

# *American Immigration Microfederalism: Sanctuaries, Restrictionist Jurisdictions, and Administrative Conflict*

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This article explains the rise of microfederalism in migration and integration policy in the United States. Power over immigration is traditionally assigned to the federal government, but the States and localities play central roles in providing services to unauthorized migrants due to gaps in congressional policy. Microfederal jurisdictions have responded pragmatically, according to their different policy preferences. Restrictionist jurisdictions seek to participate formally in federal enforcement, supplement enforcement with their independent measures, or by litigation realign

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federal enforcement priorities to match their own. Sanctuary jurisdictions employ affirmative and defensive policies to integrate migrants and shield unauthorised migrants' data against federal discovery. Policy competition and preference maximization favour non-interference with restrictionist and sanctuary microfederal policies. Nonetheless, the Obama administration challenged restrictionist jurisdictions' policies by federal pre-emption litigation. Similarly, the Trump administration has asserted federal supremacy and will seek federal pre-emption of sanctuary jurisdictions' integrative projects by resorting to broad claims of federal power at odds with local experimentation.

*Keywords:* immigration, federalism, United States, microfederalism, pre-emption, restrictionist jurisdiction, sanctuary jurisdiction

## 1. Introduction

The United States and its constituent fifty States are attempting to manage mass migration from the failed, or failing, states of the global South. In 2015, an estimated 11 million unauthorised migrants lived in the United States (Krogstad, Passel & Cohn, 2017). During fiscal year 2015, an additional 1.2 million unauthorised migrants either unlawfully crossed the border without inspection or admission by immigration officials (674,000, or 56%), or overstayed their authorised stay (527,127, or 44%) (Baker & Williams, 2017). Those migrants entering without inspection mostly came overland from Central America (Baker & Williams, 2017). Half have not completed high school, approximately a quarter live in poverty, and increasingly, they are minors, unaccompanied by any adult (Lesser & Batalova, 2017). Collectively, these migrants' needs for basic services strain federal, state, and municipal governmental resources and create a domestic humanitarian crisis.

States and their localities address these burdens differently. Some jurisdictions adopt restrictionist policies and participate in immigration enforcement. Others, such as "sanctuary cities", favour integrationist policies and sometimes decline to cooperate with federal migration policy.

At the federal level of government, different presidential administrations have favoured, or at least tolerated, integrationist policies while others have pressed for restrictionist policies. Predictably, this flip-flopping treat-

ment by different federal administrations has resulted in a non-uniform approach toward integration and, effectively, toward immigration itself. Because States, as well as their counties and cities, occasionally refuse to coordinate their policies with federal enforcement (or with one another), they instead resort to the courts to defend their prerogatives.

In the United States, migration policy has frequently triggered legal conflict between the federal government and its subsidiary sovereigns. During the tenure of President Barack Obama, the federal government and south-western Border States litigated their disputes about how to handle migrants, resulting most prominently in *Arizona v. United States* (2012) and *United States v. Texas* (2016), but also in a host of other cases challenging municipal migrant regulation. These cases tested state authority to regulate migrant integration when the United States adopted policies under the federal Immigration and Nationality Act (INA) that facilitated migrant entry as well as access to public services and the domestic labour market. Obama championed federal supremacy in migration and integration policy. The Border States challenged federal policy on the grounds that it imposed costs on state government; they asserted their competing authority to regulate.

In late 2016, federal governmental positions about immigration federalism flip-flopped in service to policy preferences. Candidate Donald Trump campaigned on his populist, restrictionist immigration platform that deployed xenophobic tropes about migration from America's southern neighbours (Washington Post, 2015). In addition to bemoaning unauthorised Latin American migration, Trump campaigned against travel to the United States by Muslims (Berenson, 2015). Finally, Trump promised to "end the sanctuary cities" (Los Angeles Times, 2016). Since election, President Trump, like Obama, has pressed for broad federal power to regulate immigration and pre-empt sub-federal governments, but this time in a restrictionist vein. Within days of assuming office, Trump threatened to punish "sanctuary jurisdictions" (Executive Order No. 13768, 2017). Conservatives, who formerly favoured state and local authority, now defend expansive federal power. Progressives, out of power in the federal government, have rediscovered federalism's virtues.

This article examines the contested allocation of migration- and integration-related administrative authority. It describes and critiques the phenomenon of municipal migrant regulation, or localities that pursue their own microfederal migration and integration policies that may be consistently at odds with both federal and state policies. At one end of the political spectrum, restrictionist localities adopt policies discouraging resettlement and integration, which may defeat federal policy. At the spectrum's other end, "sanctuary cities" pursue migration-facilitating policies,

which may impede federal enforcement of the INA. The relative political stability of localities, born from their lack of political competitiveness, suggests a unique role for some of them. They may provide communities that facilitate durable migrant integration in a federal system, particularly compared to broader, politically competitive jurisdictions prone to volatile change and less hospitable to an integrative project that by its nature must span transient political administrations.

## 2. The Possibility of U.S. Immigration Federalism

Federalism with respect to migration and integration policy results from the non-unitary character of the U.S. political system. Each of the United States exists independently of the federal government; no State depends on the federal government for its ongoing existence or its continued exercise of state powers. Indeed, a constitutional presumption of powers favours the States, at least as a textual, structural, and original historical matter: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. (U.S. Const. amend. X). Apart from delegated powers, the States retain the residuum of sovereign power.

The States’ authority, however, is subject to an important caveat. The U.S. Constitution’s Supremacy Clause pre-empts state law that is “contrary” to federal authority: “This Constitution, and the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding* [emphasis added]”. (U.S. Const. art. VI, cl.2).

This pre-emptive model permits the States to regulate concurrently through properly enacted federal law until the federal government displaces them.<sup>1</sup> Until Congress acts, the States retain legislative authority in areas of concurrent State-federal power, such as integration policy, except for those powers expressly denied them (U.S. Const. art. I, § 10).

Once Congress legislates, federal enactments may pre-empt contrary state regulatory authority. Pre-emption’s scope depends on Congress’s

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<sup>1</sup> A limited exception is the “dormant” Commerce Clause jurisprudence, which allows pre-emption without any action by the U.S. Congress (*City of Philadelphia v. New Jersey*, 1978).

intent, as expressed by the legislation's enacted text, together with the effects of the States' actions. *Express pre-emption* occurs when legislation explicitly states a congressional intention to displace State authority within an area (Shaw v. Delta Air Lines, Inc., 1983). Alternatively, a litigant can persuade a judge that Congress *implied pre-emption* of contrary state law. Implied pre-emption occurs on one of two ways. First, a court may infer *field pre-emption* when a statute's regulatory scheme is so pervasive as to "occupy the field"—i.e. Congress intended to pre-empt by its significant federal legislative activity within a field (Arizona v. United States, 2012). Alternatively, a court may infer *conflict* or *obstacle pre-emption*, because state law conflicts with, or stands "as an obstacle to[,] the accomplishment and execution of the full purposes and objectives of Congress" (Arizona v. United States, 2012). Either way, federal law trumps contrary state law.

### 3. The Centrality of States and Localities to Migration and Integration Policy

In theory, legal authority to control U.S. borders and admit migrants belongs to the federal government. Congress lacks any formally enumerated power to regulate immigration (U.S. Const. art. I, § 8), but the U.S. Supreme Court recognises a "broad, undoubted power over the subject of immigration" and a plenary congressional power to exclude foreigners, characterising this power as an "incident of sovereignty" (Chae Chan Ping v. United States, 1889). This atextual authority assigns the federal government the primary role in regulating migration. In practice, however, sub-federal units are central to U.S. immigration enforcement policy for three reasons. First, the United States remains a destination country that experiences high levels of illegal migration. Large numbers of migrants attempt to cross the lengthy U.S.–Mexico border without any federal immigration authority inspecting or admitting them. These individuals migrate to the American interior, beyond traditional border state destinations, to areas where migrants have previously travelled and been hired as unauthorised, inexpensive, "brown-collar workers" (Saucedo, 2006). In addition, migrants lawfully enter the country every day with "non-immigrant" visas, expressing their intention to remain only temporarily. Federal officials inspect and admit these migrants. When migrants remain beyond authorisation, they become "removable" in federal civil proceedings.

Second, Congress authorises an immigration-enforcement budget that is insufficient to fund removal operations. The Obama administration esti-

mated that the authorised budget supported the removal of fewer than 400,000 aliens annually (Thompson, 2014). This number represented only 4% of the 11 million unauthorised migrants in the United States. In 2015 alone, 1.2 million new unauthorised migrants either arrived in the United States without inspection and admission or overstayed their authorisation to remain (Baker & Williams, 2017). Thus, each year many unauthorised migrants remain in the country.

Third, congressional efforts to regularise these unauthorised migrants' legal statuses have repeatedly deadlocked (S.1291, 2001). A few might successfully secure relief under existing INA provisions, for example, as refugees. Millions, however, remain ineligible for any form of relief. Because they violate the INA's civil provisions by staying in the country, they remain in constant legal jeopardy of removal by the federal government. As a result, they disappear into the woodwork.

These three phenomena create a gap where the States and their subsidiary units – counties, cities, and smaller localities – enter the immigration federalism story. The federal immigration legislative gap (1) permits millions of out-of-status persons to remain in country, a majority of whom entered without inspection and admission, and yet simultaneously (2) leaves them no path to durable legal status. Thus, through its policy default, Congress places the States and their localities in a predicament: the migrants are here unlawfully and are not going anywhere, but require services. This responsibility falls to the States, which provide most direct governmental services in the United States. Indeed, in *Plyler v. Doe* (1982), the U.S. Supreme Court ruled that States *must* provide unauthorised migrant children access to public education, even though the federal government can permissibly discriminate against aliens (*Mathews v. Diaz*, 1976). In fact, any distinction that sub-federal units might draw between a citizen and a lawfully admitted alien is subject to heightened judicial inquiry (*Graham v. Richardson*, 1971).<sup>2</sup> Consequently, as a matter of legal risk management, local government may find that inclusive integration policy best satisfies constitutional non-discrimination principles, avoids civil rights violations, and humanely addresses the fallout of Congress's non-policy "policy".

As a result, States and localities become significant policymakers in fashioning migrant integration policy through their provision of governmental

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<sup>2</sup> *Plyler* might have been read as generally subjecting to scrutiny any State-level distinction between citizens and unauthorised aliens. In *Kadramas v. Dickinson Pub. Sch.* (1988), the Court clarified *Plyler* applied only to denial of public education.

services to aliens. For instance, what a locality emphasises educationally and how it achieves those goals, determines the extent to which migrant integration is advanced or impaired. If successful, a state’s educational integration policy could assist assimilating migrants with English literacy and cultural capital.

But in addition to integration policy, some States may effectively end up also framing migration policy, even if formally that is characterised as “unquestionably exclusively a federal power” (De Canas v. Bica, 1976). States and localities might select from a menu of policies to address unauthorised migrants (Tables 1 & 2). They might decide that not inquiring about a child’s immigration status best promotes integration. This non-inquiry policy may facilitate integration but also makes far less likely the federal identification and removal of unauthorised migrants. Similarly, localities that learn an alien is unauthorised but shield him or her from federal discovery by declining to alert federal authorities under a non-cooperation policy, also participate in a migration (facilitating) policy. Finally, jurisdictions that cooperate in the removal of criminal aliens who prey on other unauthorised migrants (e.g. traffickers) also participate in migration, and not just integration, policy. In these cases, no crisp line divides “integration” and “migration” policies when jurisdictions adopt integration policies for unauthorised migrants (Rodríguez, 2008, p. 571, 619). These jurisdictions participate in immigration federalism in an area only inaccurately described as “exclusively” federal.

Table 1: “Restrictionist” Jurisdiction Policies

Strategy	Description of state or local government strategy
<i>Direct enforcement strategies</i>	
INA § 287(g) agreement	Enters an ICE “memorandum of agreement” to authorise state and local participation in immigration enforcement
Responds to DHS detainer requests or federal requests for notification	Cooperates with DHS civil detainer requests, holds migrants until they are transferred to ICE; alternatively, cooperates with DHS requests for notification of pending release of arrestees; variations include cooperation when identified migrant was convicted of a serious offense
State criminalisation	Either adopts new state immigration-related offenses or provides new state penalties for what was formerly solely a federal crime

Inquiry/collection policies	Investigates migrant status to assist federal authorities with enforcement
Accessing policy	Directs state employees to access federal databases to determine individuals' immigration status
<i>Indirect enforcement strategies</i>	
Renter occupancy permitting	Requires prospective renters to obtain permits that issue after status verification; often coupled with landlord sanctions if continued rental to unauthorised migrant
Landlord and employer sanctions	Penalizes third parties, such as landlords and employers, for renting to or hiring unauthorised migrants
Government contractor certifications	Requires government contractors to hire only work-authorized employees
English as official language	Adopts English as official language for governmental business; some jurisdictions try "English only"
Affirmative litigation with federal executive	Litigates to set, redirect or block executive implementation of federal migration policy
<i>Denying benefits</i>	
Alien benefit denials	Limiting/prohibiting benefits to aliens where federally permitted

Source: Compiled from U.S. Department of Homeland Security (2017) and reported cases, including Alabama (2012); Alexander (2001); Arizona (2012); Chamber of Commerce (2011); Keller (2013); Korab (2014); Lozano (2013); South Carolina (2012); Texas (2016).

Table 2: "Sanctuary" Jurisdiction Policies

Strategy	Description of state or local government strategy
<i>"Defensive" strategies</i>	
Non-inquiry/non-collection/"don't ask" policies	Prohibits (or limits) law enforcement from collecting migrant data in the first place, or otherwise requesting that information, to prevent sharing with federal authorities
Non-reporting/"don't tell" policies	Prohibits sharing of previously collected migrant information requested by DHS
Non-participation in federal enforcement	Declines to enter a DHS memorandum of agreement under INA § 287(g) to authorise state and local participation in immigration enforcement
Non-cooperation with warrantless detainer requests or federal requests for notification	Prohibits cooperation with warrantless civil detainer requests from DHS with some jurisdictions allowing detainers for previously convicted violent felons

Non-accessing	Prohibits employees from accessing federal data provided to States about individuals' immigration status
<i>"Affirmative" strategies</i>	
Governmental accessibility	Provides governmental services without regard to immigration status, including education, driver's, marriage, and local business licenses; may also provide interpretation services and legal counsel in federal removal proceedings
Affirmative litigation with federal executive	Litigates to set, redirect or block executive implementation of federal migration policy
Migrant advocacy—legislative & executive	Advocates for, and provides aide with, migrant's regularisation of federal immigration status; lends its authority in the public policy process to secure adoption of favourable migrant rights policies at other levels of government
Prosecutorial discretion—forbearance	Exercises sentencing discretion to minimise collateral "cimmigration" consequences
Prosecutorial discretion—prioritization	Exercises case selection discretion to focus enforcement on exploitation targeting migrants
Economic empowerment	Encourages programs to assist migrants with participation and self-sufficiency in local markets

Source: Compiled from Garcia (2015); Graber (2016); Hodess (2017); Horowitz (2016); Kandel (2017).

## 4. The Case for Microfederalism

The potential for federalism conflicts extends beyond binary federal-State disputes. Microfederalism, or governmental autonomy at highly localised levels of governance, enables far more diverse expressions of policy preferences on a left-right spectrum than occur in a unitary or dual-federal model. Counties and cities vested with discretion may adopt policies that are consistent with local majoritarian preferences, but potentially at odds with broader majorities, both within their host States and within the country as a whole. Under a system that allows robust microfederalism, both voters in enforcement-minded restrictionist jurisdictions and migrant-friendly sanctuaries can have their policy preferences satisfied, albeit at decentralised, localised levels of government - at least, until pre-empted.

This possibility of local autonomy, policy competition, and migrant (or citizen) jurisdictional exit for other locales raises two important questions

about policy heterogeneity: (1) when should it be preserved against countervailing demands for uniformity and (2) why should it be preserved? At the sub-state level, the normative question about preservation proves particularly important because few federal constitutional constraints are available to help localities resist *State* legislative pressure to homogenise. Federalism principles generally govern only the federal-State relationship. Laying aside a state policy's constitutionality for non-federalism issues, advocates for municipalities have recourse only to state law to challenge the reallocation of decision-making authority (*Clinton v. Cedar Rapids and the Missouri River Railroad*, 1868).

At least two policy considerations counsel preservation of microfederalism generally and microfederal migrant integration specifically. First, microfederal experimentation allows localities to adopt new strategies for old problems without unleashing on an entire system of what may later prove to be misguided policy. Unsuccessful local experiments can be repudiated promptly; successful ones can be replicated elsewhere. Second, because microfederal polities occur in small autonomous communities, they will prove more politically uniform than larger (more populous) jurisdictions. This relative local homogeneity makes microfederal jurisdictions less politically competitive than larger jurisdictions, and consequently more predictable and stable in basic value commitments. The 2016 nationwide political changes in the United States were abrupt and the change from Obama to Trump sharp, yet the change in geographically smaller jurisdictions was slight. This political non-competitiveness and predictability are virtues rather than vices when it comes to the need for durable implementation of integration policies to achieve assimilation of migrants into a native population. Of course, political non-competition in a microfederal jurisdiction that is hostile to unauthorised migrants may counsel that migrants relocate. That exit, however, is possible only when a State tolerates microfederal competition to maximise policy preferences.

On the other hand, there are arguments that favour uniformity and qualify the heterogeneity microfederalism fosters. First, policy experiments eventually conclude and yield results (Tushnet, 1998). This fact may temporarily qualify the desirability of policy non-uniformity. Ultimately, the federal government will look to the laboratories of democracy and conclude what constitutes effective policy. Then, it presumably adopts best practices and pre-empts further experimentation on that policy.

Second, non-uniformity in administration across jurisdictions creates forum-shopping incentives, such as restrictionists' claim may exist for criminal aliens to relocate to sanctuary jurisdictions (U.S. Department of Jus-

tice, 2017). Forum shopping can result in inequitable outcomes, because similarly situated migrants are treated differently merely due to location within a State. By contrast, under microfederalism, exit and inter-jurisdictional competition are features, not flaws, that result in preference maximisation at the local level.

Third, non-uniform policy risks negative regulatory externalities where jurisdictions export to neighbouring localities their policies' costs. Restrictionists and their not-in-my-backyard ("NIMBY") anti-integration policies might drive migrants to relocate elsewhere. NIMBY policies burden neighbouring jurisdictions that provide important migrant-oriented services, like language training, by driving more migrants their way. In turn, these adjacent jurisdictions may eliminate their own services, adopt NIMBY policies themselves, and race to the bottom where services are not provided (Stewart, 1977, p. 1212).

Finally, non-uniform microfederal policies about migrants potentially harden the lack of political competition in local government and deepen local partisan entrenchment. Indeed, Republicans claim Democratic sanctuary policies are a conscious effort to tip political scales by adding more Democrats to voter rolls, i.e. the "undocumented Democrats" sally (Kurtzleben, 2015). Similarly, Republican opposition to immigration reform may be critiqued as perpetuating a status quo that partisanly disenfranchises presumptive, prospective Democratic voters.

Several states favour uniformity over heterogeneity by pre-empting the ability of their microfederal jurisdictions to diverge from statewide policies concerning migrants. Most of these states are "red states", i.e. states with Republican legislative majorities, which adopted enforcement-oriented policies (Morse, Deatherage & Ibarra, 2017). A few "blue states", i.e. states with Democratic legislative majorities, such as California, adopted statewide sanctuary-oriented policies. Pre-empting legislation ends local experimentation in favour of statewide uniformity.

## 5. Microfederalisms: Restrictionist, "Sanctuary", and Everything Between

Absent state pre-emption of microfederal policy, migration, and integration policies span the right-left spectrum from restrictionist, pro-enforcement policy to integrationist, sanctuary policy, with shades of degree between them.

## 5.1. The Restrictionist Jurisdiction Phenomenon

*Formal Cooperation with Immigration Enforcement.* Restrictionist jurisdictions occupy ideological spaces on the microfederal spectrum's right. There is variation among these jurisdictions, but they employ some common methods. They may attempt to assist or engage in the enforcement of federal immigration law in a formal arrangement as force multipliers. For instance, many jurisdictions cooperate with the Department of Homeland Security (DHS) "Secure Communities" program. Restrictionist jurisdictions participate willingly. Under that program, the Federal Bureau of Investigation (FBI) receives the fingerprints of individuals as local law enforcement initially arrests and books them in order to search for outstanding warrants for an arrestee in other jurisdictions (Stumpf, 2015, p. 1268). FBI shares this data with DHS, which identifies unauthorised migrants by comparing the data against its immigration databases (Stumpf, 2015, p. 1269). Once the database identifies the already detained unauthorised migrant, the U.S. Immigration and Customs Enforcement (ICE) lodges a "detainer request" with the local authorities to hold the alien for transfer to its regional offices, which handles removals (Stumpf, 2015, p. 1270). Some arrestees may eventually prove to be guilty of only minor offenses or may even eventually be acquitted. Still others may have been racially profiled and arrested pretextually (Chacón, 2012, pp. 645-646). Still, the DHS program flags them all, even if theoretically prioritising removal of only those with serious criminal records. In fact, removals under Secure Communities failed to meaningfully reduce crime rates (Miles & Cox, 2014).

Some jurisdictions cooperate with federal enforcement beyond data sharing by actually becoming "deputised" immigration enforcement. Currently, 60 state and local law enforcement and corrections agencies in 18 states have entered into agreements with ICE under INA § 287(g) (U.S. Department of Homeland Security, 2017). All of these agreements authorise local law enforcement to assist with civil enforcement of federal immigration law through the "jail enforcement" model. This program identifies those aliens jailed prior to the activation of Secure Communities in that jurisdiction. Like Secure Communities, local law enforcement obtains the immigration status of aliens already jailed for non-immigration criminal offenses (Skinner, 2010, p. 3). Local law enforcement notifies ICE of those unlawfully present and transfers them to ICE custody following the conclusion of their sentences (Skinner, 2010, p. 3). In this way, § 287(g) authorises local authorities to participate in immigration enforcement.

*Independent Restrictionist Jurisdiction Measures.* Beyond formal federal cooperation, restrictionist jurisdictions may adopt independent measures under state or local law to discourage migration and integration, including renter occupancy restrictions, employer sanctions, and state mirrored criminalisation (Table 1). Several of these policies were the subject of pre-emption challenges brought by the Obama administration, migrant advocacy groups, and effected business interests. Generally, courts found the INA to pre-empt many, but not all, of these independent measures. Notably, in *Arizona v. United States* (2012), Arizona attempted to remedy lax federal enforcement of its southern border. Its legislation, SB 1070, adopted restrictionist policies to deter unauthorised migration and prevent integration through a policy of “attrition through enforcement” (*Arizona v. United States*, 2012). These measures included: (1) creating a state misdemeanour and penalty for wilful failure to complete or carry an alien registration document as already required by the federal INA (“card carrying”); (2) criminalising unauthorised aliens knowingly applying for work, soliciting work in a public place, or working as an employee or independent contractor (“unauthorised work”); (3) authorising, upon probable cause, warrantless arrest of individuals believed to have committed any public offense that makes them removable (“arrest for removable offenses”); and (4) requiring state law enforcement to make a reasonable attempt to determine the immigration status of any person stopped, detained, or arrested on a legitimate basis, if reasonable suspicion exists he is an unlawfully present alien (“migration status check”) (*Arizona v. United States*, 2012).

Illustrating the elasticity in the application of federal pre-emption doctrine, *Arizona v. United States* (2012) held 5-3 that the INA impliedly field pre-empted or conflict pre-empted three of four Arizona measures. First, the Court held the INA to have field pre-empted the card-carrying provision by defining the corresponding federal subject field as the small field of “alien registration” (*Arizona v. United States*, 2012). Given the small field, the Court found congressional activity to be pervasive and inferred that Congress left “no room for States to regulate” (*Arizona v. United States*, 2012). The Court, however, could have defined the relevant INA field broadly to allow greater conceptual “room” for States to regulate. *De Canas v. Bica* (1976) had defined the INA’s federal subject field generally as “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country”, a policy space that did not infer exclusion of local authority. The Court’s Arizona field pre-emption analysis, while holding the state numerator constant,

shrunk the federal policy denominator, thereby increasing the size of the state-federal policy fraction and creating the inference of apparent state interference.

Second, the Court addressed the other Arizona provisions within the framework of implied conflict obstacle pre-emption. *Ab initio*, the Court candidly recognised its discretion in this type of pre-emption analysis: “What is a sufficient obstacle is a matter of judgment [emphasis added], to be informed by examining the federal statute as a whole and identifying its purpose and intended effects” (Arizona v. United States, 2012; Crosby v. National Foreign Trade Council, 2000). To determine the sufficiency of these alleged Arizona obstacles, the Court exercised its discretion (1) to extrapolate Congress’s apparent purposes in enacting the particular INA provisions and their intended effects as well as (2) the challenged provisions’ probable effects.

The Court ruled that the federal INA conflict pre-empted Arizona’s “unauthorized work” and “arrest for removable offenses” provisions (Arizona v. United States, 2012). Congress intended to deter unlawful employment with its INA provision regulating employment of unauthorised aliens. Arizona’s unauthorised work provision was consistent with that overarching deterrent purpose. Nonetheless, Arizona v. United States (2012) held the INA pre-empted the provision. The federal INA provides civil and criminal penalties for employers but *not* for unauthorised aliens. By contrast, Arizona v. United States (2012) provided for criminal penalties for alien unauthorised workers, observing that Congress had declined to criminalise alien conduct, because of disparity in alien–employer bargaining power, particularly in the context of aliens vulnerable to removal. The INA employer sanction reflected a delicate balance struck by Congress; Arizona would upset it with deterrence directed at an alien employee.

With respect to the “arrest for removable offenses” provision, the Court noted that the INA established a federal removal system with enforcement discretion placed in executive officers. The Arizona “arrest for removable offenses” provision would have placed unilateral control in state officials’ hands “without regard to federal priorities” (Arizona v. United States., 2012). Because Obama had challenged SB 1070 prior to the law actually taking effect, the judicial assessment necessarily considered only hypothesised effects. In its conflict pre-emption analysis, the Court reasoned that restrictionist Arizona *might* implement the “arrest for removable offenses” policy in conflict with Obama administration’s enforcement priorities. The conflicting implementation could result in the harassment and improper placement of aliens in removal, which are federal matters

that “touch on foreign relations and must be made with one voice” (*Arizona v. United States*, 2012).

Lastly, the Court sustained Arizona’s migration status check provision against the claim of conflict pre-emption. The federal INA requires DHS to answer inquiries on migrant status from the States and their localities as part of its State-federal immigration consultative purpose. The Court rejected the Obama administration’s suggestion that Arizona’s mandatory use of the system would necessarily result in adverse effects, i.e. obstacles to federal purposes, such as lengthy delays for migrants arrested, detained, or stopped. Here, unlike the arrest-for-removable-offenses provision, the Court concluded the provision’s effects were unclear at the pre-enforcement stage of litigation and therefore deferred their consideration.

Taken as a whole, the Arizona case illustrates both that implied pre-emption doctrine is fundamentally elastic and that, where federal law specifically concerns immigration, the Court is willing to stretch an elastic analysis to pre-empt sub-federal units.

*Restrictionist Litigation to Realign Federal Executive Policy.* Beyond independent state and local measures, restrictionist states may also employ affirmative litigation against the U.S. government to challenge and realign federal executive immigration enforcement priorities. This litigation entails both federalism and separation-of-powers concerns, at least to the extent that States assert the executive is violating congressional intent by its enforcement approach.

*Texas v. United States* typifies this restrictionist approach. Twenty-six states sued the United States to enjoin Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA (*Texas v. United States*, 2015). DAPA sought to provide nondurable, lawful presence to approximately 4 to 5 million unauthorised migrants. DHS had argued that due to prosecutorial discretion it could redirect scarce resources to higher enforcement priorities (*Texas v. United States*, 2015). In addition, DHS cited humanitarian concerns as justifying DAPA. Nonetheless, a federal judge preliminarily enjoined DAPA, concluding that DHS had violated the Administrative Procedure Act’s procedural provisions (*Texas v. United States*, 2015).

Similar litigation threatened by restrictionist jurisdictions ostensibly “forced” the Trump administration to change its position on Obama’s Deferred Action for Childhood Arrivals (DACA), which extended temporary legalised presence to certain unauthorised migrants who had entered the country as children. Initially, Trump had tolerated DACA’s continuation,

but restrictionist state Attorneys General threatened to sue to halt the program (Paxton, 2017). The Trump administration responded by rescinding DACA (Washington Examiner, 2017). Ironically, the rescission avoided the restrictionist litigation but precipitated sanctuary jurisdictions suing to freeze DACA in place (Compl., *New York v. Trump*, 2017). Sub-federal jurisdictions across the ideological spectrum can resort to affirmative litigation against the federal executive.

## 5.2. The Sanctuary Jurisdiction Phenomenon

States and localities occasionally market themselves (or are labelled) as “sanctuary cities”. This imprecise term is a misnomer. First, some jurisdictions adopting migrant friendly “sanctuary” policies are States and counties, not cities; “sanctuary jurisdiction” more accurately captures the phenomenon’s breadth. Second, “sanctuary” incorrectly suggests sub-federal capacity to immunize unauthorised migrants against immigration enforcement. In fact, the Supremacy Clause prohibits sub-federal governments from nullifying federal law by conferring immunity from removal. Alternatively, “sanctuary” may imprecisely imply illegality, like the City of Berkeley’s original 1971 use of “sanctuary city” (Council of the City of Berkeley, 1971), which prompted a credible threat of federal prosecution of city officials for encouraging desertion of enlisted U.S. servicemen (Ridgley, 2011, p. 205). This connotation of law violation may be misplaced for reasons elaborated below.

Many sanctuary jurisdictions originally adopted their eponymous policies to respond to Secure Communities, a federal immigration program that ran 2008-14.<sup>3</sup> Sanctuary jurisdictions used a variety of tactics to minimise federal cooperation, including non-participation in voluntary federal enforcement, like the § 287(g) program; declining to access federal databases that would identify unauthorised migrants; not reporting unauthorised migrants’ status; not inquiring about migrant status due to the difficulty in safeguarding that data; and declining federal detainer requests, unless issued with a judicial warrant (Table 2). Some jurisdictions also politically advocate for durable solutions for migrants; provide access to services without regard to legal status; litigate with the federal executive to realign enforcement with local priorities; promote migrant economic independ-

<sup>3</sup> In 2014, DHS discontinued Secure Communities following successful legal challenges (Johnson, 2014). Trump reinstated it in 2017.

ence; and exercise prosecutorial discretion to favour migrant interests (Table 2).

Sanctuary jurisdictions offer several justifications for promoting these migration and integration policies. At some point in delivering services, sub-federal governments become aware of the identities and locations of unauthorised migrants, for example, as they enrol in a public school system or serve as a local police confidential informant. Sanctuary jurisdictions decline to report these individuals to federal authorities and signal that non-cooperation to the migrant community (Office of the Chief of Police of Los Angeles, 1979). Their policies aim to promote migrants feeling safe to report crimes to local police; accessing public health programs; obtaining education; trusting local officials; and remaining united as family units (Compl., *City and County of San Francisco v. Trump*, 2017). Moreover, sanctuary policies affirm local autonomy to direct local authorities; set spending priorities for scarce resources; and limit discretionary exercises of local power to avoid actual or alleged civil rights violations. As a federalism matter, these policies permit States and localities to advance their constituents' preferences in ways that, by contrast, a relatively unresponsive national political process may fail to do.

## 6. Pre-empting Microfederalism in the Era of Trump

The 2016 national political process resulted in Donald Trump's election. Like Obama before him, Trump strongly favours federal over local authority in migrant regulation but in a restrictionist vein. Indeed, candidate Trump vowed to "end the sanctuary cities" that "refuse to cooperate with federal authorities" by cutting federal funding (Los Angeles Times, 2016). His administration, however, unsuccessfully employed the vehicle of an executive order to implement his restrictionist agenda. This failed executive unilateralism will prompt the Trump administration to mimic Obama's use of affirmative pre-emption litigation and its reliance on congressional enactments to pre-empt local authority.

### 6.1. Executive Order 13768

Notable among Trump's restrictionist action is Executive Order 13768. Its provisions, especially sections 8 and 9, target sub-federal, government-

tal actors and states-as-states. They raise substantial constitutional questions as well as policy questions about prudent and efficient public administration. Because restrictionists view state capacity to assist in federal immigration enforcement as a “force multiplier” (Kobach, 2006, p. 181), § 8 of the executive order directs DHS to expand the number of federal-State agreements under INA § 287(g). This expansion can contemplate only DHS seeking additional voluntary agreements with localities. The federal government can neither compel nor “commandeer” state officers to perform federal functions (Printz, 1997).

Section 9 presses federal collection of migrant data. It attempts to enforce a federal statute, 8 U.S.C. § 1373, which bans states and localities from restricting or prohibiting their employees from communicating migrant data with federal enforcement. The executive order provides that the consequence for noncompliance is loss of eligibility to receive “federal grants”, which taken generally and in the aggregate could constitute an enormous financial loss for these jurisdictions. The order’s impact is broad in another way. It leaves undefined “sanctuary jurisdiction”, which lacks any precise meaning, muddying the scope of federal pre-emption. As Table 2 illustrates, a constellation of strategies could constitute a locality as a “sanctuary jurisdiction”. Narrowly read, § 9 and its reference to “sanctuary jurisdiction” might be taken to reach only those states, counties, or cities that “willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions),” i.e. jurisdictions that “prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the [sic] Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual” (8 U.S.C. § 1373). The Attorney General retreated to this limited definition of “sanctuary jurisdictions” when the potentially overbroad scope was challenged (Sessions, 2017). Sanctuary jurisdictions challenged § 9 soon after Trump issued the order on both separation of powers and federalism grounds. First, Executive Order 13768 violates the separation of powers by wielding legislative, rather than executive, power. The order directs the Attorney General and the Secretary of Homeland Security to “ensure that jurisdictions that willfully refuse to comply with [8 U.S.C. § 1373] are not eligible to receive Federal grants...” The President conditioned *all* federal grants on compliance with § 1373, but oddly Congress itself provided no consequence for noncompliance. Section 9 created the consequence—loss of federal grant funding. That condition is problematic. In the American constitutional order, Congress must authorise spending conditions and “must do so unambiguously... enabl[ing] the States to exercise their

choice knowingly, cognisant of the consequences of their participation.” (South Dakota, 1987, p. 208). In *County of Santa Clara v. Trump* (2017), a district court preliminarily ruled that Trump lacked any congressional authorisation to fashion his grant requirement. The district court rejected the effort to narrowly construe the order (*County of Santa Clara v. Trump*, 2017). Since that time, other major metropolitan areas have also sued, including Chicago, Philadelphia, and Seattle, among others. These cities recognise that absent congressional approval, the President can act only with his independent constitutional authority (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952), which excludes any congressional authority to condition spending. Apart from a congressionally codified grant condition in § 1373 itself, Congress is also able to attach conditions to its subsequent funding appropriations. It could separately authorise a President to require states and localities to comply, in a general way, with “applicable Federal laws”. In *City of Chicago v. Sessions* (2017), a federal court of first instance concluded Congress did just that and had authorised compliance with § 1373 as a condition for receiving Byrne Justice Assistance Grant funds.

But even absent a separation-of-powers issue, serious federalism questions leave Executive Order 13768 under a cloud. The order still violates federalism principles by exceeding the federal power to condition spending (*South Dakota v. Dole*, 1987). Among other things, a legislative spending condition must be germane or relate “to the federal interest in particular national projects or programs” and must not coerce the States by passing the point at which fiscal “pressure turns into compulsion” (*South Dakota v. Dole*, 1987, p. 207, 211). A congressional directive that *all* federal programs, whether related to immigration enforcement or not, must comply with § 1373 flouts the germaneness and coercion limitations. This requirement explains why administration attorneys recharacterised the order as reaching only a select set of immigration and policing-oriented grants. Moreover, the amount of money implicated by conditioning *all* funds on § 1373 compliance implies more than mere persuasion—it is a coercive offer the state fiscally cannot refuse.

Finally, assuming Congress authorises a defensible spending condition, how Congress implements that condition raises a Tenth Amendment “commandeering” issue. The federal government must use its own agents to enforce federal law. It may not “commandeer” state governments and their dependent localities to implement federal rules. *New York v. United States* (1992) and *Printz v. United States* (1997) rebuked federal attempts to compel a state legislature or to conscript a state law enforce-

ment officer, respectively, to legislate or to execute federal policy. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program” (*Printz v. U.S.*, 1997). The anti-commandeering prohibition extends to directly compelled administration of federal regulatory programs. Still, federal reporting requirements do not constitute commandeering (Mikos, 2012, pp. 107–08). In *Reno v. Condon* (2000), the Supreme Court unanimously rejected a state’s claim that Congress had commandeered it by creating laws that “require[d] time and effort on the part of state employees,” such as data reporting.

Section 1373 with its prohibition on prohibiting data reporting comes close to commandeering. On the one hand, § 1373 obligates no State or local official to undertake any affirmative steps to report unauthorised migrants (*City of New York v. United States*, 1999). On the other hand, “depriving a sovereign of the right to control its own employees has significant implications... [and] severs the hierarchical relationship between senior officials and their subordinates” (Bell, 2017). Leaving it to local employees to decide whether to assist federal enforcers undermines local policymakers’ ability to avoid participation in federal enforcement. Likely, the close issue would require Supreme Court review to resolve (Blackman, 2017).

Apart from § 1373, federal immigration enforcement regularly raises commandeering issues. For example, DHS detainers direct state law enforcement to continue to hold migrants jailed by states “in state jails at state expense” even after they finish serving state criminal sentences (*Galarza v. Szalczyk*, 2014). Because mandatory federal impositions would constitute impermissible “commandeering”, one federal court construed DHS detainers as merely “requests”, not commands (*Galarza v. Szalczyk*, 2014). Truly voluntary cooperation respects state autonomy. “Voluntary” compliance, however, with an otherwise unconstitutional federal funding condition, is treated as coercive. Section 9 violates the commandeering doctrine to the extent that it requires localities to comply with DHS detainers to remain eligible for federal grants.

In short, the constitutional defensibility of Trump’s Executive Order 13768 is doubtful. It turns out, however, that order is unnecessary for Trump’s restrictionist agenda. Likely, Trump will borrow the Obama administration’s strategy of affirmative pre-emption litigation by asserting that congressionally enacted laws pre-empt sub-federal actions. Sanctuary jurisdictions may soon confront *Arizona v. United States*–style pre-emption litigation that advances a federal restrictionist purpose.

## 6.2. Affirmative Federal Pre-emption Litigation against Sanctuaries

The Obama administration, which was integrationist compared to Trump, vigorously challenged sub-federal restrictionist policies. It used the vehicle of federal pre-emption litigation, arguing that federal law displaced contrary state policies. It is unlikely that pre-emptive spirit represented by the Arizona case will spare sub-federal sanctuary policies merely because they are integrationist (Rubenstein & Gulasekaram, 2017, pp. 586–87). Inevitably, the Trump administration, supported by conservative state Attorneys General, will bring affirmative federal pre-emption litigation against sanctuary policies. Likely, Trump will rely on several federal statutes as either expressly or impliedly pre-empting microfederal policy.

First, two federal statutes, 8 U.S.C. § 1373(a) and 8 U.S.C. § 1644, expressly pre-empt state and local sanctuary policies regarding communication with federal immigration enforcement. These statutes might appear helpful to a restrictionist federal enforcer, but their bark is worse than their bite. Section 1373(a) provides that:

*[n]otwithstanding any other provision of Federal, State, or local law, 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. (8 U.S.C. § 1373).*

Similarly, § 1644 provides that

*Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States. (8 U.S.C. § 1644).*

In both statutes, the italicised pre-emption clauses expressly displace contrary state law. Section 1373(a) limits federal, state, and local entities from “prohibit[ing]” or “restrict[ing]” “sending” or “receiving” “information regarding the citizenship or immigration status, lawful or unlawful, of any individual”. Neither statute creates any affirmative obligation for state and local governments to provide migrant data to the federal government or to answer detainer requests (Pham, 2006, p. 1407).

The reliance on voluntary disclosure of migrant data means that both statutes appear to operate against an assumption that law enforcement

personnel may have significantly different ideological priors than cosmopolitan, urban policymakers responsible for sanctuary policies. To the extent that state and local law enforcement share the same policy valence as state and local policymakers promulgating sanctuary policies, then the freedom from restraint to report to the federal government achieves little. In fact, § 1373 requires no data collection. States and localities could prevent voluntary data sharing by prohibiting data gathering in the first place, i.e. adopting a non-collection policy. Moreover, neither provision provides for enforcement, such as penalties. As drafted, they are toothless in their ordinary operation and merely require states and localities not to prohibit voluntary data sharing. Given how little these provisions accomplish, it is questionable how useful they would be for restrictionist pre-emption litigation (*Sturgeon v. Bratton*, 2009). Their apparent purpose is to keep data sharing channels open between local, state, and federal agencies. An open pipeline, however, does not guarantee anything will “flow” through it. To the extent localities try to bar their officers from communicating migrant status with federal officials, Congress expressly pre-empts those policies.

Second, federal law that criminalizes shielding aliens from detection by federal agents may impliedly pre-empt conflicting sanctuary policies. Title 8, U.S. Code § 1324(a)(1)(A)(iii) covers three criminal offenses: knowingly, or in reckless disregard of the alien’s presence, (1) concealing, (2) harbouring or (3) shielding an alien from detection by the U.S. government, or attempting to do so. Of these felonies, shielding from detection is the crime most likely to pre-empt sanctuary policies as obstacles to the federal policy against integrating unlawful migrants. In *United States v. Ye* (2009), a federal appeals court interpreted “shield from detection” to mean “to protect from or to ward off discovery”. That term encompasses the “use of any means” that prevents the federal government’s detection of unauthorised aliens in the country (*United States v. Ye*, 2009). In *Ye*, shielding from detection involved, *inter alia*, the defendant knowingly keeping migrants’ names off records that the federal government might obtain. Beyond the knowing offense, shielding may also occur when a defendant acts with “reckless disregard” of the alien’s unlawful presence, defined as a “deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully” (*United States v. Uresti-Hernandez*, 1992). Because § 1324 extends beyond smuggling, it creates the possibility restrictionists might prosecute sanctuary officers or employees. Less extremely, the statute might form the basis of federal declaratory relief seeking to pre-empt sanctuary policies.

Under § 1324's shielding offense, a sanctuary jurisdiction would need to take some affirmative step to shield aliens from federal detection. A restrictionist federal government might plausibly argue that a sanctuary engages in affirmatively shielding conduct when it ceases fingerprinting aliens to avoid Secure Communities; orders its employees not to communicate migration status to immigration officials; or blocks federal officials from accessing local facilities permitted to others. Non-inquiry, non-reporting, and non-cooperation policies could become indictable behaviour, or at least, be impliedly pre-empted.

Finally, the Trump administration might also invoke the federal criminal "improper entry" statute, 8 U.S.C. § 1325, as impliedly pre-empting sanctuary policies. Its theory of pre-emption would be that sanctuary jurisdictions' integration policies encourage illicit migration that impedes or creates an obstacle to the accomplishment of § 1325's purpose of promoting border integrity. Sanctuary jurisdictions signal to migrants that local authorities will decline to cooperate with federal authorities to promote migrants' trust (Pham, 2006, p. 1380). Thus, sanctuary jurisdictions make it less likely that unauthorised migrants will be apprehended. It would be a small step for a court to conclude that prospective unauthorised migrants, located across an international border, but proximate to sanctuary jurisdictions (e.g. San Antonio), would also receive the migrant-friendly signal, and relocate illegally. From the Trump administration's perspective, the sub-federal signal is an attractive nuisance that impedes § 1325's federal objective of border integrity.

In short, Trump will press a restrictionist federal policy to pre-empt sub-federal sanctuary policies, in contrast with the relatively integrationist policy Obama previously pressed as pre-emptive. Trump, however, will mirror the Obama administration's legal strategy of displacing contrary microfederal policies by alleging their effects conflict with the intended purposes of the federal statutes. The federal government will argue to the courts that sanctuary microfederal policies obstruct the attainment of the INA's goals, including provisions that prohibit: states and localities from prohibiting communication with the federal government; shielding of aliens from federal detection; and improper entry. In all probability, the courts, as they did with the Obama administration, will find federal authority in the field of migration and migrant integration to favour uniformity over sub-federal experimentation and maximisation of local policy preferences.

## 7. Conclusion

The 2016 U.S. presidential election of Donald Trump occasioned a rapid political flip-flop in the political valence of pro-pre-emption discourse prevailing during the Obama administration: now liberals and progressives favour microfederal autonomy and conservatives favour federal enforcement. Nonetheless, American immigration microfederalism, which results from the U.S. political system's non-unitary character, continues to allow accommodation of a diverse set of policy preferences concerning integration and migration policy. States and localities, which have become key actors in the provision of most governmental services, experiment with policies designed to address congressional policy gaps. These heterogeneous laboratories of democracy reflect a diversity of policy preferences spanning an ideological right-left spectrum from restrictionist to sanctuary policies. This spectrum invites multi-level conflicts, but policy competition and preference maximisation favour tolerating some heterogeneity. Restrictionist and sanctuary jurisdictions have adopted a variety of policy strategies to advance their policy preferences about integration and migration. Occasionally, however, federal authority may permissibly preempt these policy experiments in favour of national uniformity. Likely, Trump's Executive Order 13768 provision on grant conditions is unconstitutional and therefore unable to curb grants to sanctuaries. His administration, however, is likely to resort to affirmative, federal pre-emption litigation that invokes INA provisions to displace conflicting State and local policies. Likely, that legal outcome would potentially end some of the American microfederal immigration experiment.

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AMERICAN IMMIGRATION MICROFEDERALISM:  
SANCTUARIES, RESTRICTIONIST JURISDICTIONS,  
AND ADMINISTRATIVE CONFLICT

Summary

*Immigration power is thought to be a federal power in the United States, but the States and their localities play key roles in filling congressional immigration policy gaps. When confronted with a major migration crisis, these microfederal jurisdictions in a multi-layered federal system respond differently to the policy gaps. A healthy tolerance for microfederal policies promotes this experimentation and voter preference maximisation. A countervailing interest in uniformity, among other values, tempers the case for microfederalism by suggesting temporal or other limitations may be justified. States and localities have experimented with microfederal policies concerning migrants that touch on migration and integration policy. Restrictionist jurisdictions have promoted policies that discourage migration and integration. Their strategies include: formal cooperation with federal immigration enforcement when restrictionist in policy orientation; adoption of independent state-law measures to supplement federal immigration enforcement; and litigation to attempt to force or realign federal executive enforcement priorities on migration and integration. Sanctuary jurisdictions adopt inverse strategies. They may decline to participate in voluntary federal programs; refuse to access available federal immigration status information; deny federal requests to cooperate with federal detainer requests; provide access to State and local services to all comers, without regard to legal status; and, like restrictionist jurisdictions, litigate to attempt to force or realign the federal government's enforcement priorities to favour migration and integration. Inevitably, conflict between federal and state administration results in litigation. The federal government attempts to assert its primacy in those matters touching on alien regulation. During the Trump administration, this effort has included the likely unconstitutional Executive Order 13768, but also the threat of affirmative federal pre-emption litigation against sanctuary jurisdictions. Provisions of the Immigration and Nationality Act may provide Trump with a basis for arguing that federal law expressly or impliedly pre-empting conflicting state law.*

*Keywords: immigration, federalism, United States, microfederalism, pre-emption, restrictionist jurisdiction, sanctuary jurisdiction*

## AMERIČKI IMIGRACIJSKI MIKROFEDERALIZAM: LIBERALNE I RESTRIKTIVNE SAVEZNE DRŽAVE I LOKALNE VLASTI TE SUKOB NADLEŽNOSTI

### Sažetak

Premda se u SAD-u imigracijska politika smatra dijelom ovlasti saveznih vlasti, savezne države i lokalne vlasti imaju ključnu ulogu u oblikovanju cjelovite imigracijske politike zemlje. Kad se suoče s velikim migrantskim krizama, državne i lokalne vlasti u američkom sustavu višerazinskog upravljanja reagiraju na različite načine te različito dopunjavaju saveznu imigracijsku politiku. Takvo eksperimentiranje i nastojanje za postizanjem najbolje podrške vlastitih birača omogućava zdrava tolerancija prema sudjelovanju saveznih država i lokalnih vlasti u oblikovanju javnih politika. Tome suprotno nastojanje za uniformnošću javnih politika na čitavom teritoriju SAD-a, uz ostale vrijednosti koje djeluju u istom smjeru, može opravdati vremenska i druga ograničenja ovlasti država i lokalnih vlasti. Savezne države i lokalne vlasti eksperimentiraju sa svojim migracijskim i integracijskim politikama. Restriktivne države i lokalne vlasti promoviraju politike koje obeshrabruju migracije i integraciju migranata. Njihove strategije uključuju: formalnu suradnju sa saveznom imigracijskim vlastima kad savezna razina zastupa restriktivnu imigracijsku politiku, donošenje vlastitih pravnih propisa na razini saveznih država kojima se dopunjava provedba saveznih zakona te pokretanje sudskih postupaka kojima bi se utjecalo na provedbu restriktivnih saveznih imigracijskih i integracijskih mjera. Liberalne vlasti na razini saveznih država i lokalne samouprave imaju potpuno drugačije strategije. One smiju odbiti sudjelovati u onim saveznom programima koji nisu obligatorni, smiju odbiti koristiti stvarno postojeće savezne podatke o statusu imigranata, odbiti zahtjeve za zadržavanjem osoba koji dolaze sa savezne razine, omogućiti pristup državnim i lokalnim službama svim osobama koje ga žele bez provjere statusa, te, slično kao i restriktivne vlasti, pokretati sudske postupke kojima bi se utjecalo na savezne vlasti tako da djeluju u korist migracija i integracije migranata. Stoga sukobi saveznih i državnih vlasti neizbježno završavaju sudskim postupcima. Savezne vlasti nastoje uspostaviti svoj primat u pravnoj regulaciji statusa stranaca. Za vrijeme predsjednika Trumpa ta nastojanja uključuju donošenje po svemu sudeći neustavne Izvršne uredbe broj 13768 te prijetnju pokretanjem sudskog postupka protiv liberalnih državnih i lokalnih vlasti ne bi li se sudski utvrdio primat savezne razine u imigracijskoj politici. Odredbe Zakona o imigraciji i državljanstvu mogle bi Trampu dati osnovu za tumačenje da savezni zakon izričito ili prešutno ima prednost pred zakonima koje donose savezne države.

Ključne riječi: imigracija, federalizam, Sjedinjene Američke Države, mikrofederalizam, primat saveznih vlasti, liberalne i restriktivne državne i lokalne vlasti