
**PROVIDING SAFETY FOR SANCTUARY CITIES:
 THE CONSTITUTIONAL AND POLICY ARGUMENTS
 SUPPORTING THE ENACTMENT OF UNRESTRICTIVE LAWS
 AND POLICIES BY SANCTUARY CITIES AND STATES**

*By Adam Roberts, J.D., May 2017**

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INTRODUCTION

States and cities around the United States have recently come under attack by the Trump Administration for creating sanctuary cities.¹ Just days after taking office, President Trump began issuing Executive Orders in order to show his dedication to fulfilling his campaign promises.² Some of the first executive orders he issued went to his promise to establish safer borders and to overhaul the immigration system here in the United States.³ While these orders covered many different areas regarding immigration reform, this Note is focused on the changes President Trump is attempting to make regarding sanctuary cities. In one executive order, President Trump called for the removal of federal funding to cities and states that did not act in accordance with federal laws in helping federal agencies detect and remove undocumented immigrants.⁴ While there are questions concerning the constitutional implications regarding the enforcement of these executive orders, this Note focuses on the future of laws enacted by Congress that may impact cities and states enacting unrestrictive pro-immigrant policies.

With the Republican Party having control of all branches of the federal government, it is not a stretch to conclude that President Trump's ideas of cutting federal funding to sanctuary cities could become laws. This Note addresses this possible future outcome in two ways: First, by providing constitutional and policy arguments that states could make if Congress was to enact statutes requiring local communities to comply with Immigration and Customs Enforcement (ICE) policies; and second, by using policy to argue that states should have the power to enact unrestrictive laws and establish themselves as sanctuary states.

Part One of this Note will examine reasons that have caused more confusion over which branch of government should take the lead in shaping immigration law, in addition to discussing why states and cities are

¹ See Julie Hirschfeld Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/us/politics/sanctuary-cities-jeff-sessions.html>.

² See Rebecca Harrington, *Trump has Already Signed 90 Executive Actions in His First 100 Days – Here's What Each One Does*, BUS. INSIDER (May 3, 2017, 11:07 AM), <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#executive-order-april-28-exploring-offshore-energy-prospects-1>.

³ Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

⁴ Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

more involved in implementing immigration laws on a local level. Part Two will explore the different ways states have handled this confusion. Part Three of this Note will provide analysis to Supreme Court precedent and how it will affect any future litigation regarding the constitutional rights of the states to create sanctuary cities. Lastly, Part Four will delve into the policy concerns for sanctuary cities and show additional arguments as to why unrestrictive immigration laws should be treated differently from restrictive immigration laws.

I. CREATING CONFUSION REGARDING CONTROL OVER IMMIGRATION

A. *History of Immigration Law*

It has become the norm for people to assume that the power to change immigration law is a federal power left to Congress.⁵ Yet, the word “immigration” does not appear anywhere in the Constitution.⁶ Actually, the only insight the Constitution gives regarding government power is when it provides the Federal Legislative Branch the power to “establish an uniform Rule of Naturalization.”⁷ Also, a look at history does not provide a lot of explanation on what the Constitution originally meant by giving the power of naturalization to Congress.⁸

It was actually the states that implemented the first laws regulating who could and could not enter into their state borders.⁹ The Congress of the Confederation not only supported these state laws, but in 1788, the same year the Federal Constitution was ratified, the Confederation recommended that all states should pass such laws.¹⁰ However, in 1888 the Court decided in *Chae Chan Ping v. United States*¹¹ that Congress had the

⁵ See Timothy A. Newman, *Standing to Challenging State and Local Immigration Regulation: How the Notion of Expressive Injury Can Restore Federal Power Over Immigration*, 17 WM. & MARY BILL RTS. J. 1215, 1242 (2009).

⁶ See generally U.S. CONST. arts. I–II (detailing the powers of Congress and the Presidency without express reference to “immigration”).

⁷ U.S. CONST. art. I, § 8, cl. 4.

⁸ See generally Henry Stockbridge, *The Law of Naturalization*, 17 GREEN BAG 644, 645–49 (1905) (discussing the history of naturalization law).

⁹ See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841 (1993) (examining five different areas of immigration policies implemented by states).

¹⁰ *Id.* at 1842.

¹¹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

power to create immigration laws and that the federal government must have this power because, “for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”¹²

As recently as 2012, the Supreme Court held that Congress has “broad undoubted power over immigration.”¹³ While this may seem like a strict rule, it leaves open questions such as what do we do when Congress refuses to act? Are there certain times when we would be, or maybe even should be, more willing to let states step in and shape immigration policy?

B. Congress’s Lack of Change

While immigration has been a hot topic in the media, one may think that this is an ever-changing area of law. One would be correct and incorrect in thinking such. While there are constantly minor changes made to immigration,¹⁴ there has been very little change to the United States’ overall immigration structure.¹⁵

According to a timeline put out by the Migration Policy Institute, the last legislative act relating to immigration was enacted in 2006.¹⁶ However, even this Act was not a major reconstruction of immigration law, but simply a law regarding building a fence across the United States and Mexico border.¹⁷ The major laws that influence immigration in modern time are found in the Immigration and Nationality Act (“INA”), which was originally enacted in 1952.¹⁸ While there have been amendments to the INA,¹⁹ the fact still stands that modern day immigration laws are based on an act from over sixty years ago.

¹² *Id.* at 606.

¹³ *Arizona v. United States*, 567 U.S. 387, 388 (2012).

¹⁴ See Elmer Fried, *Immigration and Nationality Law*, 1958 ANN. SURV. AM. L. 218, 218–19 (discussing minor changes that happen throughout immigration law compilations).

¹⁵ See Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POL’Y INST. (Apr. 16, 2013), <http://www.migrationpolicy.org/article/immigration-united-states-new-economic-social-political-landscapes-legislative-reform>.

¹⁶ Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638 (2006); *Major Immigration Laws, 1790 – Present*, MIGRATION POL’Y INST. (Mar. 2013), <http://www.migrationpolicy.org/research/timeline-1790>.

¹⁷ Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638 (2006).

¹⁸ *Id.*

¹⁹ *Id.*; see, e.g., Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94–571, 90 Stat. 2703; Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97–116, 95

In 1986, there was an attempt to reform immigration with the enactment of The Immigration Reform and Control Act (“IRCA”).²⁰ It has been argued that IRCA had three major parts: “(1) amnesty of undocumented aliens already in U.S. territory, (2) stricter penalties for employers hiring these aliens, and (3) . . . funding for border protection to prevent aliens from entering U.S. territory.”²¹ However, IRCA ultimately was not successful and this led to the passing of the Illegal Immigration Reform and Immigrant Response Act of 1996 (“IIRIRA”).²² IIRIRA was created to implement stricter standards on immigrants remaining in the country illegally or those entering the country illegally.²³

Therefore, while there have been small changes with small legislative enactments,²⁴ there has been no substantial change to immigration laws since 1996.²⁵ In 2007, Congress once again tried to create another major change by passing what was called the Comprehensive Immigration and Reform Act of 2011 (“CIRCA”).²⁶ CIRCA once again attempted to create some form of amnesty, while creating more border control and stricter regulations.²⁷ However, CIRCA failed to pass and there have been no other laws enacted to create any reform.²⁸ This lack of change has led to executive actions and state-made laws.

C. Confusion by Presidential Overreach

If Congress’s inaction was not enough to frustrate states as they deal with their local immigration issues, the constant changing of immigration

Stat. 1611; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99–653, 100 Stat. 3655.

²⁰ Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

²¹ Natalya Shatniy, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing for the Future*, 14 SCHOLAR 869, 879–80 (2012).

²² See *id.*; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546.

²³ See Shatniy, *supra* note 21, at 879–80.

²⁴ See, e.g., Immigration Amendments of 1988, Pub. L. No. 100–658, 102 Stat. 3908; Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94–571, 90 Stat. 2703; Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99–639, 100 Stat. 3537.

²⁵ *Major Immigration Laws, 1790 – Present*, *supra* note 16.

²⁶ See Shatniy, *supra* note 21, at 873–74; Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (2011).

²⁷ See Shatniy, *supra* note 21, at 874.

²⁸ See *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), <http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276>.

policy through Presidential executive actions²⁹ has left states in search of answers. President Obama and President Trump have both demonstrated their willingness to sign executive orders as a way to stay true to their campaign promises to reform immigration.³⁰

In 2011, President Obama made it known that he would take the legal steps he could to reform immigration.³¹ One of his first steps was by taking executive action to implement what has been called Deferred Action for Childhood Arrivals (“DACA”).³² Then again, in 2014, while announcing his executive actions on immigration reform he stated,

Now I continue to believe that the best way to solve this problem is by working together to pass that kind of common sense law. But until that happens, there are actions I have the legal authority to take as president, the same kinds of actions taken by Democratic and Republican presidents before me, that will help make our immigration system more fair and more just.³³

This Executive Order, which became known as Deferred Action for Parents of American Citizens Act (“DAPA”),³⁴ quickly faced backlash

²⁹ See, e.g., Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674–75 (2011) (challenging the assertion that states can serve as valuable laboratories of immigration reform); Harrington, *supra* note 2 (detailing how and why immigration reform has failed to pass through Congress).

³⁰ See Harrington, *supra* note 2 (discussing how President Trump has signed in more executive orders in the first 100 days of holding presidential office than any other President); see also Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> (discussing President Obama’s slogan, “We Can’t Wait”).

³¹ See Savage, *supra* note 30.

³² See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., on Individuals Who Came to the U.S. as Children to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Immigration & Customs Servs. & John Morton, Dir., U.S. Immigration & Customs Enf’t (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

³³ *Transcript: Obama’s Immigration Speech*, WASH. POST (Nov. 20, 2004), https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html?utm_term=.fbbaabd5267f.

³⁴ See Memorandum from Jeh Charles Johnson, Sec’y, Individuals Who Came to the U.S. as Children & Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t & R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

from states, and ultimately, was blocked by federal courts.³⁵ Additionally, conservative politicians made their disagreements with the President's actions known.³⁶ Even the current President, President Trump, voiced his concerns with President Obama's executive orders in July 2012, when he tweeted, "Why is @BarakObama constantly issuing executive orders that are major power grabs of authority?"³⁷ Yet, as soon as President Trump took office he began issuing his own executive actions.³⁸

Between January 25 and January 27, 2017, President Trump issued three different executive orders, all relating to immigration.³⁹ These executive orders ranged from placing temporary bans on certain immigrants entering the country,⁴⁰ building a wall between the United States and Mexico border,⁴¹ and, most importantly, for the purpose of this Note, threatening to defund sanctuary cities.⁴² However, at this point in the Note, it is important to note that once again a President is taking immigration issues into his own hands through the use of executive orders.

Both sets of executive actions issued by President Obama and President Trump demonstrate that both Republicans and Democrats are willing to use executive power to bypass Congress when it comes to immigration. It also sheds light on the issues with using executive orders to deal with immigration.⁴³ If immigration regulations are left to who is holding the pen, then the law becomes unpredictable and can drastically change with

³⁵ See generally *United States v. Texas*, 136 S. Ct. 2271 (2016), *aff'd by an equally divided court*; *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) (discussing that twenty-six states sued the federal government regarding DAPA).

³⁶ See Debate Club, *Is Obama's Immigration Executive Order Legal?*, U.S. NEWS (Nov. 21, 2014, 11:00 AM), <https://www.usnews.com/debate-club/is-obamas-immigration-executive-order-legal>.

³⁷ Donald Trump (@realDonaldTrump), TWITTER (July 10, 2012, 12:11 PM), <https://www.twitter.com/realDonaldTrump/status/222739756105207808>.

³⁸ *Executive Orders*, WHITEHOUSE.GOV, https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders?term_node_tid_depth=51&page=2 (last visited May 1, 2017).

³⁹ Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

⁴⁰ Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁴¹ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

⁴² Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

⁴³ See generally Andy J. Semotiuk, *Trump's Executive Orders Cause Immigration Chaos – No Solution in Sight*, FORBES (Jan. 29, 2017, 7:03 AM) (comparing President Trump's immigration executive orders with those of President Obama and President George W. Bush), https://www.forbes.com/sites/andyjsemotiuk/2017/01/29/_trashed/#597e70506f3d.

one simple swipe of that pen.⁴⁴ This not only leaves immigrants confused on their legal rights,⁴⁵ but also forces states to feel like they need to take the issues into their own hands.⁴⁶

II. STATES' REACTIONS

A. Restrictive v. Unrestrictive

The disagreement amongst federal legislatures⁴⁷ and the ever-changing immigration policy changes caused by executive orders⁴⁸ have led states to begin taking immigration reform into their own hands.⁴⁹ While there has been a rise in state action, the types of actions the states are taking vary. State actions are said to fall into two different categories “restrictive”⁵⁰ or “unrestrictive.”⁵¹ This part of the Note looks at the growing number of state enacted immigration laws and how different state laws fall under the two categories.

Since 2005, there has been an increase in state laws being enacted relating to immigration.⁵² In 2005 there were only thirty-nine state laws enacted.⁵³ However, in 2006 this number doubled, and then in 2007, the number reached a high of 240 laws enacted.⁵⁴ Between 2008 and 2015, states have enacted laws regarding immigration ranging from 142 to 218 laws a year.⁵⁵ According to the 2016 midyear report, enacted immigration related legislation by states was down, but states had already enacted

⁴⁴ See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 349, 365 (2017) (discussing the significance of presidents' use of executive orders to advance their signature policies).

⁴⁵ Alan Gomez, *Chaos Reigns Amid Legal Battle Over Trump's Immigration Ban*, USA TODAY (Jan. 29, 2017, 6:35 PM), <https://www.usatoday.com/story/news/2017/01/29/confusion-over-trump-immigration-executive-order/97217308/>.

⁴⁶ See Garrick B. Pursley, *Skeletal Norms*, 18 U. PA. J. CONST. L. 353, 367 (2015).

⁴⁷ *Id.* at 354.

⁴⁸ See Chen, *supra* note 44, at 349.

⁴⁹ See LYNN A. KAROLY & FRANCISCO PEREZ-ACRE, A COST-BENEFIT FRAMEWORK ANALYZING THE ECONOMIC AND FISCAL IMPACTS OF STATE-LEVEL IMMIGRATION POLICIES 1 (Arwen Bicknell ed., 2016).

⁵⁰ *Id.* at 18.

⁵¹ *Id.*

⁵² *Id.* at 4 tbl.2.1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

seventy laws in the first half of 2016.⁵⁶ In 2015, only eleven states had no policies enacted regarding immigration.⁵⁷ The remaining states had enacted laws varying between restrictive or unrestrictive laws.⁵⁸

Restrictive laws are laws that place restrictions on immigrants.⁵⁹ Some laws that fall under this category are:

[E]xpanding local law enforcement involvement in enforcing federal immigration laws, mandating that employers verify work eligibility, prohibiting access to discounted tuition for otherwise eligible unauthorized immigrants, blocking eligibility for state driver's licenses, and excluding access to publicly subsidized prenatal care and child health insurance.⁶⁰

In 2015, twenty-five states had enacted state level policies that pertain to some form of restrictive policy in one of the following areas: omnibus legislation,⁶¹ law enforcement,⁶² E-Verify,⁶³ in-state tuition,⁶⁴ and driver's licenses,⁶⁵ respectively.⁶⁶ In 2010, Arizona was the first state that enacted omnibus laws,⁶⁷ which placed overall restrictions on immigration policy in different domains.⁶⁸ After Arizona, five other states enacted their own omnibus laws.⁶⁹ While these six states are the only states that have passed comprehensive immigration legislation, other states have passed legislation focused on specific policies.⁷⁰

What is most relevant to this Note is the number of states that have enacted laws regarding law enforcement. States began adopting what has

⁵⁶ See *Report on 2016 State Immigration Laws | January-June*, NAT'L CONF. ST. LEGISLATURES (Sept. 1, 2016), <http://www.ncsl.org/research/immigration/report-on-2016-state-immigration-laws-january-june.aspx>.

⁵⁷ KAROLY & PEREZ-ACRE, *supra* note 49, at xiii fig.S.1.

⁵⁸ *Id.*

⁵⁹ See *id.* at 1.

⁶⁰ *Id.* at xi; see, e.g., S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁶¹ See, e.g., S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See, e.g., H.B. 1402, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁶⁵ See, e.g., H.B. 658, 2012 Leg., Reg. Sess. (Ala. 2012).

⁶⁶ KAROLY & PEREZ-ACRE, *supra* note 49, at 18 fig.2.5.

⁶⁷ See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁶⁸ KAROLY & PEREZ-ACRE, *supra* note 49, at 5 (citing *Immigrant Policy Project*, NCSL (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx#Background>).

⁶⁹ *Id.*

⁷⁰ See *id.* at 8.

been called “287(g) Programs” as early as 2002.⁷¹ These programs received their name because they were based off of Section 287(g) of the IIRIRA.⁷² These programs allowed local law enforcement to be involved with federal immigration enforcement, which was allowed because under 287(g),

[T]he U.S. Immigration and Customs Enforcement (ICE) can establish voluntary cooperative agreements with state and local authorities to permit local law enforcement, after receiving appropriate training, to perform immigration enforcement functions under the supervision of ICE. Programs were structured with a ‘task force’ model where deputized officers may interrogate and arrest suspected noncitizens encountered in the field. The ‘jail enforcement’ model allows deputized officers to interrogate noncitizens who have been arrested on local charges and then file immigration detainers if they are believed to be subject to removal. Detainees may be transferred to ICE custody and deportation proceedings ensue. Jurisdictions could adopt one, the other, or both models.⁷³

By 2010, ten states had 287(g) programs.⁷⁴ However, these programs were getting ridiculed because of allegations of racial profiling,⁷⁵ and by 2015 only two states still had such programs implemented statewide.⁷⁶ Yet, while statewide programs decreased, ICE reported that they have 287(g) agreements with thirty-eight law enforcement agents in sixteen different states.⁷⁷

On the other end of the spectrum are laws that are considered unrestrictive. Laws that fall under this category include “programs that provide outreach and support to immigrants pertaining to employment, housing, and social services, and that more generally seek to support immigrants’ equal access to and full inclusion in the economy, as well as in the civic

⁷¹ *Id.* at 10.

⁷² *Id.* (first citing *Immigration Enforcement by State and Local Police: The Impact on the Enforcers and Their Communities*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 97–114 (Monica W. Varsanyi ed., 2010); and then citing Randy Capps et al., *Migration Policy Inst. Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, *MIGRATION POL’Y INST.* (Jan. 2011), <https://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement> (citation omitted)).

⁷³ KAROLY & PEREZ-ACRE, *supra* note 49, at 10.

⁷⁴ *Id.* (citing Genti Kostandini et al., *The Impact of Immigration Enforcement on the Farming Sector*, *AM. J. AGRIC. ECON.* 172 (2014)).

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 10–11.

⁷⁷ Immigration Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/287g> (last visited Sept. 18, 2017).

and cultural life of the community.^{77,78} In 2015, fourteen states had either no restrictive policies or had at least one unrestrictive policy that had been enacted by the state's legislature, and nine states had a mixed of unrestrictive and restrictive laws.⁷⁹

The unrestrictive laws adopted in these twenty-three states varied among different policy areas. The largest two areas where these laws were adopted were in education and health care. In 2015, twenty states offered unauthorized immigrants in-state tuition and five of those states offered financial aid to these students.⁸⁰ Regarding health care, eighteen states offered at least one health care benefit to undocumented immigrants in 2015.⁸¹ Other areas of policies where states have enacted unrestrictive laws are in driving and employment.⁸² Twelve states allowed driving benefits to undocumented immigrants⁸³ and two states implemented restrictions on E-Verify in 2015.^{84,85}

B. Sanctuary Cities

The unrestrictive laws that are most relevant to this Note are what have been deemed as laws establishing sanctuary cities. However, acquiring an exact number on the cities that are considered sanctuary cities is difficult because of the unclear definition of what is considered such a city. While the issue to create one definition for sanctuary cities will be further discussed later in this Note, it helps here to demonstrate the differing views states have regarding sanctuary cities.

President Trump issued a list of jurisdictions that had policies in place that did not allow them to cooperate fully with ICE detainees.⁸⁶ According to a list that looked at jurisdictions that did not fully cooperate

⁷⁸ KAROLY & PEREZ-ACRE, *supra* note 49, at 2.

⁷⁹ *Id.* at 19; *see, e.g.*, S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁸⁰ KAROLY & PEREZ-ACRE, *supra* note 49, at 13; *see, e.g.*, KAN. STAT. ANN. § 76-731a (2004) (deeming persons without a lawful immigration status as residents for purposes of tuition and fees).

⁸¹ KAROLY & PEREZ-ACRE, *supra* note 49, at 17; Cal. S. 1005, 2014 Leg., Reg. Sess. (Cal. 2014).

⁸² *See, e.g.*, S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁸³ *See, e.g.*, A.B. 60, 2013 Assemb., Reg. Sess. (Cal. 2013).

⁸⁴ *See, e.g.*, S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

⁸⁵ KAROLY & PEREZ-ACRE, *supra* note 49, at 12, 15 fig.2.3.

⁸⁶ *See* Inez Friedman-Boyce et al, *Sanctuary Cities: Distinguishing Rhetoric from Reality*, 61 BOS. B.J. 8, 9 (2017).

with ICE between the dates of January 28, 2017 to February 3, 2017, there were 118 jurisdictions that had such policies in place, and these jurisdictions were located throughout twenty-five states.⁸⁷ While many cities seemed to fall under President Trump's definition of what he considers a sanctuary city, thirty-three states have introduced bills that would limit or prevent sanctuary cities.⁸⁸ However, states like California are trying to take sanctuary cities a step further by becoming a sanctuary state.⁸⁹

While the focus of this Note is on sanctuary cities, the prior data demonstrates how states are actively seeking different ways to enact immigration policy change. It also sheds some light on why there is so much confusion at the federal level to determine what the best policy change would look like. The vast differences between state legislatures show that states are ready for change, but it also shows that states are unclear what that change should be. The remainder of the Note will focus on sanctuary cities, look at the constitutional arguments against the defunding of these cities through congressional legislation, and look at policy arguments in favor of sanctuary cities.

III. SANCTUARY CITIES SHIELDED BY PRECEDENT

A. Limitations to the Spending Power

On January 25, 2017, President Trump signed an executive order that threatened to take away federal grants from sanctuary cities.⁹⁰ The Executive Order should have come as no surprise because President Trump promised to do this very act in his campaign by making statements such as “Block funding for sanctuary cities . . . [there will be] no more funding. We will end the sanctuary cities that have resulted in so many needless deaths.”⁹¹ However, while it may not have come as a surprise, it still raised

⁸⁷ U.S. IMMIGRATION & CUSTOMS ENF'T, WEEKLY DECLINED DETAINER OUTCOME REPORT FOR RECORDED DECLINED DETAINERS JAN. 28 – FEB. 3, 2017, 23–33 (Feb. 3, 2017) [hereinafter WEEKLY DETAINER].

⁸⁸ See Reid Wilson, *Battle Over Sanctuary Cities Escalating*, THE HILL (Apr. 9, 2017, 3:28 PM), <http://thehill.com/homenews/state-watch/327655-battle-over-sanctuary-cities-escalating>.

⁸⁹ See Katy Steinmetz, *California Senate Pass 'Sanctuary State' Bill*, TIME (Apr. 3, 2017) <http://time.com/4724121/california-sanctuary-state-bill-passes-senate-immigration/> (last visited Sept. 24, 2017).

⁹⁰ Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017).

⁹¹ Tami Luhby, *Trump Condemns Sanctuary Cities, but What are They?*, CNN, <http://www.cnn.com/2016/09/01/politics/sanctuary-cities-donald-trump/> (last updated Sept. 1, 2016).

the question of whether the President could do this, and prompted lawsuits⁹² claiming that such actions violated the Tenth Amendment of the Constitution.⁹³ Unfortunately for President Trump, it is likely that the following Supreme Court precedent will not allow him to fulfill his campaign promise and will make it difficult for Congress to back President Trump by enacting legislation.

In *South Dakota v. Dole*,⁹⁴ the Supreme Court explored when federal funding could be withheld from states in order to further federal policy objectives.⁹⁵ The Court stated that under the spending power, “Congress may attach conditions on the receipt of federal funds, and has repeatedly employed [this] power.”⁹⁶ However, the Court held that this power was not unlimited and was subject to the following restrictions: (1) it must be in the pursuit of the general welfare,⁹⁷ (2) it must be done “unambiguously” allowing “the states to exercise their choice knowingly . . .,”⁹⁸ (3) that the conditions be related to the federal interest,⁹⁹ and (4) the conditions are not barred by other constitutional provisions.¹⁰⁰ Exploring these limitations on the spending power will provide the basis for the argument that Congress will not be able to enact legislation to defund sanctuary cities.

B. Unambiguous Conditions

The first requirement from *Dole* states that Congress’s condition placed on receipt of federal funding must be unambiguous.¹⁰¹ This is an issue because the very term “sanctuary city” does not have a legal definition.¹⁰² In the Executive Order, President Trump seemed to define

⁹² See, e.g., *County of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017) (examining whether the executive order against sanctuary cities violates the Tenth Amendment).

⁹³ Max Greenwood, *San Francisco Sues Trump. Admin. Over Sanctuary Cities Order*, THE HILL (Jan. 31, 2017, 2:35 PM), <http://thehill.com/blogs/blog-briefing-room/news/317147-san-francisco-files-lawsuit-against-trump-for-sanctuary-cities>.

⁹⁴ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁹⁵ *Id.* at 206–07.

⁹⁶ *Id.*

⁹⁷ *Id.* at 207.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 208.

¹⁰¹ *Id.* at 203.

¹⁰² See Rose Cuison Villazor, *What Is A “Sanctuary”?*, 61 SMU L. REV. 133, 135, 150 (2008) (discussing the different meanings of sanctuary cities).

sanctuary cities by citing 8 U.S.C § 1373¹⁰³, which states “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”¹⁰⁴ President Trump goes on in the Executive Order to state that cities that fail to comply with this law will be placed on a published list.¹⁰⁵ While the Trump administration has quit releasing this weekly list,¹⁰⁶ the first list included 118 cities.¹⁰⁷

Additionally, beside each of the locations’ names is a reason why each location is being considered to not be in compliance with the Executive Order.¹⁰⁸ Yet, none of the reasons go to withholding information regarding the immigration status of individuals.¹⁰⁹ Instead, the reasons all go to whether the police departments in these cities will honor ICE detainees, or if they will not inform ICE when an individual will be released.¹¹⁰ For example, the reasoning stated for Chesterfield County, Virginia being placed on the list is that “the county will notify ICE when a detainee is going to be released, however, they will not hold an individual for any additional time.”¹¹¹

While the Executive Order cites one statute regarding withholding information,¹¹² the list seems to be more interested in those cities that do not comply with ICE detainees.¹¹³ This creates a concern because this leaves cities confused about exactly what they need to do to comply and

¹⁰³ 8 U.S.C. § 1373 (2012).

¹⁰⁴ § 1373(a); Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

¹⁰⁵ Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

¹⁰⁶ See David Nakamura & Maria Sacchetti, *Trump administration suspends public disclosure of ‘sanctuary cities’*, CHICAGO TRIBUNAL (Apr. 11, 2017, 6:50 PM), <http://www.chicagotribune.com/news/nationworld/ct-public-disclosures-sanctuary-cities-20170411-story.html>.

¹⁰⁷ WEEKLY DETAINER, *supra* note 87, at 23–33.

¹⁰⁸ *Id.* at 23.

¹⁰⁹ See *id.* (listing the reasons as to why the city would not be in compliance).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 24.

¹¹² 8 U.S.C. § 1373 (2012).

¹¹³ See generally WEEKLY DETAINER, *supra* note 87, at 23–33 (providing the different reasons why the counties were determined to be sanctuary cities).

leaves police departments confused on why they are ending up on the list.¹¹⁴

The sheriff's department in Alucha County, Florida has a policy where they refuse to allow "agents from honoring federal requests to hold suspects for up to forty-eight hours for immigration agents"¹¹⁵ because as Sherriff Spokesman, Art Forgey, stated "courts have ruled that practice to be a violation of the constitutional due process rights of suspects."¹¹⁶ However, even though they refused to comply with the detainers, they had policies in place where they "immediately shared information on every inmate that enter[ed their] jails with the local office of the federal immigration enforcement agency"¹¹⁷ and "deputies pass along the name, fingerprints, country of birth, criminal charges and even the estimated release date of each person in its jails."¹¹⁸ Therefore, they were shocked to figure out that their sheriff department had been placed on the list and was being considered a sanctuary city.¹¹⁹

The Supreme Court has held that when Congress uses the spending power to enact a statute, then the statute acts as a contract.¹²⁰ This is because "in return for federal funds, the States agree to comply with federally imposed conditions"¹²¹ and the legitimacy of Congress's power "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"¹²² Accordingly, "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."¹²³ In our situation, police departments in cities, like Alucha County, will have federal funding withheld even when they think they are complying with the condition. Therefore, if Congress were to enact legislation, they would need to provide a more clarified definition of sanctuary city in order for cities to comply with the conditions.

¹¹⁴ See Alan Gomez, *A Multi-million Dollar Question: What's a Sanctuary City?*, USA TODAY (Apr. 27, 2017), <https://www.usatoday.com/story/news/world/2017/04/26/multi-million-dollar-question-whats-sanctuary-city/100947440/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (alteration in original).

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–77 (2012) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002) (internal citation omitted)).

¹²¹ *Id.* at 576.

¹²² *Id.* at 577 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

¹²³ *Id.* at 583 (alteration in original).

C. Determining the Funds

Whether sanctuary cities are clearly defined is just one issue future legislation would have to face because it would also need to provide better specifics on what exact funds would be withheld. For example, in *Dole*, the Supreme Court found that withholding funds regarding highways was directly related to the federal government's interest in stopping South Dakota from allowing people that were nineteen years and older to drink because of the issues it caused with drunk driving.¹²⁴ However, the Court reached a very different decision in *National Federation of Independent Business v. Sebelius*.¹²⁵

In *Sebelius*, the Supreme Court was examining whether Medicaid expansion under the Affordable Care Act¹²⁶ violated Congress's authority under the spending power.¹²⁷ Under the Affordable Care Act, if a state were to expand its Medicaid program they would receive additional funding.¹²⁸ However, if the state were to refuse to expand its program then not only the new funds, but all Medicaid funding were withheld from that state.¹²⁹ The states argued that Congress was not "simply refusing to grant the new funds to States that will not accept the new conditions" but also "threatened to withhold those States' existing Medicaid funds."¹³⁰ The Court held that this was unconstitutional because Congress cannot use conditions as a way to threaten other significant grants.¹³¹ Here, by withholding all Medicaid funding, the Court found that Congress was withholding "over ten percent of a State's overall budget"¹³² and considered this "economic dragooning that leaves the States with no real option but to acquiesce."¹³³

If Congress were to enact legislation they would need to determine the exact funds that would be withheld and these funds could not be so large as to leave the state with no other option. At this moment it is unclear what exact funds President Trump has planned to withhold from cities that

¹²⁴ *South Dakota v. Dole*, 483 U.S. 208–09 (1987).

¹²⁵ *Sebelius*, 567 U.S. at 519.

¹²⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

¹²⁷ *Sebelius*, 567 U.S. at 575–85.

¹²⁸ *Id.* at 576.

¹²⁹ *Id.* at 529–48.

¹³⁰ *Id.*

¹³¹ *Id.* at 539–40.

¹³² *Id.* at 542.

¹³³ *Id.*

he deems sanctuary cities. The Executive Order states that these cities “are not eligible to receive federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”¹³⁴ It is not clear if President Trump is attempting to withhold all federal grants or just grants that relate to law enforcement.¹³⁵ Attorney General Jeff Sessions stated that some sanctuary cities would lose grants that they receive from the Federal Department of Justice that go to state and local law enforcement.¹³⁶

However, there is still a question of which grants? The answer to this question is important for two reasons. First, if Congress were to pass a law that withheld all federal grants going to local law enforcement then the funds being withheld would likely not be reasonably related to the government’s interest. There is a grant titled “The Criminal Alien Assistance Program” that goes to local law enforcement to help house inmates during the deportation process in local jails.¹³⁷ It would likely be constitutional to withhold this grant from cities deemed sanctuary cities because there is a connection between the money and Congress’s concerns regarding undocumented immigration. However, the issue is that most sanctuary cities are already banned from receiving this grant.¹³⁸ This means that Congress would have to determine which Department of Justice grants go to immigration enforcement and see if they are connected to the government’s interest.

The second issue is that Congress will also have to explore the financial effects on the states if they are to withhold the grants. For example, Congress provided 342 million dollars in 2015 to just ten cities that are now being considered sanctuary cities.¹³⁹ According to one report, these funds made up ten percent of New York’s 80.5 million-dollar total

¹³⁴ Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

¹³⁵ *Id.*

¹³⁶ See Sari Howitz & Maria Sacchetti, *Attorney General Jeff Sessions Repeats Trump Threat that ‘Sanctuary Cities’ Could Lose Justice Department Grants*, WASH. POST (Mar. 27, 2017), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-repeats-trump-threat-that-sanctuary-cities-could-lose-justice-department-grants/2017/03/27/1fa38e2a-1315-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.72652fa56374.

¹³⁷ See Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Stalled Executive Order Might Affect Them*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities/>.

¹³⁸ *Id.*

¹³⁹ *Id.*

operating budget in 2015.¹⁴⁰ The ten percent is an important number because, as stated before, the Supreme Court in *Sebelius* found that withholding ten percent of the average states budget was acting as “gun to the head”,¹⁴¹ and compelling states to enact certain legislation.¹⁴² It is likely the Court would treat ten percent of a city budget a little differently than ten percent of a state budget.

However, states like California have already started looking into legislation that would make the state of California a sanctuary state.¹⁴³ This would mean that not only cities in California would lose their funding from the Department of Justice, but the entire state would lose its funding.¹⁴⁴ In 2015, California had a budget of almost 167.5 billion dollars¹⁴⁵ and received a total of 382.9 million dollars in grants from the Department of Justice.¹⁴⁶ However, the outcome of the Supreme Court’s decision on whether the Department of Justice’s grants make up a substantial amount of the state’s budget will likely also depend on the state, since the amount of funding each state receives differs.

D. Barred by Other Provisions

While the issues of making sure the conditions are not ambiguous and the funds are related to the government interest will be large hurdles for Congress to jump, there are still other issues Congress would face in passing such legislation. The third standard the Court has established to limit the spending power is that the conditions cannot be barred by other constitutional provisions.¹⁴⁷ The Supreme Court has not answered the question of whether ICE detainees are constitutional. However, it is likely that based off the Court’s opinion in *Arizona v. United States*¹⁴⁸ that there is a reasonable argument that these detainees would create constitutional issues.

¹⁴⁰ *Id.*

¹⁴¹ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 541 (2012).

¹⁴² *Id.*

¹⁴³ Steinmetz, *supra* note 89, at 1.

¹⁴⁴ *Id.* at 1–2.

¹⁴⁵ See *Governor’s Budget 2015-2016 Enacted Budget Detail*, CA.GOV, <http://ebudget.ca.gov/2015-16/Enacted/agencies.html> (last visited Sept. 22, 2017).

¹⁴⁶ Office of Justice Programs, *OJP Award Data*, U.S. DEPT. JUST., <https://ojp.gov/funding/Explore/OJPAwardData.htm> (last visited Sept. 22, 2017) [hereinafter *OJP Award Data*].

¹⁴⁷ See *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

¹⁴⁸ *Arizona v. United States*, 567 U.S. 387 (2012).

In *Arizona*, the Supreme Court held that a law allowing local police to arrest individuals where there is probable cause that the individual is removable was preempted by federal law.¹⁴⁹ However, what is more important is the reason the Court gave for reaching this opinion. The Court stated that “[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer,”¹⁵⁰ such as when “the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government.”¹⁵¹ The Court points out that these agreements are sufficient to allow local police to act as federal agents because “the agreements must contain written certification that officers have received adequate training to carry out the duties of an immigration officer.”¹⁵² The Court does further state that there are times when local police can cooperate with the federal government by “participat[ing] in a joint task force with federal officers, provid[ing] operational support in executing a warrant, or allow[ing] federal immigration officials to gain access to detainees held in state facilities.”¹⁵³ However, the Court fails to take the next step and explore the issues that arise when local police cooperate with the federal government in one of these manners, but are still acting more like federal agents. For example, while it may be constitutional to provide operational support to DHS-ICE executing a warrant,¹⁵⁴ is it constitutional to provide support by executing an ICE detainer? Or, is it constitutional to allow DHS-ICE access to detainees that local police hold even if there is no state law reason to hold the person?

In *Arizona*, the Supreme Court held that the Arizona’s law requiring officers to determine the immigration of anyone they stop, detain, or arrest was not preempted by federal law.¹⁵⁵ Yet, they reasoned this on the fact that there was no indication that this law would require prolonged detention.¹⁵⁶ The Court held that the law could be read by state courts to avoid any prolonged detention or warrantless arrests,¹⁵⁷ but the Court made sure to explain that its opinion did not foreclose additional challenges to the

¹⁴⁹ *Id.* at 406.

¹⁵⁰ *Id.* at 408.

¹⁵¹ *Id.*

¹⁵² *Id.* at 409.

¹⁵³ *Id.* at 410.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 457 (Alito, J. concurring in part and dissenting in part).

¹⁵⁶ *Id.* at 411.

¹⁵⁷ *Id.* at 410.

law after it went into effect.¹⁵⁸ This would logically mean that if individuals do suffer prolonged detention or warrantless arrests by local police officers trying to determine their immigration status, then those actions would be unconstitutional. This is an issue for local police officers that would be forced to comply with ICE detainers.

Further, there is the issue of whether ICE detainers are warrants. ICE detainers are typically issued by authorized immigration officials and they request for local police officers to hold the person for up to 48 hours.¹⁵⁹ This explanation of an ICE detainer demonstrates that it could not be a warrant because as the Supreme Court has stated, “warrants must be issued by neutral, disinterested magistrates.”¹⁶⁰ If the ICE detainers are not warrants, then when an officer detains a person based off of the ICE detainer they are likely making a warrantless arrest.¹⁶¹ In order to demonstrate that an individual’s immigration status could be checked without there being any prolonged detainment, the Court provides the example of a drunk driver who is arrested and while being detained at the jail his immigration status is checked.¹⁶² The Court states that this would not be prolonged detainment because the individual was already being detained for the original charge of driving while under the influence,¹⁶³ but the Court does not take it to the next step. What happens if, after his immigration status is checked, ICE issues a detainer but a judge releases the person on his own recognizance? If the local police decide to continue to hold him in accordance with the ICE detainer, this may be a separate arrest and it would be based off a warrantless document. According to the reasoning in *Arizona*, this would not be constitutional.¹⁶⁴

Therefore, if Congress enacts a law requiring states to comply with ICE detainers or face losing funding, it will likely face an issue based off of the requirements that the Supreme Court set forth regarding Congress’s spending power.

¹⁵⁸ *Id.* at 415.

¹⁵⁹ See *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf.

¹⁶⁰ *Dalia v. United States*, 441 U.S. 238 (1979).

¹⁶¹ *Warrantless Arrest*, BLACK’S LAW DICTIONARY (5th ed. 1979).

¹⁶² *Arizona*, 567 U.S. at 414.

¹⁶³ *Id.*

¹⁶⁴ See *id.* (explaining that *Arizona*’s law is permissible because there is no evidence that the law will cause prolonged detainment of individuals).

IV. POLICY ARGUMENTS

A. Immigration Affects States

While Supreme Court precedent seems to back the constitutional arguments that will be argued by sanctuary cities, there is still the issue that immigration may simply just be different. This is based off of the Court's interpretation of the Constitution that provides the federal government broad power over immigration.¹⁶⁵ In *Arizona*, the Court once again showed its dedication to allowing the federal government to have such broad power over immigration by reasoning "[t]he federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."¹⁶⁶ The Supreme Court actually went as far as to hold for the first time that executive enforcement policies could preempt state law.¹⁶⁷

If the Court used this same rationale regarding sanctuary cities, then the Court could find that executive enforcement policies have changed and now cities and states that have laws protecting sanctuary cities are preempted by the new executive enforcement policies. However, as the rest of this Note will argue, the Court should allow cities and states more deference to enact unrestrictive laws and policies.

Restrictive and unrestrictive immigration laws passed by states have one thing in common: both are seeking to address the issue of undocumented immigrants in their communities. However, the two types of laws are also very different because one set is trying to restrict the legal rights of undocumented immigrants,¹⁶⁸ while the other provides additional legal rights and protections to that population.¹⁶⁹ This part of the Note will explain why states should have the right to handle immigration the way they feel best for their communities.

¹⁶⁵ *Id.* at 394–95.

¹⁶⁶ *Id.* at 395 (alteration in original).

¹⁶⁷ *See id.* at 397–98 (discussing how important Homeland Security enforcement policies are to the federal laws of immigration).

¹⁶⁸ *Id.* at 399–412 (discussing the many different aspects of Arizona's laws and how they restrict immigrants).

¹⁶⁹ *See* KAROLY & PEREZ-ACRE, *supra* note 49 (explaining the different unrestricted laws states have enacted).

It is imperative to demonstrate why states have an economic incentive to have a say regarding immigration law. This may seem obvious, but the Supreme Court has seemed to push back on this idea by giving almost full control of immigration to the federal government.¹⁷⁰ Yet, there are a number of studies that demonstrate the local impact that immigration has on communities.¹⁷¹

States should have a say in immigration related affairs due to the differing populations in each state. Between the years of 2011 to 2013, twenty-seven percent of California's population was made up of foreign-born individuals, while West Virginia's population was only two percent foreign-born individuals.¹⁷² These numbers are important because they demonstrate that, simply based on numbers, the states differ in how immigration has impacted that state. It is only logical that a state that has a higher percentage of foreign-born individuals would be impacted differently than a state with a very low percentage of foreign-born individuals.

The study also provided a breakdown of the effect immigrants had on the economy in their local communities.¹⁷³ The test broke their studies into three categories looking at first-generation immigrants (individuals who were born abroad and are noncitizens or naturalized citizens),¹⁷⁴ second-generation immigrants (individuals that were born in the United States and have at least one foreign-born parent),¹⁷⁵ and third-plus generation immigrants (individuals born in the United States with two native born parents).¹⁷⁶ While this Note examines sanctuary cities that deal with undocumented immigrants, this study still provides insight on the differing economic effect all immigrants, noncitizens and naturalized alike, have on their local communities. The study found that “[f]irst generation

¹⁷⁰ See *Arizona*, 567 U.S. at 394–95.

¹⁷¹ See, e.g., Franklin J. James, Jeff A. Romine & Peter E. Zwanzig, *The Effects of Immigration on Urban Communities*, 3 CITYSCAPE 1 (1998) (examining the impact of immigration in major urban hubs); see also George Borjas, *Immigration and the American Worker*, CTR. IMMIGR. STUD. (Apr. 9, 2013), <https://cis.org/Report/Immigration-and-American-Worker> (examining the fiscal and labor market impact of immigration); David Card *Immigrant Inflows, Native Outflows, and the Local Market Impacts of Higher Immigration*, 19 J. LAB. ECON. 22 (2001) (using census data from 1990 “to study the effects of immigrant inflows on occupation-specific labor-market outcomes.”).

¹⁷² See THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 381–442 (Francine D. Blau & Christopher Mackie eds., 2017).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 382.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

independent person units . . . cost the states on net about \$1,600 each. In contrast, second generation independent person units . . . contributed on net to state and local budgets about \$1,700 each, and third-plus generation independent person units . . . contributed on net to state and local budgets about 1,300 each.”¹⁷⁷ These numbers demonstrate that the economic impact immigrants have on their communities will likely vary depending on the type of immigrants in that community. For example, if a community had more first generation immigrants then the community would likely be losing money, while if the community had more second and third-generation immigrants the community could be making money.

At first glance it would seem obvious then that states or communities with first-generation immigrants would want stricter immigration laws because they would see immigrants as a cost. However, this may not always be the case because states could see the future revenue these individuals could generate. If first-generation immigrants begin having children, then their children become second and third-generation immigrants, and second and third-generation immigrants actually provide increased revenue for their communities. Therefore, states are willing to incur higher costs in the short term in order to reap future benefits from revenue generated by second and third-generation immigrants.

The important aspect of that analysis is that the states get to decide how they want to handle the situation. Just as some states may decide they want to incur costs now to receive the benefit later from second and third-generation immigrants, other states may not be able to pay now and can only see immigrants as an economic burden on their communities. This is why it should be the states’ choice on how to handle what they should do because ultimately the states are the ones being impacted.

B. Limitation Differences Between Restrictive and Unrestrictive Laws

While states should have discretion, this discretion should be limited. The exact way to limit such discretion is a complex question that should likely be independently researched. Yet, one line that could be drawn would be between states that create restrictive policies¹⁷⁸ and states that create unrestrictive policies.¹⁷⁹ At first, this distinction may seem biased toward a more pro-immigrant policy lacking any constitutional backing;

¹⁷⁷ *Id.* at 406.

¹⁷⁸ See *supra* Part II.

¹⁷⁹ See *supra* Part II.

but if one is to examine one reason why immigration has become a federal issue then the distinction between restrictive and unrestrictive laws becomes clearer.

In *Arizona*, the Supreme Court stated, “[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the fifty separate States.”¹⁸⁰ While the Court stated this in order to rationalize broad federal power,¹⁸¹ it also provides sanctuary cities an argument as to why restrictive policies should be treated different than unrestrictive polices.¹⁸² As stated before, restrictive polices add additional restrictions on top of federal immigration laws.¹⁸³ If all fifty states implemented different restrictive policies, then foreign governments would not have the confidence that their nationals would be safe while here in the United States.¹⁸⁴ The safety of these people would depend on which state they visited while in the country. Yet, the same cannot be said if there were fifty different unrestrictive policies.

Just one example using current federal and state legislation is that under federal law it is illegal for someone to hire an unauthorized alien, and a person or business that violates this law can face criminal penalties.¹⁸⁵ The federal government has created the use of a system called E-Verify for businesses to use in order to check a potential employee’s immigration status.¹⁸⁶ What is important about this federal statute is that it does not place criminal penalties on the unauthorized alien searching for employment. Therefore, regarding foreign countries with a national here in the United States, they are under the assumption that their nationals will not suffer criminal penalties for searching for employment.¹⁸⁷ Some states, such as California, have added protections by enacting laws that limit the use of E-Verify and have provided greater access to employment

¹⁸⁰ *Arizona v. United States*, 567 U.S. 387, 395 (2012).

¹⁸¹ *Id.* at 394–95.

¹⁸² See generally Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2013) (discussing the federalist dichotomy as it pertains to immigration enforcement).

¹⁸³ See *supra* Part II (discussing the different reactions by states).

¹⁸⁴ See *Arizona*, 567 U.S. at 394 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”) (emphasis added).

¹⁸⁵ 8 U.S.C. § 1324a(a)(1)(A), (a)(2), (e)(4), (f) (2012).

¹⁸⁶ § 1324a(b).

¹⁸⁷ There are other penalties that the unauthorized alien may suffer. See § 1227(a)(1)(c)(i) (establishing that unauthorized aliens may be removed from the country for seeking work).

for undocumented immigrants.¹⁸⁸ While the federal government may not approve of such laws, this would not create any additional concerns for foreign nations because it would be seen as a benefit for their nationals and not as an additional concern.

On the other end of the spectrum are states like Arizona that have attempted to enact laws that create criminal penalties for undocumented immigrants who search for employment.¹⁸⁹ These more restrictive laws would create confusion for foreign countries because the countries would not know the severity of punishment their nationals may suffer if they searched for a job while in the United States.

The federal government could argue that it is likely that unrestrictive laws could also cause confusion for foreign nationals. However, there is a difference in the foreign national not knowing that there are extra penalties, compared to the foreign national not knowing that there are extra protections. This really comes down to the common logic that people would rather be surprised by a good surprise versus being surprised by a bad surprise. Additionally, states that have attempted to implement restrictive laws are not left without any other alternatives because they still have the option to strictly enforce the federal laws. Sanctuary cities have simply chosen not to enforce such laws by not working with ICE officers. If states want to handle immigration differently, they still have the option to work with ICE officers in an attempt to cut down on the number of undocumented immigrants in their state.

Additionally, there would be limits on the type of unrestrictive laws a state could enact. There are laws already in place that constrict states and the unrestrictive laws they seek to pass.¹⁹⁰ One such law is 8 U.S.C. § 1373,¹⁹¹ which makes it unlawful for states or local governments to restrict the sending or receiving of information from the Immigration and National Service.¹⁹² Under this law, states and cities could choose not to reach out to ICE and implement policies to limit local officers from questioning people concerning their immigration status because that would not

¹⁸⁸ CAL. LAB. CODE § 2814 (2016).

¹⁸⁹ See *Arizona v. United States*, 567 U.S. 387, 400 (2012) (discussing Arizona's law that made it a state misdemeanor for undocumented immigrants to apply for work).

¹⁹⁰ See Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L. Q. 939, 957–60 (1994).

¹⁹¹ 8 U.S.C. § 1373 (2012).

¹⁹² *Id.* § 1373(a).

require these officers to withhold any information.¹⁹³ However, under this law, states could not enact policies that told officers to ignore inquiries from ICE because this would restrict the officer from sending requested information to ICE.¹⁹⁴ The main difference between these examples is that the first one provides immigrants protection by refusing to provide additional help to the federal government, while the second one actively attempts to hinder ICE investigations.

Another example could be if states or cities attempted to hide undocumented immigrants in churches in order to protect them from ICE raids in the community. This would be the state or city actively attempting to hinder ICE agents from finding undocumented immigrants. This prior example demonstrates one main limitation that the Supreme Court could place on states attempting to enact unrestrictive polices, which is that laws that passively provide protection to immigrants should be treated differently than laws that actively hinder federal officers.

Therefore, courts should provide more deference to unrestrictive laws because they do not contradict the policies behind the federal government having power of immigration, they do not limit other states the ability to work with ICE officers, and there are already boundaries that would limit the scope of unrestrictive policies cities and states could adopt.

C. *Defunding the Ability to Serve and Protect*

An additional policy argument that sanctuary cities or states may argue is the fact that Congress would be defunding police departments. There is likely a policy concern with removing money from police departments and hindering their ability to keep people safe. As stated earlier, if California lost all the funding it received from the Department of Justice grants, it would only be losing a relatively small portion of its budget.¹⁹⁵ However, even if it is only a small percentage of the funding being withheld, it is still almost \$400 million being withheld from police departments in California.¹⁹⁶

¹⁹³ See *id.* (discussing how this local and state procedure would not be in violation of the statute because it does not keep information from a government entity or official).

¹⁹⁴ See *id.* (discussing how this procedure would violate the statute because it withholds information from a government entity or official).

¹⁹⁵ See *supra* Part III (discussing the amount of funding the department of justice provides to California).

¹⁹⁶ See *OJP Award Data*, *supra* note 146.

Withholding any funding from police departments not only affects immigration, but affects all citizens of California. While the federal government may have full power of immigration, this power should not be so broad as to allow the federal government to place the citizens of a state in danger. Withholding funding from police departments would limit the abilities of that department to adequately protect the citizens of that state by removing funds that could go to hiring more officers, purchasing equipment, or enabling officers to fully investigate crimes. Again, these resources do not only affect the undocumented immigrants in that community but also affect the citizens of that community.

The Supreme Court in *Dole* did find that withholding five percent of South Dakota's highway budget was not enough to be coercive.¹⁹⁷ However, there is likely a difference between withholding funds that go to building highways and funds that go to police departments. It is true that defunding highways could put citizens in danger by causing difficult driving conditions. However, defunding police departments would put citizens in danger in every aspect of life, including when they were driving. While the percentage of funding being withheld from sanctuary cities is similar to that in *Dole*,¹⁹⁸ the program losing the funding is more similar to that in *Sebelius*.¹⁹⁹ This is because just as defunding state Medicaid programs could have ultimately put peoples' lives in jeopardy, defunding police departments could do the same. Therefore, the Court should focus more on the impact that defunding police departments will have on citizens than on the percentage of money the state may lose.

States and cities likely put forth strong arguments based off of court precedent, but the policy arguments will likely provide these states and cities some additional support. While there are many more arguments states and cities can and will make, these arguments just presented help demonstrate the real issues these communities will have to contend with if federal funding is withheld.

CONCLUSION

It is probable that the Supreme Court will have to decide in the near future whether President Trump's Executive Order defunding sanctuary cities is constitutional. However, it is unclear whether Congress will

¹⁹⁷ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

¹⁹⁸ *Id.*

¹⁹⁹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–85 (2012).

attempt to support the President's goal by coming to his rescue and passing legislation that would have a similar effect on sanctuary cities. What we can expect is that any future action will likely face disapproval from states that see immigrants as a benefit to their communities. The outcome between these communities and the federal government may not be crystal clear, but at the very least these places deemed sanctuary cities will have court precedent and policy arguments that favor a successful outcome.

However, the success of these arguments is not at all certain. This is because, as history demonstrates, immigration is a highly complex area of law that has struggled to fit in perfectly with the constructs of our Constitution. This is likely because of the very limited instructions the Constitution provides regarding immigration. While the Court has been clear that the federal government has control over immigration, these rules become blurry once immigration intermingles with other areas of law. It may be clear that the federal government determines who gets to enter the country, how long they get to stay, and who ultimately gets to make the United States their home. However, who governs what happens to these individuals once they are in the country presents different issues that are not as clear.

One such issue—which this Note has attempted to confront—is the issue of when states want to provide these individuals with more protection than afforded by the federal government. As this Note has pointed out, the Supreme Court's precedent should protect cities and states that wish to provide these additional protections. While Congress may have complete control over immigration, precedent has placed limitations on the different powers Congress would use in order to carry out this control. The example presented in this Note is the spending power. If Congress does attempt to create laws aimed at defunding sanctuary cities they will be acting under this power. However, as argued, this power is limited and Congress would likely be overstepping these limitations. The Court will be left to determine whether they should ignore precedent that would traditionally control such constitutional questions or begin placing limits on Congress's power regarding immigration.

Yet, precedent will not be the only issue that further complicates future decisions on immigration. The Court will also have to deal with the policy implications its holdings will have on not only the undocumented immigrants in this country but the citizens as well. As immigration law continues to intermingle into other areas of law, it also intermingles into the daily lives of the citizens of this country. If sanctuary cities and states

are able to demonstrate that their laws not only benefit the undocumented immigrants but also the citizens of these communities, the Court will need to determine whether policy dictates that states should have more power. However, how much power will likely be unclear. As this Note attempts to draw just one line between restrictive and unrestrictive policies, these future cases will clearly call for more line drawing.

The history of immigration law demonstrates that this has never been a very clear area of the law. Unfortunately, the recent discourse around the country likely indicates that we are far from clarity because states will likely continue to step in and create laws as President Trump continues to sign executive orders. As this power struggle continues, we will have to wait and see if Congress will finally step in and try to take back control, but even that may not work because precedent and policy may trump Congress's desire.