, conversely, laboratory states may do greater damage to national finances and objectives than the current system of underenforcement. Addressing these questions, the following Parts evaluate the costs of state immigration laws.

B. Paying the Price of Enhanced Enforcement

States and localities that enact their own immigration regulations appear to absorb many of the expenses generated by their policies. For example, if a decline in the unauthorized population causes the price of goods and services to rise with increased labor costs, then local residents will ultimately pay for their jurisdiction's policy decision. Likewise, if a state enacts controversial legislation that causes out-of-state companies to cease doing business with it or prevents travelers from going there, then local residents and businesses will experience the economic ramifications of enhanced enforcement.

Conversely, if states successfully reduce rates of illegal immigration in their jurisdictions, then they might enjoy certain positive internalities such as improved job markets for local workers or newly available public funds that previously financed programs used by unauthorized immigrants. Either way, states and localities that internalize the gains and losses of their experiments are more likely to generate useful data on the effectiveness of their tests. If these assumptions hold true, then current state immigration laws would seem to be ideal subjects for experimentation.

Several recent state and local immigration efforts demonstrate internalization at work. For example, when Riverside, New Jersey, enacted a restrictionist measure in 2006, it became the first municipality in the state to penalize employers who hired unauthorized immigrants and landlords who rented to them.\textsuperscript{243} Hundreds of Brazilian and other immigrants reportedly fled the town soon after the ordinance was enacted, leaving behind restaurants, corner stores, and other companies that depended on their business.\textsuperscript{244} After accruing substantial legal bills defending the law, Riverside cut costs by deferring road maintenance and construction projects.\textsuperscript{245} Roughly one year after enacting the ordinance, with stores closing and businesses suffering weekly losses estimated at $50,000, the township rescinded the law.\textsuperscript{246} This series of events can be seen through the prism of experimental federalism: After

\begin{footnotes}
\item[244] Id.
\item[245] Id. at A22.
\item[246] Id. at A1 (noting that some residents believed the law worked "too well"); \textit{see also} Jill P. Capuzzo, \textit{Immigrants Hated Law, and Now It's Repealed}, N.Y. TIMES, Sept. 19, 2007, at B2; Gulasekaram, \textit{supra} note 83, at 1473–74 (describing Riverside's "self-inflicted economic woes").
\end{footnotes}
internalizing the economic costs of its policy, Riverside decided that the negative internalities generated by its experiment outweighed any gains associated with enhanced enforcement.

Oklahoma provides another recent example of internalities operating at the subnational level. In 2007, Oklahoma enacted a law that required employers to verify the immigration status of new hires and encouraged local police to cooperate with federal officials in immigration enforcement. Soon after these provisions became law, reports began to circulate that large numbers of immigrants (both legal and unauthorized) were leaving Oklahoma, thereby causing worker shortages in industries such as agriculture and construction. Local businesses expressed fear that they would be forced to raise wages and prices to compensate for the changes. One estimate predicted that the new law would cause a $1.8 billion drop in Oklahoma’s gross state product each year. These problems were compounded by the fact that citizens seemed unable or unwilling to fill openings created by the exodus of immigrant workers. As a result, employers in certain sectors paid significant overtime premiums to those employees who remained. Not all residents opposed these outcomes; supporters argued that legal residents would eventually benefit because Oklahoma would no longer have to fund social services used by unauthorized immigrants. For these Oklahomans, the price of enduring certain economic hardships was well worth reestablishing the rule of law in their state.

Like Oklahoma, Arizona has paid a high price for its recent immigration law. Protesters have launched sophisticated boycott campaigns against the state, many of which are modeled after anti-apartheid efforts directed at South Africa in the 1980s. Musical artists and other performers have refused to appear in Arizona, and many cities including Austin, Berkeley, Bloomington, Boston, Chicago, Durham, El Paso, Hartford, Los Angeles, New York, and San Francisco have
officially condemned the law or refused to do business with Arizona.\textsuperscript{256} In addition, at least forty organizations have cancelled their conferences and conventions in Arizona.\textsuperscript{257} These cancellations are predicted to cost $90 million over five years in Phoenix alone.\textsuperscript{258} Such direct harms are coupled with lost growth opportunities. For instance, although Arizona was trying to expand its presence in the biotech and solar-energy industries, local leaders fear that the reputational harm caused by the immigration law might halt progress in those areas—an especially painful price to pay in a weak economy.\textsuperscript{259} Similar dynamics are at play in Utah and Georgia, where state legislatures have recently passed restrictionist immigration legislation.\textsuperscript{260}

In addition to internalizing economic harms, restrictionist states may impair relationships between law enforcement agencies and immigrant communities. Immigrants are far less likely to report crimes if the fear of deportation looms over their interactions with the police.\textsuperscript{261} Thus, many immigrants who already hold skeptical views of law enforcement officers are even less likely to come forward in jurisdictions that have deputized local police officers as immigration agents.\textsuperscript{262} These circumstances not only endanger the well-being of unauthorized immigrants and their family members, many of whom have legal status,\textsuperscript{263} but also harm citizens by diverting police resources away from other criminal matters and reducing the number of witnesses available to assist with criminal investigations.\textsuperscript{264}


\textsuperscript{257} See Conant, supra note 255, at 34-35 (summarizing business leaders' concerns regarding the economic ramifications of the Arizona law).

\textsuperscript{258} See Randal C. Archibold, Phoenix Counts Big Boycott Cost, N.Y. TIMES, May 12, 2010, at A15 (noting that several civil rights groups have urged travelers to avoid Arizona).

\textsuperscript{259} See Conant, supra note 255, at 34-35 (discussing efforts to boycott the state).


\textsuperscript{262} See RODRIGUEZ & CHISHTI, supra note 88, at 37-38 (discussing policy concerns raised by local enforcement efforts).

\textsuperscript{263} See Pham, supra note 60, at 983; see also Keith Cunningham-Parmeter, Fear of Discovery: Immigrant Workers and the Fifth Amendment, 41 CORNELL INT’L L.J. 27, 44 (2008) (explaining that many unauthorized immigrants live in "mixed status" families).

\textsuperscript{264} See Pham, supra note 60, at 983 (arguing that local immigration enforcement harms both witnesses and crime victims); see also Keblawi, supra note 92, at 846 (discussing how local immigration enforcement hampers community policing); Michael J. Wishnie, State and Local Police Enforcement of Immigration Laws, 6 U. PA. J. CONST. L. 1084, 1104 (2004) (same).
Although these scenarios involve very real dangers to in-state residents, they could conceivably serve as useful instances of internalization. After all, if the price of enhanced immigration enforcement weakens police officers' capabilities to protect citizens, then a restrictionist state might reconsider its immigration experiment. Likewise, if laws requiring police officers to verify the immigration status of suspects prevent police officers from focusing on more important criminal matters, then some states might target their efforts elsewhere. Or, conversely, local residents might be willing to accept these costs as necessary consequences of reducing illegal immigration in their jurisdictions.

But the foregoing examples fail to tell the full story of internalization. The fact that a state suffers some harm from experimentation does not negate the possibility that sister states and the federal government may still bear additional costs associated with state immigration laws. In other words, the existence of internalization does not speak to a laboratory state's level of internalization. Laboratory states certainly pay some price for their experiments, but they export other harms as well. Therefore, any rational assessment of the experimental value of these tests depends on knowing the full extent of costs flowing in and out of these jurisdictions. In order to make this determination, the negative externalities of state immigration laws ought to be considered as well.

C. Social and Economic Spillovers

State immigration regulations export costs in a number of ways. By demanding federal attention, restrictionist states inevitably draw federal resources away from their nonexperimenting neighbors, thereby altering national immigration priorities. Likewise, by encouraging unauthorized immigrants to resettle elsewhere, laboratory states export the economic damage allegedly caused by illegal immigration. In addition to generating economic spillovers, laboratory states export identity-based harms to the nation. State immigration laws cause many immigrants and citizens to ally themselves with those jurisdictions that match their immigration enforcement preferences. Although Americans increasingly sort themselves by race, ethnicity, and ideology, current immigration experiments hasten these movements. These social and economic costs raise serious questions about the utility of replicating state immigration laws on a national scale.

265. See Rodríguez, supra note 53, at 639 (arguing that localities with anti-immigrant regulations will be more likely to accept immigrants if they "come to feel the consequences of excluding immigrants").
I. Constraining Federal Discretion

Laboratory states do not pay for the full cost of their immigration laws. Consider measures that require local police to determine the immigration status of certain suspects. States that establish these requirements depend on the Department of Homeland Security’s Law Enforcement Support Center (“LESC”) for verification information. Located in Williston, Vermont, the LESC employs ICE agents who field calls from state and federal agents regarding the immigration status of suspects. The LESC cannot ignore requests coming from laboratory states. Federal law states that agents “shall respond to an inquiry by a Federal, State, or local government agency... by providing the requested verification or status information.”

At first glance, states that mandate status checks do not appear to generate any kind of externality. After all, the federal government created the LESC and required ICE agents to respond to state requests. If anything, it was Congress—not the states—that imposed the costs of immigration verification on the federal government. But this argument ignores natural capacity restrictions placed on any information-sharing system like the LESC. As the number of requests coming from laboratory states increases, other federal priorities must yield. In fact, given that the LESC employs a fixed number of people, an increase in verification requests from laboratory states could produce several externalities. If Congress appropriates additional funding to allow the LESC to answer more queries, then laboratory states will have exported unanticipated verification costs to the federal government. If Congress does not appropriate additional funds, ICE might transfer more agents to the LESC, or simply force existing LESC staff to handle the increased call volume. Both scenarios result in state-generated externalities.

If ICE refuses to move additional personnel to the LESC, then the increased number of verification requests will result in longer response times, thereby undermining the federal government’s ability to quickly address high-priority threats to national security and public safety. In addition to answering calls from state police, the LESC also fields queries from the FBI and the U.S. Secret Service. The more requests coming from laboratory states, the longer it will take to respond to each

266. See supra Part I.B.3 and accompanying discussion of recent state laws requiring immigration status checks.
267. 8 U.S.C. § 1226(d)(1)(A) (2006); see also McKanders, supra note 52, at 17 (explaining how local police officers can obtain information about a suspect’s immigration status).
268. See Kobach, supra note 17, at 479 (noting that state verification laws require consultation with the LESC).
271. Id. ¶ 4–5; see also id. ¶ 17 (“These are critical missions which cannot be allowed to fail.”).
inquiry. Conversely, if ICE moves agents away from their immigration posts in other parts of the country in order to meet the growing demands at LESC headquarters, then certain regions will lose valuable enforcement resources. Laboratory states do not pay for either cost. As more states experiment with immigration verification laws, more instances of resource redirection will occur as well.\textsuperscript{272}

The same dynamic is at work when local officials attempt to transfer suspected unauthorized immigrants to ICE custody. Recognizing the federal government's need to apprehend unauthorized immigrants who are arrested for state crimes, Congress authorized ICE to create response teams to take custody of suspects from local police departments.\textsuperscript{273} The response teams are distributed throughout the country and react quickly to local requests in most instances.\textsuperscript{274} But states that enact their own immigration laws constrain the federal government's discretion to assign response teams to particular geographic regions based on national priorities. ICE has approximately 3000 agents dedicated to interior enforcement, and those agents cannot be in two places at once.\textsuperscript{275} When police departments in restrictionist states issue more requests for assistance, ICE faces the difficult choice of sending more agents to these states (pulling resources away from nonlaboratory states) or failing to respond to the requests of restrictionist states. The first option generates obvious costs for sister states by diverting federal enforcement resources away from their jurisdictions.

As to the second option, ICE might refuse to send response teams to laboratory states. But this decision would generate a different type of externality by diminishing trust levels between state and federal authorities if certain calls for help go unanswered.\textsuperscript{276} Police departments in other states might observe these interactions and eventually become less willing to assist federal agents.\textsuperscript{277} Thus, whether they attract or repel

\textsuperscript{272} See United States v. Arizona, 703 F. Supp. 2d 980, 996 n.7 (D. Ariz. 2010), aff'd, 641 F.3d 339 (9th Cir. 2011) (explaining how state immigration laws burden federal resources).

\textsuperscript{273} Kobach, supra note 59, at 205-06 (characterizing quick response teams as examples of cooperative state-federal efforts). But see Pham, supra note 60, at 984 (noting that some police departments are skeptical of the federal government's ability to assist with immigration enforcement).

\textsuperscript{274} Kobach, supra note 59, at 205 (summarizing response times and arrest rates of quick response teams).

\textsuperscript{275} See Kris W. Kobach, Attrition Through Enforcement: A Rational Approach to Illegal Immigration, 15 TULSA J. COMP. & INT'L L. 155, 156-57 (2008) (arguing that current staffing levels do not allow for effective immigration enforcement); see also Parlow, supra note 13, at 1062-63 (describing the "untapped potential" of local police to enforce immigration laws given the small number of federal agents).

\textsuperscript{276} See Pham, supra note 60, at 984-85 (citing local fears that the federal government is ambivalent about immigration enforcement).

federal agents, state immigration laws externalize costs by altering federal priorities and harming state-federal relations.

Critics might challenge the foregoing argument that state immigration laws disrupt any sort of carefully considered set of federal priorities. According to one standard critique of the current state of U.S. immigration policy, the existing system of purposeful underenforcement should not be mistaken for thoughtful discretion. But this argument ignores federal primacy over immigration matters. Like it or not, Congress has granted discretion over enforcement decisions to the Department of Homeland Security—not the states. In exercising those powers, the federal government maintains exclusive control over decisions involving discretionary enforcement and the allocation of resources. States may be harmed by the growing unauthorized populations that result from these decisions, but the externalities generated by the current system should not allow states to exercise discretion over matters that are not theirs to control. In other words, the harms that states incur because of federal underenforcement cannot justify experiments that direct federal resources away from sister states or alter policies that remain exclusively within the federal domain.

2. Interstate Migration

Beyond hindering national enforcement priorities, state immigration laws generate economic spillovers as well. Mounting evidence suggests that recent immigration measures have caused immigrants to leave restrictive states and localities. For example, after Riverside, New Jersey, passed its immigration ordinance in 2006, an estimated 1000 of the township’s 8000 residents departed. Similarly, 15,000 to 25,000 unauthorized immigrants left Tulsa County, Oklahoma, after the state passed sweeping immigration legislation in 2007. The same exodus occurred in Arizona when the state’s immigrant population declined by

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27. 35–36 (arguing that subnational enforcement undermines national immigration goals).
278. See, e.g., Schuck, supra note 34, at 80 (considering whether stronger state enforcement works against the “real” federal immigration policy of inaction).
280. Pham, supra note 60, at 996–97 (explaining why federal exclusivity facilitates a unitary immigration policy).
282. See id. at 814.
283. See McCormick, supra note 5, at 346–48 (noting that some citizens and legal residents also left Oklahoma because of the state’s immigration law); see also Rodriguez, supra note 53, at 638 (assuming that immigrants leave restrictive localities for other communities in the United States).
eighteen percent in 2008 (as compared to a seven percent decline nationally) after an employment verification law took effect.284

Most of the immigrants fleeing restrictive jurisdictions are likely to resettle in other parts of the United States rather than return to their countries of origin. The fact that more states have become immigrant destinations in the last decade reflects the increasing viability of domestic migration.285 In addition, stronger controls at the southern border have created perverse incentives for unauthorized immigrants who reside in the United States to remain in the country rather than risk the dangers associated with reentry.286 These factors mean that state immigration laws will probably divert immigrants to other parts of the country rather than cause them to emigrate altogether.287

Because most immigrants will not "self-deport" as restrictionists claim, but rather resettle in friendlier states, jurisdictions that enact strict immigration laws necessarily create spillover problems for sister states.288 As explained above, supporters of enhanced enforcement assert that illegal immigration generates an enormous mismatch between federal revenues and state expenditures.289 If the restrictionists' claims are correct, then local immigration laws naturally foist economic hardships on the states that receive migrants fleeing from laboratory states. Although critics might argue that these immigrant-friendly states can avoid such problems simply by following suit and enacting their own immigration laws, this is really no answer from the perspective of experimental federalism. After all, how are receiving states supposed to determine the costs and benefits of enhanced enforcement if states that trigger migrations do not pay for their own experiments? The utility of these tests remains indeterminate precisely because of the spillover problems they create. Pushing immigrants to an ever-narrowing set of


285. Cox, supra note 101, at 389-91 (summarizing immigrants' growing settlement options within the United States); Huntington, supra note 13, at 806 (discussing increased migration to the Mountain West and Southeast).


288. See Kobach, supra note 275, at 157 ("And when the jobs dry up, unauthorized aliens self-deport."); see also Motomura, supra note 261, at 2058 (tracing the phrase "self-deportation" to former California Governor Pete Wilson).

289. See supra Part III.A and accompanying discussion of the externalities generated by federal underenforcement of immigration laws.
welcoming states will not enhance the value of these tests, but instead will continue to obscure the true costs of state immigration laws.

3. Redefining National Identity

Beyond economic and policy costs, state immigration laws export identity-based harms to the nation. These social externalities are rarely discussed by those who tout the virtues of citizen movement. Drawing on the work of economist Charles Tiebout, proponents of competitive federalism argue that decentralized power enables states and localities to distinguish themselves from one another by offering different levels of taxes and services to attract residents. If subnational bodies offer unique combinations of programs, then nonresidents can "vote with their feet" by moving to areas that match their policy preferences. In essence, competitive federalism provides an economic rationale for state experimentation by explaining how diverse local policies work in tandem with a mobile citizenry to maximize social utility.

Echoing many of these contentions, proponents of local control describe immigration law as a fruitful area for interjurisdictional competition. For example, Cristina Rodriguez has argued that the nation benefits from "population sorting in which immigrants settle in welcoming communities." According to Rodriguez, citizens that view immigration in a positive light should be allowed to express their welcoming preferences, while those who hold opposing views ought to be allowed to act on their restrictive urges in order to keep their negative sentiments from festering. Peter Spiro has also endorsed this kind of sorting and predicted that, if given the freedom to choose, most states will experiment with more immigrant-friendly measures.

291. See Michael Burger, Empowering Local Autonomy and Encouraging Experimentation in Climate Change Governance: The Case for a Layered Regime, 39 ENVTL. L. REP. NEWS & ANALYSIS 11161, 11164-65 (2009) (describing localities as goods that citizens can select); Pettys, supra note 111, at 481 (explaining how federalism scholars have employed Tiebout's theory to argue for decentralized decisionmaking).
292. See Abraham Bell & Gideon Parchomovsky, Of Property and Federalism, 115 YALE L.J. POCKET PART 1, 3 (2005), http://www.yalelawjournal.org/images/pdfs/446.pdf (discussing the connection between Tiebout's theory and state experimentation); Siegel, supra note 120, at 1649-50 (arguing that decentralized power promotes political accountability).
293. See Choper & Yoo, supra note 32, at 33 (discussing the role citizen choice plays in selecting an optimal level of services); Richard W. Garnett, The New Federalism, the Spending Power, and Federal Criminal Law, 89 CORNELL L. REV. 1, 18 (2003); see also Robert D. Cooter, The Strategic Constitution 127-29 (2000) (explaining how competitive federalism leads to population sorting).
294. Rodríguez, supra note 53, at 639.
295. Id. ("Such competition might make for better integration in the long run."); see also Huntington, supra note 13, at 831-33 (explaining how states can learn from experimentation but warning that these experiments might undermine federal goals).
296. Spiro, supra note 14, at 1640 ("[T]he prospect of a race to the bottom is slight."); see also
But these endorsements largely ignore the national costs associated with state-induced migration. In fact, allowing states to engage in experiments that either welcome or repel immigrants threatens to undermine national cohesion in a number of ways. Current racial and ethnic divisions involving state immigration enforcement represent some of these externalities. For example, seventy percent of white Americans support Arizona’s recent immigration law, as compared to just thirty-one percent of Latinos. \(^{297}\) Over eighty percent of the public believes that the law is somewhat or very likely to lead to racial profiling. \(^{298}\) Understandably, then, eighty percent of young Latino voters fear that they will be discriminated against, and most do not believe that the police treat Latinos fairly. \(^{299}\)

State immigration laws exacerbate these anxieties. Consider the danger of racial profiling. Members of the national community share a near-universal opposition to racially tinged law enforcement practices. Although federal agents are certainly capable of engaging in racial profiling, the risk increases substantially when state police officers enforce immigration laws that are outside their areas of expertise. Immigration regulations are incredibly complex, and there are numerous reasons why certain suspects may not possess official paperwork but nevertheless maintain a valid right to remain in the United States. For example, some residents may be in the process of requesting asylum or adjusting their immigration status. \(^{300}\)

Because state police officers have not received the training to make these nuanced determinations, they are more likely to detain people who “look” or “sound” like unauthorized immigrants. \(^{301}\) Recent police guidelines on this topic only increase the likelihood of racial profiling. Some training manuals advise law enforcement officers to look for unauthorized immigrants who have “thick foreign accent[s],” travel in

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299. See Howard Fineman, Showdown in Arizona: Obama Must Pursue Immigration Reform, NEWSWEEK, June 14, 2010, at 18; see also PEW HISPANIC CTR., supra note 219, at 3–4 (discussing reports of discrimination against Latinos).

300. See Manheim, supra note 46, at 975–77 (explaining why the complexity of federal immigration laws makes state enforcement difficult).

301. Pham, supra note 284, at 1156 (examining the highly discretionary nature of immigration enforcement).
crowded vehicles, wear heavy clothing in hot weather, stand in areas with other unauthorized immigrants, or otherwise look "out of place." These guidelines rely on nondescript factors that do not meaningfully assist police in distinguishing between unauthorized immigrants and legal residents. Without clearer instructions, many local law enforcement agents will be tempted to fall back on racial and ethnic cues such as accent and skin color to identify suspects. Preliminary studies indicate that some police officers in laboratory states have already engaged in this kind of profiling by stopping Latinos for minor traffic violations at higher rates than other residents.

The costs associated with profiling and selective enforcement are not confined to unauthorized immigrants, but extend to citizens and legal permanent residents as well. Status-holding residents may decide to exit laboratory states in order to join other departing family members or simply because they do not want to live in a state with ongoing immigration inspections. In addition, when police use race and ethnicity as factors in making immigration-related traffic stops, many legal permanent residents will be forced to repeatedly prove their status as legitimate members of their communities—precisely the cost that the Supreme Court warned against in *Hines v. Davidowitz* when it emphasized the need to "protect the personal liberties of law-abiding aliens... and to leave them free from the possibility of inquisitorial practices and police surveillance."

In sum, state immigration laws generate three separate divisions that fall along racial and ethnic lines: (1) profiling and selective enforcement; (2) the actual movement of immigrants, most of whom are Latino, away from restrictionist states; and (3) public attitudes about these trends. These developments threaten to shake loose the nation's basic conception of a shared identity. Americans pride themselves on being members of a national community. As Kenneth Karst has noted,

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303. See Wishnie, *supra* note 264, at 1102-03 (examining the risks of racial profiling associated with state immigration enforcement).

304. NAT'L IMMIGRATION LAW CTR., SECURE COMMUNITIES, *supra* note 69, at 5 (discussing evidence of racial profiling by local police engaged in cooperative immigration enforcement); McCormick, *supra* note 5, at 343-44 (summarizing study by Oklahoma's Human Rights Commissioner on the uneven racial effects of the state's new immigration law).


306. 312 U.S. 82, 74 (1941).

state and federal laws help define national membership by establishing a set of rules that govern all members of the community.\textsuperscript{308} This legal compact not only establishes mutual obligations based on community standards, it engenders among residents a sense of loyalty and commitment to one another.\textsuperscript{309}

It might appear that state immigration laws do not interfere with this goal.\textsuperscript{310} In fact, it could be argued that restrictionist states \textit{uphold} these shared national values by sorting residents who, based on nationally defined immigration laws, do not belong. But this assertion misstates the nature of national membership. Federal law is concerned not only with the admission of foreign nationals but also with the treatment of all people who are territorially present.\textsuperscript{311} For example, unauthorized immigrants remain “persons” under the Fourteenth Amendment.\textsuperscript{312} They enjoy a host of other constitutional rights and can engage in certain social and economic activities without state interference.\textsuperscript{313} This is not to say that unauthorized immigrants are full members of society. Quite to the contrary, their legal protections remain constrained, and Americans hold a largely ambivalent attitude toward their presence.\textsuperscript{314} But even with these limitations, the nation has extended certain basic protections to unauthorized immigrants out of a deeply held commitment to antidiscrimination and anticaste principles.\textsuperscript{315}

The divisions that arise from state immigration laws do not resemble the utility-maximizing movement of residents that proponents of competitive federalism describe. Immigrants and citizens cannot simply march to their jurisdictions of choice—whether they exist in sanctuary states or restrictionist states—without exporting costs to a shared

\begin{itemize}
\item \textsuperscript{308} Karst, \textit{supra} note 19, at 193.
\item \textsuperscript{310} See Spiro, \textit{Demi-Sovereignties, supra} note 296, at 151–52 (arguing that state enforcement is consistent with existing definitions of the national community).
\item \textsuperscript{311} See generally Linda Bosniak, \textit{The Citizen and the Alien: Dilemmas of Contemporary Membership} 74 (2006) (discussing different legal regimes governing the discriminatory treatment of noncitizens).
\item \textsuperscript{312} See Plyler v. Doe, 457 U.S. 202, 210 (1982) (striking down a state law that prevented unauthorized immigrants from attending public schools); Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (extending due process rights to unauthorized immigrants).
\item \textsuperscript{313} See Pham, \textit{supra} note 284, at 1121 (explaining why increased subnational enforcement threatens to undermine these rights).
\end{itemize}
national self-definition. It is true that much of this sorting already occurs for reasons that have nothing to do with state immigration laws. For example, the urban-suburban divisions in America reflect distinctive racial and cultural communities that have formed in part out of individual preferences.\textsuperscript{316} There is nothing inherently wrong with individuals moving to locations that match their cultural vision. Although Americans tolerate certain privately formed homogenous groupings, the same is not true for state-ushered movements. In fact, the nation uniformly opposes state actions that group residents by race, religion, or other impermissible factors.\textsuperscript{317} It is this shared \textit{intolerance} of state-based sorting that forms the foundation of our national identity. Thus, despite their many political differences, Americans believe in certain shared values such as individualism, egalitarianism, and pluralism.\textsuperscript{318} The racial and ideological groupings that result from immigration experiments fundamentally weaken these values.

When subnational immigration regulations dilute national identity, residents become partially estranged from the country.\textsuperscript{319} This intangible, identity-based externality is extraordinarily difficult to measure. Yet residents in both sanctuary states and restrictionist states may experience some form of national disillusionment. For example, some Americans may feel a sense of alienation because they live in a country where police officers in other states harass immigrants or otherwise engage in selective race-based enforcement. Conversely, other Americans may believe that sanctuary policies undermine the rule of law in the United States, thereby diluting a sense of shared national identity. Either way, states that create these different types of disconnection do not internalize the damage they cause to the national self-image. In this way, the identity-based harms of state immigration laws may be the least measurable, yet most costly externality of today's experiments.

D. VERTICAL AND HORIZONTAL REPLICATION

Proponents of local control explain how laboratory states provide policy models for other jurisdictions to follow. They argue, for example, that federal agents can observe and adopt the most effective enforcement measures coming from states that experiment on immigration matters.\textsuperscript{320}

\textsuperscript{316} Gulasekaram, supra note 83, at 1462–63 (discussing the role that wealth classifications and individual preferences play in racial sorting).

\textsuperscript{317} Id. at 1487–88 ("The critical aspect of these distinctive enclaves is that they are voluntary . . . .").


\textsuperscript{319} See Pettys, supra note 111, at 515–17 (discussing the contours of national membership).

\textsuperscript{320} See, e.g., Huntington, supra note 13, at 843 (explaining how immigration experiments might facilitate vertical learning).
If restrictive jurisdictions suffer economic losses due to immigrant departures, then other states will learn "quick lessons" and avoid such outcomes. Conversely, if sanctuary laws improve relations with immigrant communities, then outside jurisdictions might embrace this tactic.

Despite these optimistic forecasts, however, today's state immigration laws offer few opportunities for true replication. Replication requires a broad set of novel experiments operating in a number of environments. Yet today's laboratory states have largely failed to engage in this type of diverse experimentation. For example, restrictionist states remain remarkably similar in their enforcement-only focus. As explained above, some states have altered their penal codes to create immigration-related crimes. Others require police officers to verify the immigration status of detainees. Still others require employers to serve as private immigration agents. These policies differ only in the penalties they assess and the people they enlist to enforce them.

Sanctuary policies represent the opposite end of the same spectrum. Many states and localities have taken a friendlier approach to immigration experimentation by refusing to cooperate with federal officials. For example, four states currently prohibit police from asking suspects about their immigration status, and roughly fifty cities and counties have enacted ordinances that limit local officers' involvement in immigration matters. These laws differ from their restrictionist counterparts only in the level of cooperation they provide. But whether a state requires police officers to verify a suspect's immigration status or forbids them from doing so, each approach simply experiments with different levels of immigration control. None of these policies involves the kind of diverse, problem-solving methods needed for replication.

Forced federalism explains why laboratory states have failed to innovate on immigration matters. Recall that forced federalism defines a legally amorphous zone between clearly impermissible state immigration actions (e.g., categorically excluding groups of immigrants) and clearly

321. Id. at 832-33 (discussing horizontal replication); Kadidal, supra note 227, at 503 ("[O]ther states might follow the lead of liberalizing states.").
323. See supra Parts II.A & II.B and accompanying discussions of the conditions needed for effective experimentation.
324. See supra Part I.B.3 and accompanying discussion of current immigration experiments.
325. See Nat'l Immigration Law Ctr., Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities, 1-20 (2008); see also Aoki et al., supra note 57, at 493-94 (explaining how localities have attempted to assert their autonomy through sanctuary policies).
326. See Su, supra note 279, at 179 (observing that state and local immigration laws are "relatively identical").
allowable conduct (e.g., exercising police power). Because of the narrowness of these parameters, states engaged in immigration experimentation cannot do the creative work of true sovereigns, such as admitting immigrants based on local labor needs or deferring removal actions based on humanitarian concerns. Likewise, they cannot act as true partners of the federal government under a system of cooperative federalism in which they possess broad discretion to implement federally defined immigration guidelines based on local expertise. Rather, states operating within forced federalism are limited to deciding what level of immigration control they will exercise. They can attempt to push the upward boundaries of this system by exercising higher levels of control (in the case of restrictionist states) or operate at the lower boundaries of the system (in the case of sanctuary states) by refusing to assist federal officials. But either way, they do not engage in the high-variance testing necessary for true innovation.\footnote{327} Without regulatory autonomy, states cannot take the risks needed to produce diverse and replicable results.\footnote{328}

The limitations of forced federalism do not necessarily mean that the alternatives of dual federalism or cooperative federalism would yield better outcomes. Although states that act freely as sovereigns or creative servants might be emboldened to take more diverse approaches to immigration problems, their methods would generate negative externalities as well. A system wherein fifty different jurisdictions issued separate visas, for example, would certainly undermine national uniformity on admissions decisions and could interfere with U.S. foreign policy priorities.\footnote{329} Further, a more cooperative model of enforcement would create problems of its own. Data emerging from localities that have signed agreements with ICE to enforce federal immigration laws suggest that problems with racial profiling and inconsistent enforcement continue.\footnote{330} Thus, enforcement systems based on other models of federalism might yield better opportunities for replication, but these approaches would produce serious spillover problems of their own.


\footnote{328. See Siegel, supra note 120, at 1648-50 (arguing that federal preemption limits states choice and, therefore, inhibits experimentation); see also James A. Gardner, The “States-as-Laboratories” Metaphor in State Constitutional Law, 30 Val. U. L. Rev. 475, 484 (1996) (arguing that innovation depends on state discretion).}

\footnote{329. See Manheim, supra note 46, at 985 (explaining how such a system might disrupt U.S. relations with foreign countries); Pham, supra note 60, at 994-95 (same).}

\footnote{330. Dep’t of Homeland Sec. Office of Inspector Gen., supra note 60, at 23-24 (summarizing allegations of racial profiling and acknowledging the need to evaluate the civil rights records of cooperating local agencies); Nat’l Immigration Law Ctr., Secure Communities, supra note 60, at 4-5 (discussing allegations of racial profiling made against police engaged in cooperative enforcement); see also Archibold, supra note 297, at A11 (summarizing discrimination complaints involving state-federal enforcement efforts).}
Today's immigration experiments certainly offer some opportunity for replication. In fact, the more that two states share comparable resources, demographics, and geographic characteristics, the more likely it is that each state can learn from the other. Nevertheless, the lack of diversity in current state immigration laws suggests that few jurisdictions have actually enacted enforcement schemes that provide truly unique avenues for other states to observe and replicate.

As for the prospect of vertical replication, today's state immigration laws do very little to advance most of the pressing decisions that the federal government faces on immigration matters. Congress's last serious attempt to reform the nation's immigration system focused on three issues: (1) granting amnesty to unauthorized immigrants; (2) expanding the existing guestworker program; and (3) strengthening enforcement capabilities. Unfortunately, current state experiments provide virtually no information on any of these issues. This is true even for enhanced enforcement. Although the federal government might gain some insight from state attempts to verify their workforces based on Social Security records, the information contained in this database is unreliable and, much of the knowledge derived from these experiments will become obsolete if the federal government implements a tamperproof identification system—a key component of immigration reform proposals. In addition, states that encourage police officers to arrest unauthorized immigrants do not offer a realistic system of interior enforcement given that the federal government lacks the resources to detain even a small percentage of the existing unauthorized population.

In sum, state immigration laws fail to meet the two necessary conditions of successful experiments: internalization and replication. States that enact immigration regulations not only distort their own regulatory incentives through externalization, they magnify the risk that failed experiments pose to the nation. Further, because forced federalism denies them regulatory autonomy, states cannot produce diverse testing

331. See Galle & Leahy, supra note 123, at 1347 (arguing that state policies that are tailored to local needs offer fewer opportunities for replication).


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models for other states and the federal government to replicate. In other words, the states that Justice Brandeis described as models for enacting "novel social and economic experiments without risk to the rest of the country" simply do not exist within forced federalism.336

CONCLUSION

Current support for state immigration laws rests on the intuitively attractive proposition that local experimentation can help solve the country's immigration problems. But state immigration laws actually provide very little useful information to the rest of the country. Although the current system of federal underenforcement generates spillover problems, state-based immigration laws merely replace one system of negative externalities with another.

Richard Stewart famously described "Madison's Nightmare" as the fear that our federal government might become paralyzed by competing minority interests and, therefore, unable to solve pressing national problems.337 With reform efforts stalled at the national level once again, our country appears to be drifting through a never-ending version of Madison's Nightmare on immigration matters.338 States have offered to wake the country up from this dream by taking control of their own borders. Unfortunately, not all subjects are ripe for local experimentation and not all tests produce valid results. Despite the appealing image of states as laboratories, today's immigration experiments will not advance the nation's ongoing search for sounder immigration policies.


337. See Hills, supra note 125, at 10 (citing Richard B. Stewart, Madison's Nightmare, 57 U. Chic. L. Rev. 335, 342 (1990)).

338. See Rodriguez, supra note 53, at 617 & n.220 (discussing the difficulty of sustaining a national conversation about immigration).