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The Rise and Fall of the State Attrition through Enforcement Trend:
A Story of Arizona Senate Bill 1070 and *Arizona v. United States* Role as the Fulcrum of the Trend

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Public Policy and Law Senior Honors Thesis

Samantha Marie Montalbano
Class of 2013

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Introduction

On June 25, 2012, the Supreme Court ruled on the constitutionality of Arizona's immigration enforcement policy in *Arizona v. United States*. Deciding the constitutionality of Arizona Senate Bill 1070, the Court found three of the provisions federally preempt while allowing one provision to stand based on its facial constitutionality. The decision and its rationale favored the arguments and authority of the federal government's supreme power in immigration enforcement.[1] However, at the announcement of the decision, both parties declared victory.[2] How is it possible that both parties declared victory when the Court favored one party in its decision? This thesis will explore this surprising reaction to the decision and the decision's significance to the future of the trend of state immigration enforcement.

On the issue of unauthorized immigration, the nation divides into two opposing sides, resulting in significant differences and a federal immigration policy stalemate. Congressional legislative history of the last few decades demonstrates a burden placed upon the states to address the growing unauthorized population. Frustrated with the federal government's reallocation of the burden to the states and its inability to address the unauthorized population through enforcement, the states decided to assume more responsibility in state immigration enforcement.

The doctrine of attrition through enforcement, originally a theory suggested for federal authorities, claims that strict policies and strict enforcement of those policies can actively deter foreign nationals from residing illegally in the nation.[3] If the government eliminates incentives

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[1] Arizona et al. v. United States, 132 S. Ct. 2492 (2012).

[2] Julia Preston, "Arizona Ruling Only a Narrow Opening for Other States". *The New York Times*, June 25, 2012 http://www.nytimes.com/2012/06/26/us/justices-decision-a-narrow-opening-for-other-states.html

[2] Julia Preston, "Arizona Ruling Only a Narrow Opening for Other States". *The New York Times*, June 25, 2012 http://www.nytimes.com/2012/06/26/us/justices-decision-a-narrow-opening-for-other-states.html

[3] Mark Krikorian, "Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement." *Center for Immigration Studies Backgrounder* 6, (May 2002).

for unauthorized immigration, making the risk of living with undocumented status worse than the benefit, then, foreign nationals will choose not to live illegally in the United States. By instituting policies that deter unauthorized immigrants from residing in the country, then the government can actively decrease the population of unauthorized aliens by creating an environment that incites self-deportation. States adopted the attrition through enforcement doctrine as a means to deal with the growing unauthorized population and the associated burden placed on the states by the federal government.

As early as 2006, states began enacting policies intended to deter unauthorized immigrants from residing in the state, creating a trend of state policies encapsulating the attrition through enforcement doctrine.[4] With the passage of SB 1070 on April 23, 2010, Arizona advanced the state attrition through enforcement trend to the national stage; Arizona became the vanguard state in this trend.[5] While states adopted these measures, Arizona's political environment led the state to push the boundaries of state authority to deter unauthorized aliens.[6] Yet the question arose: can states act in this manner to purposely drive unauthorized immigrants from their borders?

Arizona SB 1070 escalated the trend to national attention, by enacting controversial provisions that completely encapsulated the intention of deterring unauthorized immigrants from the state. The bill, less commonly known as Support Our Law Enforcement and Safe Neighborhoods Act, created criminal penalties as deterrents, which asserted the authority of state

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[4] Gillian Johnston and Ann Morse, "2010 Immigration-Related Laws and Resolutions in the States (January 1 - December 31, 2010)." *Immigrant Policy Project.* National Conference of State Legislatures, January 2011. http://www.ncsl.org/issues-research/immig/2010-immigration-related-laws-and-resolutions-in-t.aspx

[5] Arizona Senate Bill 1070, 49th Legislature (2010).

[6] Keith Aoki and John Shuford. "Welcome to Amerizona – Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" is An Idea Whose Time Has Come". *Fordham Urban Law Journal* 38, no. 1 (2010): 6.

and local officials in investigating immigration status and enforcing immigration policy.[7] Arizona designed all the provisions to act as disincentives for aliens to live in the state. Four controversial provisions raised the state attrition through enforcement trend to the forefront of both immigration policy and the balance of powers in the federal system. The three struck down provisions allowed warrantless arrests when a state authority believes an individual committed a deportable crime and created criminal state penalties for residing in the state illegally, applying or holding a job without proper immigration status. The only provision to be found constitutional, known as "show me your papers", granted state authorities, upon the reasonable suspicion of unauthorized status at a legal stop or detention, the ability to investigate immigration status by asking for documentation.[8] If the individual did not have the proper documentation, then the authorities could detain them until their immigration status was verified. This legislation placed the trend upon a precipice, a defining moment where the nation became divided on the trend, with some states emulating Arizona's approach, while others protested it.

When Arizona brought the issue of unauthorized immigration to the forefront of the battle of power between states and the federal government, it seemed that this contentious issue would finally be decided. Yet, the escalation of Arizona SB 1070's controversial methods of deterring unauthorized immigrants from its borders divided the nation, resulting in the announcement of victory from both parties.[9] With the decision of Arizona SB 1070, the trend rested on a precipice: state adoption of the controversial trend could either be accepted or rejected by the Court. Thus, the decision ought to be considered the fulcrum of the state immigration policy trend of attrition through enforcement. The pivotal point of the trend, the

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[7] Arizona Senate Bill 1070
[8] Arizona et al. v. United States, 132 S. Ct. 2492 (2012).
[9] Preston, "Arizona Ruling Only a Narrow Opening for Other States".

decision, could either allow the doctrine to flourish, supported by the Constitution or cause its demise by failing to find the measures constitutional.

When questions of authority on the governing and enforcement of policies concerning unauthorized immigrants arise, it seems that the Court must decide where the power lies, with the federal government or with the states. Yet upon the announcement of the decision, both parties claimed victory. How could both parties claim victory in a case where little compromise existed? This counterintuitive result raised questions about how the decision will be interpreted by the lower courts and state legislatures in the future. How will the precedent affect the state attrition through enforcement trend? This thesis will explore the rise and fall of state immigration enforcement, demonstrating the role of *Arizona v. United States* as the fulcrum of the trend.

The significance of the case derives from the Court's establishment of the standard necessary to determine the constitutionality of similar attrition through enforcement provisions. In doing so, the Court allowed the centerpiece of the attrition through enforcement doctrine − the "show me your papers" provision − to stand, although temporarily. At the "heart" of both this provision and the doctrine lies the intention to invoke fear of identification and deportation in unauthorized immigrants in order to deter them from the state. In upholding this provision, the Court upheld the core of the attrition through enforcement doctrine. Although the Court favored the federal government in its decision, its tentative permission of the provision incites questions of whether the constitutionality of the attrition through enforcement trend will persist.

The question then becomes, how did the states respond to the Court's decision? Despite their initial declaration of victory, state legislatures interpreted the ruling as an obstacle to the continued existence of the doctrine. Thus, *Arizona v. United States*, the key ruling on the state attrition through enforcement trend, with the additional influence of the results of the 2012

Presidential Election, led states to largely cease attrition through enforcement efforts. By examining these outcomes, *Arizona v. United States's* role as a fulcrum in initiating the demise of the state attrition through enforcement trend becomes evident.

Chapter 1:
The Commencement of the Attrition through Enforcement Doctrine in State Immigration Policies

"The federal government has failed us, so we, the elected officials of small-town America, are getting tough with illegal immigration" - Lou Barletta, Mayor of Hazleton, Pennsylvania[10]

Since at least the most recent immigration reform that regulated unauthorized status in 1986, federal legislation and inaction has placed an increasing burden on the state, a burden that drove states legislatures to enact their own immigration policies. Arizona's controversial SB 1070 elevated the trend of state immigration policies of attrition through enforcement to the national stage. To remedy federal failure to enforce immigration policies, states like Arizona developed a doctrine of deterring unauthorized aliens from settlement. While many states and localities adopted these restrictive policies, SB 1070's extreme measures made the trend constitutionally significant. As a pioneer of state immigration policies using attrition through enforcement, Arizona SB 1070 proves significant to the balance of state and federal power in immigration policy.

In order to understand the significance of Arizona SB 1070, its context of federal inaction and state burden must be understood. This chapter will first discuss federal efforts to reform immigration in recent years, illustrating the burden placed upon state and local governments both by federal legislation and federal inaction. It will then demonstrate how federal action contributed to states' attrition through enforcement strategy, culminating in Arizona SB 1070.

Federal Failure to Positively Affect Unauthorized Immigration

Since Congress's last successful effort to address undocumented immigration in 1986, the unauthorized population has substantially expanded, from 3.2 million in 1986 to 11.1 million in

[10] "freeSpeech: Lou Barletta". CBS Evening News. CBS Broadcasting Inc. July 2, 2010. http://www.cbsnews.com/8301-500903_162-2099190.html

2011.[11] As the unauthorized population expanded and the federal government failed to act, the population's burden on state governments grew. As federal immigration efforts failed to disincentivize unauthorized immigration, the doctrine of attrition through enforcement gained traction as a plausible solution to the federal problem.

With each effort to reform immigration, Congress allocated the responsibility of providing funding to the states. Yet, the enforcement of the programs and procedures remained solely within the jurisdiction of the federal government. These enforcement measures consistently failed to address the issue of the unauthorized immigrant population. States grew frustrated as they took on financial responsibilities for unauthorized immigration, while the federal government failed to implement effective enforcement measures. With the issue of unauthorized immigration growing in significance as the years went on and the population grew, the need for immigration reform strengthened, along with the tension between the federal governments and the state governments.

The Immigration Reform and Control Act of 1986 initiated the trend of placing a significant burden upon the states in funding immigration-related matters.[12] Critically, the act banned the legalizing population of undocumented immigrants from receiving federal assistance for five years, assuming states would satisfy the funding and resource needs of the population for that period. While the federal government allotted $1 billion per year for four years to compensate states, this amount failed to be sufficient.[13]

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[11] U.S. Library of Congress, Congressional Research Service, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem., CRS Report RL33874. (Washington, DC: Office of Congressional Information and Publishing, December 13, 2012), 2.
[12] The Immigration Reform and Control Act, Pub.L. 99–603, 100 Stat. 3359 (1986).
[13] Cooper, Betsy; O'Neil, Kevin. "Lessons from the Immigration Reform and Control Act of 1986." *Policy Brief*. Migration Policy Institute, Vol. 3. (August 2005), 7.

Adding to this challenge, congressional efforts to restrict immigration into the United States since the last comprehensive effort in 1986, in effect, incentivized unauthorized immigration. Foreign nationals previously eligible for lawful entry into the country became ineligible, making unauthorized immigration the only option for a large population of people. The Immigration Act of 1990 amended some of the requirements for naturalization and immigration admission, even further narrowing the eligible population.[14] This restrictive policy incentivized unauthorized immigration among those who previously would have been eligible to migrate legally.

In 1996, Congress passed two significant acts, which placed a great financial burden on state and local governments by restricting federal benefits from unauthorized aliens. The Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), placed restrictions on unauthorized aliens' eligibility for legal status and federal benefits based on their previous undocumented status.[15] This act prevented many unauthorized immigrants from receiving benefits such as Social Security.[16] Further limiting abilities and benefits to unauthorized immigrants, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) restricted federal benefits for immigrants, both legal and undocumented.[17] By enacting these measures, the federal government placed the financial responsibility squarely onto the states, without assistance. States could choose to deny immigrant aid, in line with federal regulations, but they would bear the social consequences. This transfer of responsibility is critical to Arizona's argument that federal immigration reform placed a significant burden on state

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[14] The Immigration Act, Pub.L. 101–649, 104 Stat. 4978 (1990).
[15] The Illegal Immigration Reform and Immigrant Responsibility Act, Division C of Pub.L. 104–208, 110 Stat. 3009-546, (1996).
[16] Ibid.
[17] The Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. 104–193, 110 Stat. 2105, (1996).

governments. Thus, with this legislation, the unauthorized immigrant population's burden on the states grew.

The economic impact on state governments fails to be proportional to the impact of unauthorized immigration nationally. While some scholars argue that the net financial effect of immigration on the federal level is positive, for states with large undocumented populations, the fiscal effect is negative in the short- term.[18] Federal mandates that require that states provide public services such as education, emergency health care, and legal protections, regardless of the resident's ability to pay, place a financial burden upon the states.[19] A state must provide unauthorized aliens with emergency health care and these other services, but may not enforce immigration policies based on the alien's undocumented status. Although the federal government has some programs for reimbursing the states, reimbursements make up a tiny fraction of overall costs. The federal government retained primary authority of enforcement in immigration policies. This pattern became a serious concern to state governments' as the federal government demonstrated its legislative and political inability to effectively enforce immigration, leaving the states with the continuous obligation to finance the growing unauthorized population.

While federal legislation placed a greater financial burden and responsibility on the states, federal policies also established more of a cooperative role for states in immigration enforcement. The aforementioned IIRIRA, enacted in 1996, constructed the program known as 287 (g). 287 (g) trains state and local officials to perform immigration law enforcement procedures.[20] This program grants states and their officials far more authority in immigration

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[18] Smith, James P., and Barry Edmonston, eds. *The New Americans: Economic, demographic, and fiscal effects of immigration*. Washington D.C.: National Academies Press, (1997).

[19] "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments." Congressional Budget Office. Congress of the United States. No. 2500, December 2007, 1.

[20] "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." U.S. Immigration and Customs Enforcement. Department of Homeland Security. http://www.ice.gov/news/library/factsheets/287g.htm

policy, establishing a more cooperative relationship between federal and state authorities in immigration enforcement. With a similar aim, another program utilizes cooperation between federal, state and local officials to better identify more unauthorized immigrants for immigration enforcement. Established in 2008, Secure Communities prioritizes immigrants for removal with federal, state, and local authorities cooperating in the process.[21] As federal immigration efforts realized little benefit, more recent efforts attempted to increase effectiveness by cooperating with state and local officials. These cooperative efforts raised states' hopes that states could play some role in mitigating the financial burden of the unauthorized population.

Unauthorized immigration grew over the years to become a more daunting and politically divisive issue. With each passing year, the unauthorized population grew and the financial burden on the state grew due to new federal legislation. The year 2007 marks Congress's last attempt to reform immigration in order to address the undocumented population. Years of discussion over the need to reform immigration after the 1986 immigration reform failed to decrease the unauthorized population led to pointed discussions in 2006 and a legislative bill in 2007. Yet this effort, the Comprehensive Immigration Reform of 2007, failed due to political rifts within the ruling party, as the bill failed to receive enough votes to continue the legislative process.[22] A bipartisan effort fervently promoted by a Republican President failed, based on a lack of support from the Republican Party.[23] In response to this federal failure, state governments, including Arizona, began introducing and enacting immigration reform. This trend of attrition through enforcement policies, to be discussed in detail later in the chapter, utilized

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[21] "Secure Communities." U.S. Immigration and Customs Enforcement. Department of Homeland Security. http://www.ice.gov/secure_communities/

[22] Pear, Robert; Hulse, Carl. "Immigration Bill Fails to Survive Senate Vote." *The New York Times*, June 28, 2007. http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html

[23] Ibid.

provisions granting state officials' significant and unprecedented authority in immigration procedures regarding unauthorized immigrants.

The coupling of the states' increased burden and the federal government's inability to effectively legislate or to enforce legislation gave little assurance to states that the issue of unauthorized immigration could be properly addressed in the future. Congress's inability to compromise served as a catalyst for state government activism in enacting immigration policies. For state governments, the present could not yield a different result and the future would be too long to wait while the issue rapidly worsened.

Attrition through Enforcement Doctrine

States legislators faced a predicament that seemed to lack a solution: the growing unauthorized population placed an increasing financial burden upon the states, yet the states lacked any means to change the accelerating pattern. From this situation, the doctrine of attrition through enforcement, first proposed as a national level, began to be adopted on a state and local level. The strategy of attrition through enforcement aims to deter unauthorized immigrants from settlement through a variety of policies. Possible policies include: mandating documentation, identification at stops, criminalizing employment, criminalizing illegal settlement, and other policies aimed to create a greater risk than incentive to reside in a state as an unauthorized alien.

Immigration expert and Executive Director of the Center of Immigration Studies, Mark Krikorian, introduced the theory to the realm of state legislation in 2005. Attrition through enforcement aimed to steadily reduce the population of unauthorized immigrants in the nation, decreasing the unauthorized population to what Krikorian called "a manageable nuisance, rather than today's looming crisis."[24] Recent years demonstrate a continual increase in the unauthorized

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[24] Krikorian, Mark. "Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement." *Center for Immigration Studies Backgrounder* 6, (May 2002), 1.

immigrant population; thus this doctrine of deterrence called for an "end to the climate of impunity for border-jumping, and illegal employment, and fake documents, and immigration fraud."[25] A disdain for the federal government's inability to address the problem of unauthorized immigration clearly appears in the affirmation of the doctrine by Krikorian, its explicit creator.

In order to address the ever-increasing unauthorized population, attrition through enforcement legislation focuses on "self-deportation."[26] The desired effect of the doctrine relies on deterring the settlement of new unlawful aliens through increasing deportations and, "most importantly, by increasing the number of illegals already here who give up and deport themselves."[27] Already these types of policies, which disincentivize unauthorized immigration, deter settlement; proponents recognizing this results aim to utilize the effects of these policies to deter unauthorized immigration on a grander scale.[28] In accordance with Krikorian's theory on how best to combat the unauthorized immigration population's growth, legislation must include robust promises of enforcement.[29]

Krikorian argues that the doctrine already plays an implicit role in federal immigration policy such as the Real ID Act.[30] Furthermore, while the theory's implementation in legislation may prove unpopular with some, the majority of voters will support its intention due to the sentiment against unauthorized aliens. As middle-class America "supports the legal immigration and expresses disgust" with unauthorized immigration, this doctrine employs this distinction to garner political support.[31] This argument promoted by Krikorian foreshadows the controversy that sprang from its codification in state immigration policies. Significantly, Krikorian framed

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[25] Ibid, 5.
[26] Ibid, 3.
[27] Ibid, 1.
[28] Ibid, 3.
[29] Ibid, 4.
[30] Ibid, 1.
[31] Ibid, 6.

the doctrine as a new angle that ought to be explicitly adopted by the federal government, not necessarily state governments.[32] Therefore, Krikorian's initial argument failed to account for the complications of enacting attrition through enforcement state policies, rather than federal policies.

The attrition through enforcement doctrine translated to state legislation through the need for states to enact policies within their authority to affect the unauthorized immigration problem. Kansas Secretary of State Kris Kobach can be hailed as a key player in applying the attrition through enforcement doctrine to state legislation, as a prominent author in both Alabama and Arizona's major attrition through enforcement laws. Kobach advocates for the attrition through enforcement policy in the absence of Congress "taking the necessary steps" to address the unauthorized immigration problem.[33] Pointing to states' implementation of E-Verify to demonstrate the state's ability to affect change in the unauthorized immigrant population, he demonstrates how states can change the reality of unauthorized life in the country, which would "dramatically alter behavior" making "the only rational decision to return home."[34] According to Kobach, a nationwide strategy ought to be implemented in order to radically alter the current unauthorized immigration situation.[35] In the absence of federal action, states adopted attrition through enforcement. Essentially, states legislatures acted because the federal government failed to act.[36] This doctrine's adoption by the states blazed new ground for state sovereignty and

[32] Ibid, 6.

[33] Kris Kobach, "Attrition through Enforcement: A Rational Approach to Illegal Immigration". *Tulsa Journal Comparative and International Law* 15, No. 155 (2008): 160.

[34] Ibid, 157.

[35] Ibid, 163.

[36] Ibid, 163; Yet in practice, the adoption of the attrition through enforcement doctrine by states amounted to millions of dollars and significant resources utilized in order to defend these policies in the courts.[36] With such extensive political ramifications experienced by many several states and localities, the question arises as to the true motive of the states' adoption of the doctrine in their immigration policies. If federal inaction is the core reason for the states' adoption of the doctrine, than the experience of towns and states' political and legal consequences ought to have led states to utilize a different method.[36] Yet, since political controversy and legal backlash failed to deter

assertions of state power on a federal issue.

State Movement

In spite of the "media scrutiny, bruising debates, and legal uncertainty", state and local legislators addressed the unauthorized immigrant population by actively pursuing the attrition through enforcement theory.[37] In an effort to deter the presence of aliens and increase the authority of state officials, state legislation created criminal sanctions for acts previously only determined civil violations.[38] Many states utilized this tactic of criminalizing acts of unauthorized immigrants, specifically the criminalization of seeking employment, failing "to carry an alien registration document", and entering the county illegally, such as Arizona, Alabama, Georgia, Indiana, South Carolina, and Utah.[39] By creating state criminal violations, states increase the severity of the charges; both disincentivizing unauthorized immigration and increasing the potential for more severe penalties.

An extraordinary amount of laws, this only marked the beginning of a dramatic shift in state governments legislating in an area where the federal government had failed to reform or

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the trend, this implies that another catalyst of the doctrine proves to be critical.

The adoption of the attrition through enforcement doctrine resulted in "a crisis in race relations" between Latino immigrants and mostly white natives, the doctrine's continuation and escalation in state immigration polices suggests that a factor in the adoption of the doctrine is to affect the race of the state.[36] This suggestion receives support via the prominent policy actor, Kris Kobach's work with FAIR, Federation for Immigration Reform. FAIR founder John Tanton, claimed the intention of the organization as the preservation of "a European-American majority, and a clear one at that."[36] While subtler suggestions of racial factors occur, the greatest indication of the racial undertone of the attrition through enforcement's adoption by states lies in its persistence even after its demonstrated effect of racial conflict, and, as the Director of the Southern Poverty Law Center states, "a trail of tears."[36] Regardless of whether the suggestion of racial factors purposefully undertone the doctrine's application to state immigration policies, states' intended effect is attrition through enforcement in order to significantly decrease the burden of the unauthorized immigrant population. (Potok, Mark. "Trail of Tears". *When Mr. Kobach Comes to Town: Nativist Laws & the Communities They Damage*. Southern Poverty Law Center: 2011.)

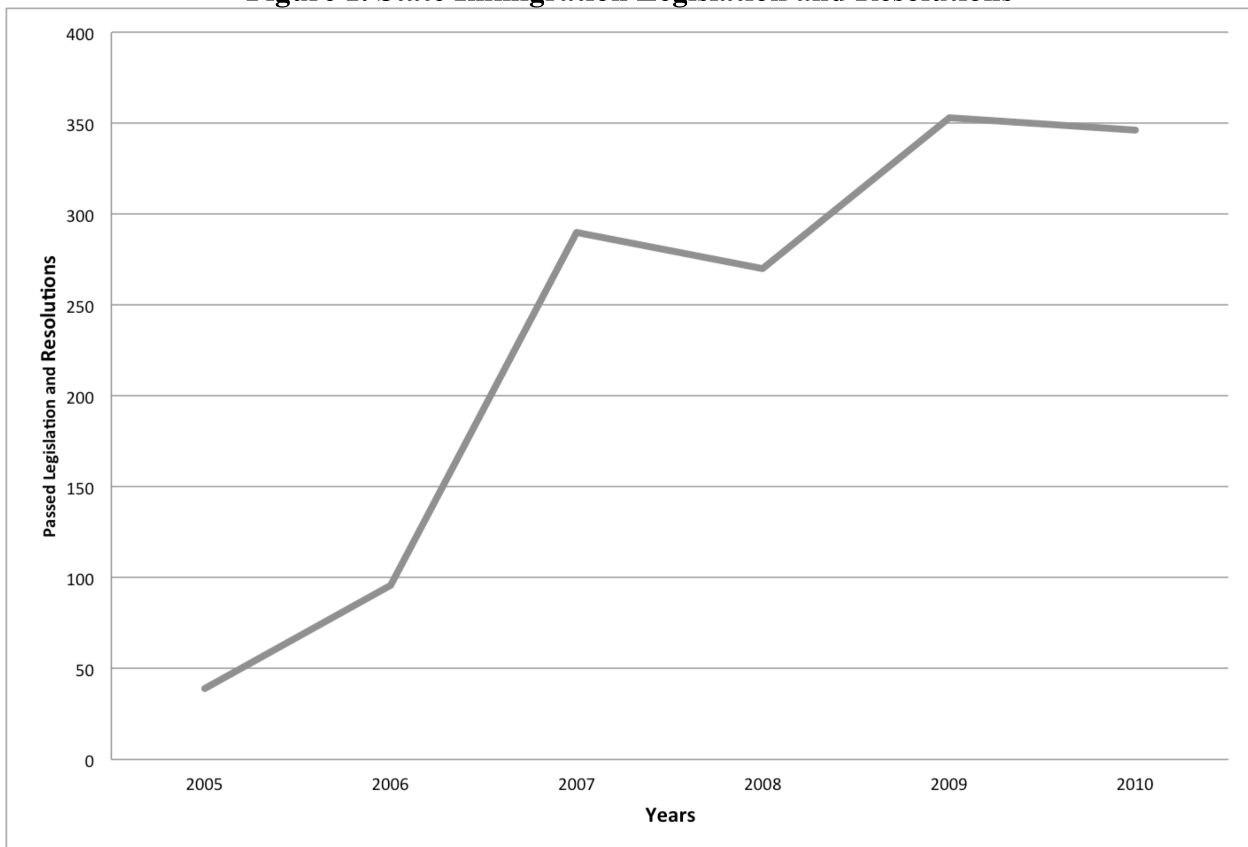
[37] Tichenor, Daniel J; Filindra, Alexandra. "Raising *Arizona v. United States*: Historical Patterns of American Immigration Federalism". *Lewis and Clark Law Review* 16, no. 4. (2012): 1215-1247, 1218.

[38] Congressional Research Service. *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, Larry M. Eig. CRS Report R41221. Washington, DC: Office of Congressional Information and Publishing, September 14, 2010, 3.

[39] Meyer, Brooke; Morse, Ann. "2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)." *Immigrant Policy Project.* National Conference of State Legislatures, January 2012. http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx; Arizona Senate Bill 1070, 49th Legislature (2010).

enforce the law.[40] In 2010, the year that Arizona enacted Senate Bill 1070, more than 1,400 bills were introduced in 46 legislatures and the District of Columbia, and 346 laws were enacted.[41] In comparison, state legislatures in 2005 only enacted 39 laws and resolutions affecting immigration in total.[42] Since 2005, with a significant escalation of the trend in 2007, state legislatures introduced and passed a far greater amount of immigration policies, predominantly with an intended effect of attrition through enforcement.

Figure 1. State Immigration Legislation and Resolutions



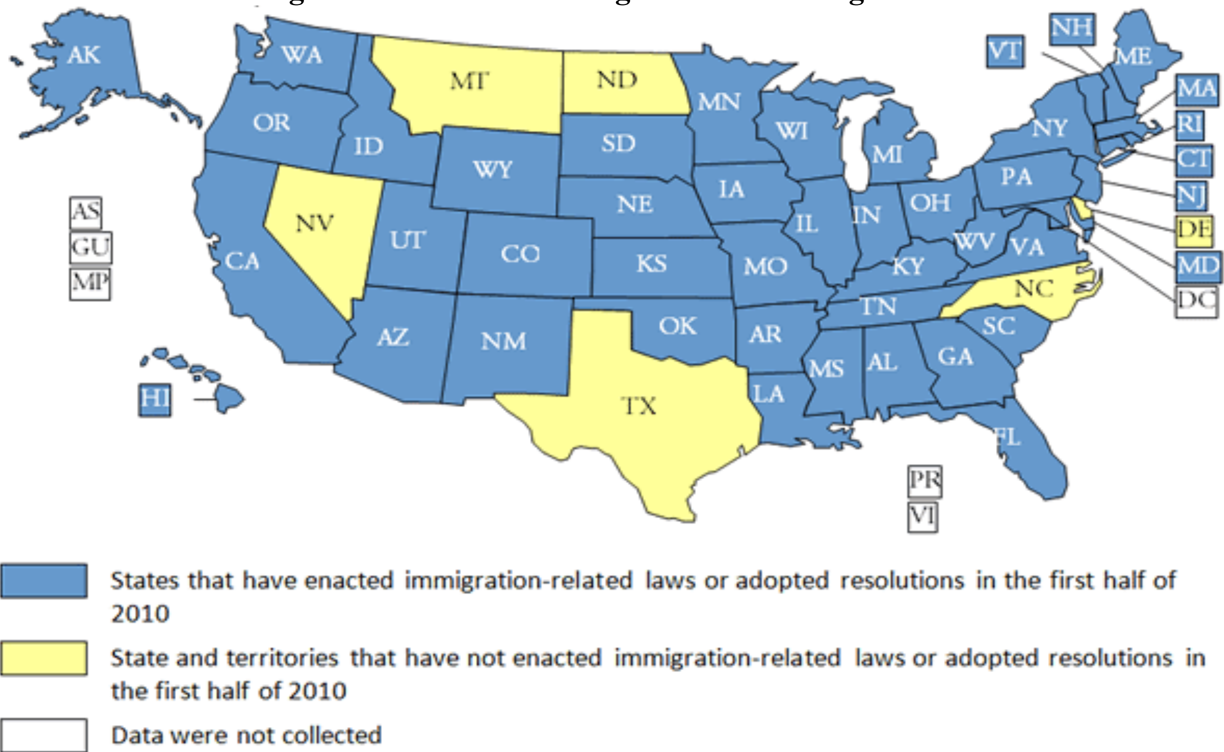
National Conference of State Legislatures 2010

[40] Tichenor, Daniel J; Filindra, Alexandra, 1244.

[41] Johnston, Gillian; Morse, Ann. "2010 Immigration-Related Laws and Resolutions in the States (January 1 - December 31, 2010)." *Immigrant Policy Project.* National Conference of State Legislatures, January 2011. http://www.ncsl.org/issues-research/immig/2010-immigration-related-laws-and-resolutions-in-t.aspx

[42] Morse, Ann. "A Review of State Immigration Legislation in 2005." *Immigrant Policy Project.* National Conference of State Legislatures, January 2007. http://www.ncsl.org/issues-research/immig/immigrant-policy-project-state-legislation-117.aspx

Figure 2. States and Immigrant-Related Legislation



National Conference of State Legislatures 2010

This influx of state policies highlights the inefficiency of federal policy, as states enacted their own legislation to address the federal problem of unauthorized immigration. Rather than continue to deal with unsatisfactory policies, states attempt to seize authority on this matter by increasing their power through legislation. Such a significant increase in state legislation challenges the decades-long stalemate on immigration policy. Finally, immigration reform progressed; however, states produced these immigration reforms, not the federal government.

As the movement among the states to deal with unauthorized immigrants grew, Arizona became the model for strict, comprehensive legislation, which tested the authority of state sovereignty on immigration policy. Arizona, with its omnibus legislation Senate Bill 1070, led the state legislation movement of employing its police powers.

Codification of Cooperation?

Yet, an argument exists which claims that the attrition through enforcement doctrine

adopted by the states merely codifies the cooperation of federal and state officials in immigration enforcement. The federal government through legislation such as 1996's IIRIRA implemented cooperation between federal and state officials. Analogous to many other federal policy problems, federalism, as a state trend advocating shared responsibility, is a "familiar solution to the problem" when the federal government seemingly fails to enforce implementation of policies.[43] The attrition through enforcement policies of states simply internalized these policies into their legislation.

According to prominent immigration policy scholars, Daniel J. Tichenor and Alexandra Filindra, state and local government historically have held a prominent role in influencing and enforcing immigration policies, even as immigration policies presume to belong solely in the federal field.[44] States retained the ability to enact de facto immigration legislation in order to affect immigration without "overstepping their restricted constitutional role."[45] This argument claims that the application of the attrition through enforcement doctrine in state policies only continues this historic and constitutional role of the states.[46]

Furthermore, the federal government enlisted this authority of state officials through its federal policies. In passing the IIRIRA in 1996, the federal government created an important program of cooperation, 287(g). This program afforded state officials formal training in immigration policy, akin to the training of federal agents in order to allow local offices to work in tandem with officials of Immigration and Customs Enforcement.[47] States claim that their attrition through enforcement policies simply codify the cooperation between federal and state

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[43] Varsanyi, Monica W., Paul G. Lewis, Doris Provine, and Scott Decker. "A Multilayered Jurisdictional Patchwork: Immigration federalism in the United States." *Law & Policy* 34, no. 2 (2012): 138-158, 139.

[44] Tichenor, Daniel J; Filindra, Alexandra, 1247.

[45] Newton, Lina; Adams, Brian E. "State immigration policies: Innovation, cooperation or conflict?." *Publius: The Journal of Federalism* 39, no. 3 (2009): 18.

[46] Tichenor, Daniel J; Filindra, Alexandra. 1215.

[47] Magaña, Lisa. "Arizona's Immigration Policies and SB 1070." *Latino Politics and Arizona's Immigration Law SB 1070*. New York: Springer, (2013): 19-26, 22.

authorities already established by the federal government.[48] These policies, such as those enacted in Arizona, Colorado, Georgia, and Oklahoma, ought to be characterized by cooperation rather than conflict with federal programs, according to this argument.[49] While the states found a different means to assert authority in immigration policy, this may not necessitate instigation of a conflict with the federal government.[50]

Proponents of federal power respond that this argument neglects the importance of the cooperation occurring upon federal terms. States and localities obtaining the ability to enact their own laws on how the state will cooperate with federal authorities create variation in federal officials' relationship with the state and local officials.[51] An even more critical consequence than differing relations between each state and the federal government, the relationship between immigrant communities and the government would differ in each locality and each state, creating a "patchwork" of immigration laws.[52] This variation in treatment of unauthorized immigrants unarguably fails to be the intention of the federal government offering state and local government cooperation in federal immigration policies.[53] Thus, the argument that the trend of state immigration policies simply codifies the cooperation permitted by the federal government, abandons the objective of federally legalized cooperation, clearly deviating from the result of this trend.

States adopted the doctrine of attrition through enforcement in order to affect the burdensome issue of unauthorized immigration. Recent federal efforts in reforming immigration only resulted in an increased burden to state governments and a substantial increase in the

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[48] Newton, Lina; Adams, Brian E, 19.
[49] Ibid, 19.
[50] Ibid, 19.
[51] Varsanyi, 153.
[52] Ibid, 140.
[53] Ibid, 152.

unauthorized population. In pursuit of addressing this growing problem, state legislatures embraced the attrition through enforcement doctrine and implemented a dramatic number of immigration policies, in the hopes of deterring unauthorized immigrants from their states. While many states participated in this trend, the subsequent chapter will demonstrate Arizona's pivotal role in both manifesting the attrition through enforcement doctrine in legislation and elevating the trend to constitutional significance.

Chapter 2: *Arizona SB 1070 as the Fulcrum of the State Immigration Policy Trend*

The trend of state immigration policies utilizing the attrition though enforcement doctrine accelerated into the national immigration policy debate through Arizona SB 1070. Enacted in 2010, Arizona's SB 1070 became the symbol of the attrition through enforcement trend as a brazen manifestation of the doctrine. As the vanguard of the state immigration policies using attrition through enforcement, Arizona's SB 1070 proves significant to the balance of state and federal power in immigration policy. Its constitutionally controversial provisions capture the intention of the attrition through enforcement strategies as applied to state immigration policies, becoming the defining legislation of the state immigration policy trend.

This chapter will demonstrate Arizona SB 1070's role as the fulcrum of the attrition through enforcement trend of state immigration policies. By beginning with Arizona's motivations for implementing this policy, the intentions of the legislation to enact the attrition through enforcement doctrine will become clear. Then the chapter will describe the controversial provisions within the act that raised preemption questions. Arizona SB 1070 represented a clear manifestation of the attrition through enforcement doctrine, such that its constitutional challenges serve as a test of the doctrine at the state level.

Arizona SB 1070 Motivations

Arizona's interest and activism in this arena stems from a variety of motivating factors, specifically its particularly high burden resulting from the federal government's neglect in enforcing immigration policies. Arizona's experience with unauthorized immigration is significant due to Arizona's location as a state bordering Mexico. However, the federal government gave the least amount of assistance to Arizona for this geographical problem. In the early 2000's, the federal government implemented a policy that strengthened law enforcement

measures at the Mexico border with California and Texas, but not Arizona. The federal government decided to rely upon the desert terrain to deter migrants from crossing the border in Arizona. The lack of border enforcement led Arizona to cope with the consequences of the "funnel effect" that the federal government created. [54] The year of Senate Bill 1070's enactment, the unauthorized immigrant population in Arizona totaled 470,000, which accounts for 7% of the state population that year.[55] Fending for itself due to federal inaction, Arizona believed the only way to solve its unauthorized immigration problem was to enact its own immigration policy.[56]

In addition, the political and ideological characteristics of Arizona fostered its activism and influential status in the emergence of state immigration policies. Largely a Republican state, Arizona's policies generally strive for conservative ideals. Strict immigration policies tend to gain the favor of the majority of the state. Rhetoric in Arizona among lawmakers classifies unauthorized immigration as a criminal problem akin to a natural disaster.[57] In 2009, such conservative rhetoric found a louder voice when then Governor Napolitano became Secretary of Homeland Security allowing Republican Jan Brewer to become Governor.[58]

Another major character in Arizona is Maricopa County Sherriff Joe Arpaio, who became the face of Arizona's extreme political and ideological motivations in immigration legislation. Since 2007, his office has forced the departure or deportation of over 26,000 immigrants,

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[54] Rubio-Goldsmith, Raquel; McCormick, M. Melissa; Martinez, Daniel; Duarte, Inez Magdalena. "The "Funnel Effect" & Recovered Bodies of Unauthorized Migrants Processed by the Pima County Office of the Medical Examiner, 1990-2005". Binational Migration Institute, The Mexican American Studies & Research Center at the University of Arizona. (October 2006).

[55] Hoefer, Michael, Nancy Rytina and Bryan C. Baker, 2011. "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010," Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security, http:// www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_ pe_2010

[56] Massey, Douglas S. Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration. New York: Russell Sage Foundation, (2002).

[57] Aoki, Keith; Shuford, John. "Welcome to Amerizona – Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" is An Idea Whose Time Has Come". *Fordham Urban Law Journal* 38, no. 1 (2010): 1-75, 6.

[58] Selden, David A; Pace, Julie A; Nunn-Gilman, Heidi. "Placing S.B. 1070 and Racial Profiling into Context, and what S.B. reveals about the Legislative Process in Arizona". *Arizona State Law Journal* 43, no. 523(2011): 523 - 561, 550.

"regardless of their legal status."[59] His threats to jail his protestors and his plans to send over 200 deputies in a search for illegal immigrants stirred suspicion as to the genuine motives of the immigration legislation.[60] The conservative personalities and outspoken comments of Arizona's lawmakers drew attention to the bill, creating controversy by suggesting that the bill was politically motivated rather than a solution to a policy problem.

Arizona SB 1070 as an Initiator of a National Dialogue on Attrition through Enforcement

Indeed, some scholars have argued that the federal burden placed on Arizona ought not to be considered the core motivation of Arizona's enactment of SB 1070.[61] In contrast to the notion that Arizona acted due to its need for enforcement resulting from federal neglect, some argue that Arizona utilized SB 1070 as "a pre-emptive strike" to move the national dialogue to the concept of attrition through enforcement.[62] As state legislators increased the amount of legislation enacted to deter unauthorized immigrants between 2007-2010, the trend failed to draw much attention.[63] Only as Arizona enacted SB 1070, the nation began a dialogue on state immigration policies and the attrition through enforcement doctrine, a result desired by Arizona, as it "seems to relish opportunities to push the boundaries in the state/federal relationship."[64]

While the theory that the state immigration policy trend sprang from the federal failure to address the problem of unauthorized immigration applies to other states, arguably that rationale fails to apply to the case of Arizona.[65] Rather, Arizona utilized the unclear messages of the federal government, and the trend toward state-federal cooperation, to push the boundaries of

[59] Aoki, 8.
[60] Ibid.
[61] McDowell, Meghan; Provine, Doris Marie. "Chapter 5: SB 1070: Testing the 'Frustration' Hypothesis." *Latino Politics and Arizona's Immigration Law SB 1070.* New York: Springer, (2013): 55-77.
[62] Ibid, 75.
[63] Ibid, 59.
[64] Ibid, 56.
[65] Ibid, 56-57.

state authority and sovereignty.[66] Arizona seemed unmotivated by the federal failure in enforcement but instead utilized it as a rationale for its legislative actions. Scholars Meghan McDowell and Doris Marie Provine, both of Arizona State University, found that in an analysis of Congressional debates on immigration reform, Arizona failed to participate in discussions of a federal need to address enforcement or in debate over the unauthorized immigrant burden on states.[67] As other states discussed the financial burden placed on states by the federal government, Arizona remained silent on this topic in comparison to other states that later would enact attrition through enforcement legislation. This evidence may signify that other characteristics in Arizona factored substantially into the enactment of the law.[68] Arizona enacted a law "designed to make unauthorized immigration as unattractive as possible" based on a financial concern for the state; however, the congressional analysis conducted by McDowell and Provine suggests that the financial reason cannot be the main factor.[69] Critical to the implication that the SB 1070's enactment occurred for political reasons, each legislator who publically supported the act in Arizona received a notable increase in political support within the state.[70] Arizona's failure to mention the stress of the federal burden before it enacted SB 1070 and the overwhelming political support of the legislation suggest that state politicians enacted SB 1070 based on its political appeal.

This political appeal can be characterized by its assertion of state authority in a federal issue, particularly one involving the conservatively unpopular concept of unauthorized immigrants. Arizona's conservative political ideology and penchant for asserting state sovereignty suggests that the desire to escalate the attrition through enforcement doctrine to a

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[66]Ibid, 58.
[67] Ibid, 68.
[68] Ibid, 74.
[69] Ibid, 74.
[70] Ibid, 61.

national dialogue fueled SB 1070 enactment. As one state's legislation can change the course of a national dialogue, this notion can be asserted as the accurate characterization of Arizona SB 1070.[71] Arizona SB 1070 intended to manifest the attrition through enforcement doctrine in legislation, by "discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[72] While McDowell and Provine argue that Arizona's political goals served as the sole motivation, both the financial burden and popular political conservatism motivated and manifested Arizona SB 1070.

Arizona SB 1070

Arizona SB 1070 embodies the doctrine of attrition through enforcement. At its passage, Southern Poverty Law Center characterized it as the "harshest law yet seen."[73] In this way, Arizona became the vanguard state for testing the legal limits of greater state involvement in immigration enforcement.[74] This legislation elevated the trend onto an inevitable track leading straight to a United States Supreme Court decision. The legislation challenged notions of state authority in immigration enforcement as it went beyond then present scope of state powers. In essence, through this bill Arizona challenged the federal government to either allow the state significantly more authority to enforce immigration policy or to start actually enforcing these policies at the federal level.[75] As the "discourse around immigration has been almost as powerful as the law itself," Arizona's SB 1070 embodiment of the attrition through enforcement doctrine

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[71] Ibid, 75.
[72] Arizona Senate Bill 1070, 49th Legislature (2010).
[73] Potok, Mark. "Trail of Tears". *When Mr. Kobach Comes to Town: Nativist Laws & the Communities They Damage*. Southern Poverty Law Center: 2011, 5.
[74] Congressional Research Service. *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, Larry M. Eig. CRS Report R41221. Washington, DC: Office of Congressional Information and Publishing, September 14, 2010, 1.
[75] Arizona Senate Bill 1070 is also entitled Support Our Law Enforcement and Safe Neighborhoods Act. Yet due to the clear political, anti-immigration angle of the title, the Act is commonly referred to as SB 1070.

instigated a national conversation on immigration enforcement, a necessary and relevant conversation to the unauthorized immigration problem facing the nation.[76]

The intent of the legislation, as stated within the bill, claims a compelling interest in enforcing federal immigration laws.[77] Yet, the law grants authorization to state officials for actions previously reserved to federal officials. Arizona enacted this Senate Bill with the intention of codifying attrition through enforcement by "discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[78] While the legislation proved to be nationally controversial, this intention of deterring unauthorized immigrants from the state, the attrition through enforcement philosophy, proved to be politically popular.[79]

Controversial sections 3, 5(C), 6, and 2(B) clearly seek to affect the undocumented alien population through attrition through enforcement. By increasing the criminality of actions through additional sanctions or increasing the potential for being recognized as an unauthorized alien, these four provisions actively pursued the notion of attrition through enforcement.[80] As the nation and the courts concentrated upon these four provisions, so will this analysis.

Section 3 established a state violation, in addition to an existing federal violation, for trespassing on public or private land if the person is of unauthorized status. [81] Thus, this section creates a state penalty, for residing or traveling through the state without authorization. By

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[76] Magaña, Lisa. "Arizona's Immigration Policies and SB 1070." *Latino Politics and Arizona's Immigration Law SB 1070*. New York: Springer, (2013): 19-26, 25.
[77] Arizona Senate Bill 1070,
[78] Ibid.
[79] Magaña, 19; Further controversy emanated from the association of the bill's sponsor Russell Perce and the bill's author Kris Kobach with the Federation of American immigration Reform, labeled a hate group by the Southern Poverty Law center in 2007.[79] ("Hate Group Lawyer Drafted Arizona's Anti-Immigrant Law", Southern Poverty Law Center).
[80] Arizona Senate Bill 1070.
[81] AZ SB 1070, Section 3: "in addition to any violation of federal law, a person is guilty of trespassing if the person is both: 1. Present on any public or private land in this state. 2. In violation of 8 United States code section 1304(e) or 1306(a)".

creating an additional penalty, the unlawfulness of the action increases, establishing more severe criminal sanctions. Such a penalty further deters unauthorized immigrants from residing in Arizona, where they will be subjected to greater sanctions than other states. Opponents claim that provisions such as these will create an intended effect of channeling unauthorized immigrants to other states, challenging other states to establish even more restrictive laws promoting "self-deportation"

Section 5(C) criminalizes the act of seeking employment in the state if unlawfully in the country.[82] Seeking employment is defined in this section to be applying, soliciting or performing work as an employee or independent contractor. A provision targeting undocumented employees raised specific controversy in Arizona, as the state had previously enacted legislation criminalizing the employment of unauthorized immigrants through employer sanctions, a measure the Supreme Court found to be constitutional in *Chamber of Commerce v. Whiting*.[83] As employment primarily motivates immigration to the United States, if the state refuses to employ unauthorized immigrants, then unauthorized immigrants hold little incentive to reside in that state.[84] Thus, Section 5(C) aims to deter unauthorized immigrants by removing the main incentive of unauthorized immigration.

Section 6 allows state officials to make a warrantless arrest "if the officer has probable cause to believe . . . [the individual] has committed any public offense that makes [him/her] removable from the United States."[85] Arizona asserts that most of this provision is already allowed, and that the additional authority to connect the crime to deportation will aid the state in

[82] AZ SB 1070, Section 5(C): "it is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state".
[83] *Chamber of Commerce v. Whiting* 131 S. Ct. 1968 (2011).
[84] Kobach, Kris. "Attrition through Enforcement: A Rational Approach to Illegal Immigration". *Tulsa Journal Comparative and International Law* 15, No. 155 (2008): 156.
[85] Arizona Senate Bill 1070,

addressing repeat unauthorized offenders.[86] By placing additional authority in the hands of state officials to arrest without warrants, Section 6 manifests the attrition through enforcement doctrine by creating additional danger of deportation for unauthorized immigrants and elevating the fear of removal.

Most critically to the attrition through enforcement doctrine, Section 2(B) granted state officials the authority, "where reasonable suspicion exists" of an alien status, to determine the immigration status of that person.[87] Commonly known as a "show me your papers" provision, Section 2(B) permitted state officials to seek the immigration status of any individual, thereby permitting the active pursuit of unauthorized aliens by state authorities. Since its enactment, similar provisions have been enacted by various states pursuing the same objective of attrition through enforcement. This controversial provision sparked the attention of the nation by capturing the heart of the attrition through enforcement doctrine. Subsections of the provision explicitly require state officials to follow federal requirements and statutes, ensuring the protection of unauthorized immigrants from discrimination.[88] These requirements, however, failed to satisfy suspicions that the provision will allow for racial profiling.[89]

Provision 2(B) seems to embody the intent of the attrition through enforcement doctrine by attempting to deter unauthorized aliens through the fear of being stopped by state officials.[90] While verifying immigration status already existed as an authority of officials once an individual

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[86] Brief of Petitioners, *Arizona et al. v. United States*, No. 11-182 (2012). 42.

[87] AZ SB 1070, "for any lawful contact made by a law enforcement official or agency of this state or a county, city, town or other political subdivision of this state where reasonable suspicion exists that the person is an alien who is unlawfully present in the united states, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person. The person's immigration status shall be verified with the federal government pursuant to 8 united states code section 1373(c)".

[88] Arizona Senate Bill 1070.

[89] Eastman, John C. "Papers, Please: Does the Constitution Permit the States Role in Immigration Enforcement". *Harvard Journal of Law and Public Policy* 35, no. 569 (2012): 569 – 592, 569.

[90] Eagly, Ingrid V. "Criminal Law and Immigration Law: Defining the Outsider: III. The New Institutional Dynamics of Immigration: Local Immigration Prosecution: A Study of Arizona Before SB 1070". *The Regents of University of California Law Review,* 58 No. 1749 (2011): 1750 -1817, 1814.

was arrested, this provision expands the authority to any stop within the reasonable discretion of state officials.[91] As this provision only allows state officials to request immigration documents from those stopped when there is a "reasonable suspicion" of unlawful residence in the United States, the provision relies on the assumption that unauthorized status in the United States can be deduced through a simple stop without relying on race or ethnicity.

Importantly, the language of the provision expands the authority of officials from investigating the immigration status of those suspected of committing a crime, to anyone detained without any criminal suspicion, "such as passengers held in a traffic stop, or residents of a home or business held during the execution of a search warrant."[92] Necessarily, this provision provides significant discretion to the law enforcement officer in judging the likely immigration status of the individual.[93] Section 2(B) places state officials in a position to determine immigration status, with a definite emphasis on finding those "not supposed to be here," a notion that understandably created prevalent questions of the possibility of racial profiling. The discretion granted to state officials to determine immigration status sends a distinct message to unauthorized aliens that any detention, criminal or otherwise, will likely result in the recognition of their undocumented status and then procedures for deportation. Critically, the state believed this provision would deter unauthorized aliens from the state based on fear of recognition of their undocumented status.

These provisions enacted in Arizona S.B. 1070, tested the legal limits of state sovereignty and its exercise of police powers. By granting additional authority to state officials and creating criminal violations, Arizona's SB 1070 places the authority to regulate unauthorized immigration

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[91] Tichenor, Daniel J; Filindra, Alexandra. "Raising *Arizona v. United States*: Historical Patterns of American Immigration Federalism". *Lewis and Clark Law Review* 16, no. 4. (2012): 1215-1247, 1245.
[92] Chin, Gabriel J; Miller, Marc L. "The Unconstitutionality of State Regulation of Immigration through Criminal Law". *Duke Law Journal* 61, no. 2 (2011): 251 – 314.
[93] Ibid.

in Arizona with Arizona officials. This assertion of state authority resulted in the Department of Justice filing suit to enjoin the legislation from enactment, claiming the provisions presented an unconstitutional interference preempted by federal law.[94] This suit initiated the case that became the pivotal decision of *Arizona v. United States*.[95]

State Immigration Legislation Trend Follows lead of Arizona SB 1070

Arizona elevated the attrition through enforcement doctrine to national attention through its controversy and other states followed its lead. Thus, the decision on the Arizona legislation can be equated with a decision on the constitutionality of states' adoption of the attrition through enforcement doctrine. The decision serves as a fulcrum for the state attrition through enforcement trend. As Arizona escalated the trend to assert state authority in immigration

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[94] Office Of Public Affairs, Department of Justice. "Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law," *United States Department of Justice* (July 6, 2010).

[95] The residents of Arizona experienced the most profound effect of the legislation. Both legal residents and undocumented immigrants fled the State in the time period between the law's passage and its effect in July of 2010. Stories of the experiences of Arizonians concerning the law's effect consumed the news, showing people fleeing the borders of the state and the nation, uprooting their lives in an "expressed fear of being subject to suspicion, harassment, and arrest by law enforcement officials."

Arizona's significant test of federal power received meaningful national controversy along with a suit filed by Department of Justice. Dissatisfaction and criticism came in a variety of means through various perspectives. Legal scholars from prestigious institutions articulated the facial unconstitutionality of the provisions in law reviews and also for the greater public in newspapers and blogs. These arguments supported the suit filed by Department of Justice, explaining that federal law preempts these state policies. These claims illuminated to the nation the constitutional questions and challenges facing the contentious bill.

While these legal challenges became profound later in the consequences of the bill, initially the municipal boycotts demonstrated to great success the disapproval of the bill. As of May 2011, 11 major cities, including: Seattle, Washington; Boston, Massachusetts, San Francisco, California; Los Angeles, California; and Austin, Texas, boycotted Arizona by terminating official travel to the state and, most critically, authorizing the ability for present and future contracts with Arizona-based businesses to be terminated. Additionally, many national organization boycotted travel to Arizona in protest, including the League of United Latin American Citizens, National Puerto Rican Coalition, and Asian American Justice Center. Months after the bill's passage, Arizona and Governor Brewer set to host the Border Governors Conference, attended by the border governors of four U.S. states, Arizona, California, New Mexico, and Texas, and six Mexican states, Baja California, Sonora, Chihuahua, Coahuila, Nuevo León, and Tamaulipas. All six Mexican governors refused to attend the conference in an effort to protest the passage of S.B. 1070.

By placing Arizona businesses in jeopardy and thus impacting the state's economy, the criticism for the legislation attempted to negatively affect the state. As these boycotts occurred publically before the legislation went into effect, disapproving and influential municipalities attempted to force Arizona to reconsider its passage of SB 1070; however to no avail as the legislation came into effect as planned. (Aoki, 8; Magaña, 25; Amended before the passage but did not omit controversial provisions before enactment HB 2162, AZ SB 1070).

enforcement, subsequent legislation in other states furthered this escalation by asserting more authority and enacting policies more narrowly aimed at deterring unauthorized immigrants.

The introduction of copycat legislation became a major consequence of Arizona's enactment of S.B. 1070; as of July 2010, only two months after the passing of SB 1070 five legislatures introduced similar bills.[96] While states enacted less legislation than predicted after the conservative shift in the 2010 elections, this pattern continued in 2011 as 25 states introduced core elements of Arizona's SB 1070's controversial provisions.[97] Undeterred by Arizona SB 1070's challenged constitutionality, other states enacted legislation, which required police to check the immigration status of criminal suspects, compelled businesses to check the legal status of workers using a federal system called E-verify, and forced applicants for public benefits to verify eligibility with documentation of their lawful presence.[98] Even as preemption questions challenged Arizona SB 1070, similar attrition through enforcement laws modeled on Arizona SB 1070 remained in effect in other states.

In contrast, some other states decided to reject the trajectory established by Arizona SB 1070 by defeating copycat proposals. Strong grassroots organization, opposing law enforcement, business groups, and the potential negative fiscal impact of enacting anti-immigrant legislation deterred many states from enacting SB 1070-inspired legislation.[99] Interestingly, the political support for Arizona SB 1070 began to waver after its initial strength among in the electorate in the 2010 elections. In 2011, Arizona voters recalled Russell Pearce, the sponsor of SB 1070, marking the first recall of a sitting state senate president in U.S. history.[100] While these actions

[96] Aoki.
[97] "State Immigration-Related Legislation: Last Year's Key Battles Set the Stage for 2012," National Immigration Law Center, January 2012, http://www.nilc.org/states-wrapup-2011.html
[98] Tichenor, 1245.
[99] "State Immigration-Related Legislation: Last Year's Key Battles Set the Stage for 2012,".
[100] Ibid, 10.

seemingly contradict the trajectory created by Arizona SB 1070, these consequences conflict with the greater political momentum for the attrition through enforcement doctrine created by Arizona SB 1070.

Even those states that did not pass similar immigration legislation claimed a stake in the decision of the doctrine's constitutionality by demonstrating legal support of Arizona S.B. 1070 by filing an amicus brief in support of Arizona's effort. Fifteen states declared their approval of SB 1070, supporting Arizona's state activism: Alabama, Florida, Georgia, Indiana, Idaho, Kansas, Louisiana, Nebraska, Oklahoma, Virginia, Pennsylvania, West Virginia, South Carolina, and South Dakota.[101] Upon the inspiration of Arizona's SB 1070 five states - Alabama, Georgia, Indiana, South Carolina and Utah— enacted significantly similar legislation.

Of particular interest to this analysis will be the omnibus legislation inspired by Arizona SB 1070 in Alabama, Georgia, Indiana, South Carolina, and Utah. The effect of the Supreme Court's decision on the constitutionality of Arizona's SB 1070 will be best demonstrated through the decision's effect on each state law. Before the decision, the constitutional challenges to Arizona SB 1070 led courts to halt the implementation of similar laws passed in Utah, Indiana, Georgia, and South Carolina.[102] Yet, this failed to be the case in Alabama, as an Alabama federal district court allowed certain SB 1070 – like provisions to be implemented.[103] While different states handled the legislation similar to SB 1070 differently, as will be demonstrated in Chapter 5, all states awaited the decision of the legislation's constitutionality.

Lower Court Decisions:

The legal challenge to SB 1070 on the constitutionality of attrition through enforcement

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[101] Brief of Amici Curiae State of Michigan and Fifteen Other States in Support of the Petitioners, *Arizona v. United States* No. 11-182 (2012).

[102] "State Immigration-Related Legislation: Last Year's Key Battles Set the Stage for 2012."

[103] Ibid, 2.

state policies began with a compliant filed on July 6, 2010 by the United States. In challenging the constitutionality of SB 1070, it filed a motion requesting the Court to issue a preliminary injunction to enjoin enforcement of the policies until the District Court ruling.[104] In agreement with the United States argument that federal law preempts Arizona's authority to enact the provisions of SB 1070, the District Court of Arizona on July 28, 2010 issued a preliminary injunction to prevent the implementation of the four contested provisions.[105]

On appeal of the decision, the Court of Appeals for the Ninth Circuit affirmed the lower court's decision, agreeing with the United States' argument that the provisions' implementation would interfere with federal authority and policies. Unanimously, the Appellate Court found Section 3 and Section 5(C) to be federally preempted; yet Justice Bea dissented from finding Section 2(B) and Section 6 to also be preempted by federal authority. This divide over interpretation led the Supreme Court to grant certiorari to resolve these contested questions on federal preemption of state immigration policies.[106]

The effect of allowing state immigration policies like SB 1070 would be fragmented national immigration policy and enforcement, a significant federal issue, which leads the federal government to challenge Arizona.[107] The question arises as to whether state immigration legislation will lead to non-uniform immigration policy. This variation across states could cause complications or an inability for federal policy to have an effect, if competing with tens of different state policies. These federal preemption questions brought this state immigration policy trend and its attrition through enforcement doctrine to the attention of the courts. As Arizona SB

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[104] *United States v. Arizona* 703 F.Supp.2d 980 (2010).
[105] *Arizona et al. v. United States,* 132 S. Ct. 2492 (2012), 2.
[106] Ibid, 2.
[107] Congressional Research Service. *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, 31.

1070 anticipated a ruling by the Court, the state-level attrition through enforcement doctrine awaited a defining decision on its constitutionality.

Chapter 3:
The Court Weighs In: The Supreme Court's Decision on Arizona SB 1070

The state strategy of attrition through enforcement reached its defining moment with the decision in *Arizona v. United States*. Before the decision, the state immigration policy strategy manifested as a constitutionally controversial trend. This doctrine pushed the boundaries of federal power, precipitating a federal challenge to its constitutionality. Through the enjoinment of Arizona's SB 1070, the attrition through enforcement doctrine accelerated to the Supreme Court. By ruling upon the constitutionality of the four contested provisions of SB 1070, the Court, in essence, ruled upon the constitutionality of the attrition through enforcement approach in state immigration policies.

In its decision, the court narrowly defined the applicable precedent, preemption tests, and standard resulting in three provisions being found unconstitutional and one provision upheld. Provision 2(B), the surviving provision, allowed the most controversial and fundamental component of the state attrition through enforcement policy to stand. The Court's ruling in *Arizona v. United States* defined a standard on preemption questions to allow states to continue to utilize attrition through enforcement policies as long as the policies' implementation remains constitutional. While this permission seems to constitute a victory for Arizona, it is the Court's narrow interpretation of constitutionality and wary permission that leads the significance of the decision to favor United States arguments. It is evident from the decision that the Court perceived an inability to effectively strike down the attrition through enforcement doctrine this early into the implementation of these provisions, yet invites a challenge, which would permit the Court to find the doctrine unconstitutional in the future.

This chapter will demonstrate the legal significance of the Court's holding and standard in order to illustrate how the Court intentionally granted temporary permission to utilize attrition

through enforcement policies. In order to better understand how the Court can interpret the preemption questions, this analysis will examine the two precedents utilized in the arguments by each side. Then, the analysis will evaluate the parties' arguments on the provisions' constitutionality. While Arizona stresses the precedent set in *DeCanas* and the police powers vested to the state governments, the United States emphasizes the precedent in *Hines* and the power of the federal government to override state policies in an effort to implement federal efforts.

Upon the foundation of the contrast between the parties' arguments and the divide in applicable precedents, the decision of the Court will be better understood as the fulcrum of the state immigration doctrine of attrition through enforcement. The majority defined the preemption tests to deem three of the provisions unconstitutional while upholding the constitutionality of the provision at the center of executing the attrition through enforcement doctrine. Justice Scalia fervently dissents, claiming that the Court ought to have found all the provisions constitutional based upon state sovereignty, along with other concurring/dissenting opinions. Yet, the significance of the case derives from the Court's establishment of the standard necessary to determine the constitutionality of similar attrition through enforcement provision. In doing so, the Court allowed the centerpiece of the attrition through enforcement doctrine to stand, although probably temporarily.

Past Court Decisions of Precedent

By first understanding the Court's prior decisions on pertinent matters, the decision's role as a fulcrum in the role of state immigration policy will become clear. Two previous decisions constitute the relevant precedent in this case: *Hines v. Davidowitz* and *DeCanas v. Bica*. Interestingly, these cases must be differentiated in their application to the case, as each case leads

the ruling to favor a different party. Thus, the United States utilized the *Hines v. Davidowitz* in its argument, and Arizona advocated for placing an emphasis on *DeCanas v. Bica*. By understanding the holding of the two differing precedents, *Arizona v. United States*' role as the determinative case in the Court's handling of state immigration policies comes into view.

In a decision expressed by Justice Black in 1941, *Hines, et al. v. Davidowitz et al. 312 U.S. 52* rejected the constitutionality of Pennsylvania's Alien Registration Act.[108] The Court found that the act, which mandated aliens to register each year by providing certain information and paying a fee was preempted by Congress's enactment of a complete schema on alien registration.[109] In an analysis of the respective powers of the state and federal government in the regulation of aliens, the Court acknowledged the importance of the federal duties to protect foreign nationals in international relationships.[110] While the decision explicitly expressed its ruling as declining to create a clear formula for preemption question relating to immigration policies, the holding clearly expresses that any state law would interfere and thus be preempted by the superiority of federal law when the federal government enacts a complete schema on an issue within its authority.[111] The holding in *Hines* expressed the authority of the federal government to provide uniformity in regulating aliens, thus preempting state policies.[112]

Years later, a similar question on federal preemption of state immigration policies concerning aliens faced the Court. In 1976's *DeCanas et al v. Bica et al. 424 US 351*, Justice Brennan expressed the affirmation of California's Labor Code, which prohibited employers from knowingly employing unauthorized immigrants.[113] Presented with the question of whether

[108] *Hines, et al. v. Davidowitz et al.* 312 U.S. 52 (1941), 59.
[109] Ibid, 74.
[110] Ibid, 62, 64.
[111] Ibid, 67, 66.
[112] Ibid. 73.
[113] *DeCanas et al v. Bica et al.* 424 US 351 (1976), 352.

federal authority on immigration matters preempts the statute, the Court ruled that the statute failed to constitute preemption.[114] While holding that the power to regulate immigration exclusively belongs to the federal government, the decision also expressed state's broad authority to "regulate the employment relationship to protect workers within the State."[115] Since the state tailored the statute to address a particular and compelling problem and Congress had not enacted conflicting policies, the Court deemed the statute constitutional.[116] The Court held that the decision in *Hines* remains consistent with this ruling by emphasizing the comprehensiveness of the federal policies relevant to Hines in comparison to the situation in this case.[117]

Yet the Court failed to account for one critical distinction between its ruling in *Hines* and *DeCanas*. Among the important components of federal preemption in terms of immigration policy, *Hines* established that state immigration policies ought to be deemed federally preempted if they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[118] *DeCanas* acknowledged this ruling, yet declared that this aspect of the *Hines* precedent failed to be applicable based on the lower court's omission of the ruling in its analysis. As the lower court did not address this preemption test, neither should the Court in this case.[119] However, it is this omission that proves to be the determining test of Arizona SB 1070's constitutionality; the Court had to determine whether Arizona SB 1070's provisions of state authority interfere with the federal government's ability to execute its purposes and objectives in immigration policy.

Years later, the Court addressed this distinction in the ruling on *Arizona v. United States*.

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[114] Ibid, 353, 365.
[115] Ibid, 354, 365.
[116] Ibid, 357, 356.
[117] Ibid, 362.
[118] *Hines, et al. v. Davidowitz et al.,* 67.
[119] *DeCanas et al v. Bica et al.,* 363.

The Court's rationalization of these two conflicting precedents adds to the significance of *Arizona v. United States* as a fulcrum in the debate over state immigration policies' attrition though enforcement doctrine. In order to rule upon SB 1070's constitutionality, the Court must define these precedents to complement its opinion, thus choosing one interpretation that will either favor federal or state authority in regulating unauthorized immigrants.

Arizona's Arguments on SB 1070's Constitutionality

Arizona's argument and the argument for state attrition through enforcement policies are premised upon the current stalemate over immigration policy. Given the federal government's lenient enforcement, Arizona argued it should have the right to regulate unauthorized immigrants within its state boundaries.[120] Based on the state's significant unauthorized immigrant population, its respective financial burden, and the location of Arizona as a border state, Arizona argues that these factors prove to be a compelling reason to enact policies concerning unauthorized immigrants.[121] Arizona utilizes the precedent established in *DeCanas* to support its argument for the provisions' constitutionality; as *DeCanas* ruled in favor of states' power in immigration enforcement policy, citing a lack of explicit interference in federal efforts.

Arizona utilizes the Court's decision in *DeCanas* as supportive and applicable precedent. As expressed previously, the decision in *DeCanas* establishes the constitutionality of state policies regulating the employment of unauthorized immigrants.[122] *DeCanas* expressed how the Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted."[123] Arizona employs this precedent to draw attention to the Court's previous authorization of state policies regulating unauthorized

[120] Brief of Petitioners, *Arizona et al. v. United States*, No. 11-182 (2012), 28.
[121] Ibid, 1.
[122] DeCanas et al v. Bica et al.,
[123] Ibid.

immigrants.[124] As the Court expressed in *DeCanas*, Arizona argues that the power of the federal government to regulate immigration policy does not exclude the power of states to regulate the unauthorized immigrants within state borders.[125]

Another rationale employed by Arizona and those states that advocate for the attrition through enforcement doctrine relies upon the notion that the federal government has commissioned state immigration policies.[126] Federal immigration laws explicitly require cooperation with state and local officials, through programs such as 287(g) and Secure Communities programs.[127] 1996's IIRIRA established 287(g) allowing state and local officials to perform immigration law enforcement procedures with adequate training and under a memorandum of agreement. The Immigration and Customs Enforcement deportation program, Secure Communities, piloted in 2008, partners federal, state, and local officials in order to compile a unified system of information on immigration status.[128] Arizona held that these provisions only codified the already established relations between the states and the federal government in matters of immigration enforcement.[129] The state asserted that the provisions in SB 1070 simply affirm the authorization and cooperation mandated by federal programs.[130] As these provisions only affirm the cooperative role state and local governments play in immigration enforcement, federal law fails to preempt these state policies.[131]

Arizona's major rationale in arguing that these provisions ought to be deemed constitutional relies upon an interpretation of the provisions to allow constitutional cooperation

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[124] Brief of Petitioners, *Arizona et al. v. United States*, No. 11-182 (2012), 29-30.
[125] Ibid, 29-30.
[126] Ibid, 8.
[127] Ibid.
[128] The Illegal Immigration Reform and Immigrant Responsibility Act, Division C of Pub.L. 104–208, 110 Stat. 3009-546, (1996); "Secure Communities." U.S. Immigration and Customs Enforcement. Department of Homeland Security. http://www.ice.gov/secure_communities/
[129] Brief of Petitioners, *Arizona et al. v. United States*, No. 11-182 (2012), 31.
[130] Ibid, 28.
[131] Ibid, 61.

and implementation.[132] As these provisions do not require conflict with federal immigration policy, absent explicit preemption, these provisions ought to be upheld as constitutional. [133] Simply, Arizona argues that these provisions only mirror or replicate the federal laws that foster federal and state cooperation. This idea is know as mirror theory, which claims that states hold the authority to enact laws, which simply reiterate federal laws. State inference in immigration enforcement heavily relies upon the mirror theory, the ability for states to mimic the legislation of the federal government, especially the legislation that permits state authority through cooperation. The attrition through enforcement doctrine relies upon states' assertion of police powers and an "inherent authority to enforce immigration laws, both criminal and civil."[134] Arizona argues against the contention raised by the federal government that these four provisions explicitly interfere with federal efforts, rather they argue that SB 1070 codifies cooperation between state and local authorities and federal officials.

United States' Arguments on Federal Government's Preemption of contested provisions

In contrast to those arguments, the United States Department of Justice argues that these four provisions would interfere with federal efforts, and thus federal law preempts these state policies.[135] Emphasizing the unconstitutionality of SB 1070's provisions, the United States stresses the comprehensive schema established in these fields of immigration policy, the precedent the Court established in *Hines*, and the federal government's power to supersede state policies that interfere with federal efforts.

According to the federal government, Congress has established a full and comprehensive schema on immigration policies and policies pertaining to unauthorized immigration through the

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[132] Ibid, 27.
[133] Ibid, 49, 39.
[134] Ibid, 42.
[135] Brief of Respondents, *Arizona et al. v. United States*, No. 11-182 (2012), 15.

Immigration and Nationality Act.[136] These regulations concern entrance and deportation but also the arenas applicable to SB 1070's provisions, such as registration and employment, establishing an inclusive schema for government relations with unauthorized immigrants.[137] Additionally, within the complete schema of immigration policies, the federal government granted state and local governments the opportunity to cooperate with federal authorities, in specific aspects of immigration policy, in order to more thoroughly address the unauthorized population.[138] For these reasons, the United States argues that Arizona's policies exceed the permissible state role in immigration policy as the federal government failed to allow cooperation in that area.[139] As the federal government decided to allow cooperation with state and local officials in certain areas, their decision to not allow cooperation in the area that Arizona asserts authority signifies a choice made by the federal government to hold exclusive authority in that area.

The United States' argument utilizes the precedent set by the Court in *Hines*, distinguishing it from the precedent in *DeCanas*. In the *Hines* decision, the Court held that any regulation of foreign nationals, such as unauthorized immigrants, implicates considerations of foreign policy, leading these powers to be granted to the federal government.[140] Foreign policy implications favor the federal government's power to address unauthorized population and deter the Court from placing these powers upon state governments. Using *Hines* as precedent, the respondents claim Section 2(B)'s preemption upon its stance as "an obstacle to the accomplishment" of federal requirements.[141]

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[136] Ibid, 2.
[137] Ibid, 18.
[138] Ibid, 43.
[139] Ibid, 17.
[140] Ibid, 13.
[141] Ibid, 50.

The majority of the United States' claims rely upon the explicit and implicit power of the federal government to address issues of immigration policy. While the notion that the federal government has the authority to regulate immigration remains uncontested, the United States asserts that this power necessitates the implicit authority to create a comprehensive schema to address all aspects of immigration including the government relationship with foreign nationals. Otherwise, differing state policies would undermine a unified national approach to immigration policy.[142] If allowed, the United States claims that SB 1070 would rival the decisions and programs of the federal government in immigration policies, conflicting and interfering with federal effort.[143] State assertion of authority in this arena is both unconstitutional and preempted based on its inevitable result of interference. Additionally, the police powers of states do not permit establishing laws addressing conduct regulated by the federal government; states cannot mirror federal policy in this arena.[144][145] Thus, while the United States argues against Arizona's authority to enact the contested provisions of SB 1070, the argument also repudiates the attrition through enforcement doctrine employed by states.

Supreme Court Decision on Arizona v. United States

On June 25, 2012, the Supreme Court released its decision on Arizona's contested SB1070 provisions.[146] The Court's ruling defines the constitutionality of state immigration policies, which utilize attrition through enforcement.[147] In ruling on whether federal law preempts and thus renders invalid four provisions of SB 1070, the Court found three of the four contested provisions unconstitutional.[148] Yet, the most critical component of the decision in

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[142] Ibid, 14-15.
[143] Ibid, 22.
[144] Ibid, 27.
[145] Ibid, 26.
[146] *Arizona et al. v. United States*, 132 S. Ct. 2492 (2012), 1.
[147] Ibid, 1.
[148] Ibid, 25.

terms of its projected effect on attrition through enforcement relies on the Court's rationale finding provision 2(B) constitutional.[149]

Justice Anthony Kennedy expressed the opinion of the Supreme Court in *Arizona v. United States 132 S. Ct. 2492 (2012),* a 5 – 3 decision affirming and remanding the Appellate Court's decision. Justice Elena Kagan recused herself due to past involvement in initial litigation of the case.[150] The opinion found three of the four provisions to be unconstitutional based on federal preemption. The Court found Section 3's state crime for unauthorized entry into the state, Section 5(C)'s crime for employment, and Section 6's ability granted to state officials to make warrantless arrests to interfere with the either exclusive power of the federal government in the area or the execution of explicit federal powers. However, Section 2(B) passed constitutionality on its face, according to the Court, due to a lack of a demonstration of any conflicts with federal policy that would constitute federal preemption.[151]

According to the Court, the federal government's authority on immigration policy is both "well-settled" and an "undoubted power" due to Article 1, Section 8, Clause 4 of the Constitution, which specifies the power of "establishing a uniform rule of naturalization" as an expressed power of Congress.[152] As a fundamental component to overall foreign policy where immigration policies link to international relations, the Court finds it important to have nations communicate with one sovereign rather than 50 sovereigns.[153] Yet, the Court recognizes that states hold a role in immigration policy, specifically when a state has a pervasiveness interest in immigration policy due to the disproportionate consequences of unlawful immigration in

[149] Ibid.
[150] Ibid, 25.
[151] Ibid, 9-24.
[152] Ibid, 3.
[153] Ibid, 3.

Arizona in comparison to other states.[154] The Court commences its decision by articulating the valid interests held by both parties. Thus, the contention in dispute narrows to whose authority in immigration policy pertaining to unauthorized aliens prevails over the other party.[155]

The Court prefaces the introduction of the preemption tests by emphasizing the need to defer to the authority of the police powers of the State, unless there exists a "clear and manifest purpose of Congress" to grant authority to the federal government.[156] In determining these questions, the Court employs preemption tests. The Court uses a two-prong test to resolve the constitutionality of provisions based on federal preemption. If a state statute fails either of these tests, federal law conclusively preempts the provision.[157] Even though the Court makes explicit that these tests fall short of a comprehensive standard, the Court utilized the standard as applicable in this case and thus future similar cases.[158] Firstly, federal law supersedes state efforts in fields, such as immigration, where the federal government "maintains exclusive governance."[159] This provision prohibits state laws that regulate in a field completely occupied by the federal government. Secondly, federal law preempts state laws when they conflict, interfering with federal efforts and authority.[160] The Court's determination of the applicable preemption test is critical to the understanding of the role this decision plays in the never-ending debate between the powers of the federal and state governments. By understanding how these three provisions failed the two-prong preemption standard, and how Section 2(B) remained constitutional under the test, the boundaries of preemption can be better understood.

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[154] Ibid, 6.
[155] Ibid, 7.
[156] Ibid, 8.
[157] Ibid, 7.
[158] Ibid, 7.
[159] Ibid, 7.
[160] Ibid, 8.

In its analysis of Section 3, the Court determined that in actuality the provision "adds a state-law penalty for conduct proscribed by federal law."[161] The redundancy of the provision is found to be superfluous where Congress occupies the entire field of alien registration.[162] Using the precedent of *Hines,* "even complementary state regulation" constitutes preemption of federal law and thus is impermissible.[163] By covering an entire field, as Congress has done with alien registration, the federal government clearly intended " to preclude States from complementing or enforcing additional regulation."[164] To the Court, Section 3 fails tests of federal preemption by making a federal crime into a state crime, an unnecessary addition of enforcement that fails to add additional enforcement, but adds state penalties for a crime sufficiently equipped with federal penalties.

Through a different aspect of the two-prong preemption standard, the Court found Section 5(C) unconstitutionally preempted by federal policy. The provision "enacts a state criminal prohibition where no federal counterpart exists.[165] By establishing a criminal penalty for an act under the jurisdiction of immigration policy, historically governed by the federal government, "Congress made a deliberate choice not to impose criminal penalties on aliens who seek or engage in unauthorized employment" based on its omission from the Immigration Reform and Control Act of 1986.[166] If the state places a criminal penalty on the act, it would "involve a conflict in the method of enforcement."[167] By deciding not to impose criminal penalties for those unauthorized immigrants who seek obviously unauthorized employment, Congress deemed the action exempt from a criminal penalty, preempting states from placing the

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[161] Ibid, 8.
[162] Ibid, 10.
[163] Ibid, 9-10.
[164] Ibid, 11.
[165] Ibid, 12.
[166] Ibid, 13.
[167] Ibid, 15.

action with a criminal penalty. Due to the obvious decision of Congress to omit this criminal penalty from legislation, Section 5(c) fails the two-prong standard, resulting in its unconstitutionality.

The last provision found to be preempted by federal law was Section 6, which, as interpreted by the Court, attempts to "provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers."[168] As understood by the majority, this would allow the State to "achieve its own immigration policy."[169] This provision fails the preemption standard as it authorizes state officials to have the discretion entrusted to the federal government.[170] State officials would be able to unilaterally enforce immigration policy without any input or approval from the federal government.[171] The Court finds Section 6 to be preempted by federal law as it fails the legal standard since Congress has clearly instituted a policy where "state officers may not make warrantless arrests of aliens based on possible removability."[172] For this, Section 6 of Arizona's SB1070 creates an obstacle to the purposes and objectives of federal policies, therefore clearly conflicting with federal law.

Distinct from the three unconstitutional, federally preempt provisions, the Court determined the final contentious provision, Section 2(B), passed federal preemption tests. However, the Court explicitly provides a critical disclaimer stating the Provision 2(B)'s constitutionality may be tested further if its implementation fails to be as constitutional as its text.[173] Due to the anti-discrimination statutes both federally and for the state, the court did not

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[168] Ibid, 16-17.
[169] Ibid, 17.
[170] Ibid, 18.
[171] Ibid, 18.
[172] Ibid, 19.
[173] Ibid, 24.

address the possibility of discrimination based on racial profiling or any other factor in the identification component of the "show me your papers" component of the provision. Rather the Court addressed the aspect of the provision, which involves federal, state, and local authorities working together. In addition to the "show me your papers" component of the provision, the provision instructs that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from ICE information regarding the immigration status, lawful or unlawful of an alien in the United States."[174] The Court interprets the provision, on its face, to provide for alternatives in order to avoid preemption concerns.[175] Since the provisions could be implemented in a manner that would not interfere or be federally preempt, the provision remains constitutional unless its implementation differs from its facial constitutionality. For the Court, the enjoining of the provision occurred too early, as the provision had yet to be implemented and practice had yet to determine whether the provision would interfere with federal objectives.

Without evidence, of either by interfering in a field secured exclusively through the federal government or by providing an obstacle or conflict for federal law, Provision 2(B) must be considered constitutional. As the provision can be read in a constitutional manner, failing to interfere with federal objectives, it would be "inappropriate to assume Section 2(B) would be preempted by federal law, without the definitive interpretation from the state courts."[176] In layman's terms, the Court determined it was too early to decide whether Section 2(B) is unconstitutional or not based on preemption. Although the Court decided that the provision was

[174] Ibid, 21.
[175] Ibid, 22.
[176] Ibid, 24.

constitutional, it placed a "to be determined" pause on its constitutionality investigation, to be resolved in the future with the assistance of the interpretation of the state courts.[177]

While understanding the plight and frustrations of Arizona, the court expresses that "the State may not pursue policies that undermine federal law."[178] As a pivotal decision in determining the trajectory of the trend of state activism in immigration policy, the Court's decision critically asserts the power of the federal government in immigration policy but fails to rule the attrition through enforcement doctrine unconstitutional. By allowing provision 2(B) to temporarily stand, the Court allows the attrition through enforcement doctrine to stand, but only as long as its implementation remains as constitutional as the face of the statutes. Significant for the potential trajectory of the state attrition through enforcement policies, the decision grants states tentative permission, warning further questioning if implemented in a manner inconsistent with its constitutional text.

Notable components of the dissent

Justice Samuel Alito, Justice Antonin Scalia, and Justice Clarence Thomas all issued separate concurring and dissenting opinions expressing their disagreement with both the decision and the legal rationale of the Court. Justice Alito argued for deeming all the provisions constitutional other than Section 3, claiming that the Court gave "short shrift to our presumption against pre-emption."[179] In contrast, both Justice Thomas and Justice Scalia contended that the Court ought to have deemed all the provisions constitutional based on a lack of conflict with federal law and the authority of state sovereignty.[180] [181] In an adamant lone dissent, Justice Scalia

[177] Ibid, 24.
[178] Ibid, 25.
[179] J Justice Samuel Alito, Concurring/Dissenting Opinion, *Arizona et al. v. United States*, 132 S. Ct. 2492 (2012), 12.
[180] J Justice Clarence Thomas, Concurring/Dissenting Opinion, *Arizona et al. v. United States*, 132 S. Ct. 2492 (2012), 1.
[181] Justice Antonin Scalia, Concurring/Dissenting Opinion, *Arizona et al. v. United States*, 132 S. Ct. 2492 (2012), 1.

argues that Arizona's legislation conforms to federal law, choosing to "enforce those restrictions more effectively."[182] Scalia laments the Court's decision, claiming that its effect would limit states' ability to remedy the negative consequences of the federal government's lenient immigration policy enforcement.[183] Yet this advocacy of state ability to employ the attrition through enforcement doctrine failed to be persuasive to the majority of the Court. Rather, the Court only granted the states cautionary permission to implement one element of the attrition through enforcement doctrine.

Significance of the decision

While the Court did not endorse the attrition through enforcement doctrine, provision 2(B) passed preemption tests narrowly due to a need for additional interpretation following implementation. The decision's significance lies in the preemption test it creates that permits provision 2(B), and thus a crucial part of the attrition through enforcement doctrine, to stand. This interpretation could allow other similar provisions to stand, thereby failing to completely repudiate the states' attrition through enforcement doctrine.

The preemption questions raised by Arizona's SB1070 are not unique, as the Court has addressed similar questions before. Yet the decision of *Arizona v. United States 132 S. Ct. 2492* uniquely chooses a course for the interpretation of state attrition through enforcement immigration policies. The Court chose this course by addressing the gap left by the Court in the precedents set by *Hines* and *DeCanas*. *Arizona* advocated for the federal government's authority, rejecting Arizona's arguments of inherent authority and mirror theory. The Court's decision grants the federal government dominating power over immigration policies, including those regarding unauthorized aliens' relationship to their state. Upon the decision of the Court, the

[182] J. Scalia, 22.
[183] J. Scalia, 16.

constitutionality of the attrition through enforcement doctrine remains contested based on the temporary approval given to Arizona's SB1070's Provision 2(B). The question then left to interpretation becomes whether the Court's decision to temporarily approve the provision's constitutionality serves as a partial endorsement of the attrition through enforcement doctrine.

Chapter 4:
Who Won?: The Battle over the Arizona v. United States Interpretation

Upon the announcement of the Supreme Court's decision in *Arizona v. United States*, both parties claimed victory. In an opinion that promoted the power of the federal government to regulate and supervise immigration, how could state actors consider the same rationale supportive to state authority? *Arizona v. United States'* importance emanates from its decisive role as the fulcrum in the trend toward state immigration policies. By determining the constitutionality of state policies aimed at deterring unauthorized immigrants via attrition through enforcement, *Arizona v. United States* had the potential to shift the trajectory of state immigration activism. How then could the decision of a critical case on the constitutionality of the attrition through enforcement doctrine result in such an ambiguous victor? As both parties claimed victory, questions arose as to how the decision of the Court in *Arizona v. United States* ought to be interpreted. Which party truly was victorious?

This chapter will focus on two distinct interpretations of the Court's decision that led both parties to claim victory. Although the decision seems ambiguous based upon the conflicting interpretations, this analysis will clearly illustrate how the decision grants the federal government primacy in immigration enforcement. If an analysis of the decision clearly indicates that the federal government is victorious, how can Arizona purport success? The chapter will then explore the counterargument that the decision resulted in a victory for states' use of the attrition through enforcement doctrine. This analysis of the states' victory rationale reveals that the key component of the attrition through enforcement doctrine is the power of Provision 2(B) to invoke the fear of identification and deportation.[184]

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[184] Morales, Daniel I. "Immigration Reform and the Democratic Will", *University of Pennsylvania Journal of Law and Social Change* 16, no. 49 (2013): 49 – 93, 57.

While three of the four provisions failed constitutionality based on federal preemption, states perceive the Court's holding on the Provision 2(B) provision as upholding the constitutionality of the attrition through enforcement doctrine. Emphasis on Provision 2(B) as the heart of the attrition through enforcement doctrine raises questions about what component of the provision proves to be fundamental to the doctrine. By understanding Provision 2(B)'s role in attrition through enforcement implementation, it becomes clear that at the heart of both the provision and the doctrine lies the intention to invoke fear of identification and deportation in unauthorized immigrants to deter them from the state. In upholding this provision, the Court upheld the core of the attrition through enforcement doctrine. Although the Court favored the federal government in its decision, allowing Provision 2(B) to remain valid allows questions of attrition through enforcement's constitutionality to persist. While the decision on Arizona SB 1070's constitutionality is clear, the constitutionality of the attrition through enforcement doctrine employed by the state immigration policy trend remains somewhat ambiguous.

Both Parties Claimed Victory

With the announcement of the Court's majority decision in *Arizona v. United States*, both parties interpreted the holding as a promotion of their authority over immigration policies and enforcement. Arizona Governor Jan Brewer considered the ruling a victory for the rule of law as "all Americans who believe in the inherent right and responsibility of states to defend their citizens."[185] As Arizona claims Provision 2(B) as the "heart of the bill," its constitutionality signifies a major success.[186] For proponents of these efforts in state legislation, the ruling served as authorization to continue. According to Kris Kobach, a primary author of Arizona's SB 1070 and similar omnibus legislation in Alabama, the ruling ought to be considered a "qualified

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[185] Office of the Governor. "Statement by Governor Jan Brewer: U.S. Supreme Court Decision Upholds Heart of SB 1070". *Office of Governor, State of Arizona*. (June 25, 2012).

[186] Ibid.

victory."[187] Even though the Court struck down three provisions, its permission for Provision 2(B) can be considered a crucial success for attrition through enforcement advocates.[188]

Other states propelling the trend of restrictive state immigration policies also deemed the decision a victory.[189] Alabama, which enacted the similar HB 56 just a year after SB 1070, also claimed victory.[190] Alabama's House majority leader, Republican Rep. Micky Hammon, expressed confidence that the ruling would serve as precedent to uphold Alabama legislation as the "'real teeth of Arizona's law' survived, meaning [Arizona's] law, and others like it, should be just fine."[191] For other state actors, such as Pennsylvania State Representative Daryl Metcalfe, "the decision reaffirms our position that we do have a place in this debate."[192] For state leaders, the decision failed to reprimand states for overreaching state authority on a federal issue. Instead, advocates for state immigration policies adopting attrition through enforcement, like Georgia Governor Nathan Deal, judged the decision as upholding "the major thrust of our state's statute, that states have the right" to legislate in this arena.[193]

Yet federal advocates claimed a different interpretation of the decision. For many legal scholars, policy actors, and advocates of federal authority, "*Arizona v. United States* is an unmistakable affirmation of federal primacy in matters of immigration," as one legal scholar put it.[194] Former Governor of Arizona and current Secretary of Homeland Security Janet Napolitano expressed the decision's confirmation that "state laws cannot dictate the federal government's

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[187] Preston, Julia. "Arizona Ruling Only a Narrow Opening for Other States". The New York Times, June 25, 2012 http://www.nytimes.com/2012/06/26/us/justices-decision-a-narrow-opening-for-other-states.html
[188] Ibid.
[189] Office of the Governor.
[190] Alabama House Bill 56, Regular 2011 Session (2011).
[191] Gomez, Alan, Richard Wolf, Dennis Cauchon and Chuck Rassch. "In Arizona law's wake, other states to forge ahead". *USA Today*, June 25, 2012. http://usatoday30.usatoday.com/ news/washington/judicial/story/2012-06-25/supreme-court-arizona-immigration-ruling-analysis/55825582/1
[192] Ibid.
[193] Preston.
[194] Howard, A. E. Dick. (2012). "Out of Infancy: The Roberts Court". *Virginia Law Review in Brief* 98, (2012): 76 – 107, 80.

immigration enforcement policies or priorities."[195] Marielena Hincapié, executive director of the prominent legal advocacy organization the National Immigration Law Center, argues that the decision affirms the constitutionality of a unified immigration policy "rather than having a patchwork system of state laws."[196] While the United States and all other parties conceded that unauthorized immigration significantly burdens the nation and the states, the decision clearly expressed the need for states and localities to work in cooperation with the federal government rather than independently.[197] Furthermore, advocates for federal primacy on immigration policy focus upon the narrow and conditional constitutionality granted to the only permitted provision and the potential for the provision's implementation to be deemed unconstitutional in the future.[198] While the contention between the parties continued after the decision, according to University of Virginia legal scholar David Martin, the "federal side has the better claim to success."[199]

In order to resolve this ambiguity surrounding of the Court's holding, the legal standard of the Court established in *Arizona* must be clearly defined. With a clear definition of the Court's decision, the holding can be applied to both federal and state powers in order to determine to whom the Court allocated the greatest authority. The critical significance of the decision relies upon the Court's holding and established standard, which will be applied as the constitutional test of the trend of state immigration policies of attrition through enforcement. The decision

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[195] Preston.

[196] National Immigration Law Center Press Release. "Statement of Marielena Hincapié, Executive Director of the National Immigration Law Center, on the Decision in Arizona v. United States". National Immigration Law Center. (June 25, 2012).

[197] Ibid.

[198] Migration Policy Institute Press Release. "Supreme Court's Ruling in Arizona Immigration Case Affirms Federal Primacy in Immigration Policy, MPI Experts Say." Migration Policy Institute. (June 25, 2012).

[199] Martin, David A. "Reading Arizona". *Virginia Law in Brief* 98, (2012). 41 – 47, 41.

ruled upon the constitutionality of a trend of instituting laws to incite self-deportation.[200] With this holding, the Court constrained state authority in immigration policy, expressing that state authority is contingent upon cooperation with federal policies, and more importantly on federal terms.[201] The decision overall expressed federal primacy in immigration enforcement, rejecting Arizona's argument of state authority through sovereignty.[202]

United States as Victor Interpretation

An analysis of the decision leads many scholars to acknowledge that the Court supported federal primacy on immigration policy. Due to the recency of the decision, little has been published in response to the decision of the case. However, sufficient evidence shows that the majority of the works, over 70 percent, five out of the seven of published academic articles within the short timeframe from the decision's announcement to the present, conclude that the Court's decision expressed a pattern of federal prevalence in terms of immigration policy and enforcement.[203] The question of the decision's interpretation focuses solely on the constitutionality of 2(B), as the Court unambiguously ruled the other three provisions unconstitutional. Justification for this interpretation divides into four rationales. First, the decision clearly limited the power of the states in immigration enforcement policy. Second, the decision rejects both arguments of inherent authority and mirror theory utilized by Arizona to claim these provisions constitutional. Third, the decision rationalized the constitutionality of Provision 2(B) upon federal terms, through its feature of cooperating with federal officials. Lastly, the federal government prevailed based on the Court's narrow constitutional

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[200] Wessler, Seth Freed. "What Ever Happened to SB 1070?". Colorlines.com, Applied Research Center. March 5, 2013. http://colorlines.com/archives/2013/03/what_happened_to_sb_1070_the_anti-immigrant_tide_recedes_in_the_states.html

[201] Martin, 44.

[202] Guttentag, Lucas. "Immigration Preemption and the Limits of State Power: Reflections on *Arizona v. United States*". *Stanford Journal of Civil Rights and Civil Liberties* 9, (2013): 1 – 46, 3.

[203] See: Martin, Houston Lawyer, Charles, Filindra and Tichenor, Guttentag.

interpretation of Provision 2(B) and the Court's invitation for the provision to be questioned later.

The majority decision severely limited the authority of states to implement and enforce immigration policies. The Court rejected the state provisions aiming to replicate the powers of the federal government in immigration enforcement.[204] According to legal scholar Lucas Guttentag and a consensus of scholars, the Court's rationale "sharply constrain[ed]" state authority by "articulat[ing] a strong foundation for federal primacy in immigration enforcement and reject[ing] broad theories of state power."[205] SB 1070 and similar laws clearly aim to implement restrictionist policies in order to deter unauthorized aliens from the state. Yet, the boundaries placed upon state authority with respect to immigration policies clearly limit states from pursuing those intentions.[206] On the whole, Arizona's arguments failed to persuade the Court to permit states the authority necessary to continue to enact attrition through enforcement legislation.

In Arizona's defense of SB 1070's controversial provisions, its argument relied largely upon two premises being constitutional, inherent authority and mirror theory.[207] Inherent authority claims that state and local enforcement hold an "inherent authority," or an essential power, to enforce immigration statutes.[208] Mirror theory claims that states may enact provisions that mirror federal obligations, simply replicating the federal provision but on the state level.[209] The Court's rejection of state arguments of inherent authority and the mirror theory define a signature feature of the decision. Arizona's argument that its "inherent authority" to police its

[204] Guttentag, 37.
[205] Ibid, 3.
[206] Charles, Patrick J. "Weighting the Constitutionality of Immigration Verification Laws in the Wake of *Arizona v. United States*" Journal of Civil Rights and Economic Development 27, (2013): 1 – 22, 14.
[207] Brief of Petitioners, *Arizona et al. v. United States*, No. 11-182 (2012).
[208] Tichenor, Daniel J; Filindra, Alexandra. "Raising *Arizona v. United States*: Historical Patterns of American Immigration Federalism". *Lewis and Clark Law Review* 16, no. 4. (2012): 1215-1247, 1240.
[209] Martin, 42.

borders grants it the ability to establish provisions such as those in SB 1070 expired in the decision. According to Yale University legal scholar Lucas Guttentag, the case reasonably may read as an inclination of the Court to explicitly favor preemption of sub-federal immigration enforcement.[210] The decision expressed a "broad discretion" over the substance and manner of immigration enforcement for the federal government. Such discretion for the federal government cannot be wholly reconciled with the state's inherent authority or states' ability to "mirror" federal policies. [211] By rejecting this mirror theory, the Court avoided some future state attempts to increase their role in immigration policy.[212] The decision clearly affirmed the primary role held by the federal government in immigration. [213]

The Court based the constitutionality of Provision 2(B), the only narrow success for Arizona, on a legal standard that allows state immigration policies, granted the policies operate upon federal terms. The case offered a cautionary message to states engaging in immigration enforcement to proceed carefully in order to avoid interference with federal policies.[214] Justice Kennedy expressed that state policies may cooperate with federal policies, yet the cooperation must occur on the terms of the federal government. These terms of cooperation illustrate how federal discretion supersedes state authority on immigration policies.[215] Further, *Arizona*'s rationale implies that any unsolicited cooperation with the federal government may be preempted by federal preeminence.[216] While states may be able to cooperate with federal officials, *Arizona*

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[210] Guttentag, 34.
[211] Tichenor, 1220.
[212] Martin, 42.
[213] Preston.
[214] Ibid.
[215] Martin, 44.
[216] Guttentag, 20.

upholds the federal government's control on immigration policies and the treatment of unauthorized immigrants.[217]

While the Court permitted Provision 2(B), legal scholars argue that this decision fails to be a victory for Arizona due to the rationale of its constitutionality. Provision 2(B) had yet to be implemented by state authorities or lower courts. Thus, because it lacked facial unconstitutionality based upon preemption, the Court expressed its inability to strike down the provision.[218] Law scholars assert, however, that the decision of facial constitutionality constitutes only a modest victory for Arizona; The decision's rationale only narrowly allows the provision since the provision could be implemented in a constitutional manner, yet the Court made clear that provision may be claimed unconstitutional upon rulings in the future, which the Court solicits.[219] The Court even invited future cases to bring the provision's constitutionality into question once again, including cases alleging discrimination.[220] Even though the Court ruled that the provision passed the preemption tests of constitutionality, the approval's narrowness signifies the likely possibility that the Court would later deem the provision unconstitutional.

Arizona as Victor Interpretation

Given the general consensus among legal scholars on the federal victory, how could Arizona claim victory? According to states and a minority of legal scholars, states can claim a victory for the continuation of the attrition through enforcement doctrine for two reasons. First, the decision of the Court recognizes that state intervention in immigration policies and enforcement is necessary. Second, the Court permitted the legislation's paramount provision that is central to the attrition through enforcement doctrine. The importance of this provision

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[217] Martin, 45.
[218] *Arizona et al. v. United States*, 132 S. Ct. 2492 (2012).
[219] Martin, 45; Preston.
[220] Preston.

emanates from the fear it invokes among unauthorized aliens; the fundamental factor in promoting attrition or "self-deportation" through enforcement. Thus, Arizona can claim that its adopted doctrine of attrition through enforcement persists.

Even while it emphasized the power of the federal government, *Arizona*'s decision understood that states hold an interest in addressing the effects of immigration within their jurisdiction.[221] In view of the absence of federal action, some scholars such as Jennifer Chacon, assert states' ability to shape immigration policy above the federal government.[222] Acting on behalf of their citizens, states ought to be able to yield a certain authority over the issue within state its boundaries. The Court's understanding of the necessity for action in Arizona expresses this need for that authority.[223] By declining to explicitly prohibit the trend of authority-expanding state immigration policies, the Court condones this involvement.[224] However, this rationale omits the primacy explicitly bestowed to the federal government within *Arizona*'s decision. While the Court recognized the involvement and role of the states, it did so only so far as to articulate the foundation of immigration enforcement as federal superiority.[225]

Beyond the claim that the decision recognized states' role in immigration enforcement, Provision 2(B)'s survival of federal preemption tests accounts for states claiming victory in the case. The most controversial provision in contention prevailed. This decision set a precedent that as long as state immigration verification laws act with federal direction, similar controversial provisions will be supported by the Constitution.[226] If the discretion to act remains within the authority of the federal government, then 2(B) and other "show me your papers" provisions pass

[221] Morales, 81.
[222] Chacon, Jennifer M. "Noncitizen participation in the American Polity: The Transformation of Immigration Federalism". 21 *William and Mary Bill of Rights Journal* 21, (2012): 577 - 618, 596-597.
[223] Morales, 78.
[224] Chacon, 598.
[225] Guttentag, 3.
[226] Charles, 15.

preemption tests.[227] Provision 2(B)'s constitutionality, while just facial, serves as an endorsement of attrition through enforcement doctrine for its proponents.[228] Nonetheless, the Court clearly and explicitly placed the future of the attrition through enforcement doctrine at the mercy of 2(B)'s implementation. If sufficient evidence, when implemented, points to a contrast with federal obligations, then the provision and similar provisions will be deemed unconstitutional. [229] Thus, the provision's constitutionality is far from guaranteed but rather under constant surveillance.

Even so, states see the failure to strike down Provision 2(B), as a partial acceptance of the attrition through enforcement doctrine.[230] The core of the attrition through enforcement doctrine is the ability of state officials to question the immigration status of any individual, for any reason, criminal or otherwise, to invoke fear by identification and deportation. Copycat legislation concentrated upon emulating Provision 2(B), further evidence of the provision's status as a manifestation of the core component of the attrition through enforcement doctrine. The original author of the attrition through enforcement doctrine, Mark Krikorian, claims that the real effect of the provision's use of the doctrine has already occurred; "the exaggeration of its effects has already scared illegals from the state, the fear-mongering has served the purposes of the bill's sponsors."[231]

This fear derives from Provision 2(B)'s "reasonable suspicion" standard, which originally stirred controversy about SB 1070's constitutionality based on the possibility of racial profiling.[232] As an ambiguous standard, it grants discretion to state officials who could certainly

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[227] Ibid, 22.
[228] Chacon, 609.
[229] Gemoets, Marcos. "Arizona v. United States: A State's Role in Immigration Enforcement". The Houston Lawyer 46, (2012): 45 – 46. 46.
[230] Morales,,57.
[231] Greenblatt, Alan. "The Case for Arizona's Immigration Law." *National Public Radio,* May 5, 2010. http://www.npr.org/templates/story/story.php?storyId=126529117
[232] Johnson, Kevin. "Immigration and Civil Rights: State and Local Efforts To Regulate Immigration." *Georgia Law Review, Forthcoming* (2012), 630.

fail to follow federal statutes and profile by race.[233] This fear of racial profiling results in a fear of interacting with state officials simply if the individual is of Latino/a ancestry, regardless of citizenship.[234] Attrition through enforcement occurs when unauthorized immigrants fear that their residence in a state will lead to their deportation, an aim upheld in the constitutionality of Provision 2(B). The tentative upholding of 2(B)'s constitutionality allowed Arizona to claim that the decision favored its arguments. However, in actuality, the Court upheld the attrition through enforcement doctrine with a warning. By only deeming it constitutional on its face, it remains to be seen whether its implementation will remain constitutional.

For now, so long as a law does not impede upon federal procedures, then a law intending to deter unauthorized immigrants from state boundaries remains constitutional.[235] An implementation of the law consistent with federal and state statutes on conduct between the state and its residents will continue to be considered constitutional.[236] Yet, this includes abiding by racial and ethnic protections against discrimination, which opponents of the law have long claimed cannot be distinguished from the implementation of attrition through enforcement.[237] Reasonable suspicion on unauthorized status must be based on a factor distinct from race and ethnicity and many opponents of the law claim that there are not many instances where this can occur.[238] How can immigration status be indicated without documentation and without consideration of race/ethnicity? Supporters of the law cite suspicious behavior as qualifying

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[233] Michaud, Nicholas D. "From 287 (g) to SB1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement." *Arizona Law Review* 52, (2010): 1083 - 1133, 1118.

[234] Aoki, Keith, and John Shuford. "Welcome to Amerizona-Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism is an Idea Whose Time Has Come." *Immigr. & Nat'lity L. Rev.* 31 (2010): 23.

[235] Charles, 7.

[236] Ibid, 9.

[237] Martin, 45.

[238] Brief of Amicus Curiae State of American Civil Liberties Union, Mexican American Legal Defense and Educational Fund, National Immigration Law Center, ACLU of Arizona, Asian American Justice Center, Asian Pacific American Legal Center, National Day Labor Organizing network, and Friendly House v Whiting Plaintiffs in Support of the Respondents, *Arizona v. United States* No. 11-182 (2012).

"reasonable suspicion" due to as an unauthorized person's fear of deportation.[239] What is clear is that the execution of the reasonable suspicion component of the provision remains ambiguous, and thus may be founded unconstitutional. If the implementation of 2(B) results in a contrast with federal authorities and policies, including those of anti-discrimination, then the doctrine will lose its constitutional permission.[240] Allowing states to utilize the core of the attrition through enforcement doctrine temporarily does not constitute an endorsement. Rather, the Court's acceptance of the attrition through enforcement doctrine may prove to be tentative, as its survival will likely instigate an upsurge of legal challenges.[241]

This temporary victory pales in comparison to the victory of the federal government via the significance of the decision's rationale. In essence, the decision placed a "giant stop sign for other states" attempting the enactment of similar legislation.[242] *Arizona* illustrates how enforcement actions fail to be permissible based on the will of the federal government on immigration issues.[243] The complexities and importance of immigration law require federal discretion and overriding control according to the Court's decision.[244] The majority of interpretations see the overarching theme of the decision as an articulation of federal primacy.[245] A principle significant to the decision places federal policy as the final judge of immigration policy, superseding state authority in enforcement even within the state's boundaries.[246] As University of Virginia legal scholar A. E. Dick Howard articulated in his synopsis of the case, "All in all, *Arizona v. United States* is an unmistakable affirmation of federal primacy in matters

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[239] Brief of Amici Curiae State of Joseph M. Arpaio, Maricopa Country Sheriff in Support of the Petitioners, *Arizona v. United States* No. 11-182 (2012).
[240] Charles, 11.
[241] Tichenor, 1223.
[242] Gomez.
[243] Martin, 44.
[244] Guttentag, 26.
[245] Ibid, 45.
[246] Tichenor, 1223.

of immigration."[247] Despite states' claims of victory, this interpretation of the decision is reinforcing state legislatures' lack of action both in anticipation and after the announcement of the decision.

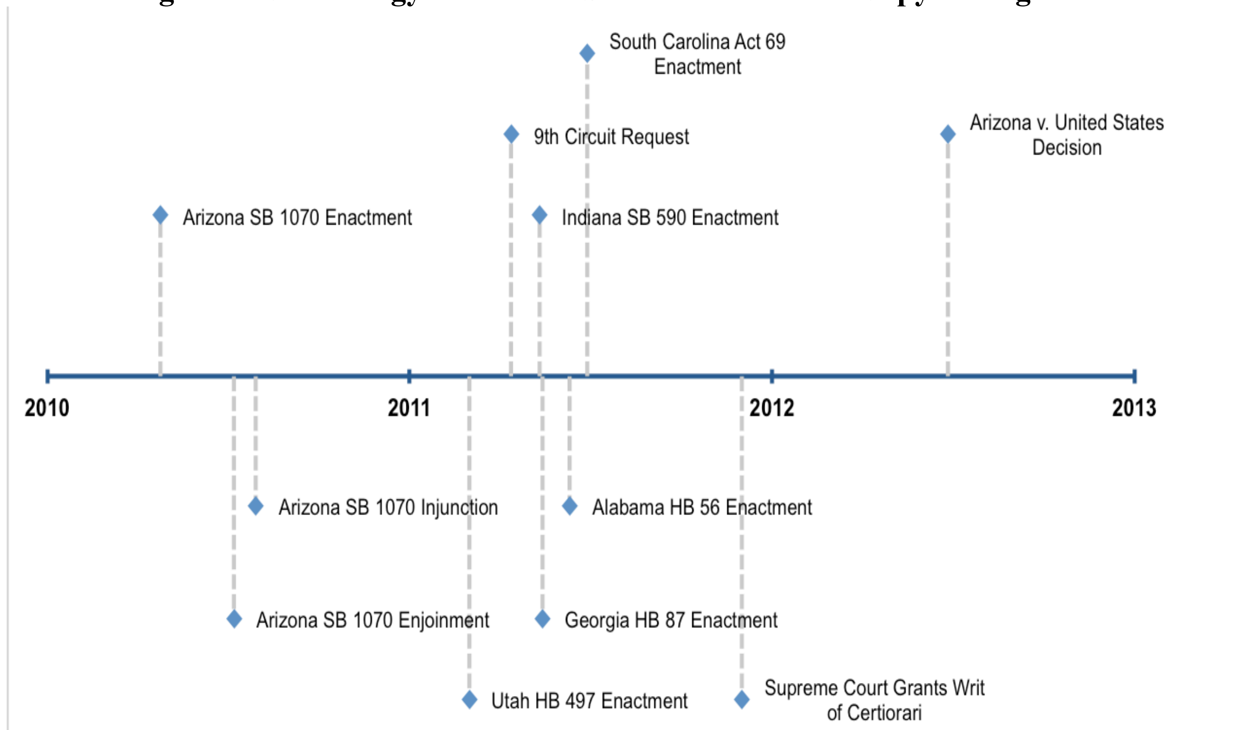
[247] Howard, 80.

Chapter 5:
An Inevitable End: The Effect of Arizona's Decision on the State Immigration Policy Trend of Attrition through Enforcement

The significance of *Arizona v. United States* derives from its consequences for the trend of attrition through enforcement state immigration policies. As a fulcrum for the trend, the decision defined the future trajectory of state immigration policies. The chronology of the Court's involvement in the contestation of Arizona SB 1070 demonstrates the Court's critical role, as the trend shifted dramatically upon its involvement. Overall, the chronology makes clear that the Supreme Court's involvement in the constitutional challenge over Arizona SB 1070 incited the end of the state attrition through enforcement trend.

Before the Court took the case upon appeal from the Ninth Circuit, state legislatures pressed forward with attrition through enforcement policies regardless of lower court injunction and enjoinment. Upon the Supreme Court taking the case upon appeal, state legislatures ceased all action in the attrition through enforcement trend. No other copycat legislation occurred after the Court granted writ of certiorari. The decision of the Court, while it allowed the attrition through enforcement doctrine to persist, led to the reversal at the lower court level of many of the copycat actions passed by states. Regardless of states' claims of victory, the Court's involvement in the constitutional contestation of Arizona SB 1070 essentially stalled the state attrition through enforcement trend. The decision of the Court, in combination with the Latino influence in the 2012 Presidential Elections, caused a deterioration of the attrition through enforcement doctrine as a tool of state legislatures in addressing unauthorized immigration. The Court's involvement in the case *Arizona v. United States*, from beginning to end, played a divisive role in the demise of the state-level attrition through enforcement doctrine.

Figure 3. Chronology of Arizona SB 1070 in terms of Copycat Legislation



Copycat Legislation modeled after Arizona SB 1070

Initially Arizona SB 1070's passage in April 2010 inspired copycat legislation that accelerated the use of the attrition through enforcement trend in addressing unauthorized immigration. Interestingly, most of the copycat legislation passed after Arizona SB 1070's enjoinment on July 6, 2010. Despite the lower court's enjoinment in 2011, Alabama, Georgia, Indiana, South Carolina, and Utah, enacted similar legislation to Arizona SB 1070. These contributions to the state attrition through enforcement trend promoted the model established by Arizona, furthering the trend of aiming to deter unauthorized immigrants from state borders. For the most part, the copycat legislation concentrates upon recreating Arizona SB 1070's Provisions 5(C), 6, and most especially 2(B).

Similar to Arizona SB 1070's Provision 5(C), On June 9 2011, Alabama House Bill 56 enacted three provisions addressing employment for unauthorized immigrants. Arizona SB

1070's Provision 5(C) established a criminal penalty for unauthorized immigrants to become employed or to seek employment, well after a lower court enjoined Arizona SB 1070's similar provision. This bill included Section 11(A) which created a misdemeanor for unauthorized aliens to apply or perform work, Section 16 which prohibited businesses from taking tax deductions for wages given to unauthorized immigrants, and Section 17 which created a civil cause of action for United States citizens and legal immigrants against employers if lose the individual loses his/her job to an unauthorized immigrant.[248] All of these provisions, similar to Arizona SB 1070's 5(C) aimed at eliminating the incentive of employment in the state for unauthorized immigrants. Alabama HB 56 asserted even more state authority than Arizona SB 1070; its provisions went farther with the attrition through enforcement theory than Arizona SB 1070.

On May 10, 2011, Indiana enacted Senate Bill 590, which mimicked Arizona SB 1070's Provision 6, aimed at deterring unauthorized immigration by allowing state officials to make warrantless arrests of presumed unauthorized immigrants who commit crimes that may be grounds for deportation. Indiana SB 590 Section 20 allowed state officers to make arrests if state officials obtained probable cause to believe person had been indicted or convicted of aggravated felony.[249] As similar provisions, both aim at deterring unauthorized immigrants by invoking a fear of a warrantless arrest. None of the other copycat legislation from Alabama, Georgia, South Carolina, and Utah utilized this same criminality in order to deter unauthorized immigrants from the state. Rather copycat legislation significantly concentrated upon mimicking Arizona SB 1070's Provision 2(B).

As further evidence of Provision 2(B)'s role as the heart of the attrition through enforcement doctrine, the majority of copycat legislation concentrated upon mimicking that

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[248] Alabama House Bill 56, 2011 Regular Assembly (2011).
[249] Indiana Senate Bill 590, 117th Legislature (2011).

central component of the trend, Provision 2(B). Arizona SB 1070's Section 2(B) granted state officials the authority, "where reasonable suspicion exists" of an alien status, to determine the immigration status of that person.[250] Commonly known as a "show me your papers" provision, Section 2(B) permitted state officials to seek the immigration status of any individual, thereby permitting the active pursuit of unauthorized aliens by state authorities. Indiana, Georgia, South Carolina and Utah all enacted copycat provisions to Section 2(B), focusing on the identification and detention components the statute.

The only copycat legislation passed before the Ninth Circuit request of the *Arizona* case, Utah enacted House Bill 497 in March 2011, which requires that a state officer verify the immigration status of an arrested, detained, or at a lawful stop.[251] While this provision offers less latitude for state officials in inquiring about immigration status than Arizona SB 1070's Provision 2(B), Utah HB 497 permits far more authority to state officials than previously held.[252] After the Ninth Circuit's request, Georgia also enacted a similar provision in its House Bill 87 on May 13, 2011, also focusing on employment, law enforcement, and public benefits in an effort to promote attrition through enforcement.[253] Georgia HB 87 Section 8 mimics Arizona's Section 2(B), permitting state officers to verify immigration status on any stop. On June 27, 2011, South Carolina enacted their version of state attrition through enforcement legislation, Act 69. Its Section 6B(2) reflects Arizona SB 1070's 2(B) as it allows state officers to verify immigration status, yet only upon reasonable suspicion in a criminal offense.[254]

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[250] Arizona Senate Bill 1070, 49th Legislature (2010).

[251] Morse, Ann; Johnston, Allison; Heisel, Hillary; Carter, April; Lawrence, Marie; Segreto, Joy; "State Omnibus Immigration Legislation and Legal Challenges." *Immigrant Policy Project.* National Conference of State Legislatures, August 27, 2012. http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx

[252] Utah House Bill 497, 2011 Regular Assembly (2011).

[253] Georgia House Bill 87, 2011 Regular Assembly (2011).

[254] South Carolina Act 69, 119th Legislature (2011).

Identification requirements also became a popular aspect of Arizona SB 1070's Provision 2(B) that state legislatures mimicked. As a means of verifying immigration status, identification documents remain a critical aspect of Provision 2(B). A component of Indiana's SB 590 included a statute that prohibited false identification from being offered, accepted, or recorded as valid identification.[255] All of the provisions enacted in South Carolina's Act 69, aforementioned Section 6B(2), address identification documents: making the creation or use of false identification a criminal offense, creating a misdemeanor for failing to carry certification of alien registration, criminalizing offering false picture identification for verification of lawful presence, and Section 15, which made it a felony to issue, make, sell, or offer counterfeit or fraudulent identification.

In this way from March of 2011 – June of 2011, five states copied AZ SB 1070, accelerating the trend of the state attrition through enforcement. This period before the Court granted approval for appellate jurisdiction ought to be considered a time where state legislatures furthered the momentum of the Arizona legislation aiming to further deter unauthorized immigration.[256] After the Court granted approval of the appeal of the *Arizona* case, state legislatures stopped enacting attrition through enforcement legislation. This point in the chronology of Arizona SB 1070's legal challenges marks the end of the momentum for the state attrition through enforcement trend.

Decline in Amount of State Immigration Policies After Decision

Upon the Court's grant of writ or certiorari, a clear shift in states' immigration legislation occurred. This shift showcases the influence of the pending Court's decision on the state attrition through enforcement doctrine. In 2012, proposed immigration bills decreased by 44 percent in

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[255] Indiana Senate Bill 590.

[256] "State Immigration-Related Legislation: Last Year's Key Battles Set the Stage for 2012," National Immigration Law Center, January 2012, http://www.nilc.org/states-wrapup-2011.html

state legislatures, according to the National Conference of State Legislatures.[257] This decrease occurred in all subjects of legislation such as identification, law enforcement, and employment.[258] State legislatures became less active and far subtler on anti-immigration positions during this period of anticipation.[259] Since then, measures akin to SB 1070 have not been enacted.[260] One would assume that once the Court deemed Provision 2(B) constitutional, the trend would narrow its implementation and enact similar provisions that states knew would be held constitutional. Interestingly, this tapering of the attrition through enforcement trend did not occur. Rather, the decision failed to spur the enactment of provisions similar to Provision 2(B), although the Court deemed the provision constitutional. The Supreme Court's public reprimand of Arizona's efforts in its *Arizona* decision lessened state legislatures commitment to the attrition through enforcement strategy. In 2012, no laws passed similar to Arizona SB 1070.[261]

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[257] Johnston, Allison; Morse, Ann. "2012 Immigration-Related Laws and Resolutions in the States (January 1 - December 31, 2012)." *Immigrant Policy Project.* National Conference of State Legislatures, January 2013. http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx

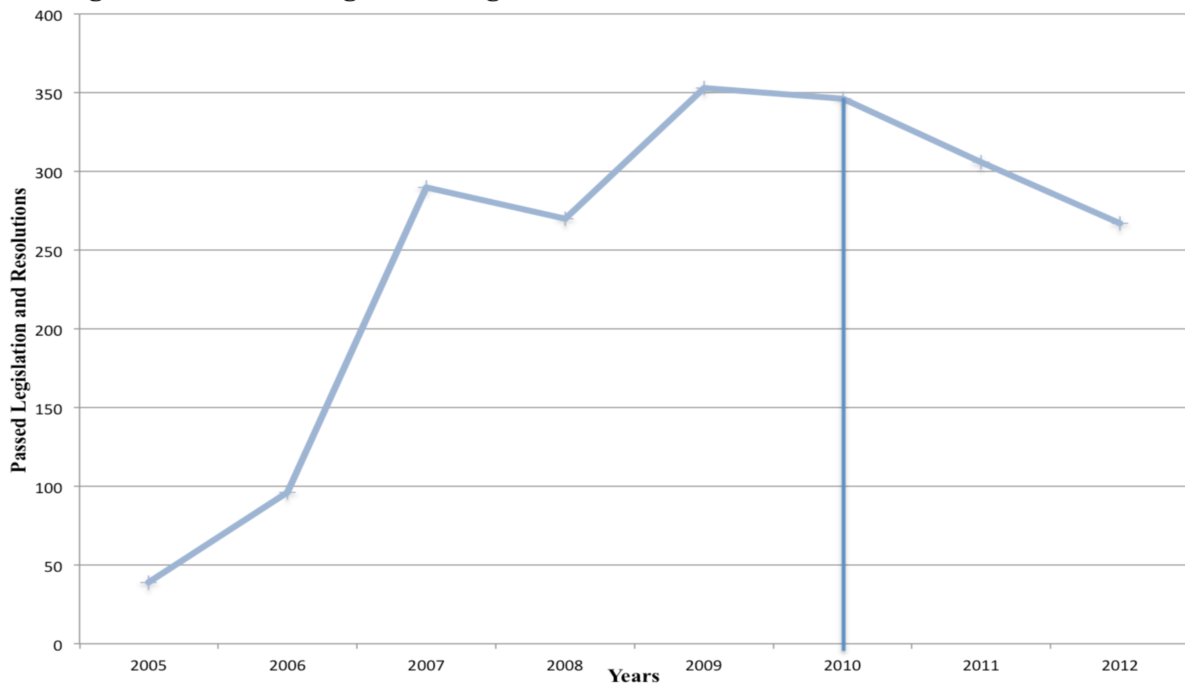
[258] Ibid.

[259] Beadle, Amanda Peterson. "Immigration Policy in the States: A Roundup". *Immigration Impact.* March 1, 2013. http://immigrationimpact.com/2013/03/01/immigration-policy-in-the-states-a-roundup/

[260] Ibid.

[261] Preston, Julia. "Arizona Ruling Only a Narrow Opening for Other States". *The New York Times*, June 25, 2012. http://www.nytimes.com/2012/06/26/us/justices-decision-a-narrow-opening-for-other-states.html

Figure 4. State Immigration Legislation and Resolutions – Post Court Involvement



National Conference of State Legislatures, 2012

Instead, state actors wishing to pursue the attrition through enforcement strategy, even after the Court's decision, reallocated efforts to aspects of the relationship between the government and unauthorized aliens not addressed in Arizona SB 1070. As the Court prohibited establishing criminal actions and forcing unauthorized immigrants to deal with increased obstacles, some Republican legislatures allocated their efforts to obstructing legislative efforts to provide benefits to unauthorized immigrants.[262] If the states could not institute policies to deter undocumented aliens, then states focused on preventing incentives for undocumented aliens to reside in the state. In Arizona, Iowa, Michigan, Nebraska, and North Carolina, Governors or Department of Motor Vehicle administrators announced that they would no longer issue driver's licenses to unauthorized immigrants. Similar action is under consideration in other states,

[262] Wessler, Seth Freed. "What Ever Happened to SB 1070?". Colorlines.com, Applied Research Center. March 5, 2013. http://colorlines.com/archives/2013/03/what_happened_to _sb_1070_the_anti immigrant_tide_recedes_in_the_states.html

including Tennessee.[263] Yet importantly, much of the momentum for the state attrition through enforcement trend transferred to inciting a dialogue for immigration reform at the federal level rather than state policies.[264]

Effect on SB 1070-like Legislation

Even the states of copycat legislation have largely tempered their restrictive policies both voluntarily and through lower court rulings. Like their model legislation, Arizona SB 1070, many of the copycat attrition through enforcement provisions soon were found unconstitutional by lower courts. As the attrition through enforcement trend has lost legislative support, the doctrine remains active in the courts. The same rationale to block the provision of SB 1070 has been employed in decisions on Alabama and Georgia's laws.[265] State legislatures created these provisions similar to Arizona SB 1070 in order to deter or punish unauthorized immigrants. Following *Arizona v. United States*, these provisions failed to pass tests of constitutionality based on federal preemption.[266] These trials for the SB 1070-like laws ought to be understood as evidence for states' inability to circumvent federal authority and continue the strategy of attrition through enforcement through this means.[267]

On August 20, 2012, the Court of Appeals for the Eleventh Circuit issued two opinions on Alabama HB 56. Collectively, the court deemed seven of the originally ten contested provisions as unconstitutional. Along with the four previously enjoined provisions, the court

[263] Ibid; In another direction, Democrats have employed the momentum of the Court's decision to protect unauthorized immigrants from infringement of their rights. For example, the New York City Council passed two laws that protect prisoners from deportation. State legislatures attempting to benefit the lives of their unauthorized immigrant population have been focusing on instate tuition and driver's licenses. (Wessler; Beadle).

[264] Beadle.

[265] Santos, Fernanda. "Arizona Immigration Law Survives Ruling". *The New York Times*, September 6, 2012. http://www.nytimes.com/2012/09/07/us/key-element-of-arizona-immigr...n-law-survives-ruling.html

[266] "Setback for Rogue Immigration Laws in Georgia and Alabama", *The New York Times*, August 21, 2012. http://www.nytimes.com/2012/08/22/opinion/setback-for-rogue-immigration-laws-in-georgia-and-alabama.html

[267] Ibid.

struck down an identification provision, which created a misdemeanor for failing to carry alien registration documentation. The court also struck down two other provisions that expanded the type of polices included in the state attrition through enforcement: trend one which barred courts from enforcing contracts with unauthorized aliens, with the exception of federal contracts, and the other which required every public school to determine students' citizenship. Prior to the two decisions of the Eleventh Circuit Appeals Court, Alabama voluntarily revised the law, trimming some of the anti-immigrant provisions to avoid court injunctions including its provision that restricts enrollment in public schools for unauthorized aliens. The court upheld those provisions in the same manner as Arizona SB 1070 Section 2(B), as facially constitutional pending implementation.[268] Yet *Arizona*'s decision seems to have lessened the zeal of activist states. On February 28, 2013, in its appeal of the Eleventh Circuit ruling, Alabama refrained from challenging the court's opinion on its provision restricting unauthorized immigrants from public secondary education.[269]

On August 20, 2012, in *Georgia Latino Alliance for Human Rights et al. v. Nathan Deal*, the Eleventh Circuit Court of Appeals affirmed the enjoinment of a provision which criminalizes harboring an unauthorized immigrant included in Georgia's HB 87, but remanded the enjoinment of the provision mimicking the Arizona's SB 1070 Provision 2(B). Akin to Arizona and Alabama, the court narrowly upheld those provisions assuming that state officials could implement the legislation in a manner that is not preempted by federal law.[270]

On March 28, 2013, the judge enjoined Indiana SB 590 Section 18 which prohibited consular identification from being offered, accepted, or recorded as valid identification and Section 20 which allowed officers to make arrests if immigration courts filed a removal order

[268] Ibid.
[269] Wessler.
[270] "Setback for Rogue Immigration Laws in Georgia and Alabama".

issued for the individual if the state officials obtained probable cause to believe person has been indicted or convicted of aggravated felony.[271] As further evidence of the present, there are no reports that Indiana intends to appeal the decision of the court.

Months after the *Arizona v. United States* decision, on November 15, 2012, the district court dissolved the injunction for South Carolina Act 69 Section 6, other than the section of the provision most analogous with Arizona SB 1070's 2(B), and affirmed the injunction for all the other provisions addressing identification.[272] Interestingly, South Carolina Act 69's Section 6B(2) provided state officials virtually the same authority granted to state officials through Arizona SB 1070 Provision 2(B). Thus, this district court ruling leads to the notion that even the provisions similar to Arizona SB 1070's Provision 2(B), deemed constitutional by the Court, will soon be deemed unconstitutional. Lastly, On June 28, 2012, the District Court assigned to the petition for enjoinment of Utah HB 497, requested that the parties file briefs addressing the preemption contentions in response to the Court's decision in *Arizona*.[273] Since then, little judicial action has occurred to continue the petition, as efforts to continue the state attrition through enforcement trend seemed moot.

With the decision of *Arizona v. United States*, Alabama, Georgia, Indiana, South Carolina and Utah's copycat legislation sustained a similar fate to Arizona SB 1070. The courts applied the standards established in the case to find that many of the attrition through enforcement provisions were federally preempted. Most provisions similar to SB 1070's Provision 2(B) narrowly survived the preemption tests, although South Carolina Act 69's 6B(2) served as one exception. Additionally, state legislatures voluntarily revised many of the contentious provisions,

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[271] Morse, Ann; Johnston, Allison; Heisel, Hillary; Carter, April; Lawrence, Marie; Segreto, Joy.
[272] Ibid.
[273] "After Arizona: What's Next for S.B. 1070 and its Progeny?" National Immigration Forum. October 2012. http://www.immigrationforum.org/images/uploads/2012/State_Immigra tion_Law_Status.pdf

in anticipation of lower courts' adherence to *Arizona*'s precedent, which would predictably find the copycat provisions to be unconstitutional.

Future cases alluded to by the Court

As the Court suggested in its ruling, the implementation of attrition through enforcement provisions similar to SB 1070 2(B) remain under legal scrutiny. The continued existence of SB 1070 Section 2(B) perpetuates the debate on the attrition through enforcement doctrine's constitutionality, leading to new legal challenges as Filindra and Tichenor predicted.[274] In September of 2012, an Arizona district court formally dismissed the injunction on SB 1070 Section 2(B), allowing it to be implemented for the first time.[275] The ACLU of Arizona has received hundreds of reports of state officials abridging fundamental rights in the provision's implementation since its employment, including cases of rights violations against citizens and legal residents.[276] The ACLU of Arizona, along with other parties, plans to challenge Section 2(B)'s constitutionality based on invalid implementation, as soon as sufficient evidence has been accumulated.[277]

In another suit, the Ninth Circuit Court of Appeals determined that the SB 1070 provision that criminalized day labor work, ought to remain blocked.[278] This ruling further illustrates the slow demise of the attrition through enforcement doctrine, as more provisions that utilized its core intention fail to be deemed constitutional. Additionally on May 10, 2012, the Department of Justice filed suit against Maricopa County, the Maricopa County Sheriff's Office (MCSO), and

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[274] Tichenor, Daniel J; Filindra, Alexandra. "Raising *Arizona v. United States*: Historical Patterns of American Immigration Federalism". *Lewis and Clark Law Review* 16, no. 4. (2012): 1215-1247, 1223.
[275] Santos.
[276] Wessler.
[277] "Federal Appeals Court Blocks Anti-Day Laborer, Anti-Speech Ordinance." American Civil Liberties Union, March 4, 2013. http://www.aclu.org/immigrants-rights/federal-appeals-court-blocks-anti-day-laborer-anti-speech-ordinance
[278] Office of Director. "Victory for First Amendment: Ninth Circuit Blocks Anti–Day Labor, Anti-Speech Provisions of SB 1070", *National Immigration Law Center*, Press Release. (March 4, 2013).

Sheriff Joseph M. Arpaio based on unconstitutional and unlawful actions emanating from the dominant objective of deterring unauthorized immigrants from Arizona's borders.[279] These cases attempt to resolve any ambiguity left by *Arizona*'s decision.

Impact of 2012 Presidential Election

Similarly, the demonstration of Latino political power in the 2012 presidential election contributed to the gradual demise of the state-level attrition through enforcement doctrine. As a growing population in the United States, the Latino demographic accounts for 10% of the electorate, which notably increases each presidential election term.[280] The Latino population overwhelmingly voted for President Barack Obama over Republican candidate Mitt Romney, 71% to 27% respectively.[281] The statistical importance of the Latino voting bloc became undeniable following the results of the election. This overwhelming Democratic support among Latinos can be attributed, at least partly, to the Democratic administration's response to the states' attrition through enforcement doctrine. Latino voters united in support of President Barack Obama, who actively opposed the state attrition through enforcement laws, as well as deferred action for undocumented youth.

According to a 2012 national survey conducted by the Pew Research Center for the People and the Press, supporters and opponents of Arizona SB 1070 break down along clear racial/ethnic divisions. Seventy-five percent of Latinos opposed the law, compared to 56% of African-Americans and 28% of Whites.[282] This racial/ethnic division on Arizona SB 1070 correlates with the division on presidential preference. In general, Hispanic Arizonians favor the

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[279] Office Of Public Affairs, Department of Justice. "Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio," *United States Department of Justice,* (May 10, 2012).

[280] Lopez, Mark Hugo; Taylor, Paul. "Latino Voters in the 2012 Election". Pew Hispanic Center, (2012), 4

[281] Ibid.

[282] Leal, David L. "Latinos, Public Opinion, and Immigration Reform". *Immigration Reform: A System for the 21st Century*. James A. Baker III Institute for Public Policy Rice University, (2013), 23.

Democratic candidate for president in contrast to White Arizonians. However, this pattern significantly increased in the 2012 election. In 2012, following his actions against state restrictionist policies and support for deferred action, Obama received 74% of the Hispanic vote, while in 2008 he received 56%, which is the exact percentage that Democratic Presidential Nominee John Kerry received in the 2004 election.[283] Although many factors could have contributed to this change, one certainly can argue that the administration's persistence in challenging Arizona's immigration law and other state attrition through enforcement laws served as a major factor in gaining the support of Hispanic voters.[284] A majority of Latino voters unified in order to reelect the administration that fought against the state attrition through enforcement trend, a significant demonstration of the political liability of state attrition through enforcement amidst growing Latino political clout.

Inevitable demise of the States Adoption of the Attrition through Enforcement Doctrine

The decision of *Arizona v. United States* failed to answer all the constitutional questions that the attrition through enforcement strategy raised for state immigration policy. The Supreme Court's decision became a fulcrum in the debate on state involvement in immigration policy but does not end the trend's constitutional questions.[285] While the federal government emerged as the main victor in the decision, the allowance of the most critical provision for the states' attrition through enforcement doctrine offers the states' argument a temporary lifeline in the debate. Less than a year after the decision, courts have successfully challenged attrition through enforcement provisions and state legislatures have curtailed their attempts at deterrence. The Court's decision

[283] Lopez, Mark Hugo; Taylor, Paul. 9.
[284] Valenzuela, Ali A., Ph.D; Stein, Sarah K. "Latino Issue Priorities and Political Behavior Across U.S. Contexts". *Immigration Reform: A System for the 21st Century.* James A. Baker III Institute for Public Policy Rice University, (2013), 3.
[285] Santos.

in *Arizona v. United States* clearly instigated a trend of explicit federal primacy on immigration issues and a slow decline of the attrition through enforcement doctrine at the state level.

Arizona v. United States articulated the primacy of the federal government in immigration policies and enforcement. However temporary its constitutionality, Section 2(B)'s acceptance narrowed the questions on the boundaries of state immigration policies, pertaining to the attrition through enforcement strategy. The question left by the Court as to whether these provisions will be constitutionally enforced has begun to be answered by state legislatures and the courts.[286] From this trajectory of legal challenges, it seems inevitable that the provision will fail constitutional tests based on federal preemption or anti-discrimination law. As the Court warned, the unconstitutional implementation of facially constitutional provisions will continue to be contested. Despite the Court's split decision of SB 1070, the trend of state immigration policies has already faltered. By ceasing all efforts of persisting the state attrition through enforcement trend, state legislatures signal their understanding of the unconstitutionality of the trend's core premise: the ability of states to utilize fear to deter unauthorized immigrants from their borders.

[286] Charles, Patrick J. "Weighting the Constitutionality of Immigration Verification Laws in the Wake of *Arizona v. United States*" Journal of Civil Rights and Economic Development 27, (2013): 1 – 22, 1.

Conclusion:
The Successful Existence of the State Attrition through Enforcement Trend

Arizona v. United States plays a critical role in the continuing stories of unauthorized immigration and the balance of power between states and the federal government. Significantly, the gradual demise of the state attrition through enforcement trend began with the Court's initial involvement in the decision when it granted approval for appellate jurisdiction. Following the decision, despite the states' claims of victory, states have curtailed the use of the attrition through enforcement strategy.

The decision of the Court promoted the authority of the federal government in immigration enforcement, yet allowed the attrition through enforcement doctrine to continue by finding Arizona SB 1070's 2(B) constitutional. While the Court permitted the doctrine, its decision, which cited potential for the provision to be found unconstitutional upon implementation, still precipitated the state legislatures' dissolution of the doctrine. The question arises as to whether the attrition through enforcement doctrine could continue to be of interest. Upon the analysis of the effect of *Arizona v. United States* and all components of the case, there is no momentum for continuing the state attrition through enforcement trend. Instead, the momentum is moving further away from state enforcement, with legal challenges of the state attrition through enforcement doctrine, as the Court foresaw. All evidence illustrates that the state attrition through enforcement trend both flourished and expired through the role of Arizona SB 1070 and its constitutional challenges.

As demonstrated in the thesis, states adopted the doctrine of attrition through enforcement in order to affect the burdensome issue of unauthorized immigration. Both federal legislation creating a financial burden upon the states and federal inaction allowing the unauthorized population to grow substantially led the states to utilize the attrition through

enforcement doctrine. These motivations created a trend of state attrition through enforcement legislation intending to deter unauthorized immigrants from settling. The trend then sprung to the national stage through the constitutional questions of federal preemption raised by Arizona SB 1070. As the vanguard of the state immigration policies using attrition through enforcement, Arizona SB 1070's constitutionally controversial provisions encapsulated the attrition through enforcement doctrine.

Thus, the court's decision in *Arizona v. United States* proved to be the fulcrum of the state attrition through enforcement trend. The decision resulted in the Court finding three of the four provisions unconstitutional, but permitting Section 2(B) to stand. Section 2(B) proved central to the attrition through enforcement doctrine in its use of fear to deter unauthorized immigrants from settling in the state. In allowing the centerpiece of the state trend to continue, the announcement of the Court's opinion received victorious reactions from both parties; a strange result based on a decision that clearly favors the federal government's authority in immigration enforcement. Despite claims of victory, this analysis has shown that upon the Courts' granting writ of certiorari, state legislatures ceased their attrition through enforcement efforts and did not resume their following the decision.

Before the Court's involvement, other states enacted copycat legislation building on the momentum of Arizona SB 1070. After the Court took up the case, the trend ceased to progress, only regressing its efforts with revisions to legislation and court decisions. As a fulcrum for the trend, the decision defined the future trajectory of state immigration policies. The decision of the Court, along with the 2012 presidential election's demonstration of the political influence of the Latino voting bloc, illustrated the challenges of implementing the doctrine through a politically feasible means constituent with the Constitution. State legislatures have revised their efforts in

addressing unauthorized immigration, utilizing alternative methods even as the attrition through enforcement doctrine as adopted by the states remains constitutional on its face. The Court's involvement in the state attrition through enforcement doctrine illustrates the inevitable demise of the trend.

Upon analyzing the effect of the Court's involvement in the state attrition through enforcement trend, the end of the state trend seems imminent. While tentatively ruled constitutional, states have not pursued enacting provisions like Provision 2(B). The state attrition through enforcement doctrine failed to attain momentum from the decision and thus inevitably will cease to be implemented by state legislatures. With time, legal challenges will likely find "show-me-your-papers" implementation unconstitutional and the trend will completely expire.

As state attrition through enforcement remains poised for an inevitable and complete fall, the question arises as to what will be the effect of the doctrine's rise and fall for immigration reform. Upon the announcement of the decision, both Democratic and Republican legislators called for Congress to pass comprehensive immigration reform. House Minority Leader Nancy Pelosi stated, "The Supreme Court's ruling is a clear reminder of the urgent need to enact comprehensive immigration reform".[287] Democratic Senator of New York Charles Schumer claimed "This decision makes it clear that the only real solution to immigration reform is a comprehensive federal law. The decision should importune Republicans and Democrats to work together on this issue in a bipartisan way."[288] On the other side of the aisle, Republican Senator of Oklahoma Jim Inhofe stated that the ruling "highlights the fact that President Obama has not provided leadership in working with Congress to adequately secure our nation's borders and

[287] "Pelosi Statement on Supreme Court Ruling on the Arizona Immigration Law." Office of Democratic Leader Nancy Pelosi, (June 25, 2012). http://pelosi.house.gov/news/press-releases/2012/06/pelosi-statement-on-supreme-court-ruling-on-the-arizona-immigration-law.shtml

[288] Jones, Terry. "What People Are Saying About the Supreme Court's Ruling on Arizona SB 1070." National Immigration Forum, (2012). www.immigrationforum.org/images/uploads/2012/SB1070Quotes.pdf

provide comprehensive immigration reform that is beyond amnesty for those who have broken our laws."[289] Additionally, one of the prominent advocates for immigration reform in the Republican Party, Republican Senator of Florida Marco Rubio declared that the decision "on Arizona's immigration law is a reminder of Washington's failure to fix our broken immigration system."[290] Certainly, the trend's existence on the national stage incited fervor for a dialogue on immigration reform.

For the first time in decades, immigration reform seems possible, as the nation understands the burden placed upon state governments by the substantial unauthorized immigrant population. After Obama's reelection, attention turned to the momentum toward reforming immigration policies. Yet, this momentum suffered a significant obstacle very recently with the bombings at the Boston Marathon this April. As the suspects of the act of terrorism were both immigrants, one a legal resident and the other recently gaining his citizenship, their act of terrorism has incited opposition for granting citizenship to unauthorized immigrants. With fears of terrorism, public opinion may move against allowing unauthorized immigrants to remain in the country.

The question now before the nation is whether comprehensive reform remains possible despite growing concern about immigrants in the aftermath of the Boston Bombings. The momentum created by the demise of the state attrition through enforcement trend, and the 2012 presidential election, may have been lost with the effect of the Boston Bombings. Regardless of

[289] "Supreme Court Ruling Highlights Obama Failure on Immigration." Office of Senator James M. Inhofe, (June 25, 2012). http://www.inhofe.senate.gov/newsroom/press-releases/inhofe-supreme-court-ruling-highlights-obama-failure-on-immigration

[290] Rubio, Marco. "Help Us Improve the Bill." Office of Senator Marco Rubio, (2012). http://www.rubio.senate.gov/public/index.cfm/help-us-improve-the-bill?ID=8445a89e-bcf3-4897-a145-a00e1e8cd763

whether immigration reform remains politically feasible, the recent momentum for reform suggests possible success in the future.

The states illuminated the pressing issue of a lack of immigration enforcement and a growing problem through the rise of the attrition through enforcement trend, culminating in the role of *Arizona*. Arizona SB 1070 and the Court's involvement in its constitutional questions proved to be the fulcrum of the state attrition through enforcement trend. The Court's grant of writ of certiorari and the subsequent decision in *Arizona v. United States* incited the demise of the state attrition through enforcement trend. This demise only became more evident with the political clout the Latino voting bloc demonstrated in the 2012 presidential elections. The state attrition through enforcement trend rose and fell through the influence of Arizona SB 1070. Yet, this trend of state attrition through enforcement legislation spurred a national conversation that may contribute to spurring immigration reform after a decades-long stalemate.

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