

Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law

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INTRODUCTION

The passage of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act¹ (SB 1070) has exposed an intriguing characteristic of the current debate over illegal immigration. The recent immigration debate has been conducted, as most national debates are, through the national discourse in newspapers, television broadcasts, and congressional debates. Unlike in most national debates, however, opposing sides of this debate have also demonstrated their discontent by passing state and local laws intended to modify the extent to which federal immigration law—an area of law in which “formulation of policies is entrusted exclusively to Congress”²—is enforced. Governments that consider federal immigration law too harsh have expressed their disagreement by passing “sanctuary” laws, which withhold local assistance in the enforcement of the federal law. Those seeking more stringent immigration policies, in contrast, have passed laws (such as SB 1070) directing local authorities to enforce federal immigration laws even when the federal government would not. In other words, state and local governments create jurisdictions of under- and overenforcement³ depending on their policy preferences. These actions have caused the immigration debate to evolve into a unique question about the appropriate scope and role of *states* in enforcing federal immigration law, rather than (as one might expect) on *federal* spending, enforcement, or immigration policy. Paradoxically, state

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¹ 2010 Ariz Sess Laws 113, as amended by Immigration and Border Security; Providing for Conditional Enactment, 2010 Ariz Sess Laws 211.

² *Galvan v Press*, 347 US 522, 531 (1954).

³ The use of “underenforcement” or “overenforcement” is not meant to suggest any normative conclusion. Such normative questions are beyond the scope of this Comment. Instead, these terms simply denote enforcement below or above an actual or possible middle ground. For the purposes of this Comment, this middle ground is the level of enforcement currently pursued by the federal government. Thus, overenforcement would include statutes like SB 1070, and underenforcement would include sanctuary ordinances passed in jurisdictions such as San Francisco or New York City.

actions, rather than federal ones, are thus driving a debate about an area of law that the federal government has the exclusive authority to determine.

This Comment contributes to the contemporary debate by drawing lessons from the antebellum controversy over fugitive slaves, which shares two unique characteristics with today's immigration debate. First, the terms of the debate in both disputes take the form of questions of state enforcement. Second, both cases center on the status of individuals whose presence in those states is illegal under federal law. These similarities make it possible to use the fugitive slave debate and its central case, *Prigg v Pennsylvania*,⁴ to inform the modern question of what role states can serve in enforcing federal immigration law by arresting, detaining, and prosecuting federal law—a question currently being litigated in *United States v Arizona*,⁵ in which the United States government has brought suit to enjoin enforcement of SB 1070. As will be shown, this is a question that recent case law has left unresolved but is one that the antebellum fugitive slave debate and *Prigg* are well suited to address.

Though the fugitive slave debate does prove informative, there is little evidence that the parties or the courts have considered it to be so. This is likely because—though *Prigg* has not been overturned—it is often read to apply only to the antebellum slavery debate.⁶ One of the central purposes of this Comment is to show that *Prigg*, as one of the first preemption cases, has implications outside the slavery context and can be particularly informative with regard to the current immigration debate.

Part I of this Comment provides a basic outline of the current immigration debate to show how varied levels of enforcement occupy a central place in the debate. Part II gives a more detailed account of the fugitive slave debate before and after the Supreme Court's *Prigg* decision, demonstrating that a similar debate regarding under- and

⁴ 41 US (16 Pet) 539 (1842).

⁵ No CV10-1413-PHX-SRB (D Ariz), appeal of preliminary injunction order available at 703 F Supp 2d 980 (D Ariz 2010), affd, 641 F3d 339 (9th Cir 2011).

⁶ Most recently, the Court utilized *Prigg* to help determine the intent of Congress in enacting civil rights legislation following the Civil War. See *Jett v Dallas Independent School District*, 491 US 701, 726–29 (1989) (plurality). *Prigg* was also cited in dissent in *Haywood v Drown*, 129 S Ct 2108 (2009), as informative to the question of whether the federal government can require state courts to hear federal causes of action. Id at 2131 n 8 (Thomas dissenting). Undoubtedly, one reason courts have not frequently cited to *Prigg* is that relying on lessons taken from the debate on slavery is obviously unsettling. This Comment certainly does not seek to imbue slavery with any degree of legitimacy or convey any sense of approval for the practice. The goal here is only to draw on lessons about the relationship between states and the federal government from a period when questions about the relationship were identical to those asked today.

overenforcement took place in the antebellum era. Part III then demonstrates that the two unique characteristics that these debates share—the terms of debate and the legal question regarding enforcement of a federal status—allow the fugitive slave debate to inform the immigration debate. Part IV will use this analogy to show that though the reasoning of *Prigg* supports the constitutionality of laws like SB 1070, the consequences of *Prigg* demonstrate that SB 1070 should be found unconstitutional because laws like it in the past have had disastrous consequences for the vitality of federal law. The Comment will conclude by first analyzing the channeling characteristic⁷ of the debates to better understand when this occurs and what effect it has on a debate’s scope. This understanding will then be used to show that the Court should adopt a narrowly tailored resolution when legal questions that arise from debates of this nature are before it.

I. *UNITED STATES V ARIZONA* AND THE CURRENT IMMIGRATION DEBATE

The immigration policies of the United States have been heavily contested over the past several years. Though this debate is extensive, this Comment seeks only to fully explore the debate over the proper level of state involvement in enforcing federal immigration law. This Part will first demonstrate the central role that state-level enforcement plays in the debate surrounding recent immigration reform efforts. State participation in the immigration debate, in light of federal inaction, will then be analyzed to show how states and municipalities have expressed discontent with federal policies by adjusting their levels of assistance in enforcing those policies. Finally, the discussion will discuss the legal questions at issue in *Arizona*, which brings the dispute about enforcement to the forefront.

⁷ “Channeling” is a short-hand term for the idea articulated by Arthur Bestor that the Constitution serves an important role of shaping national debates in ways that are not always immediately apparent. See Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 *Am Hist Rev* 327, 328–30 (1964). In the antebellum era, he argues, the “configurative role” of the Constitution focused the slavery debate leading up to the Civil War on a relatively narrow dispute over the expansion of slavery into the territories, rather than on the evils of slavery. See *id.* at 329, 338–41. This Comment argues that the configurative function of the Constitution has narrowed debate over immigration to one regarding states’ roles in enforcement, rather than one about the immigration system itself. That is, the immigration debate has been “channeled” into a narrower question about states’ roles in enforcement.

A. Enforcement as a Central Aspect of Recent Efforts to Reform Immigration Laws

The most recent attempt at comprehensive immigration reform was the effort to enact both the Comprehensive Immigration Reform Act of 2007⁸ and A Bill to Provide for Comprehensive Immigration Reform and for Other Purposes.⁹ The debate over these bills encompassed numerous immigration-related issues, but the question of the importance of enforcement became a flash point. Opponents of the bills argued that a comprehensive approach was a mistake because past experience demonstrates that the federal government lacks the will to enforce immigration law.¹⁰ Supporters, however, argued that enforcement was only one part of a broader solution needed to resolve more fundamental problems with immigration law—problems evidenced by the millions of immigrants in the country who have violated it.¹¹ Underlying the debates over both bills was an awareness that many state and local governments were beginning to craft their own solutions for internal enforcement.¹² Despite apparent consensus that something should be done to improve the immigration system, comprehensive immigration reform twice failed to pass in the Senate.¹³

Since this most recent attempt at comprehensive immigration reform, the debate has largely continued along the same lines, with differences about enforcement playing a central role.¹⁴ On the national level, Congress has mostly avoided discussion of broad reform and

⁸ S 1348, 110th Cong, 1st Sess (May 9, 2007).

⁹ S 1639, 110th Cong, 1st Sess (June 18, 2007).

¹⁰ See 153 Cong Rec S 8644 (June 28, 2007) (Sen Dole) (stating that the American people need proof that the federal government has control of the border given the government's "track record of total failure"). See also 153 Cong Rec S 8582–83 (June 27, 2007) (Sen Bond) (describing the Bond Amendment, which sought to eliminate provisions in the comprehensive reform effort that provided a path to citizenship for illegal immigrants).

¹¹ See 153 Cong Rec at S 8583 (Sen Specter) (cited in note 10) (praising the bill as recognizing that "enforcement alone will not work to secure our border and meet the needs of the U.S. economy"). See also *id.* at S 8583–84 (Sen Salazar) (describing groups supporting strict enforcement as "being unrealistic" because of the high practical costs such a solution would involve and the human costs the current system imposes); *id.* at S 8582 (Sen Bond).

¹² See *id.* at S 8526 (Sen Kennedy) ("States and cities are starting to step in and solve their immigration problems in their own way, regardless of the national interest. We cannot let that happen.").

¹³ See 153 Cong Rec S 7279 (June 7, 2007) (rejecting the motion to end debate for S 1348 by a vote of thirty-four in the affirmative, sixty-one in the negative, and four abstentions. See also 153 Cong Rec at S 8650–51 (cited in note 10) (rejecting the motion to end debate on S 1639 by a vote of forty-six in the affirmative, fifty-three in the negative, and one abstention).

¹⁴ See Devin Dwyer, *President Obama Prods Republicans in Speech on Comprehensive Immigration Reform*, ABC News (July 1, 2010), online at <http://abcnews.go.com/Politics/obama-renews-push-comprehensive-immigration-reform/story?id=11062758> (visited Aug 29, 2011) (reporting on a July 2010 speech made by President Barack Obama urging comprehensive reform and on Republicans' response emphasizing enforcement and border security).

focused on narrower aspects of immigration reform.¹⁵ State and local governments, however, have increasingly weighed in on the debate through laws that either undermine or enhance the enforcement of immigration laws.

B. The Sanctuary Phenomenon: State and Municipal Underenforcement of Immigration Law

States or cities that seek to underenforce immigration policy are frequently referred to as “sanctuary” areas. These governments—which include Alaska,¹⁶ Oregon,¹⁷ and many large cities in other states¹⁸—express their discontent with the federal immigration system by passing laws that prohibit local authorities from assisting federal immigration law enforcement.¹⁹ San Francisco, for example, is frequently considered a sanctuary city because of the city’s 1989 refuge ordinance,²⁰ which prohibits city funds from being used “to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco.”²¹ This ordinance, as well as others like it, prohibits local law enforcement from checking the immigration status of people they arrest or from forwarding that information to federal authorities. This in turn creates an area of underenforcement because federal authorities lack access to and the cooperation of local resources they frequently rely on to identify and detain illegal aliens.²²

Opponents of sanctuary policies have sought to eliminate these areas of underenforcement through federal law. The Personal

¹⁵ See, for example, S 3992, 111th Cong, 2d Sess (Nov 30, 2010) (providing illegal aliens who entered the United States as children a path to legal residence if they attend college).

¹⁶ See Alaska HR J Res 22, 23d Leg, 1st Sess (2003).

¹⁷ See Or Rev Stat § 181.850.

¹⁸ See Lisa M. Seghetti, Stephen R. Vina, and Karma Ester, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 26 n 85 (CRS Aug 14, 2006) (listing Los Angeles, California; San Diego, California; San Francisco, California; Baltimore, Maryland; Detroit, Michigan; Minneapolis, Minnesota; New York, New York; Houston, Texas; and Seattle, Washington, as sanctuary cities).

¹⁹ Yule Kim and Michael John Garcia, “*Sanctuary Cities*”: *Legal Issues* 2 (CRS Jan 9, 2008).

²⁰ City of Refuge Ordinance, Ordinance 375-89, codified at City and County of San Francisco Municipal Code ch 12H.

²¹ City and County of San Francisco Municipal Code § 12H.2. The local importance of the Act was reiterated in Gavin Newsom, Executive Directive 07-01 (Mar 1, 2007) (requiring local departments to ensure their compliance with the 1989 City of Refuge Ordinance).

²² See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U Chi Legal F 57, 72 (2007) (“Indeed, it is no exaggeration to say that where enforcement against criminal aliens is concerned . . . federal immigration officials are practically impotent without the substantial help of the state and local criminal justice systems.”).

Responsibility and Work Opportunity Reconciliation Act of 1996²³ (Welfare Reform Act) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996²⁴ (IIRIRA) both, for instance, prohibit any law restricting state and local authorities from sharing immigration information with federal immigration authorities.²⁵ More recently, opponents have sought (without success) to strengthen these provisions by restricting federal funding for local law enforcement agencies that do not comply with the mandate to assist with enforcement of federal immigration law.²⁶ The efforts of state and local governments to frustrate enforcement, and opponents' response through federal law, demonstrate that one aspect of the immigration debate concerns an argument over the ability of local governments to create areas of underenforcement of federal immigration law.

C. State and Local Laws Creating Areas of Overenforcement of Immigration Law

On the other end of the spectrum, many state and municipal governments have enacted or are considering laws that seek to increase enforcement of immigration laws. Perhaps the most prominent enactment of this kind is Arizona's SB 1070, which requires Arizona police and other government officials to enforce federal immigration law to the "full extent permitted by federal law."²⁷ Law enforcement officers are required to, among other things, check the immigration status of suspected illegal aliens during any lawful stop or in any other circumstance in which probable cause exists that an individual is an illegal alien.²⁸ Furthermore, individual citizens are provided a cause of action against sanctuary municipalities in Arizona to force them to assist enforcement of federal immigration law.²⁹

Though SB 1070 is the first law of its kind, twenty other states are considering passing laws that imitate it.³⁰ Supporters of these laws

²³ Pub L No 104-193, 110 Stat 2105.

²⁴ Pub L No 104-208, 110 Stat 3009-546.

²⁵ Welfare Reform Act § 434, 8 USC § 1644; IIRIRA § 642, 8 USC § 1373.

²⁶ See, for example, A Bill to Prohibit Appropriated Funds from Being Used in Contravention of Section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, S 95, 111th Cong, 1st Sess (Jan 6, 2009) ("None of the amounts appropriated in any Act for the Community Oriented Policing Services Program may be used in contravention of [IIRIRA § 642].").

²⁷ SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051(A).

²⁸ SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051(B).

²⁹ SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051(H).

³⁰ John Miller, *Twenty Other States Considering Copying Arizona Immigration Law*, Huffington Post (June 25, 2010), online at http://www.huffingtonpost.com/2010/06/25/twenty-other-states-consi_n_626095.html (visited Aug 29, 2011). See also Julia Preston, *Political Battle on Immigration Shifts to States*, NY Times A1 (Jan 1, 2011) (describing the expected increase in state

contend that they are motivated by the federal government's failure to fully enforce immigration law.³¹ Accordingly, the laws are thought by these supporters to further a policy of "cooperative enforcement" by working concurrently with federal law to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."³² The practical effect of these laws is to create jurisdictions where federal immigration law is enforced to a greater extent than in other jurisdictions.

Opponents of these laws have challenged SB 1070 as preempted by federal law. Suits were filed by several parties, the most prominent of which is the federal government's challenge in *Arizona*. The essence of the argument made by the federal government is that SB 1070 infringes on the federal government's exclusive authority over immigration policy, which prevents a state from "establish[ing] an independent state enforcement scheme outside federal control."³³ The government argues that allowing states to create overenforcement schemes, even if the state "merely" enforces federal law, interferes with the balance reached by the federal government and thus with its ability to speak with one voice on an issue of international relations.³⁴ Arizona contends, however, that SB 1070 is not preempted because it corresponds with congressional intent "to encourage the assistance from state and local law enforcement officers in the enforcement of federal immigration laws,"³⁵ and because it doesn't impose additional burdens on immigrants.³⁶

legislation designed to crack down on illegal immigration). Many other state and local governments have also passed laws that seek to increase restrictions on illegal immigrants through separate state remedies that imitate federal law rather than "simply" enforce it as SB 1070 does. See *Lozano v City of Hazleton*, 620 F3d 170, 177–80, 224 (3d Cir 2010), petition for cert filed, 79 USLW 3370 (Dec 8, 2010) (describing two ordinances passed by the City of Hazleton that regulated the employment of and rentals to illegal immigrants, and finding them preempted by federal immigration law).

³¹ See, for example, Arizona Governor Janice K. Brewer, Letter to President Barack Obama *3 (June 23, 2010), online at http://azgovernor.gov/dms/upload/PR_062410_LettertoPresidentObama.pdf (visited Aug 29, 2011) ("[T]he single most significant factor behind the passage this year of SB 1070 . . . was the frustration of Arizona elected officials, and the public we serve, regarding the failure of the federal government over the years to effectively address the problem of illegal immigration.").

³² See SB 1070 § 1.

³³ Brief for Appellee, *United States v Arizona*, No 10-16645, *23–26 (9th Cir filed Sept 23, 2010) (available on Westlaw at 2010 WL 5162512) ("US Appellate Brief").

³⁴ See *id* at *24–25, 28.

³⁵ Appellants' Opening Brief, *United States v Arizona*, No 10-16645, *27, 29–30 (9th Cir filed Aug 26, 2010) (available on Westlaw at 2010 WL 5162518) ("Arizona Appellate Opening Brief").

³⁶ *Id* at *28–29 (distinguishing factually *Hines v Davidowitz*, 312 US 52 (1941), on grounds that SB 1070 does not impose additional burdens on immigrants, unlike the Pennsylvania Alien Registration Act of 1939, which was found to be preempted in *Hines*).

* * *

The current immigration debate has thus evolved in an interesting way—through variations in the level of enforcement of federal law by state and local authorities. Localities that consider the current federal laws too harsh pass laws that forbid local authorities from assisting in their execution, thus creating areas of underenforcement; those localities that think that the current laws are not sufficiently enforced pass laws requiring local law enforcement to engage in activities typically performed by federal authorities, thus creating areas of overenforcement. This type of debate is unusual because states do not typically play such a crucial role in the enforcement of federal laws, much less one that enables them to express their views on those federal laws by adjusting their levels of enforcement. But this debate is not without precedent, as the discussion of the antebellum fugitive slave debate below will demonstrate.

II. *PRIGG V PENNSYLVANIA* AND THE FUGITIVE SLAVE DEBATE

The immigration debate is not the first time that a national controversy has manifested itself through varied levels of enforcement of federal law. The debate surrounding the return of runaway slaves to their owners—one of the central aspects of the antebellum slavery controversy—took place primarily in the same manner. This Part will begin by explaining the contours of the fugitive slave debate before the Supreme Court's decision in *Prigg v Pennsylvania*. It will then summarize *Prigg* and discuss how the Court attempted to resolve the debate by establishing the duties and responsibilities of local, state, and the federal governments in enforcing the federal law requiring the return of fugitive slaves. Finally, this Part will show how the Court's decision failed to resolve the fugitive slave debate but increased sectional tensions by providing Northern states the ability to render federal law requiring the return of fugitive slaves effectively unenforceable.

A. The Fugitive Slave Debate before *Prigg v Pennsylvania*

The Fugitive Slave Clause in the United States Constitution required that escaped slaves be returned to their owners.³⁷ In 1793,

³⁷ US Const Art IV, § 2, cl 3:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Congress passed the first Fugitive Slave Act,³⁸ which implemented the clause by providing procedures for returning slaves to their owners. The Act allowed slave owners to seize an alleged slave without prior judicial or law enforcement approval; it required the owner only to present the alleged slave before a judge in order to receive a certification of removal, which would be provided so long as the person seeking the removal swore that the individual was a slave.³⁹ This meant that alleged slaves had essentially no procedural protections, since courts relied on slave owners' word as evidence, and the removal order was rarely reconsidered once the slave was brought back to the owner's state.⁴⁰

These minimal procedural protections were of particular concern for the Northern states. These states feared that the absence of greater protections would result in free African Americans being seized and brought south, where they would be unable to prove that they were actually free individuals.⁴¹ The Northern states took two steps to abate these concerns: they challenged the constitutionality of the 1793 Fugitive Slave Act, and they passed personal liberty laws.

Northern states argued that the Act was unconstitutional on one of two grounds: the Constitution did not provide Congress authority to pass the 1793 Fugitive Slave Act, or the Act failed to provide procedural protections required by the Fourth Amendment. Both of these challenges failed,⁴² though the exact reasoning is largely specific to the Fugitive Slave Act and therefore outside the scope of this Comment. The challenges did not acknowledge the growing divide in enforcement of the Act that later became a central flash point of the debate.

abrogated by US Const Amend XIII.

³⁸ Act of Feb 12, 1793 ("1793 Fugitive Slave Act"), ch 7, 1 Stat 302 (Feb 12, 1793).

³⁹ 1793 Fugitive Slave Act § 3, 1 Stat at 302–05.

⁴⁰ See Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* 44 (Johns Hopkins 1974) (recounting a Pennsylvania legislator's account of the procedural protections afforded to fugitive slaves and the minimal judicial review provided in Southern courts).

⁴¹ See *id.* at 32, 44–45.

⁴² Courts found that Congress had power to act under the Necessary and Proper Clause in order to make the Fugitive Slave Clause effective. See, for example, *Wright v Deacon*, 5 Serg & Rawle 62, 63 (Pa 1819) (holding the 1793 Fugitive Slave Act constitutional because it was a necessary act of Congress to make the Fugitive Slave Clause effective). See also Paul Finkelman, *Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 S Ct Rev 247, 269–72 (describing the split among state courts over the constitutionality of the 1793 Fugitive Slave Act). Courts also rejected challenges on Fourth Amendment grounds because either slaves were not considered parties to the Constitution or the Northern concerns about erroneous arrest of free African Americans were not readily apparent. See *Commonwealth v Griffith*, 19 Mass 11, 20–21 (1823).

The primary method that Northern states used to undermine the Act was to pass laws designed to frustrate enforcement—even though they were based on constitutionally questionable grounds.⁴³ These Northern laws, called personal liberty laws, effectively created jurisdictions of underenforcement of the Fugitive Slave Act. They were designed to enhance the procedural protections that these states felt were lacking in the Act.⁴⁴ Lawmakers were forced to walk a fine line to remain within what they considered the boundaries of the states' authority under the federal Constitution. This was part of the reason they limited themselves to increasing procedural protections, rather than taking more drastic moves to frustrate owners' attempts to recover fugitive slaves.⁴⁵ The practical effect of these laws, nonetheless, was to create areas in which enforcement of the 1793 Fugitive Slave Act was more difficult than in other jurisdictions.

An excellent example of the personal liberty laws is the 1826 Pennsylvania law at issue in *Prigg*.⁴⁶ The law made the forceful seizure permitted by the Fugitive Slave Act unlawful by making it a felony to forcefully seize African Americans.⁴⁷ To reclaim a fugitive slave, the slave owner (or his agent) had to first apply for a warrant from any state judge, justice of the peace, or alderman, who would then authorize the sheriff (rather than the owner) to seize the alleged slave.⁴⁸ This warrant could be obtained only if the owner or his agent “supported [his claim] by oath or affirmation of [the] claimant,” “produce[d] the affidavit of the claimant of the fugitive . . . in the state or territory in which such claimant shall reside,” and had that affidavit authenticated by a court in the claimant's state of residence.⁴⁹ Finally, once the alleged slave was seized by the sheriff, the owner or agent, in

⁴³ See Earl M. Maltz, *Slavery and the Supreme Court, 1825–1861* 93–94 (Kansas 2009) (discussing a split between state courts with regard to the constitutionality of the Fugitive Slave Act, that led in turn to a divide over the constitutionality of state laws in conflict with the Act); Morris, *Free Men All* at 42–56, 76–78, 88–92 (cited in note 40) (describing the efforts by Pennsylvania, New York, Massachusetts, and Ohio to pass personal liberty laws).

⁴⁴ See Maltz, *Slavery and the Supreme Court* at 93–94 (cited in note 43).

⁴⁵ See Morris, *Free Men All* at 52–56 (cited in note 40) (discussing the New York legislators' deliberations in agreeing to a new personal liberty law).

⁴⁶ Act of March 25, 1826 (“Pennsylvania Personal Liberty Law”), 1825 Pa Laws ch 50 at 149 (1826). For examples of personal liberty laws from other states, see *Of the Writ of Habeas Corpus, to Bring Up a Person to Testify, or to Answer in Certain Cases*, 2 NY Rev Stat 559 (Albany 1829) (enacting provisions very similar to those seen in the Pennsylvania Personal Liberty Law); Act of April 19, 1837, 1837 Mass Laws ch 221 at 240 (requiring jury trials to determine if an alleged slave could be reclaimed by slave owners or their agents).

⁴⁷ Pennsylvania Personal Liberty Law §§ 1–2, 1825 Pa Laws ch 50 at 150–51 (providing a fine between \$500 and \$2,000, with a sentence between seven and twenty-one years, for the forceful seizure or sale of an African American).

⁴⁸ Pennsylvania Personal Liberty Law § 3, 1825 Pa Laws ch 50 at 151.

⁴⁹ Pennsylvania Personal Liberty Law §§ 3–4, 1825 Pa Laws ch 50 at 151–52.

order to obtain a certificate of removal, had to prove to the court issuing the warrant that the individual was actually a slave owing service to the requesting party under the laws of the state from which the slave fled.⁵⁰ To ensure that these procedures were carried out exclusively by the state courts, the Pennsylvania legislature explicitly removed jurisdiction over the 1793 Fugitive Slave Act from state aldermen and justices of the peace.⁵¹ This meant that the requirements laid out in the state law supplemented, but did not supplant, the federal procedural requirements with which claimants would still have to separately comply.⁵²

This removal of jurisdiction shows that the Pennsylvania personal liberty law was designed to create an area of underenforcement of the 1793 Fugitive Slave Act by increasing the procedural protections for African Americans. While the federal Act allowed an owner and his agents to seize fugitive slaves without a warrant and obtain a certificate of removal solely on his own oath, the Pennsylvania law made it necessary for owners to first obtain a warrant, then wait for the sheriff to capture the alleged slave, and then prove that the alleged slave was in fact theirs. The practical effect of these extra procedures was to make recapturing fugitive slaves significantly more difficult—though certainly more fair—than under the federal Act.⁵³ Unsurprisingly, underenforcement caused by these laws led to significant tension with Southern states,⁵⁴ leading to questions about the constitutionality of the 1793 Fugitive Slave Act and Northern states' personal liberty laws. The Court would try to resolve these questions in *Prigg*.

B. *Prigg v Pennsylvania* and the Court's Attempt to Resolve the Fugitive Slave Debate

Prigg came before the Supreme Court in a unique way. Edward Prigg was the appointed agent and lawyer of Maryland resident Margaret Ashmore, who sought the return of Margaret Morgan, a fugitive slave, in Pennsylvania.⁵⁵ Prigg and three associates obtained a warrant for Morgan's arrest and sought an appearance before a local

⁵⁰ Pennsylvania Personal Liberty Law § 6, 1825 Pa Laws ch 50 at 152–53.

⁵¹ Pennsylvania Personal Liberty Law § 9, 1825 Pa Laws ch 50 at 153–54.

⁵² See Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-slavery Use of a Pro-slavery Decision*, 25 *Civil War Hist* 5, 7 (1979) (suggesting that a slave owner would have to comply with state and federal removal laws in order to leave the state with a slave).

⁵³ See *id.* at 7–8 (describing the additional procedural provisions provided by the Pennsylvania Personal Liberty Law as “much stricter” and placing extra burdens on owners compared to federal law).

⁵⁴ Morris, *Free Men All* at 59–64 (cited in note 40).

⁵⁵ *Prigg*, 41 US (16 Pet) at 608–09.

magistrate, but the magistrate refused to hear the case.⁵⁶ This ought to have prevented Morgan's removal because the Pennsylvania personal liberty law of 1826 required the magistrate's approval for Prigg to leave Pennsylvania with Morgan.⁵⁷ Prigg and his associates nevertheless took Morgan and her children back to Maryland, in clear violation of the state law.⁵⁸

Pennsylvania initially sought extradition of Prigg and his associates, but Maryland refused. Eventually, the states agreed to an expedited trial and appeal to the Supreme Court for the specific purpose of clarifying the constitutionality of the personal liberty law.⁵⁹ The Pennsylvania trial court found Prigg guilty of violating the personal liberty law, a decision that was summarily affirmed by the Pennsylvania Supreme Court.⁶⁰ The United States Supreme Court reversed this holding.

The Court, in an opinion written by Justice Joseph Story, held that the personal liberty law (and Pennsylvania's conviction of Prigg under it) was unconstitutional because it was preempted by the 1793 Fugitive Slave Act. After determining that the federal Act itself was constitutional,⁶¹ the Court determined that the federal government, rather than state governments, had the duty to enforce the Fugitive Slave Clause, because the clause appeared only in the national Constitution.⁶² Because this authority was vested in the federal government, the Court held that federal supremacy meant that the 1793 Fugitive Slave Act preempted state laws that interfered with federal law by "prescrib[ing] additional regulations, and what [the states] may deem auxiliary provisions for the same purpose."⁶³ This determination was reinforced by the Court's finding that the power to legislate on the return of fugitive slaves was one of exclusive, rather than concurrent, authority in the federal government.⁶⁴ The Court thus held that Pennsylvania's personal liberty law, and others like it, were

⁵⁶ Finkelman, 1994 S Ct Rev at 276 (cited in note 42).

⁵⁷ *Prigg*, 41 US (16 Pet) at 608–09.

⁵⁸ See id at 609.

⁵⁹ See id (emphasizing the cooperation of Maryland and Pennsylvania in seeking Supreme Court resolution of this question). See also Finkelman, 25 Civil War Hist at 8 (cited in note 52) (summarizing the negotiations and agreement between Pennsylvania and Maryland).

⁶⁰ *Prigg*, 41 US (16 Pet) at 609.

⁶¹ Id at 615–16 (determining that the 1793 Fugitive Slave Act was constitutional because the Fugitive Slave Clause required that the slave owners' rights be protected among the states and "where the end is required, the means are given"). Before *Prigg*, only state courts had weighed in on the question of the 1793 Fugitive Slave Act's constitutionality. See note 42. This holding definitively put the question to rest.

⁶² *Prigg*, 41 US (16 Pet) at 615–16.

⁶³ Id at 617–18.

⁶⁴ Id at 622–25.

unconstitutional because they interfered with the federal law through the additional procedural protections they provided.⁶⁵

The Court's determination that the federal government had exclusive authority over the regulation of fugitive slaves, however, forced it to define the role that states had in enforcing the 1793 Fugitive Slave Act. In analyzing this role, Justice Story concluded that "[t]he states cannot [] be compelled to enforce [the 1793 Fugitive Slave Act]; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government."⁶⁶ But the Court made clear that this holding did not infringe on states' ability to exercise their general police powers "to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers."⁶⁷ This meant, according to most scholars, that states had the choice to assist with the enforcement of the 1793 Fugitive Slave Act.⁶⁸ In other words, states were prohibited from passing laws that frustrated the purposes of federal law with additional procedures. States could, however, either assist in enforcing federal law or refuse to aid in enforcement if they so desired.

The Court's holding that states could refuse to assist with enforcement was not, however, unanimous. Chief Justice Roger Taney agreed with the opinion of the Court only insofar as it held the Pennsylvania law unconstitutional, established slave owners' right to peacefully arrest their fugitive slaves wherever they encountered them, and recognized the power of Congress to legislate on the matter of returning fugitive slaves to their owners.⁶⁹ But he had two objections. First, Taney construed the opinion of the Court to make "all laws upon the subject [of fugitive slaves] passed by a state, since the adoption of the Constitution of the United States, [] null and void."⁷⁰ Most later commentary on *Prigg* suggests that this concern of

⁶⁵ Id at 625–26.

⁶⁶ *Prigg*, 41 US (16 Pet) at 625. See also Finkelman, 25 Civil War Hist at 15–16 (cited in note 52) (suggesting that some free-state legislatures interpreted the conclusion that Congress was solely responsible for the enforcement of the Fugitive Slave Clause to mean that states could not be forced to enforce federal fugitive slave laws).

⁶⁷ *Prigg*, 41 US (16 Pet) at 625.

⁶⁸ See, for example, Finkelman, 25 Civil War Hist at 9–10 (cited in note 52). See also *Moore v Illinois*, 55 US (14 How) 13, 19–21 (1852) (upholding a state law designed to incarcerate people harboring fugitive slaves despite the fact that the 1793 Fugitive Slave Act prohibited the same activity).

⁶⁹ *Prigg*, 41 US (16 Pet) at 626–27 (Taney concurring in part and dissenting in part).

⁷⁰ Id at 627 (emphasis added) (noting that the opinion would have this effect even on laws passed in good faith that did not conflict with federal legislation).

Taney's was based on his misreading of Justice Story's opinion.⁷¹ A minority of scholars, however, argue that Taney was not mistaken and that *Prigg* was intended to remove from the states any authority to assist with enforcing the federal Act.⁷² This minority interpretation is substantially undermined, however, by Justice Story's explicit acknowledgement that states could continue to exercise their police powers to assist with the reclamation of fugitive slaves and his later affirmation of states' ability to enforce the 1793 Fugitive Slave Act.

Taney's second concern was that the practical result of allowing states to refuse to assist in enforcement would be the nullification of the 1793 Fugitive Slave Act. Taney contended that state cooperation in enforcement was necessary for the Act to be effective.⁷³ That is, in allowing states to abstain from enforcing the federal law, the Court allowed the law itself to essentially go unenforced because state and local cooperation was essential to the law's effectiveness. This latter concern largely came to fruition.

C. The Fugitive Slave Debate Continued: Divergent Levels of Enforcement after *Prigg v Pennsylvania*

The initial response to *Prigg* fell, predictably, along sectional lines. Southern states considered the decision to be a broad victory, while the antislavery movement in Northern states was disappointed with the apparent strengthening of slave owners' rights.⁷⁴ The initial response, however, soon reversed as Northern states passed laws forbidding local resources from being used to enforce the 1793 Fugitive Slave Act and Northern courts interpreted *Prigg* as removing from state officials the authority to enforce federal law. In response to *Prigg*'s holding that the Northern personal liberty laws adding procedural protections were unconstitutional, many Northern states passed new personal liberty laws designed to take advantage of the *Prigg* Court's discussion suggesting that Northern states were not obligated to enforce the federal law. A good example of these later laws is the one passed by the Massachusetts legislature in 1843. This Act provided that "[n]o judge of any court of record of [Massachusetts], and no justice of the peace, shall hereafter take cognizance or grant a certificate" in Fugitive Slave Act cases, and that

⁷¹ See Finkelman, 25 *Civil War Hist* at 20 (cited in note 52).

⁷² See, for example, R. Kent Newmyer, *The Supreme Court under Marshall and Taney* 125 (Harlan Davidson 2d ed 2006) (asserting that Story concluded that states were "not constitutionally able [] to assist in the return of slaves").

⁷³ *Prigg*, 41 US (16 Pet) at 630–31 (Taney concurring in part and dissenting in part).

⁷⁴ See Maltz, *Slavery and the Supreme Court* at 136 (cited in note 43) (quoting several abolitionist newspapers expressing displeasure with *Prigg*).

“[n]o sheriff, deputy-sheriff . . . or other officer of [Massachusetts], shall hereafter arrest or detain, or aid in the arrest or detention or imprisonment in any jail . . . of any person for the reason that he is claimed as a fugitive slave.”⁷⁵ This law, as well as others like it, explicitly barred state officials from providing any assistance to slave owners in reclaiming their slaves, such as the use of the public jail to keep the slave overnight on return to the owner’s state.⁷⁶ Without the assistance of the local authorities, the 1793 Fugitive Slave Act became practically unenforceable in these states until it was amended by Congress.⁷⁷

Besides these later personal liberty laws, Northern courts interpreted *Prigg* in ways that frustrated owners’ efforts to reclaim their slaves with the 1793 Fugitive Slave Act. *Prigg* removed most of the uncertainty surrounding the constitutional authority of Congress to pass laws implementing the Fugitive Slave Clause.⁷⁸ Several judges, however, interpreted the language in *Prigg*—specifically the language questioning Congress’s authority to compel state judges to enforce the 1793 Fugitive Slave Act—to mean that state authorities lacked *any* jurisdiction over fugitive slaves. In *In re Kirk*,⁷⁹ for example, a New York trial court had to determine the constitutionality of a New York law that enabled ship captains to arrest and return stowaway slaves if the captain brought the slaves before the city mayor to authorize the arrest.⁸⁰ Applying *Prigg*, the court determined that the New York law authorizing this procedure was unconstitutional because “the law of Congress may be truly said to cover the whole ground of the Constitution” and that the legislation of Congress “must supersede *all*

⁷⁵ An Act Further to Protect Personal Liberty §§ 1–2, 1843 Mass Acts ch 69 at 33 (providing a fine and imprisonment for judges and law enforcement officials that help slave owners recover runaway slaves).

⁷⁶ For examples of laws from other states with similar provisions, see Act of June 6, 1844, 1844 Conn Pub Acts ch 27 at 33; Act of March 3, 1847, 1847 Pa Laws ch 159 at 206. See also Maltz, *Slavery and the Supreme Court* at 137 (cited in note 43) (describing the circumstances that led to Connecticut, Massachusetts, Ohio, Pennsylvania, Rhode Island, and Vermont passing new personal liberty laws forbidding the use of local resources in efforts to reclaim slaves).

⁷⁷ See Finkelman, 25 *Civil War Hist* at 21–22 (cited in note 52); Act of Sept 18, 1850 (“1850 Fugitive Slave Act”), 9 Stat 462 (1850) (creating a comprehensive statutory scheme that placed federal officials in counties of Northern states with the task of assisting the capture and return of fugitive slaves).

⁷⁸ See *Ex Parte Bushnell*, 9 Ohio St 77, 186–87 (1859) (citing and discussing a few state supreme court cases that predominantly recognized Congress’s power to enact legislation like the 1793 Fugitive Slave Act). But see *In re Booth*, 3 Wis 13, 64–71 (1854) (holding that Congress did not have authority to pass a later Fugitive Slave Act on grounds that the original intent of the Fugitive Slave Clause was not to bestow such authority), revd, *Ableman v Booth*, 62 US 506, 523–26 (1858).

⁷⁹ 1 Edm Sel Cas 315 (NY Sup Ct 1846).

⁸⁰ *Id* at 333–34.

state legislation upon the same subject, and, by necessary implication, prohibit it.”⁸¹ This court, and others using similar reasoning,⁸² thus broadly interpreted *Prigg* to mean that all state laws on the issue of slavery were invalidated.

Of course, not every court completely rejected the authority of states and state courts to assist with the enactment of the Fugitive Slave Clause.⁸³ Nevertheless, the combined effect of some courts removing jurisdiction from local authorities and state statutes prohibiting the same authorities from assisting enforcement of the 1793 Fugitive Slave Act was to make the Act unenforceable in many Northern states. These areas contrasted starkly with Southern states, which did everything they could to make it possible to capture runaway slaves. Many Southern states, for example, denied alleged slaves the right to habeas corpus—a right that Northern states thought they deserved⁸⁴—and enacted laws that encouraged the detention and return of runaway slaves.⁸⁵ Southern states also had considerable influence over federal fugitive slave policy, as is evident in the passage of the 1850 Fugitive Slave Act,⁸⁶ which placed a federal agent with significant monetary incentives for capturing and returning fugitive slaves in every county.⁸⁷ Unsurprisingly, the state and federal statutes show that Southern states sought to maximize enforcement of the fugitive slave acts, creating areas of overenforcement in the South.

The debate following *Prigg*, therefore, was defined by drastically differing levels of enforcement. Northern states took steps to avoid enforcement of the Fugitive Slave Acts, while Southern states took what steps they could to enforce the acts. When this divergence was not solely the result of differing statutory language (as in today’s debate over immigration), it was the result of state court interpretations of *Prigg*. Differences over the federal Fugitive Slave

⁸¹ *Id.* at 336–37 (emphasis added).

⁸² See Finkelman, 25 *Civil War Hist.* at 22–25 (cited in note 52) (discussing several cases from Northern states that utilized *Prigg* to absolve themselves of responsibility to enforce the 1793 Fugitive Slave Act).

⁸³ See, for example, *Moore*, 55 *US* (14 *How*) at 18–21 (upholding an Illinois law making it illegal to aid fugitive slaves in their flight as a proper exercise of the state’s police power).

⁸⁴ *Morris*, *Free Men All* at 38–39 (cited in note 40) (discussing Southern representatives’ refusal to accept habeas corpus as a mechanism to review whether an alleged slave is actually slave or free).

⁸⁵ See Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-bellum South* 153 (3d ed Knopf 1956) (noting the lawful ability of all white men to seize fugitive slaves).

⁸⁶ Act of Sept 18, 1850 (“1850 Fugitive Slave Act”), ch 60, 9 *Stat.* 462 (1850).

⁸⁷ See 1850 Fugitive Slave Act §§ 1–2, 5, 8, 9 *Stat.* at 462–65. See also Jeffrey Schmitt, Note, *Rethinking Ableman v. Booth and States’ Rights in Wisconsin*, 93 *Va L Rev.* 1315, 1319–20 (2007) (describing the procedures of the 1850 Fugitive Slave Act as a response to Southern demands that were dramatically successful in helping Southern slave owners).

Acts thus became embodied through differing levels of enforcement at the state and local level.

III. PARALLELS BETWEEN THE IMMIGRATION AND FUGITIVE SLAVE DEBATES

The central argument of this Comment is that the antebellum fugitive slave debate and the current immigration debate have several intriguing similarities that allow lessons learned from the former to inform the latter. This Part lays out the two strongest similarities: First, both debates have been channeled through states varying their level of enforcement of a federal law, rather than just through discourse in the public sphere or changes in federal law. Second, both debates center on how states interact with the federal government with regard to individuals illegally within their borders whose illegal (fugitive) status is determined by an area of law within the federal government's exclusive authority. Each of these similarities will be discussed below.

A. Debates Continued through Varied Levels of Local Enforcement

One of the strongest similarities between these debates about laws exclusively the federal government's to establish is that each is a national debate that is channeled into the states as questions about states' role in enforcing federal law, and furthered by proponents on either side of the discussion through varied levels of local enforcement of federal law rather than direct change of the national policies. That is, instead of the debates taking place and being addressed in Congress, state and local legislative chambers are the primary actors in influencing the national policies at issue as they pass laws intended to resolve the federal issue in a manner favorable to their local interests. This is most obvious when comparing the underenforcement pursued by Northern states in the fugitive slave debate with sanctuary jurisdictions in the immigration debate. Northern states post-*Prigg* demonstrated their disagreement with the Southern institution of slavery and the federal government's support of it by abdicating as much responsibility for assisting in the enforcement of the 1793 Fugitive Slave Act as possible.⁸⁸ This mirrors the modern sanctuary jurisdictions, which have expressed discontent with federal immigration laws by refusing to provide assistance to the federal immigration authorities.⁸⁹

⁸⁸ See notes 75–81 and accompanying text.

⁸⁹ See notes 19–21 and accompanying text.

The similarity continues on the opposite end of the enforcement spectrum as well. Throughout the fugitive slave debate, Southern states sought to maximize the return of fugitive slaves within their borders through state and federal laws.⁹⁰ Likewise, proponents of strict enforcement today have also used their influence in state and federal legislatures to ratchet up the level of enforcement of federal immigration law.⁹¹ In both debates, therefore, jurisdictions that considered the current federal laws to be too lenient—at least in application—expressed their discontent by passing laws and bringing cases that created areas of overenforcement.

The fugitive slave and immigration debates, therefore, share a common locus of debate. States and localities that desire laws more favorable to illegally present persons enact laws that diminish the effectiveness of the federal law by reducing enforcement. Those that favor more stringent immigration policies, however, enact state laws that seek to maximize the enforcement of existing laws. The states' creation of areas of under- and overenforcement has thus been used in both debates to further the cause and express the discontent of partisans on each side of the debate. When this similarity is viewed in light of the similar legal questions discussed below, the fugitive slave debate's relevance in understanding today's immigration debate becomes particularly evident.

B. Slaves and Illegal Immigrants: Similar Legal Questions Arising through Similar Legal Circumstances

Besides the shared locus of debate, the fugitive slave and immigration disputes also share a unique legal subject matter: they center on what actions states can take towards individuals within their borders whose presence there is made illegal by federal law. In *Prigg* and the fugitive slave debate, these individuals were runaway slaves, while in the Arizona immigration case and the broader immigration debate, these individuals are illegal immigrants. These groups share one—and likely only one—characteristic: their status as illegally present in a state is established by federal law. There are few other groups whose legal status is similarly determined, and none that have stirred national debates embodied through varied levels of state and local enforcement.

The most important aspect of this similarity is that it substantially increases the value provided by, and possibly creates the necessity for, local enforcement. As discussed earlier, the statuses of both fugitive

⁹⁰ See notes 84–87 and accompanying text.

⁹¹ See notes 28–32 and accompanying text.

slaves and illegal immigrants as illegally present in a state are determined by federal law. Detecting illegal presence, however, is incredibly difficult for the federal government given its generally limited resources for enforcing the underlying laws. This is evident in both debates through federal laws that authorize and even encourage state assistance with enforcement of the federal law.⁹² The reliance on states for enforcement is fraught with difficulties, however, as it provides states an opportunity to express their policy preferences by varying their levels of enforcement.⁹³ This creates at least two legal questions: First, must states assist the federal government if they prefer not to? And second, to what extent can a state enforce the law with or without federal consent? Both debates have directly addressed, though not necessarily resolved, both of these questions.

The fugitive slave debate addresses the question whether states are obligated to assist with federal enforcement in the courts, while the immigration debate has mostly discussed this through various forms of legislation. *Prigg* resolved the question in favor of underenforcing states by establishing, perhaps inadvertently, that states had no duty to enforce laws that were exclusively federal.⁹⁴ The immigration debate has not yet come to a conclusion, but many state and local governments continue to have sanctuary policies⁹⁵ despite several state and federal laws mandating state and local law officials' aid in enforcing the immigration regime.⁹⁶ The conflicting laws show that there is an ongoing debate over the ability of the federal government to mandate assistance.⁹⁷ States' duties to assist in enforcement of federal laws involving individuals within state boundaries are thus at issue in both debates.

Both debates also contemplate the extent to which states can voluntarily assist the federal government in enforcing the same

⁹² See 1793 Fugitive Slave Act § 1, 1 Stat at 302 (authorizing “any magistrate of a county, city or town corporate” to hear and enable the removal of fugitive slaves); Immigration and Nationality Act § 287(g), Pub L No 414, 66 Stat 163, 233–34 (1952), as amended by IIRIRA § 133, 8 USC § 1357(g) (authorizing the Department of Homeland Security (DHS) to authorize state and local law enforcement to assist with detection and arrest of illegal immigrants).

⁹³ See Part III.A.

⁹⁴ See *Prigg*, 41 US (16 Pet) at 625.

⁹⁵ See, for example, Newsom, Executive Directive 07-01 (cited in note 21).

⁹⁶ See, for example, IIRIRA § 642, 8 USC § 1373; SB 1070 § 2, codified at Ariz Rev Stat Ann § 11-1051 (providing residents of Arizona a cause of action against Arizona law enforcement agencies that do not carry out the state's policy of enforcing federal immigration law).

⁹⁷ See, for example, Buck Delventhal, Mariam Morley, and Wayne Snodgrass, Legal Memorandum to San Francisco Mayor Gavin Newsom, Legal Issues in Connection with Proposed Amendment to Sanctuary City Ordinance *5–6 (Aug 18, 2009), online at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=481> (visited Sept 1, 2011) (concluding that available case law is not sufficient to predict how federal courts would rule if the city's sanctuary policies were challenged on preemption grounds).

federal laws. This is most evident for the fugitive slave debate in *Prigg*, where one of the central issues of dispute between Justice Story and Chief Justice Taney was the extent to which states could continue to assist with enforcement of the 1793 Fugitive Slave Act. Story, writing for the Court, stated that states were permitted to enforce the Act within the scope of their police powers.⁹⁸ Taney, however, argued that states' police powers were not sufficient to permit them to enforce the Act because "[t]he fugitive is not always arrested in order to prevent a dangerous or evil-disposed person from remaining in [a state's] territory."⁹⁹ That is, he understood states' police powers not to be broad enough to allow states to assist owners to reclaim fugitive slaves who had not actually caused a disruption of the peace.¹⁰⁰ The justices thus disagreed over the placement of the line between a proper assertion of states' police powers and preemption.

Though the line has never been definitively drawn, in *Moore v Illinois*,¹⁰¹ the antebellum Court made clear that states could pass laws to enforce the 1793 Fugitive Slave Act by upholding a state law that outlawed the sheltering of fugitive slaves as done in the federal Act.¹⁰² At the least, the exchange demonstrates that an aspect of the fugitive slave debate was whether states could utilize their police powers to enforce the 1793 Fugitive Slave Act.

This same legal question is a central part of the current immigration debate. Arizona's stated purpose in passing SB 1070, for example, is to "cooperatively enforce" the federal law consistent with its own police powers rather than add additional regulations or procedures to immigration law.¹⁰³ As discussed above, the effect of this

⁹⁸ *Prigg*, 41 US (16 Pet) at 625.

⁹⁹ *Id* at 632 (Taney concurring in part and dissenting in part).

¹⁰⁰ *Id* at 633.

¹⁰¹ 55 US (14 How) 13 (1852).

¹⁰² *Id* at 19–21 (upholding a state law designed to incarcerate people harboring fugitive slaves, despite the fact that the 1793 Fugitive Slave Act prohibited the same activity).

¹⁰³ See SB 1070 § 1 (expressing Arizona legislature's finding that it is within its interest to pursue "cooperative enforcement" of federal immigration law to discourage illegal immigrants from moving to and doing business in the state through a policy of "attrition through enforcement"). Whether Arizona will succeed in doing this is, of course, debatable. Some provisions of SB 1070 clearly do provide additional regulations on smuggling and employment of illegal immigrants. See SB 1070 §§ 4–9. These provisions, however, are not the focus of this Comment because they are not intended to enforce federal law in the unique way discussed here—namely, enforcement of federal law through the arrest, detention, and prosecution of violators under state law. See SB 1070 §§ 2–3, codified at Ariz Rev Stat Ann §§ 11-1051, 13-1509; notes 111–18 and accompanying text. Of course, whether these sections succeed in merely enforcing federal law, rather than creating a new state remedy, is also debatable. This Comment assumes for the sake of argument, however, that SB 1070 creates a policy of "cooperative enforcement." Separate analysis of these provisions is possible because of the severability clause that allows each provision of the statute to stand if another is found unconstitutional. SB 1070 § 12.

law is to make Arizona an area in which the federal immigration laws are overenforced.¹⁰⁴ Opponents, however, have been quick to challenge Arizona's overenforcement ability. In *Arizona*, the United States argues that SB 1070 is preempted by federal immigration law because immigration is an area of exclusive federal power over which Congress has asserted its plenary authority.¹⁰⁵ The government contends that this exclusive authority means that the enforcement regime established in SB 1070 is an unconstitutional infringement on Congress's authority to regulate immigration, because it interferes with the federal government's ability to create a uniform immigration policy, of which the level of enforcement is an integral part.¹⁰⁶ The immigration debate, therefore, also involves a question about the extent of states' ability to enforce federal law.

As demonstrated above, however, the common legal questions in the slavery and immigration contexts are the result of the unique situation in which fugitive slaves and illegal immigrants find themselves: carrying a status determined by federal laws. But there are also important differences between slaves and immigrants, the most important being that slaves were considered property,¹⁰⁷ while illegal immigrants are simply in violation of immigration laws, retain certain rights,¹⁰⁸ and are obviously not property.¹⁰⁹ This difference indicates that state assistance might be more expected in the fugitive slave context, because states enforcing fugitive slave laws could characterize their behavior as helping protect the property rights of individual citizens, instead of merely acting as agents of the federal government. Such enforcement of individual property rights is an area in which states have traditionally acted.¹¹⁰

This does qualify the lessons drawn from the fugitive slave debate to some extent, but it does not make them irrelevant for two reasons.

¹⁰⁴ See notes 29–36 and accompanying text.

¹⁰⁵ US Appellate Brief at *27–29 (claiming the federal government's responsibility to "establish and implement a uniform foreign policy" as grounds for the federal government's exclusive control over immigration policy).

¹⁰⁶ See *id.* at *29–31 (describing Arizona's conception of separate enforcement as within states' ability as a "fundamental[] misunderstand[ing]" of the "scope and nature of the States' role" in situations where Congress has exclusive authority to regulate).

¹⁰⁷ See *Dred Scott v Sandford*, 60 US (19 How) 393, 451–52 (1856) ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution.").

¹⁰⁸ See, for example, *Zadvydas v Davis*, 533 US 678, 693–94 (2001) (determining that Due Process Clause protections are extended to aliens present legally or illegally once they have entered the country).

¹⁰⁹ See US Const Amend XIII, cl 1.

¹¹⁰ See *Pennoyer v Neff*, 95 US 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to . . . regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.").

First, the distinction does not eliminate the common legal question. Despite the state law questions of property at issue in the slavery debate, it was only federal law—namely, the fugitive slave acts—that provided the method of recovery for slaves by slave owners and that led to inevitable questions about states' obligation to carry out federal law when slave owners utilized the Act in a Northern state.¹¹¹ Thus, only federal law—not concepts such as comity, full faith and credit, or recognition of sister-state law—governed these disputes. Second, the diminished power of states relative to the federal government following the Civil War cuts in the opposite direction. Modern conceptions of federalism—tempered by the experience of the Civil War and the Reconstruction Amendments—have weakened conceptions of states' rights. Thus, just as we might once have expected an antebellum state to be required to assist with the recovery of a fugitive slave (because individual property rights were at stake), we might now expect a modern state to be required to assist with enforcing federal law (given the modern relationship between the federal government and the states). Therefore, while the property distinction between the fugitive slave debate and today's immigration debate is an important distinction, it does not fundamentally alter the question about states' roles in enforcing federal laws.

The immigration and fugitive slave debates, therefore, share not only a common locus of debate but also common legal questions about the appropriate role that states have in enforcing federal laws that the federal government itself has difficulty enforcing. These similarities make it possible to use the fugitive slave debate and the legal reasoning used in *Prigg* to inform the current immigration debate.

IV. LESSONS FROM THE FUGITIVE SLAVE DEBATE FOR THE CURRENT IMMIGRATION DEBATE

The antebellum debate sheds light on at least two aspects of the current immigration debate: the constitutionality of laws like SB 1070 in jurisdictions of overenforcement and the implications that differing levels of state enforcement have for the Supreme Court's ability to resolve the debate. The following analysis will first show that though the fugitive slave debate provides precedent for a crucial distinction necessary to find SB 1070 constitutional, the antebellum debate shows that the consequences of recognizing this distinction can be disastrous for the vitality of federal law—a fact that suggests that the distinction should not be carried forward and that SB 1070 should be held

¹¹¹ See Part II.A.

unconstitutional. This Part will then analyze the channeling characteristic of these debates that forces them into a common locus (the role of states in enforcing federal law) in order to better understand when this occurs and what effect it has on a debate's scope. This understanding will then be used to show that the Court should utilize a narrowly tailored resolution when deciding legal questions that arise from debates of this nature.

A. Insights from the Complementary Legal Questions

The fugitive slave and immigration debates address complementary questions. Whereas the antebellum debate was about states' ability to disrupt federal law through underenforcement, the debate surrounding SB 1070 is about states' ability to disrupt federal law through overenforcement. Understanding the debates in this way allows for several insights into the immigration debate. The following discussion will first explain how *Prigg* and the fugitive slave debate show the vitality of a distinction urged by Arizona: that state enforcement of federal law through *arrest, detainment, and prosecution* under federal law is different from enforcement through separate state *remedies* that supplement federal law. The analysis will then demonstrate that modern preemption jurisprudence lacks direct precedent on the constitutionality of this form of enforcement. Finally, the discussion will consider the resolution to the dispute in *Arizona* suggested by Justice Story's and Chief Justice Taney's competing understandings of the holding in *Prigg*. Taney's view clearly suggests that Arizona's law is unconstitutional. Story's view also shows that SB 1070 is unconstitutional, albeit in a different manner: it demonstrates that, although the distinction urged by Arizona has some merit, allowing states to vary their levels of enforcement has profound consequences for the effectiveness of federal law—consequences that warrant preemption.

1. *Prigg*'s insights on the enforcement distinction urged in *Arizona*.

Arizona focuses on states' abilities to overenforce federal law. This litigation is not the only ongoing immigration litigation,¹¹² but it asks a unique preemption question. The controversy in *Arizona* is, in part, about whether state and local government can enact laws that do not alter the immigration scheme with additional remedies but “merely seek[] to assist with the enforcement of existing federal

¹¹² See, for example, *Lozano v City of Hazleton*, 620 F3d 170, 224 (3d Cir 2010), petition for cert filed, 79 USLW 3370 (Dec 8, 2010) (holding that two city ordinances regulating illegal immigrant employment and housing leases were preempted by federal law).

immigration laws.”¹¹³ This concept of enforcement is unique because it means that SB 1070 “merely” assists with the enforcement of federal law by arresting, detaining, and prosecuting violators of existing federal law with state resources, even though it lacks federal authorization.¹¹⁴

This question is far different from the more typical preemption questions that are before courts, which generally arise from a state creating a separate or additional remedy that assists or interferes with federal laws; in the immigration context, such a law might take the form of a state statute that requires aliens to register with the state in addition to any federal registration requirements. This form of state action is assuredly preempted,¹¹⁵ but whether a state can assist or interfere in the former arrest, detention, and prosecution manner is uncertain.

The question that immediately arises, however, is whether the distinction between enforcement and remedies is a meaningful one, or whether overenforcement through arrest, detention, and prosecution is simply another form of state remedy (and thus preempted). The fugitive slave debate and *Prigg* indicate that the distinction does, indeed, have merit. This is most apparent in how the Northern personal liberty laws shifted after *Prigg*.¹¹⁶ Before *Prigg*, these laws took the form of separate state remedies that increased the procedural protections for alleged fugitive slaves. For example, Pennsylvania’s personal liberty law required several additional steps to receive state authority to remove a slave from Pennsylvania in addition to receiving federal authority under the 1793 Fugitive Slave Act.¹¹⁷

After *Prigg* held these statutes unconstitutional,¹¹⁸ Northern states took advantage of the Court’s language suggesting states had no responsibility to enforce the federal law by passing new personal liberty laws that, rather than create separate remedies, frustrated enforcement through the prohibition of assistance by state authorities with the arrest, detainment, and prosecution of fugitive slaves as contemplated in the 1793 Fugitive Slave Act.¹¹⁹ Pennsylvania’s post-

¹¹³ Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction, *United States v Arizona*, No CV10-1413, *3 (D Ariz filed July 22, 2010) (available on Westlaw at 2010 WL 3154413).

¹¹⁴ See SB 1070 §§ 2, 6, codified at Ariz Rev Stat Ann §§ 11-1051, 13-3883.

¹¹⁵ See notes 127–32 and accompanying text.

¹¹⁶ The distinction is also discussed briefly in *Prigg* itself. See *Prigg*, 41 US (16 Pet) at 625 (clarifying that the holdings of *Prigg* did not infringe on states’ ability to exercise their police powers because the Court “entertain[ed] no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to *arrest and restrain* runaway slaves, and remove them from their borders”) (emphasis added).

¹¹⁷ See notes 46–52 and accompanying text.

¹¹⁸ *Prigg*, 41 US (16 Pet) at 617–18.

¹¹⁹ See Part II.C.

Prigg personal liberty law, for example, modified the prior act to make it unlawful “to use any jail or prison of [Pennsylvania], for the detention of any person claimed as a fugitive from servitude or labor”¹²⁰ The shift from underenforcement through separate state remedies to underenforcement through arrest, detention, and prosecution shows that Northern states considered these methods of assistance (or interference) to be distinct from one another—with the latter being a constitutional exercise of state police powers and the former an unconstitutional infringement on the federal government’s authority. *Prigg* and the fugitive slave debate show, therefore, that the “cooperative enforcement” of the Arizona law is a distinct preemption question from the preemption question associated with separate state remedies.

2. Value of lessons from the antebellum debate in light of modern preemption doctrine.

The insights provided by *Prigg* and the fugitive slave debate are valuable not only in clarifying the particular question at issue in the *Arizona* litigation but also in resolving it. This is so because modern preemption doctrine does not directly resolve the unique question in *Arizona*: whether overenforcement through statutes that do not create state remedies but seek to increase enforcement of federal law through elevated state assistance is preempted by federal law.

Preemption is derived from the Supremacy Clause, which establishes the federal Constitution and laws as superior to those of the states.¹²¹ Preemption comes in one of two forms: express or implied.¹²² At issue in *Arizona* is implied preemption, which can be further divided into two subtypes that have been recognized by the Court: field preemption and conflict preemption.¹²³ Both allow for the preemption of laws that do not explicitly conflict with the text of a federal statute.¹²⁴ Field preemption allows for state laws to be preempted if Congress enacts laws that entirely occupy a field of law, either explicitly or implicitly.¹²⁵ Conflict preemption, on the other hand, occurs when compliance with both federal and state law is impossible

¹²⁰ An Act to Prevent Kidnapping §§ 6, 8, 1847 Pa Laws ch 159 at 208.

¹²¹ See US Const Art VI, cl 2.

¹²² *Gade*, 505 US at 98.

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ *Id.* See also Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 402 (Aspen 3d ed 2006) (“[T]he Court will find field preemption either if Congress expresses a clear intent that federal law will be exclusive in an area or if comprehensive federal regulation evidences a congressional desire that federal law should completely occupy the field.”).

or when the state law interferes with the purposes and objectives of Congress in passing the federal law at issue.¹²⁶ Each doctrine can provide insights into the enforcement question in *Arizona*, but the case law in neither is sufficient to definitively resolve it.

Field preemption cannot resolve the question in *Arizona*, because the Court has not considered the particular form of enforcement at issue in the case. Consider *Hines v Davidowitz*,¹²⁷ the leading field preemption case in the immigration context.¹²⁸ In *Hines*, the Supreme Court considered the constitutionality of a Pennsylvania law requiring aliens to register with the state in addition to any obligations the aliens had under federal immigration law.¹²⁹ The Court determined that the state law essentially created a separate state remedy, and was therefore preempted by federal immigration laws.¹³⁰ The federal government, the Court held, had completely occupied the field of law governing alien registration by passing its own alien registration act that left no room for additional state regulation.¹³¹ This decision is representative of other field preemption cases, which typically involve state laws that provide separate and slightly different remedies designed to complement or frustrate federal authority.¹³² This means that field preemption does not directly deal with the unique question in *Arizona*. Field preemption, therefore, does not definitively show that enforcement as contemplated in SB 1070 is preempted.

Conflict preemption is likewise indeterminate because SB 1070 is neither impossible to enforce along with federal law nor in obvious conflict with the congressionally intended operation of the immigration scheme. Enforcement of laws like SB 1070 along with

¹²⁶ *Gade*, 505 US at 98.

¹²⁷ 312 US 52 (1941).

¹²⁸ See Chemerinsky, *Constitutional Law* at 402 (cited in note 125) (calling *Hines* the “classic example of preemption of state regulation in the field of immigration”).

¹²⁹ *Hines*, 312 US at 59–62.

¹³⁰ *Id.* at 73–74 (interpreting Congress’s intent to create “a single integrated and all-embracing system . . . free from the possibility of inquisitorial practices and police surveillance”).

¹³¹ *Id.* at 67–74 (finding that the Pennsylvania statute interfered with Congress’s valid goal of uniformity in immigration policy).

¹³² See, for example, *American Insurance Association v Garamendi*, 539 US 396, 408–13 (2003) (determining a California law designed to reveal abusive practices by insurance providers during the Holocaust was preempted by executive agreements with several countries seeking to do the same); *Crosby v National Trade Council*, 530 US 363 (2000); *Toll v Moreno*, 458 US 1, 3–17 (1982); *DeCanas v Bica*, 424 US 351 (1976); *Pennsylvania v Nelson*, 350 US 497 (1956); *Takahashi v Fish and Game Commission*, 334 US 410 (1948). The important aspect of these cases is that each centers on a particular state law or policy that has an impact on aliens that would not necessarily happen under the direct application of federal law, but none deal with laws that only dedicate state resources to enforce federal laws and provide no additional state remedy, punishment, or regulation on aliens. In other words, these cases deal with state laws creating separate remedies but not policies of cooperative enforcement as arguably done in SB 1070.

federal laws is possible because the state laws are designed to maximize compliance with federal law and no federal law forbids the type of assistance contemplated in SB 1070.¹³³ And SB 1070 does not necessarily conflict with the purpose and objective of Congress. Congressional intent on the matter of assistance with immigration enforcement is far from clear; some provisions suggest that state assistance is desirable,¹³⁴ while others suggest that assistance is only wanted through particular means.¹³⁵ The enforcement question resulting from SB 1070 thus cannot be definitively found to be in tension with the purpose and objective of Congress because there are no clear guiding principles regarding what the congressional objective is for state assistance with enforcement. Conflict preemption, therefore, also fails to definitively resolve the preemption question in *Arizona*.

The lessons provided in *Prigg* and the fugitive slave debate are particularly valuable, therefore, because preemption jurisprudence is unable to resolve the overenforcement question created by SB 1070. The case law either focuses on overenforcement through separate state remedies, which is not even contested by the parties in *Arizona*,¹³⁶ or is not definitive because of an absence of congressional direction. In essence, modern preemption case law does not address the specific enforcement question asked by jurisdictions of overenforcement like Arizona: To what extent can a state overenforce a federal law by using state resources to arrest, detain, and prosecute people in violation of the federal law? This is exactly the question the antebellum debate addresses.

The fugitive slave debate and *Prigg* centered on the question of states' ability to enforce federal law by arresting, detaining, and prosecuting those who have violated it (rather than providing separate remedies). Justice Story, writing for the Court in *Prigg*, for instance, explicitly affirmed the ability of states to assist with enforcement, stating that the Court "entertain[ed] no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to *arrest and restrain* runaway slaves, and remove them from their

¹³³ See notes 29–32 and accompanying text. See also note 103.

¹³⁴ See IIRIRA § 642, 8 USC § 1373 (prohibiting state and local governments from withholding immigration information from federal authorities).

¹³⁵ See Immigration and Nationality Act § 287(g), 66 Stat at 233–34, as amended by IIRIRA § 133, 8 USC § 1357(g) (creating a program that allows DHS to sign agreements with state and local law enforcement that allow for greater coordination and enforcement by the local authorities).

¹³⁶ See US Appellate Brief at *29 (acknowledging that "Arizona does not claim authority to regulate in the sphere of immigration" but instead claims that it can "enforce immigration law independently of the immigration priorities of the federal government").

borders”¹³⁷ This language was used by courts to show that while *Prigg* limited states’ ability to frustrate efforts to reclaim slaves through separate remedies, states still had latitude in deciding whether to “arrest, restrain, and even remove from [their] borders” fugitive slaves.¹³⁸ Furthermore, though states had the ability to arrest and restrain runaway slaves, following *Prigg*, Northern states disrupted the effectiveness of the 1793 Fugitive Slave Act primarily by decreasing the degree to which they assisted with arresting and detaining these slaves.¹³⁹ The authority for states to alter the degree of assistance with enforcement of federal law through arrest and detainment of persons illegally within their borders, as determined by federal law, was thus directly discussed and recognized in the fugitive slave debate.

Admittedly, the informative usefulness of *Prigg* and the antebellum debate is limited because they focus on these questions mostly as a matter of underenforcement. This does not make the fugitive slave debate uninformative, however, because (as demonstrated above) it asks a complementary question to the one at issue in *Arizona*. Namely, where the fugitive slave debate was fundamentally about states’ ability to disrupt federal laws by *frustrating* enforcement, the current overenforcement debate in *Arizona* is about the ability of states to disrupt federal prerogatives by *enhancing* enforcement. This complementary nature is unsurprising, because both legal contexts involve persons whose legal status within a debate is dependent on federal law—a situation that forces legal questions about the appropriate role for states in enforcing that federal law.¹⁴⁰ Understood in this way, the antebellum debate is, therefore, uniquely situated to provide valuable insights into the immigration debate that cannot be derived from existing preemption case law.

3. Insights on *Arizona* from *Prigg* and the fugitive slave debate.

Prigg’s direct discussion of the question of enforcement as contemplated in SB 1070 makes the decision particularly fruitful for resolving the dispute in *Arizona*. As discussed, Justice Story and Chief

¹³⁷ *Prigg*, 41 US (16 Pet) at 625 (emphasis added) (clarifying that the holdings of *Prigg* did not infringe on states’ ability to exercise their police powers). See also note 68.

¹³⁸ *Moore*, 55 US (14 How) at 16–17. See also *Commonwealth v Tracy*, 46 Mass 536, 546–48 (1843); *Eells v Illinois*, 5 Ill 498, 505–06 (1843).

¹³⁹ This is evident given the fact that the personal liberty laws that came after *Prigg* were largely meant to make removal of slaves more difficult by eliminating logistical support, such as forbidding the use of local jails from slave owners returning with runaway slaves. See notes 75–77 and accompanying text.

¹⁴⁰ See Part III.B.

Justice Taney had sharply different understandings of what the Court's determination of exclusive federal authority over the regulation of the return of fugitive slaves meant for state assistance with enforcement of the 1793 Fugitive Slave Act.¹⁴¹ If Taney was correct in his dissent that the Court's ruling made any state law on a subject of exclusive federal authority unconstitutional,¹⁴² then the question in *Arizona* is an easy one: immigration is an area of exclusive federal authority,¹⁴³ SB 1070 is a law on the subject of immigration, and therefore SB 1070 is unconstitutional.

As discussed, however, Taney's understanding of the Court's holding is frequently considered to be erroneous.¹⁴⁴ Guarding against the interpretation urged by Taney, Justice Story explicitly reserved authority for states to enforce the federal law through their police powers. This provided states the choice to either enforce the federal law or to stand on the sidelines but did not forbid state enforcement.¹⁴⁵ This means that *Prigg* made a sharp distinction between those state actions designed to enforce federal law through the arrest, detention, and prosecution of violators and those state actions that create supplemental state remedies; the former were a constitutional exercise of state police powers, while the latter were an unconstitutional infringement on the federal government's authority.

The distinction provides historical precedent for the constitutionality of SB 1070. First, the viability of this distinction makes the "cooperative enforcement" of the Arizona law a distinct preemption question from the preemption question associated with separate state remedies—one that has already been almost certainly resolved against their constitutionality in the immigration context.¹⁴⁶ Furthermore, the antebellum debate not only shows that the distinction has merit but also provides an example of differential treatment for the two types of enforcement—frustration of enforcement through state remedy was found unconstitutional, while frustration through arrest and detainment was at least tolerated. This historical precedent supports a similar conclusion in the immigration context that SB 1070 and statutes like it are constitutional.

¹⁴¹ See notes 66–73 and accompanying text.

¹⁴² *Prigg*, 41 US (16 Pet) at 627 (Taney concurring in part and dissenting in part).

¹⁴³ *Hines*, 312 US at 62–63 (“[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration . . . is made clear by the Constitution.”).

¹⁴⁴ See notes 70–73 and accompanying text.

¹⁴⁵ See *Prigg*, 41 US (16 Pet) at 625 (emphasizing, however, that states could not use their powers to interfere with federal regulation). See also notes 66–68 and accompanying text.

¹⁴⁶ See notes 127–32 and accompanying text.

Whether this precedent should be applied today, however, is another question. One benefit of looking back to earlier debates is that we learn not only what was done, but also the consequences of the decisions made. The post-*Prigg* laws passed by Northern states to create areas of underenforcement made the 1793 Fugitive Slave Act effectively unenforceable,¹⁴⁷ which is perhaps the most extreme form of interference possible. This interference is at least equivalent to that caused by some separate remedies that the Court has struck down as preempted.¹⁴⁸ Indeed, such consequences constitute a strong argument for finding such state enforcement regimes as conflict preempted, in that they have the potential to allow state enforcement to entirely frustrate congressional objectives in passing a law. After all, no matter what Congress's actual desire for states' role in enforcement is, one can be sure that Congress intends immigration laws to be generally effective.

The fugitive slave debate, therefore, shows us that modifying enforcement of federal law through additional or restricted state assistance with arrest, detainment, and prosecution, as SB 1070 does, is very likely unconstitutional. On the one hand, Taney's minority view of the Court's decision in *Prigg* directly prohibits states from interfering at all with federal enforcement. On the other hand, Story's majority view recognizes the enforcement distinction made by Arizona, but also shows that this type of enforcement is probably at least as problematic for federal authority as differing levels of enforcement through additional or varied state remedies and may even conflict with Congress's desire for an effective immigration system. That is, the consequences from *Prigg* demonstrate, as a sort of real world experiment, the potentially severe disruptive ability that state enforcement of federal law has for the ability of the federal government to carry out its goals. Though there may be reasons to think that interference from overenforcement is less disruptive than the underenforcement seen after *Prigg*, at the very least, the antebellum debate shows a great deal of potential for harm to the

¹⁴⁷ See Finkelman, 1994 S Ct Rev at 288 (cited in note 42) (“[T]he decision, in the end, did lead to a practical nullification of the federal law.”).

¹⁴⁸ Consider, for example, *Crosby v National Foreign Trade Council*, 530 US 363 (2000), in which the Supreme Court found unconstitutional a state law prohibiting businesses from dealing commercially with a country in which a federal executive order already prohibited further investment. *Id.* at 366–70, 372–73. The decision held that the state law interfered with the President's discretion in foreign policy matters by limiting his ability to withdraw the executive order. *Id.* State interference with the federal sanctions law at issue in *Crosby*—which hinders only a President's discretion by foreclosing an option not yet sought—certainly seems to be less disruptive than interference from a state law that effectively renders a federal law unenforceable, as the post-*Prigg* personal liberty laws did to the 1793 Fugitive Slave Law.

federal immigration scheme through bills like SB 1070. This potential ought to create a reasonable hesitance on the part of the Court to allow independent state enforcement of federal law without more explicit direction from Congress as to what role it sees states having in enforcement. Absent this guidance, *Prigg* and the fugitive slave debate, considered as a whole, provide powerful historical evidence for the federal government's argument that the enforcement contemplated in SB 1070 would fundamentally disrupt the delicate balance of domestic and international factors considered to determine the appropriate level of immigration enforcement. This requires SB 1070 to be found preempted as an unconstitutional infringement on the federal government's exclusive authority over international relations.

B. Insights on the Nature of Enforcement Questions and the Role of the Supreme Court in Resolving Them

There are also lessons to be drawn from the similarities between the fugitive slave and immigration debates beyond those that suggest a particular legal outcome. As discussed in Part III, the fugitive slave and immigration debates are national debates that have been "channeled" into the states rather than the floors of the Senate and House of Representatives. In this context, channeling refers to the effect our Constitution's structure has of pushing both of these national debates about the appropriate policy for an exclusive federal responsibility into the states as questions about the states' roles in enforcing federal law.¹⁴⁹ Paradoxically, state actions, rather than federal ones, become the main focus of a federal debate.

This similarity not only allows for the doctrinal lessons drawn out above but also demonstrates the effect our constitutional design has on national debates. Channeling a national debate into the states is a unique feature of our Constitution that can have a profound impact on the manner and focus of discourse over a national policy.¹⁵⁰ The fugitive slave and immigration debates, by sharing this characteristic, provide us an opportunity to better understand when national debates are channeled into the states, what impact this has on a debate, and what implications this aspect of the immigration debate has for the Supreme Court.

¹⁴⁹ See Part III.A.

¹⁵⁰ See Bestor, 69 *Am Hist Rev* at 338–40 (cited in note 7).

1. Three common characteristics of national debates channeled into the states.

The fugitive slave and immigration enforcement debates, and their corresponding broader controversies on slavery and immigration, respectively, share at least three characteristics that appear to be necessary preconditions for a national debate to be channeled into the states: (1) strong and differentiated policy preferences on the national level, (2) sufficiently concentrated preferences in states to create a diversity of preferences among individual states, and (3) a mechanism for states to directly affect the national policy.

As a threshold matter, both debates demonstrate that strong and differentiated policy preferences are important precursors to such channeling. Such policy differences are necessary because they make compromise impossible, thus bringing the national government to a standstill on the very federal issues it regularly addresses.¹⁵¹ This feature is evident in both debates. The antebellum slavery debate's failure to reach compromise was made evident in the Civil War, and the immigration debate has not seen another sincere effort to comprehensively reform immigration since the last attempt several years ago.¹⁵² Strong and differentiated policy preferences are thus necessary for channeling, because otherwise the dispute will be resolved on the national level before it can escalate to the level at which states will take independent action.

In addition to staunchly divergent preferences, another crucial element for channeling federal debates into the states is that policy preferences be concentrated in different states, such that the states themselves can be seen as having polarized preferences. During the slavery debate, this concentration was seen in the Northern states that opposed slavery and resisted efforts to return fugitive slaves, while Southern states supported slavery and sought the return of fugitive slaves.¹⁵³ In the immigration debate, the divide is not as sectional, but preferences are certainly concentrated in particular states.¹⁵⁴ This concentration of preferences in different states is essential to channeling national debates into the states because it empowers the

¹⁵¹ See Robert A. Dahl, *A Preface to Democratic Theory* 96–98 (Chicago 3d ed 2006) (using the antebellum slavery debate to show how severe, symmetrically strong policy preferences that differ from one another prevent compromise to such an extent that violent conflict frequently follows). Polarization is of course not the only way gridlock can be achieved, but it is the situation in which the controversy is likely to prove so important that actors will not be content with federal inaction.

¹⁵² See Part I.A.

¹⁵³ See Part II.C.

¹⁵⁴ See notes 16–18 and accompanying text.

various factions to enact laws through the political system of the particular state in which they are dominant. In other words, policy preferences must be polarized between states but uniform within states in order to create a diversity of policy outcomes from the states.

In addition to divergent and concentrated policy preferences, if a debate is to be channeled into the question of state enforcement, then states must have a mechanism to autonomously affect the federal government's policy choices. In the fugitive slave and immigration context, this lever is created by the federal government's reliance on state assistance in enforcing the federal law.¹⁵⁵ The significant value provided to the federal government by state assistance means that states have a vehicle through which to express their discontent with a federal policy: varying the level of assistance they provide from that requested by the federal government. If states lacked this mechanism, the debate would likely not be channeled to the states because there would be no relevant way for them to express their policy preferences. The current debate over the federal deficit, for instance, is unlikely to be channeled into the states, because there is no mechanism for states to autonomously affect the federal government's budget. States having a way to directly impact federal policies, therefore, is essential to channeling a national debate into the states. And when—as the fugitive slave and immigration debates suggest—this characteristic is combined with strong, differentiated policy preferences at the national level and concentrated policy preferences within the states, then the national debate may be channeled into the states.

2. The effect of channeling federal policy debates into the states.

Knowing when a national debate on federal policy is likely to be channeled into the states is valuable because channeling has a profound effect on the substance of the debate itself. The most important effect is that the scope of debate on the federal policy is dramatically narrowed when it is channeled to a particular locus. The pre-Civil War slavery debate did not focus on the morality or perceived necessity of slavery but instead focused on collateral issues such as the expansion of slavery into the territories and the return of fugitive slaves.¹⁵⁶ In other words, moving the debate to questions about states' (or territories') duties and abilities regarding slavery meant that the central issue in contention was never reached. Debating

¹⁵⁵ See notes 92–93 and accompanying text.

¹⁵⁶ Bestor, 69 *Am Hist Rev* at 338–39, 343–44 (cited in note 7) (describing the focus of the antebellum slavery debate on collateral issues as the “central paradox” of the debate).

federal policies through the states thus limits the scope of the debate, such that many central issues that could be debated are avoided.

This feature of channeling a national debate is not unique to the debate on slavery but is instead the result of the federal structure of our constitutional government. The Constitution limits the scope of a debate that has been channeled to a nonfederal locus by foreclosing particular issues from regulation—and thus, largely, discussion—at the state and local level.¹⁵⁷ In the fugitive slave context, for example, Northern states did not directly dispute Southern states had the right to designate slaves as property (which was well-settled law), but instead urged their own right to have no part in returning slaves to their owners.¹⁵⁸ The scope of a national debate held on the state level, therefore, is necessarily limited to those areas in which a state can at least arguably act in a constitutional manner.

In regards to immigration, the same limited scope is seen in the *Arizona* litigation. Arizona has been careful not to challenge the federal government's exclusive authority over immigration matters.¹⁵⁹ Instead, it has sought to act within its police powers to affect the federal policy in a way that is at least arguably constitutional. More interesting, however, is that SB 1070's effect on the national debate has taken the focus away from efforts for comprehensive federal reform. Rather than debate what the correct federal immigration policy, level of funding, or level of enforcement are, the litigation has narrowed the debate to what the appropriate level of assistance a state can withhold or provide to enforce the federal laws as they stand. This is not to say that no discussion of federal reform does (or will) take place but only to suggest that the locus of debate has shifted to a narrower scope and more localized place.¹⁶⁰ This does mean, however, that the debate in its current form is unlikely to produce any definitive conclusion to the broader questions in the immigration debate.

3. Implications of channeling for the Supreme Court.

The nature of national debates over federal policies channeled to states, as shown by the antebellum debate, demonstrates that litigation like *Arizona* ought to be resolved by the Court in a narrow way. The

¹⁵⁷ See id at 340–43 (discussing one central way the Constitution shaped the slavery debate was through shared understandings of what disputes it settles).

¹⁵⁸ See id at 341–44.

¹⁵⁹ See note 136 and accompanying text.

¹⁶⁰ Consider NY Times, Editorial, *Immigration and Emigration* (Feb 2, 2011), online at <http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/index.html> (visited May 11, 2011) (describing the immigration debate as dormant following the last attempt at comprehensive reform before being revitalized by the passage of SB 1070).

nature of the broader debate out of which these legal questions have arisen means that the Court will weigh in on a highly polarized political controversy in a way that only tangentially reaches the actual cause for debate but could have profound repercussions on it. *Prigg* and its consequences demonstrate this by showing that in these channeling situations the Court is unlikely to be able to definitively resolve the dispute but is instead placed in a situation where profound and unintended consequences are likely.

Justice Story, an ardent nationalist, wrote the opinion of the *Prigg* Court to maximize the power of the federal government.¹⁶¹ This ambitious and broad approach, however, failed to either definitively resolve the enforcement question or strengthen the supremacy of the federal government. This happened in part because his nationalist approach forced Story to discuss matters not directly before the Court.¹⁶² Specifically, the discussion on the broader questions about the relationship of federal and state governments compelled him to hypothesize that states could opt out of assistance with the enforcement of the federal law¹⁶³ and that the federal government could not mandate cooperation.¹⁶⁴ This language provided Northern states the opening they needed to undermine the federal fugitive slave laws to such an extent that they further undermined federal authority and increased sectional tensions¹⁶⁵—the complete opposite effect from what Story desired.

This failure of *Prigg* to resolve the fugitive slave debate is helpful for the modern courts in at least two ways. First, the decision shows the perils of overly ambitious decisions given their propensity for unintended consequences.¹⁶⁶ Second, and more particular to debates channeled into the question of state-level enforcement, *Prigg* provides an example of state behavior in situations where the states are seeking to influence underlying federal policies not at issue in the decision.

¹⁶¹ Finkelman, 1994 S Ct Rev at 290–92 (cited in note 42) (using personal letters from Justice Story to a United States senator to conclude that Story was motivated by “the aggrandizement of federal power” in *Prigg* rather than the desire to provide a backdoor way to end slavery). This was not the only approach possible. Story could have, for instance, reached the same conclusions through a narrower decision that instead emphasized owners’ property rights, as urged by Chief Justice Taney. See *Prigg*, 41 US (16 Pet) at 627–28 (Taney concurring in part and dissenting in part). Taney’s approach would have had the benefit of avoiding the sensitive issues about state and federal relations.

¹⁶² See Finkelman, 25 Civil War Hist at 14 (cited in note 52) (explaining that the logic of Story’s nationalist position forced him to conclude that states did not have to enforce the Fugitive Slave Clause).

¹⁶³ See *Prigg*, 41 US (16 Pet) at 622, 625.

¹⁶⁴ See id at 615–16.

¹⁶⁵ See notes 75–81 and accompanying text.

¹⁶⁶ Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 362–64 (2006).

The states, unsurprisingly, took full advantage of any leeway provided by the Court to fulfill their own policy goals.

It might be argued that the issue with Story's opinion is not that he sought to resolve the broader questions but that he sought to resolve them in the particular way he did. That is, he reached the wrong conclusion. After all, Northern states might have taken just as much advantage of silence as they did ambiguity. Under this theory, Story perhaps should have used the same broad approach but instead ruled definitively in the other direction by simply stating (as Taney's dissent insisted he had) that the federal government had exclusive authority, foreclosing any state assistance.

Though this criticism holds some truth—states likely would have taken advantage of such silence—it misses the larger point: the channeling aspect of these debates necessarily and drastically limits both the knowledge available to the Court and the means with which it can act. These limitations make any attempt to create a generalized rule extremely difficult, because the legal issue before the Court is but one small aspect of a larger debate, requiring much more information than the Court will have before it to resolve. That is to say, the channeled nature of this debate left Story no guidance as to *which* of the two choices he ought to have taken. Hindsight might tell us that Story should have made a different ruling to achieve his nationalist goals, but we can prescribe that only because we now know how the broader coalitions at work reacted to the decision.

These insights should caution the Court against a broader decision that might attempt to settle the definitive authority of the federal government on immigration matters, as urged by some scholars.¹⁶⁷ A broader solution like this might appear wise on its face, but like *Prigg*, it would have profound implications for issues not directly before the Court. For example, a holding that forecloses *any* state action that interferes with the federal enforcement regime would not only preempt SB 1070 but also strongly imply that sanctuary jurisdictions are unconstitutional because they also alter the enforcement regime—a result that at a minimum may not be intended and that is also not obviously desirable.

A narrower decision, however, would avoid the possibility of unintended consequences because sharply focusing on the merits of the enforcement–remedy distinction made by Arizona would diminish the likelihood both of ambiguities in language and of impacts on

¹⁶⁷ See, for example, Gabriel J. Chin, et al, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 *Georgetown Immig L J* 47, 77 (2010) (framing the question of SB 1070's validity broadly as one that focuses on the exclusiveness of federal authority over immigration).

matters not before the court (such as the legality of sanctuary jurisdictions, which may not conflict in the same way with federal law as Arizona's law). This is particularly important given that, as mentioned above, the *Prigg* experience demonstrates that local and state governments would surely exploit any such ambiguities in their favor and that the information before the Court will be severely limited. Indeed, the Court's decision is likely only to create a baseline from which further state policymaking will take place.¹⁶⁸ The fugitive slave debate, therefore, demonstrates that the Court ought to avoid a broad ruling on enforcement of immigration laws but instead favor a narrower holding, resolving only the question before it: the uncertainty surrounding the ability of states to enforce federal law by increasing the use of state resources to arrest, detain, and prosecute those in violation of the law.

This conclusion is reinforced by the fact that the underlying cause of the dispute in *Arizona* will not actually be before the Court. Instead, because of the nature of the debate, the underlying policy differences will remain hidden behind the collateral issues that do make it into the court system. Only Congress, the sole institution that can reach these fundamental policy differences, can provide a definitive solution to them. Resolution of the sectional conflict over slavery ultimately had to be resolved through legislation, the Civil War, and finally constitutional amendment. With respect to the fugitive slave debate, the prewar solution to the enforcement question came from the passage of the 1850 Fugitive Slave Act as part of the Compromise of 1850 rather than the Court's decision in *Prigg* or later cases.¹⁶⁹ Absent a secession movement over immigration, the only method to resolve the immigration debate will be through congressional compromise.

CONCLUSION

The fugitive slave and immigration debates share two unique characteristics—debate through varied levels of enforcement at the state and local level, and common legal questions derived from similarly situated persons. This makes the antebellum debate uniquely relevant to the current immigration debate over the role states have in enforcing federal immigration law. The antebellum debate provides historical precedent for laws like Arizona's SB 1070 by establishing

¹⁶⁸ See Beth M. Henschen and Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J L & Polit 685, 719–24 (1989).

¹⁶⁹ See Morris, *Free Men All* at 131 (cited in note 40) (describing the 1850 Fugitive Slave Act as one part of the Compromise of 1850).

enforcement through the arrest and detention for prosecution as a concept separate from enforcement through separate state remedies. But the consequences of this precedent show that interference from differing levels of local enforcement through arrest and detention interfere with federal laws to a degree not generally permitted. Considered as a whole, *Prigg* and the fugitive slave debate thus provide powerful historical evidence that the federal government's argument for a respect of federal balancing is a powerful one that requires SB 1070 to be found preempted. Finally, the antebellum and immigration debates show the unique nature of national debates over federal policies that are channeled into the states. Analysis of the debates shows when channeling to states is likely to take place, the narrowing effect it has on debates, and that resolutions that the Court reaches for immigration enforcement cases should be modest, clear, and made with the understanding that the issues before it are only collateral to the core conflict.

This Comment has shown that the current immigration debate over enforcement is not unprecedented. We have been here before and would be wise to take what we can from our past experience. The analysis provided here has focused on *United States v Arizona* because it is a current issue with which many are familiar. But this one case is not the limit of the value provided by *Prigg v Pennsylvania* and the fugitive slave debate. The antebellum debate has many more lessons to provide. The 1850 Fugitive Slave Act, for example, includes a unique form of encouragement for enforcing federal laws—creating private causes of action—that have only recently begun to be used again.¹⁷⁰ Furthermore, an additional issue of interest is the implications *Prigg* has for the Tenth Amendment and recent developments in anti-commandeering case law. The fugitive slave debate, as a crucial stepping stone in the establishment of federal supremacy, is ultimately an area ripe for further study that has too often been overlooked.

¹⁷⁰ Compare 1850 Fugitive Slave Act § 5, 9 Stat 462–63 (providing slave owners, as private citizens, the ability to bring suit against local authorities that frustrate their efforts), with SB 1070 § 2(H)–(J), codified at Ariz Rev Stat Ann § 11-1051(H)–(J) (providing a cause of action to private citizens against municipal authorities that “adopt[] or implement[] a policy that limits or restricts the enforcement of federal immigration laws”).

The similarities of these remedies stand in contrast to some commentators' assertion that the provision in SB 1070 has never been tried before. See, for example, Chin, et al, 25 Georgetown Immig L J at 75 (cited in note 167) (stating that two provisions in SB 1070 §§ 2(H)–(J) are “previously unknown in United States law”).