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State Versus Federal Government in the Regulation of Immigration: Examining the Constitutionality of Arizona and Alabama's Immigration Laws

San Jose State University

Master's of Public Administration Program

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Introduction

Immigration issues have caused great debate amongst community members. In particular lawmakers, politicians, interest groups, and civil rights activists have been vocal in voicing their concerns. It is estimated that there are currently ten to eleven million undocumented immigrants in the United States (Immigration Policy Center, 2010). Immigration issues arise from concerns regarding the insufficient number of visas that are available to bring both high and less skilled workers into the country legally to meet the changing needs of the country's economy and labor market, separation of family members, wage and workplace violations, and lack of an efficient government infrastructure that delays the integration of immigrants who seek to become citizens (Immigration Policy Center, 2010). In other cases, community members feel overwhelmed by the presence of a large number of new immigrants whose cultural lifestyle does not fit well with the formerly dominant ethnic group. In these cases the existing residents are lobbying their governments for stricter enforcement of existing immigration laws (Huweih, 2007). These issues have placed pressure on the federal government to implement changes in immigration laws, or to change the way they enforce the existing laws. Critics have examined the inadequacy of the federal government in establishing an effective immigration law that deals with the rising issues. This has led many states to tackle the immigration issue on their own, attempting to regulate immigration in their respective territories. This masters project will examine the constitutionality of state involvement in the regulation of immigration which is both an enumerated and implied constitutional power given to the federal government. Case

studies looking at Arizona and Alabama's immigration laws will provide a framework for examining state involvement in immigration laws and the problems that arise including:

- Issues of federal preemption
- Financial costs to the states implementing programs to enforce existing immigration laws
- The arbitrary treatment of citizens by government agents who target an ethnic group to check their immigration status.
- Legal costs as a result of lawsuits brought against the states
- Violations of the fourteenth amendment's equal protection clause
- Implementation issues faced by law enforcement agencies

This research will analyze the application of federalism as it relates to immigration law, and consider the constitutional requirements for immigration regulation placed on the federal government, and the rights of states to enforce the federal law in the absence of active federal enforcement, or in concert with federal agencies like Immigration and Customs Enforcement (ICE).

Background

The Supreme Court has ruled for over a century that the federal government has the exclusive power of regulating immigration. These powers are based on the Commerce Clause, Naturalization Clause, Migration and Importation Clause and the War Power Clause of Article I of the US Constitution (Guizar, 2007). The courts have ruled that any state or local law that attempts to regulate immigration is in violation of the Supremacy Clause of the U.S. Constitution and is preempted by federal law (Guizar, 2007). The

Supreme Court's decision in *De Canas v. Bica* established the following three-tiered test for determining if a state or local law is preempted by federal law (Guizar, 2007):

1. **Constitutional preemption** – determining if the state or local ordinance makes a "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain"? (Guizar, 2007).
2. **Field preemption** – assessing if the state or local law attempted to legislate in a field that Congress intended a "complete ouster" of state power regardless of rather the law conflicts with federal law (Guizar, 2007).
3. **Conflict preemption** – determining if the state or local law is in conflict with federal law, making it impossible to comply with both state and federal law (Guizar, 2007).

California and Texas have attempted to regulate immigration. California's Proposition 187 "required state and local law enforcement agencies, social services agencies, and health care and public education personnel to (1) verify the immigration status of persons with whom they came in contact; (2) notify certain individuals of their immigration status; (3) report those individuals to state and federal authorities; and (4) deny those individuals heath care, social services, and education" (Guizar, 2007). The court ruled that the "verification, notification and cooperation/reporting requirements" of the law sought to regulate immigration and were unconstitutional (Guizar, 2007). In Farmers Branch, Texas an ordinance was passed that required landlords to verify the immigration status of residents seeking to rent from them. Similar to California's Proposition 187, the court ruled that the ordinance in Texas unconstitutionally sought to regulate immigration (Guizar, 2007). The three-tiered test limits state involvement in immigration laws and

seeks to place constitutional constraints on state involvement in immigration regulation. The Arizona and Alabama laws have faced similar legal challenges.

State Authority in Immigration Enforcement

Congress defined immigration laws through the Immigration and Nationality Act (INA), which contains both criminal and civil enforcement measures (Ester, Seghetti, Vina, 2004). State and local law enforcement officials obtain their authority to enforce immigration laws through the criminal provisions of the INA. The civil provisions, which include the apprehension and removal of illegal immigrants has been an exclusive federal power (Ester, Seghetti, Vina, 2004).

The events of 9/11 lead to an increase of non-federal law enforcement officers dealing with immigration control, which intensified the merger of immigration and criminal law enforcement. Changes in the political and social environment have led to the devolution of immigration enforcement from an exclusive federal power to an increase in states and localities having authority with federal oversight. For example, non-federal authorities duties like everyday policing that in the past did not have a direct relation to national security now hold significance (Coleman and Kocher, 2011). In a post-9/11 era misdemeanor offenses now require immigration status check by state and local enforcement agents. Section 287 (g) of the Immigration and Nationality Act is an example of the devolution of federal immigration enforcement being delegated to non-federal police. The 287(g) program gives authority to state and local police to investigate immigration cases and make arrests working on behalf of federal authorities (Coleman and Kocher, 2011). The Department of Homeland Security's Immigration and Customs

Enforcement (ICE) office works with the local law enforcement agents. They set up two types of 287(g) authorities. The first is the jail enforcement model in which federally trained local law enforcement agents are authorized to check the immigration status of individuals as part of the booking process. The second form of authority is the task force, giving state and local officers discretionary powers to make arrests based on civil immigration status (Coleman and Kocher, 2011). Although, the 287(g) program was available to states since 1996, there was little interest in implementation. However, from 2002-2010 the program has been implemented on a larger scale, leading to the "identification of more than 185,000 deportable non-citizens and the removal of more than 125,000 individuals from the US" (Coleman and Kocher, 2010). After the events of 9/11, there was a stronger push for local and federal law enforcement agents to cooperate together on immigration enforcement as a means to combat the terror threat on the home front. However, states are expanding their role in immigration regulation going beyond the federal authority that is delegated to them, this has lead to several issues and has impacted the community as a whole. One issue is that with increased state involvement there is a lack of a uniform policy dealing with immigration issues. Furthermore, state legislation dealing with immigration is criticized for being unfair and treating residents in a discriminatory manner.

The issue of immigration has been in the forefront of political debate. Some claim that immigration law needs to become stricter, with stronger punishment for illegal immigration. When federal law fails to address immigration policy issues, or when federal agencies fail to enforce existing immigration laws, state governments have taken the leading role in establishing reform in the law. However, state actors who have taken

on immigration policy reform have faced legal challenges from critics who question the constitutionality of their actions. The topic of immigration has many policy issues such as smuggling in all forms, but most especially drugs and weapons; human trafficking; and terrorism threats from terrorists crossing a porous border. There have been concerns regarding the regulation of immigration and the value of immigrants both economically and socially. However, this research will focus on the question of whether the Constitution permits states to create laws that enforce federal immigration law more strictly than the federal government is currently enforcing on its own.

Literature Review

Among the many issues related to immigration that researchers and experts have examined, the following three issues are related to this research:

1. The history of immigration law in the United States, emphasizing the intent of the Constitution that granted the federal government the power to set immigration law and how states are increasing their involvement in immigration policies.

2. Federal versus state powers, and their implementation of immigration law as a means of reforming the law. In particular, they are examining whether state actors have stricter enforcement regimes as compared to the federal government.

3. New immigration laws in Arizona and Alabama, and their implementation and affect on residents.

History of Immigration Law

To better understand the history of immigration law, research has been done describing the historical background of U.S. immigration and deportation laws. The Constitution grants enumerated power to the Federal government in dealing with immigration issues, particularly deportation cases (Hester, 2010). An extensive report filed by the Congressional Research Service examined the background of state involvement in immigration enforcement as well as the outcome of state action. There are also several Supreme Court cases that upheld the constitutionality of deportation versus criminal punishment (Hester, 2010) when enforcing the law. In *Fong Yue Ting,* the *Japanese Immigrant Case,* and *Turner v. Williams,* the Supreme Court upheld deportations under the Chinese exclusion law as well as general immigration law (Hester, 2010). Furthermore, the Court made the distinction between deportations as an exclusive federal power compared to individual criminal punishment (Hester, 2010). The Office of Legislative Research examined Supreme Court cases that set the precedent of immigration laws, which are delegated to the federal government (Price, 2007). Furthermore, it examines certain situations where federal immigration law gives states power in immigration cases, primarily in the field of employment and licensing laws of illegal immigrants (Hester, 2010).

Experts have studied the devolution of immigration law as an exclusive federal power that regulates immigration to non-federal law enforcement agencies controlled by the state (Coleman & Kocher, 2011). Researchers have looked at this shift, providing a background of immigration enforcement in the U.S. dating back to the US-Mexico border militarization in the late 1980s and early 1990s due to the war on drug use (Coleman &

Kocher, 2011). Studies have analyzed how state involvement in immigration law enforcement has evolved, providing a better understanding of the programs implemented in Arizona and Alabama (Coleman & Kocher, 2011). The National Immigration Law Center has written extensively on federal preemption regarding immigration law and how to recognize if states or localities are acting unlawful when they try to enforce immigration policies (Guizer, 2007). Such unlawful action includes states that act beyond their delegated power in regulating immigration cases.

It is important to note the research that examines U.S. Immigration and Customs Enforcement (ICE) and their performance. In 1996 Congress passed the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996,* which added section 287(g) to the *Immigration and Nationality Act*. Through the passage of this act, Congress gave the executive branch the authority to delegate immigration enforcement to state and local governments. Thus, the federal government has in fact delegated certain enforcement authorities to states through the *Immigration and Nationality Act,* however these are limited and defined powers that are controlled by the federal government (Office of Inspector General, 2010).

Federal Versus State Power in the Regulation of Immigration Laws

Researchers have examined the power that both the federal and state governments exercise when enforcing immigration laws. Programs like 287(g) have formalized the delegation of state power on immigration issues to criminal violations, allowing for federal oversight (American Immigration Council, 2010). Under this program, state enforcement entities establish a partnership with U.S. Immigration and Customs

Enforcement (ICE), attaining authority in immigration enforcement limited to their jurisdictions (U.S. Immigration and Customs Enforcement, 2011). The federal government entered into the 287(g) agreement in 2002. From 2002 to 2006 the Department of Homeland Security had delegated immigration enforcement to six jurisdictions (Office of Inspector General, 2010). However, as interest rose at the state and local levels in immigration enforcement the 287(g) program grew as well. In June of 2009 there were 66 active agreements between state and local law enforcement agencies with 833 active 287(g) officers (Office of Inspector General, 2010). As evident from the Arizona and Alabama immigration laws, states are taking a step further and increasing their involvement in immigration laws beyond their delegated power under program 287(g). Thus, states are now taking control of an authority that was once delegated exclusively to the federal government. States that are mandating immigration reform are doing so based on their interpretation of the Supreme Court's ruling in *Manifault v. Springs* which gives states "police powers" warranting them the sovereign right of government to protect the general welfare of their constituents (Kobach, 2004). Thus, states feel that federal enforcement of existing laws pertaining to immigration issues are inadequate in providing for the security and safety of their residents. The Immigration Policy Project has examined states that have implemented immigration reform without federal oversight. The report found that as of March of 2010, forty-five states have introduced 1,180 bills and resolutions that relate to immigrants and refugees (Immigrant Policy Project, 2010). The research further examines which policy areas the legislation highlights. It is important to note that the employment area of immigration legislation garnered the most attention (Immigrant Policy Project, 2010). With the increase of state

involvement in immigration enforcement it is not clear if the state or federal government has the responsibility of settling immigration enforcement issues (American Immigration Council, 2010). Thus, when issues arise from immigration laws there is no longer a central authority that exclusively deals with immigration cases.

Due to the issues surrounding immigration cases, the federal government has invested efforts at reforming immigration laws. Reformed policies have been proposed that focus on the country's economy as a measure in promoting immigration reform. The need for job creation as a means to raise the economy of the country is a huge factor promoting the legalization of immigrants (Ewing, 2010). However, states that have proposed their own immigration laws have done so due to the increased crime related to illegal immigrants and the need for control of their borders. Lawmakers in these states feel the federal government is not doing enough to protect against criminal activities by illegal immigrants. However, research has demonstrated issues when states enforce immigration laws. Local police do not have the proper training or education on immigration laws to effectively deal with immigration cases. Furthermore, they lack knowledge of case histories that the Department of Homeland Security has access to. The insufficient resources prevent local police from adequately enforcing immigration laws (National Council of La Raza, 2006). The Police Executive Research Forum (PERF) examined the impact of illegal immigrants on local law enforcement agents. The report looked at six jurisdictions that have a history of battling the immigration issue and how these police departments dealt with the challenges and pressures of immigration enforcement (Hoffmaster, McFadden, Murphy 2010).

Immigration Laws in Arizona & Alabama

States that have passed immigration laws have faced challenges from residents and law enforcement agents. Arizona's Immigration law "Support Our Law Enforcement and Safe Neighborhoods Act" (SB 1070) requires police officers to check a person's immigration status if they are suspected of being in the state illegally (Immigration Policy Center, 2010). The Alabama immigration law HB 56 is similar to SB 1070 in their strategy of "attrition through enforcement" with the aim of making undocumented residents so uncomfortable that they leave the state on their own (Immigration Policy Center, 2011). Provisions of the law make it a crime to "knowingly rent to an undocumented immigrant and barring undocumented people from enrolling in postsecondary institutions" (Immigration Policy Center, 2011).

Arizona's SB 1070, faced challenges from mayors of the state's two largest cities, Phoenix and Tucson. The Arizona Association of Chiefs of Police, the state's Native American tribes, the faith-based and community organizations, and the business community (Lacayo, 2011). The Arizona Association of Chiefs of Police stated that the law inhibited enforcement agents from their primary duty of protecting public safety. Police officers will be spending resources investigating immigrants' status instead of solving violent crime cases (Immigration Policy Center, 2011). There was further outcry nationally from fifty one leading civil rights, social justice, and labor organizations leading to boycotts, travel bans, and lawsuits against the state, causing severe damages to the state's reputation as well as a loss in business and tourism revenue (Lacayo, 2011).

The immigration laws in Arizona and Alabama have been severely critiqued; critics often look at its implications on residents and its impact on society. The immigration law in Arizona has led to the rise of racism (Stevens, 2010). The Arizona law has been compared with Black codes from the antebellum period, demonstrating similarities in their affect (Stevens, 2010). Such comparison demonstrates the effects of the law on residents as well as its implication on society as a whole. The law has also been critiqued, as claims have been made that it is discriminatory towards Hispanic Americans, treating them as second-class citizens (Stanislowski, 2010). Furthermore, the law is found to be ineffective, leading to a negative impact on enforcement agencies (Stainslowski 2010). The law dehumanizes and humiliates immigrants who are criminalized with the enforcements of the current immigration laws (Alvarado, 2010).

The Arizona and Alabama case studies seek to implement stronger criminal sanctions against illegal immigrants. The role of criminal justice in immigration law is critical. Researchers have looked at the main actors mainly the police, courts and corrections officers and the role they play in the criminal process of immigration enforcement (Eagly, 2010). Although, the Arizona law has faced legal challenges the Supreme Court has upheld the law. Justice Roberts stated that the law "falls well within the confines of the authority Congress chose to leave to the states," (Gibeaut, 2011).

The Immigration Policy Center has written prolifically regarding both the Arizona and Alabama laws. They have looked in great detail at the outcomes of the laws; in particular they have measured if crime rates have declined since the implementation of the law. Their study found that immigration laws passed by states cannot be attributed to lower crime rates. For example, in Arizona crime rates were already decreasing prior to the

passage of the law. In 2006 violent crime rate fell from 545.2 per 100,000 people to 481.1 per 100,000 people in 2008. (Immigration Policy Center, 2010). The American Majority Foundation related a report in 2008 that found crime rates to be lowest in states with the highest immigration growth rates like Arizona, they conclude that from 1999 to 2006 the crime rate had declined thirteen percent in nineteen of the highest-immigration states (Immigration Policy Center, 2010). Furthermore, research has found that "immigrants are less likely to commit crimes or be behind bars than the native-born" (Immigration Policy Center, 2010).

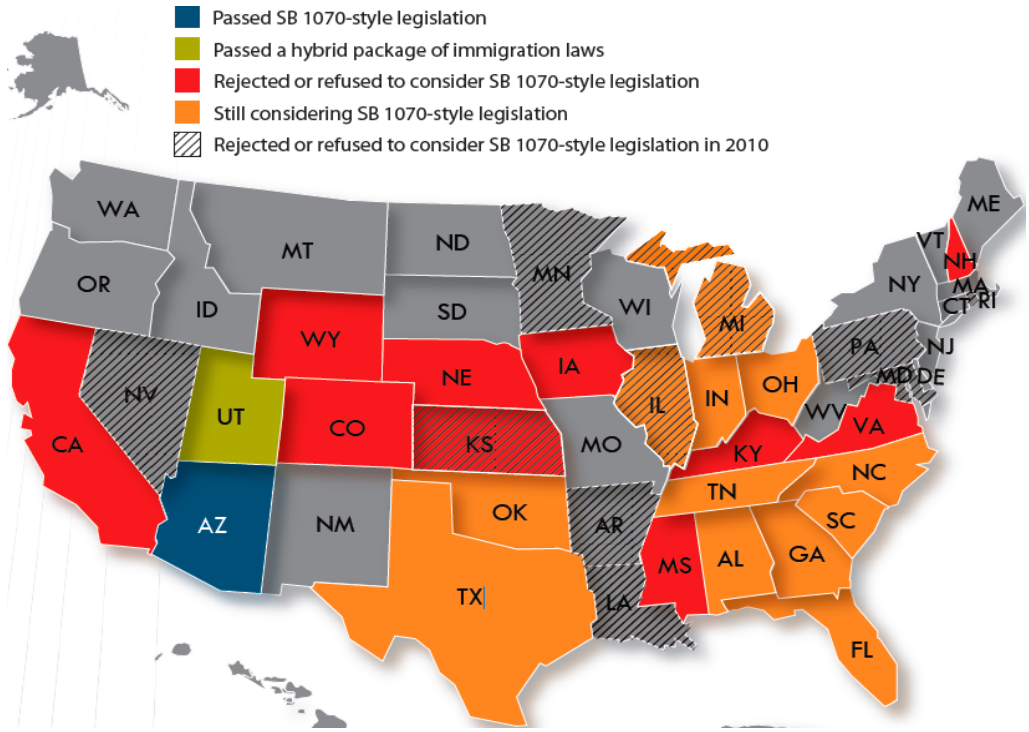
States that are passing immigration laws also have to bear the financial costs. One major financial cost will be the lawsuits against the states from legal immigrants as well as native-born Latinos who argue the laws unjustly target their ethnic group. Riverside, New Jersey has spent $82,000 in legal fees since the passage of their immigration bill (Immigration Policy Center, 2010). Furthermore, Prince William County, VA did not implement the police enforcement section of their immigration law after they realized they were facing costs of 14 million dollars within five years of the law's passage (Immigration Policy Center, 2010). Aside from the legal costs there is also fiscal cost when examining the economic impact of the illegal immigrants on the workforce. In Arizona, if the illegal immigrants were put out of work the state would lose "$26.4 billion in economic activity, $11.7 billion in gross state product, and approximately 140,324 jobs" (Immigration Policy Center, 2010).

Similar to the Arizona law, the impact of Alabama's immigration law has also been analyzed. In particular its impact on the school system has been given great attention, providing a framework to better understand the impact of the law on school children

(Khadaroo, 2011). The Alabama law has been compared to other state immigration laws; based on this research experts have concluded that the Alabama law is the strictest law of any state (Campbell, 2011). The law in Alabama has faced legal challenges (Campbell, 2011). When the law was brought to the courts it was passed, however there was great opposition from civil rights organizations and the US Department of Justice (Gomez). Enforcement officers are also not clear how to enforce the law. Critics are concerned when officers interpret the law at their own discretion, potentially leading to more civil rights violations.

Alabama's immigration law has affected the daily life of the residents, especially the workforce, which has depleted since the passage of the law (Jonsson, 2011). This has great implications on the state's economy and sustainability. The Obama administration has tried to step in to propose immigration enforcement reforms, further demonstrating the complexity of state and federal government control of immigration laws (Jonsson, 2011). The Alabama law has kept children away from school, since parents fear the teachers will become enforcers of the law (Jonsson, 2011). Protest efforts have been made by civil rights activists calling on the federal government to appeal the law (Jonsson, 2011). Further research has been conducted that examines the contracting and transaction provisions of the law and its impact on the lives of residents. The Immigration Policy Center examines Alabama's HB 56 section 27 that prohibits enforcing contracts between an illegal immigrant and the U.S. government, as well as section 30 that prohibits illegal immigrants from business transactions with states or localities. The consequences of the law impact the public health and safety of residents (Friedland, 2011). Since the passage of Arizona's law many other states have attempted to pass

similar bills. A total of twelve states including Arkansas, Florida, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nevada, North Carolina, Pennsylvania, and Rhode Island introduced similar bills, however due to the fallout and reaction in Arizona the bills have been rejected or delayed in their passage (Lacayo, 2011). The table below demonstrates this data:



The immigration laws passed in Alabama and Arizona are examples of state actors legislating in a field that many claim is delegated solely to the federal government.

Methodology

The research in this paper will examine the immigration laws in Arizona and Alabama and their impact on reducing crime, the financial cost to the states, resident and national reaction to the laws, as well as the constitutional challenges brought against the laws. Reports released by the Immigration Policy Center and National Council of La Raza have

extensively examined the impacts of the laws on the various points mentioned. This research will be conducted using an outcome evaluation of state-based immigration enforcement laws, using Alabama and Arizona as exemplars. An outcome evaluation requires the determination of the legislative intent of the program and its specific goals, and the function of the program to understand exactly how the laws are being implemented. The proximate indicators will be used to assess the programs' performance. One such indicator would be analyzing the crime rates in the states and if the laws met their objective to decrease crime. The intent of the Arizona immigration law was to be a crime-fighting measure, which would create "less crime" and "safer neighborhoods." A proximate indicator will be to examine the crime rate in Arizona pre and post implementation of the law. The Immigration Policy Center has collected this information and provided a detailed analysis examining the crime rate and the impact of the law. An attitudinal indicator examines "client satisfaction and staff perception of program operations and success" (Sylvia, 2004). This includes citizens of the state who might feel that illegal immigrants are a hindrance to their economic success, a rancher feeling less safe when illegal immigrants cross over his land, a farmer who is struggling to make ends meet when his employees leave the state fearing deportation, or the illegal immigrants and their families who live in fear that one day they will be deported. A literature search has revealed that journalists for national news organizations have written about the impact of immigration laws in Arizona and Alabama, and these articles will be useful in determining some aspects of the impact of the laws in these states. For example, articles have been written in the *New York Times* and *Christian Science Monitor* that have documented public perception of the laws. Articles about these same laws from

the major newspaper in each state capital will also be reviewed to determine public opinion and editorial positions on these laws within the state. For example, local news media outlets have interviewed law enforcement regarding the immigration laws. The *Arizona Republic* has examined the impact of the laws, and will be another source for information on the local response to Arizona's laws. A similar journal will be found for Montgomery, Alabama. The National Council of La Raza released a report that analyzed the impact of Arizona's SB 1070 and the reaction it received across the nation from civil rights, social justice, and labor organizations challenging the constitutionality of the law. Thus, another indicator will examine the constitutionality of the laws and the legality of its implementation. The Immigration Policy Center has also looked at two provisions of the Alabama law that has led to an increase in exploitation of workers, erosion of legal protections for residents, and the denial of access for residents to both state and local government services. Measuring the impact of the law on school children, The National Council of La Raza reports that the laws have led to a decrease in the enrollment of Latino children in public schools.

Program measures are also critical in an outcome evaluation. Such measures could include data on the frequency of border crossing and the means police are taking to enforce the law. This can be used to better understand the impact of the laws, and if they are meeting the stated goals. The Police Foundation has released a report that offers a detailed breakdown of how law enforcements agents are required to implement the law. Furthermore, the Police Executive Research Forum released a report examining the role of local police in the enforcement of immigration. The report looks at Arizona's law as one of its case studies, analyzing the impact of illegal immigrants on law enforcement

agents. The American Immigration Council's Project *Immigration Impact* reports on how law enforcement officers are implementing the laws in Alabama and the confusion that has arisen due to the language of the law. Program outcome will identify the direct impacts of the program and is the main purpose of an outcome evaluation. In identifying the program outcomes it is critical to look at the direct impacts of the law. This will include the direct cost to the states in implementing the laws. The American Immigration Council has documented this vital information. The financial cost of the laws on the states will be another measure of the program objective. The Arizona Udall Center for Studies in Public Policy has measured the economic output that is attributed to Arizona's immigrant workers. Their careful work on the economic impact of Arizona's immigration law is documented by the Immigration Policy Center. Another impact is the legal challenges the laws face and the burden the courts receive from the implementation of the laws. The Legal Action Center has examined all the court cases relating to both the Arizona and Alabama laws, examining their financial costs as well as the courts' decisions. Furthermore, the Office of Legislative Research has looked at the history of state versus federal powers in setting immigration policy, providing a historical framework to this constitutional issue. The final step is the outcome valence that will measure if the outcomes were positive or negative. A negative valence would occur in two instances: 1) If the residents in Arizona and Alabama were not content with the implications of the law and 2) If the outcomes did not correlate with its intended goals and objectives. After examining the Alabama and Arizona laws and evaluating its outcome and impact to the state and residents, a recommendation can be made to reform

immigration law at the federal level. However, this will be discussed after the data on current immigration laws are presented.

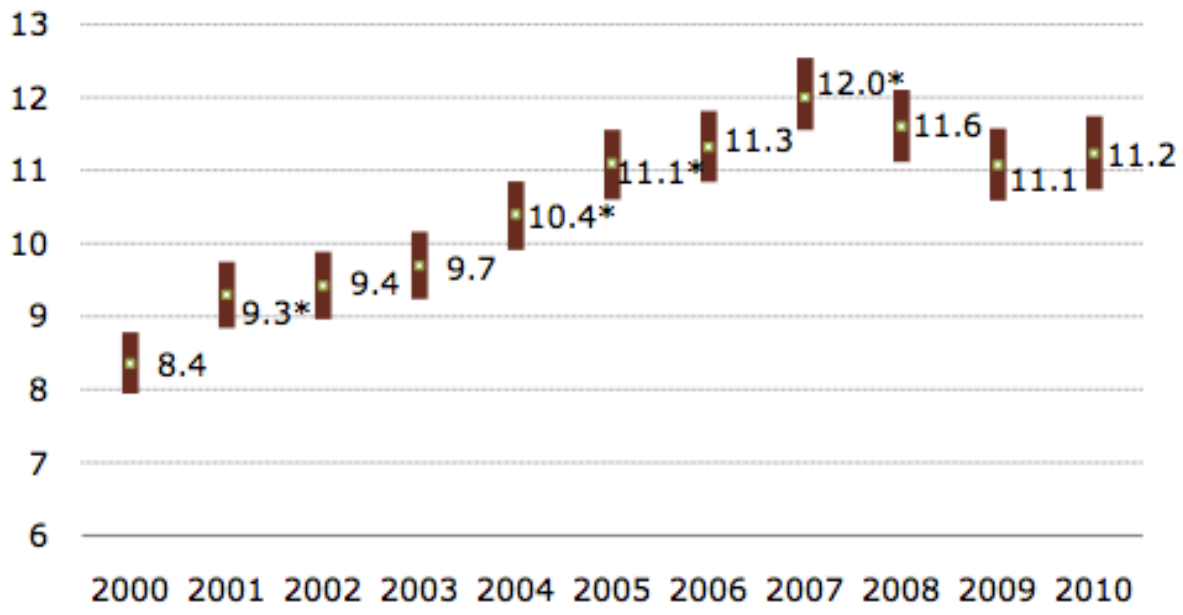
Part 1: Trend Analysis: Immigration in the United States

The rate of immigration in the United States has increased at historic rates. From 1990 and 2000 more than eleven million immigrates entered the country. This was a 57% growth rate in immigration and was the largest the country had encountered (Singer, 2010). From 2000 until 2010 there was a 28% growth rate in immigration with 8.8 million new immigrants, a drastic reduction from the previous decade (Singer, 2010). The immigrants that were living in the United States in 2010 were likely in the country more than a decade, as compared to those who were living in the country in 2000 (Wilson & Singer, 2010). This is evident in their naturalization rates, thus the longer the immigrants have lived in the country the more likely they would be eligible for U.S. citizenship. It is important to note that the context for immigration has changed within the last two decades. In the early 1990s immigrants were lured to the U.S. due to the expanding economy and job opportunities. In many ways the U.S. was viewed as a land of opportunity where immigrants could find an escape from the demands and hardships they endured in their countries. The U.S. was more welcoming of the immigrants who were viewed as an asset to the labor force (Singer, 2010). Yet, as the economy worsened with higher rates of unemployment immigrants were "viewed as a drain on resources and as competitors for jobs" (Singer, 2010).

During this economic expansion the trend for immigration dispersion was in the new metro areas and suburbs. New York, Los Angeles, Miami, Chicago and Houston were the five metropolitan areas that had the highest rate of foreign-born populations (Singer,

2010). With the increased rate of immigrants entering the country many began settling away from the traditional "gateway cities" and were moving to new destinations throughout the country. Fifty-one percent of immigrants were living in suburbs of large metropolitan areas in 2010 (Wilson & Singer, 2010). Twenty-one metropolitan areas saw an increase of at least 100,000 immigrants from 2000 to 2010 (Wilson & Singer, 2010). Many of these new cities lacked experience with integration of the immigrant population (Khashu, 2009). Furthermore, the immigrant population grew more diverse with immigrants from Latin American and Asian countries entering the country. This has created demographic changes that resulted in racial tensions, especially in new destination communities. The changes in demographics, along with the increase of immigration settlement in new areas that are not accustomed to immigrants, has led to friction with long standing residents who are demanding that the government implement policies that are more aggressively enforcing immigration laws (Khash, 2009).

This tension has gotten worse when the rate of unauthorized immigrants increased. In 1990 there were 3.5 million unauthorized immigrants living in the United States; that number increased to 8.4 million in 2000 and peaked at 12 million in 2007 (Passel, 2011). The graph below depicts this information, demonstrating a decline in unauthorized immigration population from 2007 to 2010.



The decline of unauthorized immigrants from 2007 to 2010 was due in part to the decrease of immigrants from Mexico. Whereas, in 2007 there were 7 million unauthorized immigrants from Mexico, that number dropped to 6.5 million in 2010 (Passel, 2011). Other indicators to explain the decline include deportation, deaths, or unauthorized immigrants attaining legal status (Passel, 2011). In 2010 there were 40.2 million foreign born residents in the United States, of that number 28% were unauthorized immigrants. It is important to note that 350,000 births from 2009 to 2010 had at least one parent who was unauthorized (Passel, 2011). Thus, these children are U.S. citizens by their birthright.

State Settlement Patterns of Unauthorized Immigrants

The table below shows the states with the largest unauthorized immigrant populations:

States with Largest Unauthorized Immigrant Populations, 2010

(thousands)

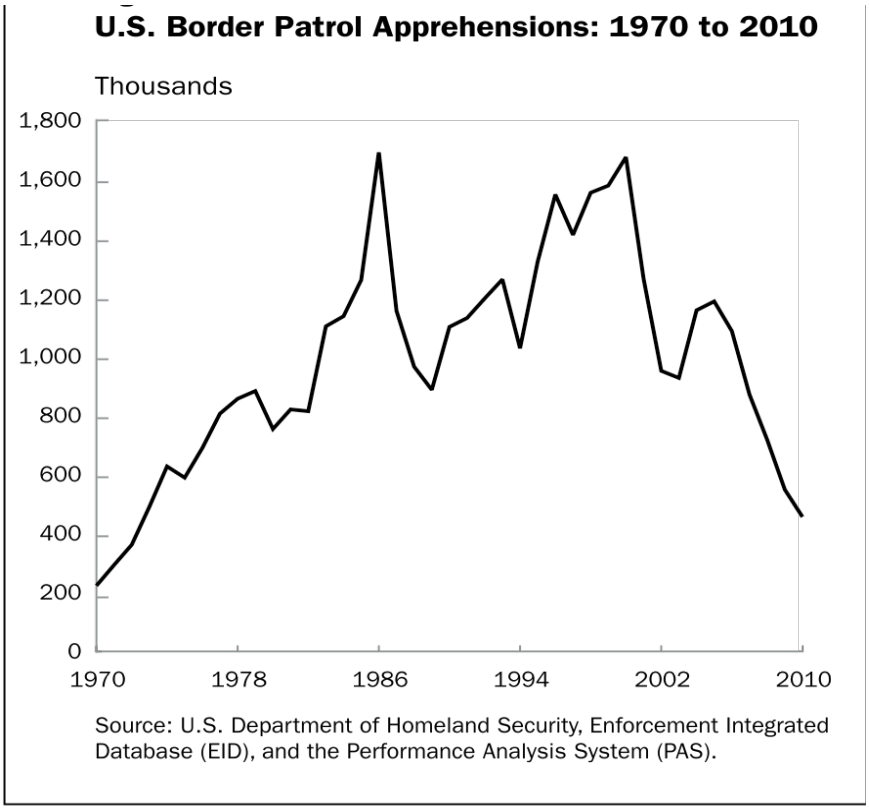
	Estimated Population	Range
U.S. Total	**11,200**	**(10,700 - 11,700)**
California	2,550	(2,350 - 2,750)
Texas	1,650	(1,450 - 1,850)
Florida	825	(725 - 950)
New York	625	(525 - 725)
New Jersey	550	(425 - 650)
Illinois	525	(425 - 625)
Georgia	425	(300 - 550)
Arizona	400	(275 - 500)
North Carolina	325	(240 - 425)
Maryland	275	(200 - 325)
Washington	230	(140 - 325)
Virginia	210	(170 - 250)

Although, immigrants are dispersed across the country the unauthorized immigrants are concentrated in a small number of states. The twelve states listed above account for more than 77% of the unauthorized immigrant population. As is evident from the data, California has the largest population of unauthorized immigrants totaling 2.55 million. Furthermore, in California the unauthorized immigrant population constitutes the "largest share of the overall population" (Passel, 2011).

Border Apprehension

The increase of state involvement in immigration is due to the broken immigration system that the federal government has failed to fix. Supporters of state involvement in immigration law point to the apprehension statistics that demonstrate the number of illegal immigrant entry into the U.S. Individuals that are apprehended at the border can be removed from the U.S. since they are violating the INA. The majority of apprehensions at U.S. borders are made by Border Patrol of U.S. Customs and the Border Protection of the

Department of Homeland Security (Department of Homeland Security, 2011). The data below shows the number of border apprehensions from 1970 to 2010:



It is important to note that 97% of the apprehensions that occurred in 2010 happed at the southwest border. Furthermore, Mexican nationals accounted for 87% of the apprehensions in 2010 (Department of Homeland Security, 2011).

Immigrant Contribution

With the increased rate of immigrants in the U.S. it is important to discuss the impact and talent the immigrant population is providing. The following data demonstrates the talent of immigrants and their contributions to the U.S. economy (Immigration Policy Center, 2011):

- Immigrants constitute 16% of workers with a masters degree, 17% with a professional degree, and 27% with a doctoral degree.
- Immigrants constitute 15.5% of the high-skilled labor force.
- Immigrants constitute 45% of medical scientists and 37% of computer programmers with a large presence in the medical, engineering, higher education, accounting, nursing, and architectural fields.

A recent Harvard Business School study found that immigrants make up half of the scientists and engineers in the U.S. and account for "67% of the increase in the U.S. science and engineering workforce between 1995 and 2006" (Immigration Policy Center, 2011). Thus, immigrants are contributing to economic growth, innovation, entrepreneurship, and job creation (Immigration Policy Center, 2011). However, immigrants are settling to new destination that lack experience in integrating them to their respective societies. Without a comprehensive federal immigration policy, the issue of immigration has become a local policy challenge (Khashu, 2009).

Part II: History of Immigration Policy in the United States

The Continental Congress in 1776 listed their compliments of King George III for preventing "the population of these States . . .obstructing the Laws for Naturalization of Foreigners; reusing to pass others to encourage their migrations hither" (The Declaration of Independence, 1776). The historical roots and founding of the United States demonstrated a country that was to be a nation of immigrants. From 1780 until 1882, Congress passed very few immigration legislations, welcoming citizens as a means of state building. The legislation that was passed had a focus on health and public treasury,

rather than baring foreigners from entering the country. As immigration policy developed the federal government did not enact a comprehensive system of immigration legislation, rather they shared their regulatory powers with the states (Bartolomeo, 2008). Thus, there was a culture of unimpeded immigration policies that was maintained until the 1830s. Immigration policy took a drastic change with the ascension of Andrew Jackson to presidency. "Jackson ushered in a new era of scientific racism and westward expansion that would steer immigration policy into the twentieth century" (Bartolomeo, 2008). This concept was demonstrated in the 1848 Mexican-American War, which forced Mexico to surrender tracts of their land in the southwest as part of the Treaty of Guadalupe Hidalgo (Bartolomeo, 2008). As part of the Treaty, Mexico surrendered what are now California, Arizona, New Mexico, and Texas to the U.S. This created what has become "the most frequently crossed international border in the world" (Bartolomeo, 2008). By the 1850s, many of the western states were passing laws that were hostile to the newly arrived Mexican and Chinese immigrants. State and federal cooperation in the jurisdiction of immigration law ended in the 1850s (Bartolomeo, 2008). The Supreme Court's ruling in *The Passenger Cases* struck down laws that imposed special taxes on aliens and passengers who were arriving form foreign ports. The court ruled that the "era of joint state and federal control over immigration had come to a close" (Bartolomeo, 2008).

The Immigration Act of 1924 & the INA

The Immigration Act of 1924 was enacted in response to the high increase of immigrants following World War I. The laws were intended to set an annual quote of 2% to any nationality entering the country. The law also created a system of visas that all immigrants were required to have (Bartolomeo, 2008).

The restrictive immigration policies became more inclusive from the 1950s to the 1970s. In 1952 the Immigration and Nationality Act (INA) was passed, removing the racial and ethnic restrictions and providing avenues for state enforcement of the law's civil and criminal provisions (Seghetti, Vina, and Ester, 2004). The law was intended to be comprehensive of all federal immigration and naturalization laws, including both civil and criminal penalties (Chin, 2011). The law regulated both the procedural and substantive aspects of removal, exclusion and admission of immigrants (Chin, 2011). The INA provided states with limited enforcement authorities; however it did not allow states to pass their own laws (Chin, 2011). The INA's section 287(g) provided greater avenues for state involvement in immigration. States who signed a 287(g) agreement had their law enforcement officers trained in the investigation, apprehension, or detention of unauthorized immigrant as removable under the INA (Chin, 2011). The 287(g) officers "work for the federal immigration authorities, under their direction and control" (Chin, 2011). The INA also provides local police officers access to their federal immigration stations. Thus, under the INA states are involved in the enforcement of immigration law, but *only* by "providing information and working cooperatively under the supervision of federal enforcement authorities" (Chin, 2011).

The INA provides the Department of Homeland Security and the Department of Justice a range of options dealing with unauthorized immigrants. The undocumented individual could potentially face removal from the country or could depart voluntarily, however each option has legal consequences. Furthermore, the "deferred action program" provides undocumented immigrants the ability to petition and stay in the country based on compelling reasons like a threat in their home country (Chin, 2011). The immigration

judges and the Board of Immigration Appeals make these decisions. Thus, the federal government has the power in regulating immigration and the states cannot bring charges against an individual, "prosecution by states in cases in which federal immigration authorities would not have prosecuted presents a serious danger of conflict with the administration of the federal program," furthermore it is risky because it would be "hampering . . . uniform enforcement of the [federal government's] program by sporadic local prosecutions" (Pennsylvania v. Nelson, 1956). The INA is meant to direct the federal government in responding to undocumented immigrants. States are able to take part in the enforcement of national immigration policy *only* under the supervision of the federal government.

Immigration Reform and Control Act (IRCA)

In 1986 Congress passed the Immigration Reform and Control Act. The law was intended to grant amnesty to undocumented immigrants that had lived in the states for a designated period. At first glance the law seemed like a relief for immigrants, however it imposed sanctions on employers that hired undocumented immigrants. Furthermore, the law placed greater concentration of Boarder Control agents along the US-Mexican boarder (Bartolomeo, 2008). The trend towards greater cooperation between law enforcement and the federal government in the enforcement of immigration law was evident.

Increasing Role of Local Police in Immigration Enforcement

The federal government placed effort in increasing the role of local police in the enforcement of immigration laws. The Immigration and Naturalization Service (INS) created the Alien Criminal Apprehension Program in 1991 as a means of establishing

cooperation between police and immigration authorities (Khashu, 2009). Police would notify federal immigration authorities of foreign-born nationals who had committed a crime and were under custody (Seghetti, Vina, and Ester, 2004). Congress created the Law Enforcement Support Center (LESC) as a means of providing federal, state and local law enforcement with information on the status of those who were arrested or detained for a criminal offense (Kashu, 2009). With the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) the role of local police expanded (Kashu, 2009). The AEDPA gave states the authority to arrest and detain an immigrant who had a record of deportation or crime. The IIRIRA allowed the INS to deputize local law enforcement officials if there was a mass influx of immigrants (Kashu, 2009). The IIRIRA was an amendment to the INA and added section 287(g), giving federal officials the authority to enter agreements with state and local law enforcement to carry out tasks of immigration officers (Kashu, 2009). As stated above these tasks were limited to investigation, apprehension, and detention at the supervision of the federal government. Advancing further cooperation between the federal immigration authorities and local enforcement, President Clinton signed the Clear Law Enforcement for Criminal Alien Removal Act in 1996 (Federation for American Immigration Reform, 2003). The law included the following:

- Provided authority to detain criminal and illegal aliens to both state and local agencies.
- Provided $2.5 billion in grant money to offset the local costs of incarceration of criminal and illegal aliens.

- Provided funding to train and equip law enforcement agencies so they would cooperate with federal immigration law enforcement.

After the attacks of September 11, 2001 there was greater need for cooperation of state and local officials in federal immigration enforcement. The number of localities entering 287(g) programs rose dramatically after September 11, 2011, demonstrating the need for collaboration between federal and local officials in the effective regulation of immigration. However, the Major Cities Chiefs Association, which represents 56 police departments, demonstrated the hesitance some law enforcement officers have in enforcing federal immigration laws. Members in the association felt that increased cooperation would hinder the police from gaining the trust of the immigrant communities (Dalmia, 2011). The Police Chief from George Gascon of Mesa, Arizona stated that the new approach "is setting the police profession back to the 1950s and '60s, when police officers were sometimes viewed in minority communities as the enemy" (Dalmia, 2011). Aside from a reduced trust and cooperation in immigrant communities, there are other major costs in expanding the role of local police in immigration enforcement (Kashu, 2009):

- The increased victimization and exploitation of undocumented immigrants.
- Police misconduct due to a lack of training and knowledge on immigration policies.
- Resources being diverted from traditional law enforcement activities.
- Understanding the complexity of federal immigration law when verifying immigration status. Immigration enforcement requires specialized knowledge of

"suspect's status and visa history and the complex civil and criminal aspects of the federal immigration law and their administration.

- Racial profiling and civil litigation costs.
- Immigrants will fear accessing other municipal services.

Part III: Case Study: Examining the Arizona and Alabama Immigration Laws

Immigration has been at the forefront of political debate. The federal government has tried to implement a comprehensive immigration policy, however with a changing economy and growing numbers of immigrants entering the U.S. it has been difficult to maintain a policy that represents the changing social constructs surrounding immigration. The federal government has relied heavily on the cooperation of state governments to maintain and control immigration policies. However, many states have taken the cooperation a step further by implementing their own immigration laws. Their frustration is caused by the increase in illegal immigrants and the inefficiency of the federal government to properly deal with this issue. Arizona and Alabama are examples of two states that have implemented stringent immigration laws and are facing challenges from the federal government as well as civil and immigration rights advocates. Legal challenges have been made against Arizona and Alabama's laws on grounds that they are superseding the Supremacy Clause of the U.S. Constitution and violating the First, Fourth and Fourteenth Amendments. Before the constitutionality of Arizona and Alabama's laws are examined, it is first imperative to take a closer look at each law. The laws will be examined in the broader context of needed federal immigration reform.

Arizona's SB 1070 Anti-Immigration Act

Arizona's SB 1070 was written by Republican State Senator Russell Pearce of Mesa with the intent that the law would lead to "safe neighborhoods" and "less crime" (Immigration Policy Center, 2010). The law was proposed after the fatal shooting of Robert Krentz, a rancher who was killed by an illegal immigrant that came from Mexico (Chapman, 2010). With a majority of public support legislators passed the law in 2010. The law has four major provisions that are intended to discourage undocumented immigrants from entering the state. The first is requiring local law enforcement officers to determine the legal status of any individual that is detained or arrested and is suspected of being unauthorized (Gulasekaram, 2011). The second provision is enforcing state criminal penalties if an individual fails to comply with federal alien registration laws or does not carry their registration documents (Gulasekaram, 2011). The third provision makes it a crime for unauthorized persons who perform work or solicit it (Gulasekaram, 2011). Lastly, the fourth provision allows for the warrantless arrest of individuals so long as there is probable cause that the individual is removable from the U.S. (Gulasekaram, 2011). Any offense of the law will result in either a "misdemeanor with a six month imprisonment sentence and a $500 fine to felonies for non-citizens found in the U.S. after having been ordered deported or granted voluntary departure within the last five years" (New York City Bar, 2010). The law can criminalize the estimated 400,000 unlawfully present people in the state (Gulasekaram, 2011). SB 1070's purpose is as follows:

> "The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United State" (Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 2010).

Alabama's H.B. 56

Alabama's H.B. 56 immigration law was passed on June 9, 2011 when the Republicans won a supermajority in the State Legislature the previous year. Although, the number of illegal immigrants in Alabama is not significantly large it is growing and residents felt that jobs and resources were going to illegal immigrants (Robertson, 2011). Similar to Arizona, policy makers in Alabama vindicated the ability of states to participate in the regulation of immigration. H.B. 56 has the following provisions (Robertson, 2011):

- Makes it a crime to be in the state without status.
- Requires law enforcement to check the papers of individuals that are suspected of being undocumented.
- Mandates public schools to check the legal status of their respective students.
- Abrogates contracts that are made with undocumented immigrants.
- Makes it a felony for undocumented immigrants to enter into contracts with a government entity (this includes basic human rights like having water connected to an individuals' home).

In September 2011 Judge Sharon Lovelace Blackburn of the Federal District Court in Birmingham upheld a majority of the sections of the law, issuing a preliminary injunction against a few sections of the law on grounds of federal preemption (Robertson, 2011). Provisions that outlawed the harboring or transporting of illegal immigrants and another provision that barred illegal immigrants to enroll in public universities were blocked (Robertson, 2011).

Supporters of Arizona & Alabama's Immigration Laws

Immigration is a major concern for Americans. However, gallop polls have found that 60% of Americans have a positive view of immigration. Yet, when the polls asked Americans about the Arizona laws and its crack down on illegal immigrants, 51% had a favorable view of the law (Harsanyi, 2010). Americans understand the value of immigrants to society and the need to assist immigrants seeking to come to the United States legally. However, recent lawlessness and frustration over border enforcement as well as the lack of a comprehensive immigration reform has led many to support stringent state immigration laws like S.B. 1070 and H.B 56. A majority of those who were polled felt that the government needed to do more to keep illegal immigrants from entering the country (Singer, 2010). The same poll asked, "Would you support or oppose a program giving illegal immigrants now living in the United States the right to live here legally if they pay a fine and meet other requirements?" Of those polled 57% said yes, almost the same percentage of those that support the Arizona law (Singer, 2010). These numbers demonstrate that Americans distinguish between immigration and immigrants. Immigration means policies and government responsibilities such as visas and border fortification; on the other hand immigrants bring different images, mainly human ones who have families and are settled in the country (Singer, 2010). Thus, "the American public may be more prepared to accept a bargain struck between supporters of enforcement-only proposals and supporters of legalization" (Singer, 2010). Furthermore, 52% of those who were polled believed that the federal government should be enforcing the immigration laws. Indicating the need for immigration reform effort led by the President and Congress.

Supporters of Arizona and Alabama's laws look to the failure of the federal government in implementing a comprehensive and effective immigration law. They point to several achievements of Arizona's law to demonstrate the need for state involvement. The drop in the population growth in the state, which was fueled by illegal immigrants, is one indicator that supporters highlight (Martin, 2012). The population change was a result of local law enforcement activities as well as the legislative changes that were intended to make Arizona less accommodating for illegal immigrants (Martin, 2012). Furthermore, the FBI crime data showed a drop in criminal activity from 2005 to 2010, this is a 14% drop as compared to the 10% drop nationally (Martin, 2010). Supporters of the law look to H.B 1040 to explain the decrease in criminal activity in the state, linking crime to illegal immigrants.

Opponents of Arizona & Alabama's Immigration Laws

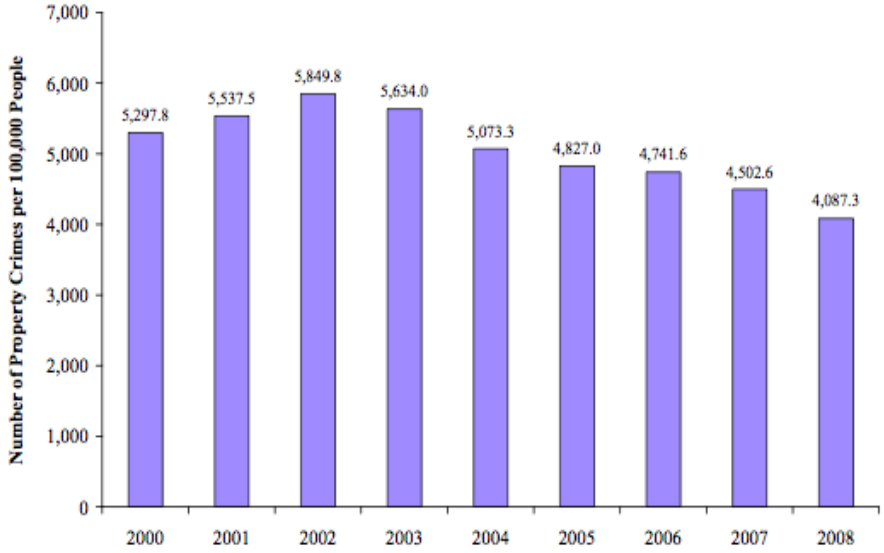
There are clear constitutional issues with Arizona and Alabama's immigration laws. These will be looked at in depth in Section IV of this paper. This section will counter the argument of supports of the laws, examining the criminal and budgetary impacts of the laws.

Illegal Immigrants and Crime Rate

Supporters of tough immigration laws argue that illegal immigrants are a threat to the safety of our neighborhoods, and keeping them out will lead to safer communities. The decrease in crime rates in Arizona is **not** the outcome of S.B.1040, on the contrary crime has been falling in Arizona for years, despite the presence of illegal immigrants (Immigration Policy Center, 2010). The U.S. Bureau of Justice Statistics collected data

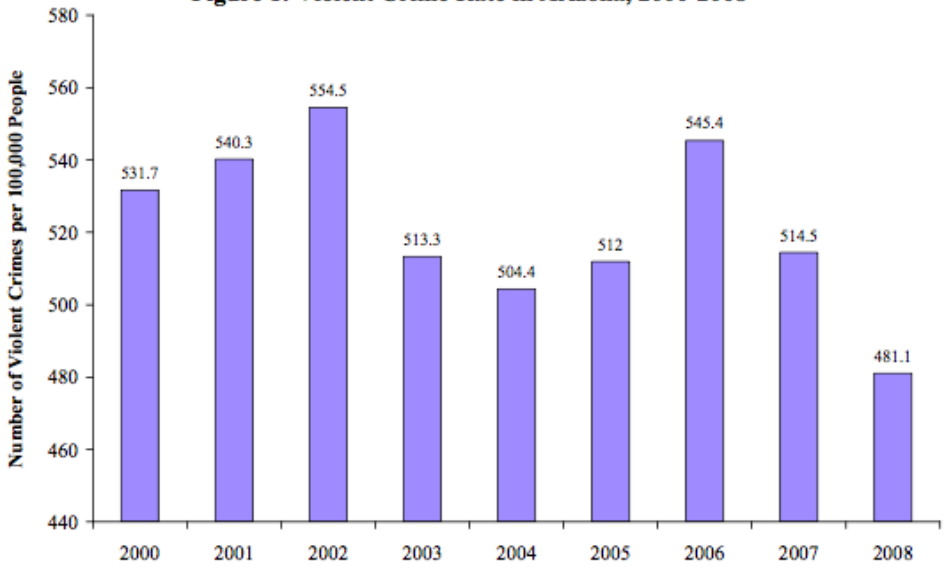
on both property and crime rates in the state. As evident from the graphs below the crime rate fell from 545/100,000 people in 2006 to 481/100,000 people in 2008. Furthermore, property crime fell from 5,849/100,000 people in 2002 to 4,807/100,000 people in 2008 (Immigration Policy Center, 2010).

Figure 2: Property Crime Rate in Arizona, 2000-2008



Source: U.S. Bureau of Justice Statistics, Data Online: Crime Trends.

Figure 1: Violent Crime Rate in Arizona, 2000-2008



Source: U.S. Bureau of Justice Statistics, Data Online: Crime Trends.

Although, there has been cases of kidnappings law enforcement officers in the state have pointed to drug smugglers and human smugglers as the culprit, *not* the general population of residents in Arizona (Immigration Policy Center, 2010). The American Majority Foundation released a report in 2008 that showed immigration states have *lower* crime rates. From 1996 to 2006 the crime rate decreased by 13.6% in 19 of the highest immigration states, this is compared to a 7.1% decline in the other 32 states (Immigration Policy Center, 2010). Furthermore, the Public Policy Institute in California's report showed that foreign-born adults had a lower incarceration rate as compared to native-born (Immigration Policy Center, 2010). Ruben Rumbaut, a sociologist at the University of California, conducted a report in 2007 that found that "for every ethnic group, without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated" (Immigration Policy Center, 2010). Although, there is abundant empirical data showing that immigrants are not responsible for higher criminal rates, the majority of the public still makes this correlation. In the 2000 General Social Survey, 73% of respondents believed that immigration is related to more crime. The stereotype of immigrant criminality is caused by the media's coverage of singular criminal events that involve immigrant perpetrators (Khashu, 2009).

Economic Costs of State Immigration Laws

In passing their immigration laws, both Arizona and Alabama dealt with the costs of implementation as well as the costs of defending the state against lawsuits (Immigration Policy Center, 2010). The National Employment Law Project (NELP) has examined other states that have passed strict immigration laws. NELP did an observation of Riverside, New Jersey's anti-immigration ordinance. The state spent $82,000 in legal fees

to defend their ordinance, which was rescinded in 2007. Arizona has already spent $1.9 billion to defend S.B. 1040, however the case is ongoing and the state will face continued litigation costs (Robertson, 2011). Aside from the legal costs, there is also the cost of losing residents who will either be deported or flee the state due to the strict laws. The Arizona Udall Center for Studies in Public Policy estimated that the "total economic output attributable to Arizona's immigrant workers was $44 billion in 2004," this sustained about 400,000 full-time jobs (Immigration Policy Center, 2010). If all unauthorized immigrants were to leave Arizona it would result in a decline of $26.4 billion in economic activity, a loss of 140,324 jobs, and a decrease of $11.7 billion in gross state product (Immigration Policy Center, 2010). Similarly, in Alabama the state would face a cost of $2.8 billion to deport the 120,000 undocumented immigrants that reside in the state (Robertson, 2011). If 10,000 of the state's undocumented immigrants discontinued working in the state the cost would be $40 million to contract the work (Robertson, 2011). Chad Smith of Smith Farms in Alabama estimated that he lost $300,000 in labor shortages as a result of H.B. 56 (Robertson, 2011).

Supporters of the law argue that the undocumented immigrants place a financial burden on government services since they are not paying their share of the taxes (Kashu, 2009). However, the U.S. Social Security Administration has found that three quarters of undocumented immigrants actually pay payroll taxes; this contributes to six to seven billion dollars in social security funds that cannot be claimed by the immigrants (Kashu, 2009). Supporters further argue that illegal immigrants are a burden on the school budgets since they are supporting bilingual education. However, undocumented immigrants pay real estate taxes and sales taxes at the same rate as other residents

(Kashu, 2009). In 2010 Alabama's undocumented immigrants paid $130 million in taxes that included state and local, income, property, and consumption taxes (Robertson, 2011). Thus, state and local services like public education should not be denied to illegal immigrants who contribute to the economy by paying the same tax rate.

The American Majority Foundation found that areas with a high population of immigrants have higher levels of growth in their "gross state product, personal income, per capita personal income, disposable income, per capita disposable income, median household income, and median per capita income" (Kashu, 2009). Furthermore, jurisdictions with high immigrant populations had lower rates of unemployment (Kashu, 2009).

Part IV: The Constitutionality of State Regulation in Immigration Law

The constitution has created two branches that deal with noncitizens. The first is immigration law; this deals with noncitizens that have entered the U.S. and determines if they can stay or if they have to leave. The second branch is alienage law; this deals with the rights and burdens of noncitizens that live in the U.S. States have limited authority when dealing with the regulation of immigration, "states have some limited direct power to regulate *immigrants,* but no direct power to regulate *immigration"* (Chin, 2011). Thus, the federal government has the exclusive power to regulate immigration. The constitution grants the federal government control over immigration through the provisions that authorize Congress to establish a uniform rule of naturalization, regulate interstate commerce, and to conduct foreign affairs (Chin, 2011). The Supreme Court's ruling in *Negusie v. Holder* held that noncitizens come from other countries, thus their treatment

implicates foreign affairs, which is an exclusively federal power (*Neguise v. Holder,* 2009). *Is it constitutional for states to create and pass laws pertaining to immigration?* In order for this question to be answered, it is essential to examine Supreme Court cases that have set the precedent. Furthermore, the reasoning and application of the justices' rulings will be evaluated. Pro-state arguments based on constitutional grounds will be examined to provide a balanced view of this issue.

Supreme Court Rulings on Immigration Regulation

> "This court has decided distinctly and frequently . . . that [the power to regulate immigration] does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former" *(Head Money Cases,* 1884).

There are several Supreme Court rulings that have upheld the federal government's power to regulate immigration. All of these cases demonstrate that states have no sovereign authority to impose any criminal sanction that involves immigrants. Furthermore, they cannot deport noncitizens (Chin, 2011). It is important to note that not all state laws that affect immigrants are unconstitutional; instead the Supreme Court has looked at these state laws in light of the state's interest. Thus, if the law furthers a state interest it is *not* automatically deemed unconstitutional, however if the law seeks to regulate immigration itself than the law is unconstitutional.

The Supreme Court's rulings in *Henderson v. Mayor of New York* and *Chy Lung v. Freeman* were the foundational immigration cases. These cases invalidated California,

Louisiana, and New York's immigration regimes (Chin, 2011). The Court held in *Henderson* that there is "a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the U.S." (*Henderson v. Mayor of New York,* 1875). However, the Court further ruled that there are matters that are "of such a nature as to require exclusive legislation by Congress" (*Henderson v. Mayor of New York,* 1875). The *Henderson* Court reasoned that immigration belonged to a class of laws that was concerned with the exterior relation of the nation with other nations and governments and is national in its character (*Henderson v. Mayor of New York,* 1875). The Court's ruling in *Chy Lung v. Freeman* stated that there were foreign policy and national security dangers by allowing states to have a discretionary enforcement role in immigration issues (Chin, 2011). The case involved a California law that sought to restrict Chinese immigration. The court stated, "a silly, an obstinate, or a wicked [state immigration] commissioner may bring disgrace upon the whole country, the enmity or a powerful nation, or the loss of an equally powerful friend" (*Chy Lung v. Freeman,* 1875). The Court recognized the political causalities that can ensue if states pass laws that inflict hardship on individuals from other nations. Arizona's SB 1070 has caused great international concerns from countries like Mexico. The Mexican Department of State has issued an advisory to Mexican citizens who are traveling to Arizona (New York City Bar, 2010). Allowing a state to have this kind of authority demonstrates power without responsibility in which "a state would have the authority to raise an international crisis through implementation of its own statues without the corresponding responsibility to redress the resulting concerns in any meaningful

way"(New York City Bar, 2010). Thus, both the *Henderson* and *Chy Lung* cases established that control over immigration and naturalization is an exclusive federal power and that states have no authority to interfere. There are three reasons as to why states lack this authority. First, federal laws regarding immigration legislation preempt state laws. Second, the police power of states does not include regulation of immigration. Lastly, as the court ruled in the *Chy Lung* case, the establishment of substantive immigration laws and its execution belong to the national government (Chin, 2011).

Supreme Court Rulings Granting Power to States

The Court has made it clear that immigration regulation is an exclusive federal power, however states do have authority in the treatment of immigrants. The Supreme Court ruled in *De Canas v. Bica* that a California law prohibiting employers from hiring noncitizens who did not have authorization to work in the state if their employment had an "adverse effect on lawful resident workers" was constitutional (*De Canas v. Bica,* 1976). This case was upheld because it demonstrated state concern and the federal government did not disapprove the state action (Gulasekaram, 2011). The Court's reasoning was that "'power to regulate immigration is unquestionable a federal power,' states nevertheless retain broad police powers over the employment relationships of workers within the state" (Gulasekaram, 2011). The *De Canas* ruling is important because it demonstrates that not all state laws that deal with aliens is a regulation of immigration and cannot be preempted. In this case the Court ruled that regulation pertains to "a determination of who should or should not be admitted into the country" that includes the processes of admitting, removing, or excluding noncitizens (*De Canas v. Bica,* 1976). Thus, states do have authority to deal with illegal aliens, so long as their

actions mirrors federal objectives and is intended to further a *legitimate* state goal (Chin, 2011).

Mirror Image Theory

States like Arizona and Alabama that pass immigration laws defend their laws by stating that it mirrors federal laws. Furthermore, they claim that federal immigration law requires state involvement in immigration enforcement (Gulasekaram, 2011). The first claim is based on the mirror-image theory, which argues that states can enact criminal laws addressing undocumented immigration since it is done in a cooperative manner. If the laws of the state are identical to the laws of the federal government then states have the authority to enact them (Chin, 2011). However, the mirror image theory does not rest on existing constitutional doctrine, rather it represents an expansion of state authority that is inconsistent with the constitution. SB 1070 and H.B 56 make interactions with undocumented individuals a crime. However, these interactions are needed to sustain life, thus the criminal sanctions of the laws force undocumented immigrants to either stay in their residence and risk physical deprivation or deport the country. With this understanding, the laws constitute a regulation of immigration since they "require undocumented individuals either to leave or to face great suffering and perhaps even criminal liability" (Chin, 2011).

The mirror image theory is valid only if state laws are in harmony with federal laws and consistent with congressional objectives, "Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized" (*Gonzales v. City of Peoria,* 1983). If they meet these criteria then they are not in

violation of the constitution. States can assist the government in immigration enforcement, however their assistance cannot be implied through legislation or prosecution. The power to arrest implies the power to legislate or to prosecute. These actions require decision-making power, which is in the realm of the federal government, who is free to choose among criminal, civil, and administrative sanction as authorized by the INA (Chin, 2011). Congress has sought the assistance of states in federal programs. However, states are not invited to pass their own legislation or to enforce laws at their own discretion (Chin, 2011). An example of state assistance in immigration enforcement is Section 287(g) in which state officers work for federal immigration authorities, following their direction and control. Section 274 (c) of the INA gives authority to state officials to make arrests for criminal violations of immigration laws, however states do not have authority in civil violations (New York City Bar, 2010). In *Gonzalez v. City of Peoria* the Court stated that allowing states to enforce civil provisions of the INA would lead to warrantless arrests of individuals that were undocumented and would lead to unlawful arrests (*Gonzales v. City of Peoria,* 1983). However, it is important to note that although the federal government can seek the cooperation of the state they *cannot* delegate their authority to the state. The Supreme Court's ruling in *Martin v. Hunter's Lessee* stated that "no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals" (*Martin v. Hunter's Lessee,* 1816). Thus, Congress is not permitted to delegate any legislative authority over issues that the Constitution has identified as federal powers. There are severe implications if Congress authorized states to regulate immigration by passing and implementing their own laws. First, it would be delegating power that has been assigned

to the federal government. Furthermore, it would be "impermissibly invading the areas of foreign affairs and national security" (Chin, 2011). The Supreme Court has made it clear that immigration regulation is an exclusive federal power, and this is imbedded in the legislative and judicial fabric of the U.S. government. Therefore, only Congress can create crimes that involve the admission, exclusion, and removal of undocumented immigrants (Chin, 2011).

Constitutional Concerns over State Immigration Laws

Arizona and Alabama's immigration laws are unconstitutional, violating the Fourth and Fourteenth Amendments. The Fourth Amendment prohibits unreasonable stops that are based on nationality or ethnicity. The Arizona and Alabama laws provide officers with discretionary power to stop individuals and check for documentation, "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" (New York City Bar, 2010). There only needs to be "reasonable suspicion" however this is not clearly defined and can lead to racial profiling. Furthermore, there are concerns that the laws violate the due process clause of the constitution and the Fourteenth Amendment. Due process requires that laws have sufficient particularity so there is known standards (New York City Bar, 2010). The due process clause of the Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without fairness. Opponents of the laws point to the open-ended nature of its provisions that raise due process concerns. Furthermore, the open-ended nature of the law along with the potential of a warrantless arrest leads to equal protection concerns under the Fourteenth Amendment. Alienage is a suspect category and requires equal protection analysis (New York City Bar, 2010). Thus, in cases involving

alienage the courts will be using heightened scrutiny in making the evaluation. When heightened scrutiny is applied it becomes more difficult to locate a compelling state interest (New York City Bar, 2010). Opponents of the laws argue that they will place noncitizens in a subordinate status and will make them inferior in their communities (New York City Bar, 2010). Both laws have the potential to discriminate against individuals that are either foreign born or are members of a minority group, thus the laws are deemed offensive on equal protections grounds (New York City Bar, 2010). A lawsuit was brought against the Arizona law regarding the discriminatory nature of the law. In *Friendly House et al v. Whiting et al* a group of civil rights plaintiffs claimed that Arizona's law "was enacted with the purpose and intent to discriminate against racial and national origin minorities, including Latinos" (*Friendly House et al v. Whiting,* 2010). Arizona and Alabama's immigration laws give authority to their law enforcement officers to partake in civil and criminal immigration regulation without federal oversight. This violates the federal supremacy clause of the constitution that gives unilateral power to the federal government to regulate immigration, thus creating equal protection and due process concerns.

Examining the 10th Amendment of the U.S. Constitution

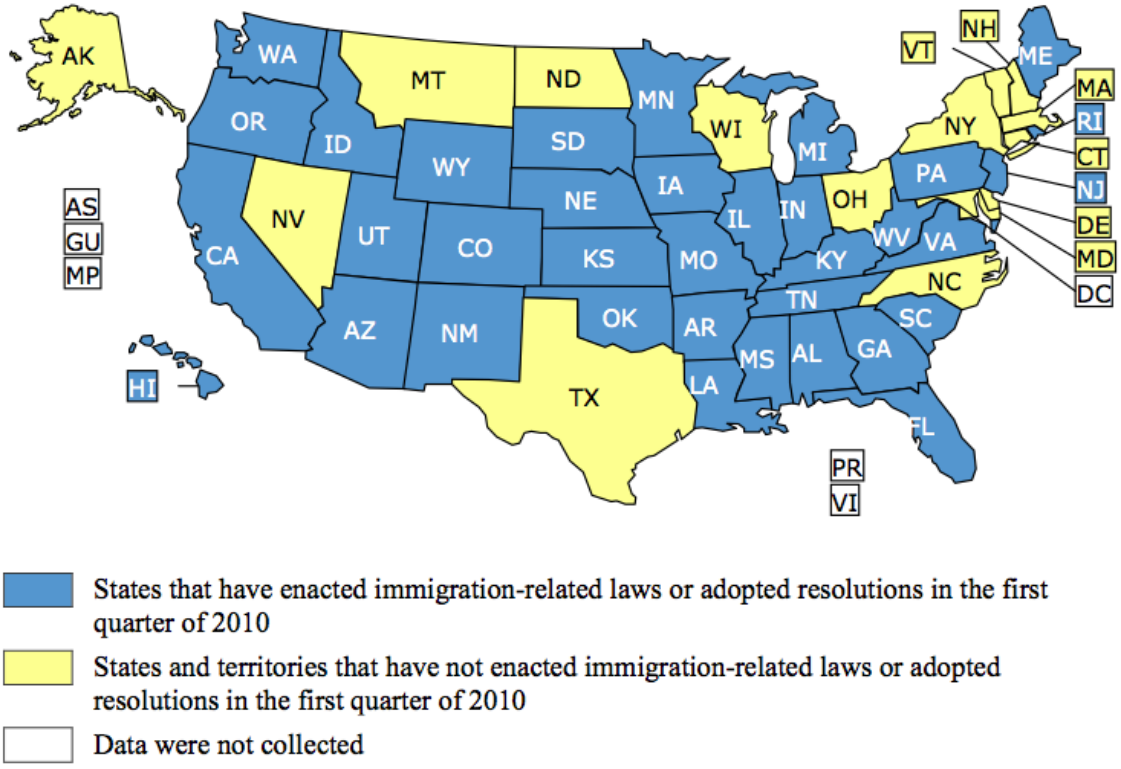
Proponents of Arizona and Alabama's immigration laws point to the Tenth Amendment that established a federalist system of government. They claim that states have powers to regulate immigration. These rights are reserved for them so they can protect and provide for the welfare of their constituents (Mayer, 2011). This assumption is based on the police powers that the Courts have granted to the states. The police powers allow states to pass laws that protect the safety, general welfare, and health of the people (Pham, 2006).

However, these powers do not give states broad authority to pass legislation on issues that the federal government has exclusive authority. Furthermore, the Naturalization Clause, the Commerce Clause, the Foreign Affairs Clauses, and the nation's status as a sovereign demonstrate that immigration power is exclusively federal, preempting even state police powers (Pham, 2006). Thus, the Tenth Amendment is not violated and state sovereignty is not overlooked if Congress prohibits states from passing laws in an area that Congress has legislative authority (Pham, 2006).

Part V: Finding a Solution

With the increase of states passing immigration laws it is evident that the federal government needs to implement comprehensive immigration reform.

STATES AND IMMIGRANT-RELATED LAWS



State laws that relate to immigration have increased in recent years. In 2006 there were 570 immigration bills introduced, 84 laws were enacted and 12 resolutions were adopted (National Conference of State Legislatures, 2010). In 2007 this was tripled with 1,562 immigration bills that were introduced, of which 24o laws were enacted and 50 resolutions were adopted. Immigration issues surrounding employment, identification/drivers' licenses, and law enforcement were the top interest for states (National Conference of State Legislatures, 2010).

State policy makers implementing immigration reforms have resulted in divisive immigration laws that violate the constitution. States have every reason to be angry and frustrated at the broken immigration system. However, it needs to be recognized that they cannot solve the complex issues on their own; **this is a federal responsibility**. The solution is to implement federal immigration reform that include the following (Rosevear, 2010):

- Having stronger borders with increased security.
- Creating more secure systems for employers nationwide to verify the legal work eligibility of their employees.
- Requiring immigrants that are already in the states illegally and have no criminal record to register for a federally established form of legal status, learn English, and pay appropriate penalties and taxes.
- Growing the economy by establishing a market-based immigration process that supports a range of workforce needs from seasonal to highly skilled workers, and entrepreneurs.

To deter states from implementing their own immigration laws there needs to be more assistance between the states and the federal government in the enforcement of immigration policies. States should be able to regulate immigrants; this is needed to provide for the safety and welfare of their constituents. However, this does not mean they can regulate immigration; this distinction must be made and understood. Even in the regulation of immigrants states must do this based on their regulatory justifications and their sovereign interests, both of which needs to be consistent with federal authority (Chin, 2011). The Supreme Court's decisions, based on reasoning from the Constitution, have established that "federal power over immigration is supreme" and to reverse that by upholding SB 1070 and H.B. 56 would be a dramatic reversal of the Supreme Court's immigration jurisprudence (Chin, 2011).

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