State Preemption of Local Immigration "Sanctuary" Policies: Legal Considerations

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States have enacted a wave of statutes over the past several years preempting local government law and policies that potentially promote public health in various ways. Among these local preemption measures are statutes in at least 9 states that outlaw municipal policies providing some form of "sanctuary" to immigrants. Such policies, and their preemption, have importance both for direct access to health services and for broader social determinants of health.

This article gauges the coverage and potential impact of these state preemption laws based on key informant interviews nationally and a close legal analysis of relevant laws and policy documents. It distinguishes between preemption laws focused on law enforcement cooperation and those that also encompass a wider array of "welcoming" policies and initiatives. It also distinguishes between more passive forms of preemption that prohibit barring cooperation with federal immigration enforcement, and those statutes that more affirmatively require active measures to assist federal enforcement.

Drawing these distinctions can help municipalities determine which immigrant-supportive measures are still permitted, and how best to mitigate the adverse public health effects of these preemption laws. (*Am J Public Health*. 2021;111:259–264. https://doi.org/10.2105/AJPH.2020.306018)

As social policy issues have become more divisive, there is a growing trend for municipalities (e.g., cities or counties) to adopt distinctive ordinances or policies that express the views and preferences of local majorities.[1–3] Immigrant rights are 1 such social issue on which a growing number of municipalities have taken a stand, by enacting "sanctuary" or "welcoming" policies that promote immigrants' welfare in various ways.[4–7]

In response, a growing number of states have enacted statutes that preempt local ordinances or policies on specific social issues. To date, a dozen states have adopted statutes that bar municipalities from maintaining an immigrant "sanctuary" policy that refuses or limits cooperation with federal immigration enforcement.[8] These preemption laws are a concern for public health because they interfere with municipal efforts to address various determinants of health such as freedom of movement, receipt of a range of social services, and criminal justice.[9] Accordingly, the scope and effects of these local preemption laws merit attention from the public health policy community.

State preemption of local law resembles, but is distinct from, federal preemption of state law. For both kinds of preemption, a larger jurisdiction with superior legal authority restricts or removes a subordinate jurisdiction's lawmaking prerogative over a particular matter. Because the federal government has primary authority over immigration matters, it is able to override state and local laws that conflict with federal immigration policy. The Supreme Court ruled, for instance, that federal law preempted Arizona's 2010 law that gave local officers immigration enforcement authority, explaining that only federal law can determine immigration violations.[10] Under Supreme Court precedent, states are constitutionally protected from being "commandeered" by federal law, meaning that there are limits to the extent that federal law may force states to take action.[11] The tension between these 2 principles has produced litigation over whether states can, for instance, adopt a statewide policy to limit cooperation with federal immigration enforcement, as California and Washington have done,[12] or whether states, acting without federal permission, may authorize local officers to arrest suspected undocumented immigrants solely for federal immigration violations.[10]

State preemption of local law raises different legal issues. States have inherent sovereign authority that provides some protection against federal preemption. Municipalities, however, are entirely subordinate to states; they have no inherent lawmaking authority beyond what states grant them. Some states embrace a "home rule" approach that gives municipalities greater authority, but these states typically provide that general statewide legislation overrides any contrary local law or policy.[1,13]

Although state authority over municipalities is broad, it is not unlimited. States may not contravene federal law, including federal immigration statutes as noted earlier. Furthermore, states must avoid violating constitutionally protected rights such as due process and equal protection. For instance, the Fifth Circuit Court of Appeals ruled that 1 portion of Texas' sanctuary preemption law violated the First Amendment by forbidding local elected officials from "endors[ing] a policy" that limits federal immigration enforcement.[14] Otherwise, the core of state immigration preemption laws have, so far, survived judicial challenge. A federal district court in Florida, for instance, ruled that Florida's requirement that municipal officials use "best efforts" to support federal immigration enforcement is not unconstitutionally vague.[15]

Considering this legal background, most of the debate over sanctuary preemption laws focuses on their coverage and reach, as well as their public policy implications. This article surveys these issues of legal scope and public policy, beginning with an overview of how these preemption laws are worded and then describing the types of protective policies that still might remain permissible under these preemption laws. This analysis is based on legal and public policy research, as well as interviews with 30 key informants familiar with how these sanctuary preemption laws function. Most informants were from 3 states that have strong preemption laws (NC, TN, TX), but some have national perspectives. Also, most were from immigrant rights organizations, but some were from law enforcement.

SCOPE OF "SANCTUARY" PREEMPTION LAWS

The meaning and scope of immigration "sanctuary" is not well settled and, in fact, remains somewhat contentious.[16–19] Supportive municipal policies can range over a fairly broad spectrum. At 1 end, a strong sanctuary jurisdiction is one that shelters immigrants from federal immigration enforcement by refusing to take any proactive steps to notify or cooperate with federal authorities, and by declining to respond to most or all federal requests for information or assistance. At the other end of the spectrum, a locality might cooperate fully with federal authorities but institute policies outside the law enforcement arena that protect and advance immigrants' welfare, in domains such as health care, education, housing, and employment.

Accordingly, sanctuary preemption laws have 2 basic components: those that address law enforcement activities and those that address other civic services and functions.[13,20] A further distinction is whether, in the law enforcement area, the preemption law requires only reactive cooperation (responding to requests) or instead requires localities to take more proactive steps to advance federal enforcement, as follows:

- Reactive: Requires cooperative response to federal requests for assistance.
- Proactive Type A: Forbids local policies that remove officers' discretion to inquire about immigration status.
- Proactive Type B: Requires local law enforcement to inquire about immigration status or affirmatively assist with federal immigration enforcement in other ways.

All of the preemption laws in question require localities to respond to federal requests for assistance. These requests include inquiries about the identity and immigration status of prisoners or people arrested, and "detainer" requests that ask local authorities to keep immigrants in custody beyond their normal release time, until federal authorities can assume custody. Federal authorities sometimes also ask to interview detainees, or ask local authorities to transport them to a federal facility. Beyond specifying these particular forms of cooperation, state laws sometimes have a more general provision that requires law enforcement to respond to federal requests for assistance "to the full extent permitted by federal law."[21,22]

In addition to these "reactive" forms of federal cooperation, several states require more proactive local involvement in federal immigration enforcement. These proactive provisions can take 2 forms: (1) those that require localities to adopt proactive policies, and (2) those that forbid localities from precluding the adoption of proactive policies and practices. This distinction may appear subtle, but it is critical for understanding the leeway that municipalities still have under preemption laws.

Most proactive preemption laws merely allow local law enforcement to ask about immigration status when they stop or arrest people. This precludes local policies that forbid such inquiries. Examples are the statutes in Florida,

Tennessee, and Texas. Arizona, however, goes further by affirmatively requiring local law enforcement to inquire about immigration status when an officer has "reasonable suspicion" that a person is an undocumented immigrant. Other states have not gone quite this far, possibly out of respect for preserving some discretion for local law enforcement agencies and officers.

Most state preemption statutes do not explicitly apply outside the law enforcement arena. Following conventional understanding, most (but not all) of these laws define "sanctuary" in terms of law enforcement activities. Tennessee, for instance, defines "sanctuary policy" as any that "limits or prohibits any local governmental entity or official communicating or cooperating with federal agencies" to verify or report immigration status; grants undocumented persons "right to lawful presence" in the state; prevents law enforcement "from inquiring [about] citizenship or immigration status"; or "restricts in any way, or imposes any conditions on" compliance with detainers or other requests to maintain custody or to transfer custody.[23] However, a few statutes potentially, or explicitly, cover various municipal civil or social services. Arizona's, for instance, says that municipalities may not prohibit local agencies and officials from "sending, receiving, or maintaining information" about immigration status for official purposes, including "determining eligibility for any public benefit, service or license," or verifying any legally required claim of residence or domicile.[21]

POLICIES THAT POTENTIALLY AVOID PREEMPTION

Building on the foregoing description of the coverage and reach of sanctuary preemption laws, this section draws from key informant interviews and legal research to discuss immigrant-supporting policies that municipalities might still adopt, despite the presence of state preemption. Naturally, each of these depends on the particulars of how a preemption law is worded and interpreted by enforcement authorities.

Law Enforcement Cooperation—Reactive

Preemption laws that require municipalities only to respond to federal requests for assistance leave open 3 possible avenues for leeway. The first is to decline more proactive forms of cooperation. For instance, these laws do not require municipalities to enter into what are termed 287(g) agreements (after the federal statutory provision that authorizes them), under which the federal government, in essence, deputizes local officers to actively enforce federal immigration law as if they were federal officers, with the authority to arrest and detain suspects for federal immigration offenses. None of the preemption laws require municipalities to go this far. At most, they require only that local officers gather and report relevant information to federal authorities.

The second strategy is to define the limits of cooperation that local officials believe would violate constitutional protection of immigrants' rights. Primarily, this entails due process rights that limit the legality of holding a detainee without probable cause, beyond the period of confinement authorized by local law.[24] Thus, some local authorities have taken the position, backed by judicial precedents, that once a detainee has served the required time for a state or local infraction or met the conditions for release (such as bail or parole), it would violate the person's constitutional rights to further detain them for a federal investigation, without a judicial order. That position has been taken, for instance, by the county attorney in Shelby County (Memphis), Tennessee,[25] and by the sheriff in Mecklenburg County (Charlotte), North Carolina,[26] despite their states' sanctuary preemption laws.

A third avenue to consider is to adopt a "cite-and-release" policy that applies to all residents, to reduce the extent to which minor offenders engage with the law enforcement system. A number of municipalities have adopted what have been called "Freedom City" policies[27] that either allow or require officers to issue those suspected of relatively minor, nonviolent offenses (such as simple drug possession, petty larceny, trespassing, etc.) a simple citation, and then to release the individual under terms similar to those for an ordinary traffic ticket, rather than to arrest the person for booking and possible detention. Municipalities do this to reduce the burden on their criminal justice system, and to counteract the disparate disadvantages of the bail system for low-income and minority populations.

This approach to law enforcement has not been sufficiently studied to know for certain whether it might have any adverse consequences, such as increasing the number or disparity of minor citations. However, an additional protective effect of not arresting, "booking," or detaining low-level offenders is to avoid triggering requirements to report immigration status to federal officials or requests to detain immigrants for federal purposes. An advantage of a cite-and-release approach is that it draws together a more diverse set of constituencies, and serves broader purposes, than just support for immigrants.

Law Enforcement Cooperation—Proactive

State laws that require municipalities to assist more proactively in federal immigration enforcement also leave some avenues for leeway. Texas serves as the leading example. Its statute prohibits municipalities from "materially limit[ing]" a local officer from "inquiring into the immigration status of a person under a lawful detention or under arrest."[28] Austin, Texas, however, adopted the following measures to constrain how these requirements are implemented[29]:

- Officers are not required to ask about immigration status; they are only permitted to do so.
- Officers may not stop someone simply to inquire about immigration status, or extend a stop longer than needed for purposes of local law enforcement, simply to check immigration status.
- Officers must write an incident report that documents the circumstances for each immigration-status inquiry they make, including the reason(s) for making the inquiry.
- Inquiries about immigration status may not be based on a person's race, skin color, or language spoken.
- When making an immigration-status inquiry, the office must tell the individual that he or she has the right to refuse to answer.
- Officers may not make immigration-status inquiries in sensitive settings, such as when interviewing victims of or witnesses to a crime, or while serving as a safety officer at schools, health care facilities, or places of worship absent exigent circumstances.

Examples of other localities adopting some or all of these constraints on immigration-status inquiries include Phoenix and Tucson, Arizona.[30]

Non–Law-Enforcement Measures

Even the strictest antisanctuary state laws leave wide berth for localities to adopt various supportive policies outside the law enforcement arena. To avoid the flashpoint that the "sanctuary" label can create, many localities are phrasing such policies as "welcoming" toward immigrants.[17,31–33]

Welcoming policies comprise a long list of possible measures,[34] starting simply with an office (or official) charged with tending to immigrant affairs and charged with helping to create a positive community attitude toward immigrants. No preemption laws appear to prohibit this general expression of support. In Arizona, for instance, whose preemption laws are among the strictest in the country, the state attorney general ruled that the law's prohibition of sanctuary policies does not preclude policies with "aspirational language" such as "welcoming."[35] Were these laws to do so, they might well be challenged on First Amendment constitutional grounds. The federal court decision reviewing Texas' preemption law, for instance, ruled that it was unconstitutional to prohibit government officials from "endorsing" noncooperation policies, in the sense of expressing personal support for them.[36] This protection would not likely extend, however, to official statements by municipal bodies because they, unlike, individual officers, do not have clearly recognized speech rights.

Beyond their primarily expressive content, welcoming policies can have more substantive effects. These policies often facilitate or require local agencies and officials to communicate in non-English languages. Most substantively, these policies can forbid civic or social service agencies from inquiring about immigration status unless essential to the program in question, and they can reinforce nondiscriminatory service policies. These welcoming policies appear to be valid even under some of the strictest preemption statutes. Arizona's, for instance, requires that local officials be allowed to exchange or keep immigration information, but that does not necessarily equate with requiring them to collect such information, especially when the information is not essential to "determining eligibility for any public benefit, service or license." Alabama's statute, however, specifically bans most local public benefits for undocumented persons and thus would appear to require many local agencies to make immigration status inquiries.[37]

The extent to which local supportive policies can effectively offset hostile or restrictive state and federal policies remains unclear.[38] Nevertheless, 1 helpful measure that appears to have potential in this regard is municipal ID programs. Many states limit immigrants' access to state-issued IDs such as driver's licenses, which has been found to have a negative impact on immigrant well-being.[39] Accordingly, some municipalities give residents (of any immigration status) the option of obtaining valid identification in a form other than a state-issued ID, and then require local officials to accept such identification for various purposes where identification is needed.[40,41] A few municipalities (e.g., New Haven, CT) do this simply by declaring that a local

library card will be accepted as valid identification for other municipally governed purposes. Preliminary studies suggest that such municipal IDs may improve access to services, with some limitations.[39,42,43]

Municipal IDs have not been widely adopted, nor have they been fully studied. However, where these programs exist, they appear to be legally permissible. Two exceptions, though, are North Carolina and Tennessee, which forbid municipal IDs.[44,45] A handful of North Carolina communities, however, have maintained a workaround consisting of an alternative ID issued by a private nonprofit organization, which local law enforcement officials and a range of private institutions agree to accept.[46,47]

Backlash Concerns

One consideration in deciding how aggressively to pursue possible workarounds to state preemption laws is whether doing so might cause an enforcement "backlash" as a form of retaliation against municipalities that follow only the letter, but not necessarily the "spirit," of these laws.[18] Federal immigration authorities on a number of occasions have carried out targeted immigration enforcement activities in localities that openly support undocumented immigrants.[48] Similarly, state authorities have brought enforcement actions against cities or counties they believe are not honoring their preemption statutes,[49] and anti-immigration activists have called out communities they believe are too lenient.

We heard mixed views from key informants about the extent of this retaliation risk. Some thought that only the most blatant or aggressive attempts to circumvent preemption are likely to prompt enforcement backlash. Thus, it was not thought that the separate set of policies encompassed under the "welcoming" heading constitute true "sanctuary" status or were likely to draw antagonistic attention. Others, however, were concerned that embracing supportive positions too openly would cause critics to apply the "sanctuary" label inappropriately, leading to a real risk of federal or state retaliation. This viewpoint caused some officials either to back away from supportive policies or to implement them less visibly. Out of these concerns, a variety of informed sources thought that backlash concerns could be reduced with careful attention to the boundary of what constitutes acceptable versus unacceptable forms of support for immigrants under the preemption laws in place. If such lines are thoughtfully interpreted, they thought that adverse state or federal actions can be avoided without further limiting local actions to protect and advance the welfare of immigrant community members.

CONCLUSIONS

By preempting local laws that support and protect immigrants, states exacerbate the adverse social conditions in which immigrants live that contribute to a range of physical and mental health problems. Preemption laws likely increase the climate of hostility and fear that adds to stress and reluctance to seek services, and that deters or denies tangible health care and social services. These negative impacts on social determinants of health threaten the welfare not only of immigrant persons, but also the welfare and social fabric of the broader communities in which they live and work.

Some key informants noted that, when states consider adopting preemption laws, even if defeat of the law appears unlikely, advocates still can work to narrow the law's scope before it is passed. Once enacted, municipalities can also take various steps to mitigate negative impacts. First, they can carefully evaluate states' preemption laws to determine precisely what they forbid, and thus what they allow, and then think creatively about allowable measures to maintain supportive policies. Second, they can implement additional measures that do not constitute "sanctuary" but nevertheless convey the impression and the reality of welcoming and including immigrants. Many of these inclusive policies that could be adopted have a potential positive impact on community members regardless of citizenship or nationality, thus promoting community welfare and social justice more broadly. AJPH

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