Two Sides to Preemption Comments on Bau
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INTRODUCTION

The doctrine of preemption protects federal interests in maintaining exclusive domain over a particular area of law.1 In the past, it has been used to strike down policies and statutes enacted by local and state governments that restrict the rights of immigrants.2 However, in the current social climate, rather than insisting upon exclusive control over immigration enforcement, the federal government is likely to solicit assistance from any branch of government willing to join in the "war on illegals," a popular campaign that is attracting many eager recruits.3

An opinion issued in 1992 by California Attorney General Daniel Lungren concludes that cities are barred under the Supremacy Clause of the United States Constitution from enacting policies or ordinances that prohibit local government employees from cooperating with Immigration and Naturalization Service (INS) enforcement activities.4 The Lungren opinion has altered the traditional concept of federal preemption to such a degree that we may no longer depend on it to prevent local agencies from enforcing immigration laws. The State Attorney General has turned preemption upside down to argue that states are preempted from not working with the INS to search out and deport undocumented residents.5 It is likely that this twisted interpretation of the preemption doctrine will be applied to other situations in which the rights of undocumented residents are at issue. As a result, activists and advocates must find new legal and policy arguments to raise in defense of immigrants as they try to protect immigrants' access to police protection and basic government services.

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5. Id., at 285.
While the doctrine of preemption was once a useful weapon in fighting state restrictions on immigrants' rights, opponents of immigrants' rights can be expected to use it themselves to defend such restrictions. An example of this trend can be seen in the opinion of Attorney General Lungren on the issue of local cooperation with the INS.6 In June of 1992, a State Senator Quentin Kopp (I-San Francisco) requested the California Attorney General to revise an earlier opinion on the issue of local cooperation with the INS. The earlier opinion concluded:

There is no general affirmative duty in the sense of a legally enforceable obligation incumbent on peace officers and judges in California to report to the Immigration and Naturalization Service (INS) knowledge they might have about persons who entered the United States by violating title 8, United States Code section 1325, but such public officials may report that knowledge if they choose to do so unless it was learned in a process made confidential by law.7

Although Senator Kopp did not get an opinion stating that local officials must inform INS when they come into contact with undocumented aliens, as he might have hoped,8 Lungren's opinion did reach the conclusion that the Supremacy Clause bars ordinances that restrict local government cooperation with the INS.9

In Cities of Refuge: No Federal Preemption of Ordinances Prohibiting Local Government Cooperation with the INS, Ignatius Bau critiques the Lungren opinion and concludes that local ordinances barring cooperation with the INS are not preempted by federal law.10 After a review of previous holdings regarding the authority of local police to enforce immigration laws, Bau states: "It seems incongruous that local law enforcement officials are prohibited from making arrests for civil violations of the federal immigration law but a city cannot prohibit them from initiating enforcement activity based on such violations."11

As Bau points out, Lungren's opinion turns the doctrine of preemption on its head. The Attorney General uses the preemption argument to suggest that because Congress has created a broad scheme of laws related to immi-

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6. Id., at 284-285. ("By peremptorily removing such a significant component from enforcement activities, the City's Ordinance stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.")
11. Id.
migration enforcement, local governments must cooperate with the INS to enforce those laws. The traditional role of the Attorney General and state legislators has been and should continue to be to advance the powers of the state and local governments which they represent, rather than argue for increased federal authority over issues of public welfare. Although I agree that the Lungren opinion is incorrect, it is just one instance where the doctrine of preemption is being used to increase state and local involvement in the area of immigration regulation.

LEGISLATIVE PROPOSALS: ATTACKS ON IMMIGRANTS’ RIGHTS ON ALL FRONTS

Attorney General Lungren concluded that a city cannot “prohibit its officers and employees from cooperating in their official capacities with Immigration and Naturalization Service investigation, detention, or arrest procedures relating to alleged violations of the civil provisions of the federal immigration laws.” Such an argument creates a real danger that the reasoning might be taken one step further and form the basis of a rule that states that local employees must engage in enforcement of federal immigration laws.

In fact, it was exactly such an attempted extension that was behind Senator Kopp’s introduction of a bill that would prohibit enforcement of noncooperation ordinances, and require all state employees (including those who work for social service agencies) to report to the INS any non-citizen who has been arrested for a felony. The final version of the bill, which was passed by the Legislature and signed by the Governor, does not prohibit sanctuary ordinances, nor impose a mandatory duty to report undocumented immigrants to the INS. It does, however, bar localities from enacting laws prohibiting law enforcement officers from notifying the INS when they have arrested an individual on felony charges and the officer has a reasonable suspicion that the person has violated the civil provisions of the immigration law. Although the mandatory reporting language has been deleted, the ban on local protection of immigrants from police and other officers’ reporting of undocumented people arrested for an alleged felony will surely result in increased cooperation between local officers and the INS, and, subsequently, decreased police protection for undocumented immigrants and their communities.

13. See e.g. Ex Parte Young, 209 U.S. 123 (1908) (Minnesota Attorney General defends Constitutionality of state statute).
Senator Kopp's bill was not the only attempt by California legislators to assist the federal government with immigration enforcement. In response to a battle cry to "declare war on immigration" from Alan Nelson, consultant with the Federation for American Immigration Reform (FAIR) and former INS Commissioner under President Reagan, at least 21 anti-immigrant bills were introduced in the California Legislature in the first year of the 1993-94 Regular Session. These bills sought to deny health-care, housing, worker's compensation, job training and referral services to low-income undocumented immigrants, to restrict access to public schools, to deny driver's licenses to persons who cannot prove that they are citizens or "lawful residents," and to make it a crime under state law to be "unlawfully present" in California.

The doctrine of preemption is relevant to these attempts to limit the rights of noncitizen residents. Under the "pervasive regulation" theory, states are prohibited from establishing laws or policies which have as their sole purpose the regulation of an area, such as immigration, where the federal government has established a pervasive scheme of regulation. Moreover, federal law preempts state regulation in the area of immigration even when the regulation furthers a valid state purpose other than the regulation of immigration, if the state policy conflicts with federal law. In Graham v. Richardson, the United States Supreme Court struck down state laws restricting the receipt of welfare by United States citizens or aliens who had not met a durational residency requirement imposed solely by state law. The Court reasoned, "since such laws encroach upon exclusive federal power, they are constitutionally impermissible." This precedent may have been a factor in the defeat of a recent California bill which would have

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29. Id., at 380 (class actions arising out of Arizona and Pennsylvania struck down state laws restricting welfare benefits to lawful permanent residents on the basis of alienage).
limited the amount of federal Aid to Families with Dependent Children (AFDC) available to aliens who had lived in the state for less than 12 months.\textsuperscript{30} Since such a law would also "encroach upon exclusive federal power," one can argue that it would also violate the rule in Graham.

Preemption is a useful argument to raise where state legislation conflicts with federal law. An example of such a conflict is seen in the case of the failed California proposal to deny state Medi-Cal funds to service providers for care given to undocumented patients unless the patients are reported to the INS. This bill, AB 150, conflicts with a federal requirement that states provide emergency health care to all residents regardless of immigration status and with doctor-patient confidentiality.\textsuperscript{31} However, under the reasoning of the Lungren opinion, the preemption doctrine might now be used to justify such a withholding of benefits by arguing that states cannot knowingly condone violations of federal immigration law, and that to provide benefits to those individuals the state knows to be undocumented would be an implicit violation of federal law. The preemption argument against such laws must therefore be bolstered by other legal and policy arguments.

Arguments that supplement the doctrine of preemption can be seen in the proposed restrictions on health care for undocumented aliens and a new California law requiring every applicant for an original drivers license to show proof of citizenship or lawful immigration status.\textsuperscript{32} With respect to health care for undocumented aliens, immigrant advocates must emphasize the negative public health consequences of failing to provide preventive care and treatment to low-income immigrants with communicable diseases such as tuberculosis. With respect to the denial of driver’s licences to undocumented aliens, preemption could be used to argue that since there is no conceivable state purpose behind the law other than to discourage immigrants from coming to California, the policy is an impermissible attempt by the state to regulate immigration. Supporters of the law might argue (echoing the Lungren opinion) that the state is preempted by federal immigration law from issuing identification papers and allowing undocumented aliens to drive and register their cars in the state. But without a clear federal mandate one way or the other, the issue should ultimately be decided based on public policy. Arguments should focus on the fact that the state has a primary obligation to public safety — an objective which would be thwarted by failing to effectively regulate all drivers and which would encourage undocumented drivers to bypass the entire motor vehicle regulatory system.


\textsuperscript{31} 42 U.S.C. § 1396b(v)(3).

Police department policies of limited cooperation with INS have been seen as necessary to maintain trust and cooperation from immigrant communities. Such trust and cooperation is essential to effective law enforcement. Caselaw interpreting the Supremacy Clause and the Fourth Amendment has limited the authority of police to enforce the majority of immigration violations which are civil, rather than criminal. Lungren's interpretation threatens these policies and case precedents.

The danger inherent in Lungren's conclusion that federal immigration law prohibits cities from refusing to cooperate with the INS is illustrated by the case of Maximino Calderón. In the spring of 1990, Maximino Calderón, a Salvadoran national on his way to the United States, was kidnapped in Mexico by alien smugglers, also known as "coyotes." He was taken to a house in Los Angeles, California, given a phone and told to call his relatives and get $1,000 from them for his release.

Calderón's wife and in-laws called the Central American Refugee Center (CARECEN), an agency they had gone to for assistance in applying for asylum. They could not raise the $1,000 and were worried for Calderón's safety. An attorney at CARECEN called a supervising officer at the Los Angeles Police Department (LAPD) on their behalf and gave him the phone number of the house where Calderón was being held.

The police found Maximino locked in a bathroom, along with over 20 other hostages. LAPD had a written policy of not inquiring into immigration status or enforcing immigration laws. Despite the policy, the officer ultimately in charge of the kidnapping investigation did not treat Maximino as a crime victim. Rather, Calderón and the other hostages were detained in handcuffs until the INS came to take them into custody. Meanwhile, the coyotes fled.

Maximino Calderón sued the LAPD for false arrest. The LAPD claims that because this incident involved "alien smuggling," it had no choice but to turn the victims over to the INS. Their defense to the false arrest claim was that they could not tell the victims from the suspects (notwithstanding the fact that the victims were all found locked in a small room, and their names and ransom amounts were listed on a pad of paper by

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33. U.S. CONST. art. VI, cl. 2.
34. See Gates v. Superior Court, 193 Cal. App. 3d 205 (1987); Gonzales v. Peoria, 722 F.2d 468 (9th Cir. 1983).
35. 75 Op. Cal. Att'y Gen. 270 (1992). The Lungren opinion could be read narrowly to mean that cities must cooperate only when the INS requests assistance. However, immigration restrictionists are likely to expand the reasoning to argue that local government officers must affirmatively take steps to assist the INS with its mission.
the phone). The police also argued that under the circumstances a two hour detention did not constitute an arrest. 38

What makes CARECEN worthy of attention is that, as opposed to earlier cases involving police enforcement of immigration laws, the police implicitly argued that they were preempted from not enforcing federal civil law. 39 In CARECEN, the police preempted themselves from exercising their authority to enforce the state criminal laws against kidnapping and extortion, because federal immigration laws were involved. Under either reasoning, whether officers are not preempted from enforcing the civil provisions of immigration law or if they are preempted by federal law from not turning crime victims over to INS, the end result is the same: undocumented city residents who come into contact with local police end up in INS custody, even if they have not committed any crime.

One can see the true scope of this shift in the use of the doctrine of preemption by contrasting CARECEN with two earlier cases. The first of the two, Gonzales v. City of Peoria, 40 was brought by individual Mexican farmworkers in Arizona who unsuccessfully sought damages against the city of Peoria and individual police officers. Suspected criminal violation is necessary in order for police to lawfully detain or arrest an individual, 41 and in certain circumstances suspicion of a misdemeanor is not sufficient grounds for a lawful arrest. 42 The Gonzales court held that state or local governments are not preempted from enforcing criminal provisions relating to immigration law, but specified that “this authorization is limited to criminal violations.” 43 Furthermore, the court stated that “[a]lthough the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause for the criminal violation of illegal entry.” 44

The second case, Gates v. Superior Court, 45 limited local police authority to arrest and hold persons suspected of being in the United States illegally and to detain noncitizens pursuant to “immigration holds,” which occur when an immigration officer authorizes state or local law enforcement agencies to detain an individual for the INS. 46 In Gates, federal jurisdiction over immigration was found to preempt local law enforcement, by prohibiting local police practices of arresting individuals solely on the basis

38. Id., at 5: 14-17; 4: 5-13. (order granting defendant’s motion for summary judgment).
39. Id.
40. 722 F.2d 468 (9th Cir. 1983).
41. Id., at 477.
42. Id., at 476.
43. Id.
44. Id., at 476-77.
that they might be deportable aliens. These cases established that enforcement of the civil provisions of immigration law—e.g. arresting an individual simply for lacking valid documents—is preempted by the broad federal immigration enforcement scheme.47

Although Gates and Gonzales established that local police enforcement of civil immigration laws is preempted by federal law, this concept is being reformulated. Notwithstanding the LAPD’s limited authority to make arrests based upon immigration status, the court ruled against the plaintiffs in CARECEN, dismissing Maximino Calderón’s false arrest claims.48 The court granted defendants’ motion for summary judgment, holding that “the individual officers had probable cause to believe that Calderón was engaged in criminal activity or that Calderón presented a flight risk.”49 It is inconceivable how a court could analyze whether police had probable cause that a crime had been committed without identifying the crime. It was clear from the facts presented to the court that Calderón was not one of the kidnappers. What criminal behavior was he suspected of? The court avoided identifying the law the police were enforcing precisely to avoid coming into conflict with Gonzales and Gates which establish that the police cannot make arrests for the immigration crime of entry without inspection when that crime does not occur in the officer’s presence or with additional evidence.50 The alternative rationale offered by the court, that Calderón was a flight risk and that his detention was justified, is ludicrous.51 Use of the word “flight” connotes attempted escape from captivity or from punishment for criminal activity. Calderón could not have been suspected of any criminal activity except the immigration crime of entry without inspection, a crime which, as previously mentioned, is generally outside the purview of local authorities.52 The court in Carecen was not willing to consider cases that held that police are prohibited from arresting individuals who are not crime suspects and turn them over to INS. Rather, it tacitly accepted the idea that because undocumented immigrants are violating federal law, local police officers have the authority and obligation to assist in their capture.

47. Id.
49. Id., at 5: 1-3.
52. Since in many states, such as California, a police officer can only make a warrantless arrest for a misdemeanor if it has been committed in the officer’s presence, police officers operating away from the border will not usually have the authority to arrest someone simply because he or she is undocumented. CAL. PENAL CODE § 836 (Deering Supp. 1992); FLA. STAT. ANN. § 901.15 (West 1919); TEX. CRIM. PROC. CODE ANN. § 14.01 (Vernon 1977).
Such cases show us how the doctrine of preemption can be used to favor the involvement of local police in the enforcement of federal immigration law.

CONCLUSION

The Lungren opinion was the first signal that state and local governments would no longer refrain from enforcing immigration laws in deference to the doctrine of preemption. The recent flurry of state legislation in California that seeks to regulate immigration demonstrates how politicians are eager to enter an arena that was formerly reserved for the federal government. Finally, while the court in the CARECEN case did not squarely address the preemption issue, it can be expected that litigation in this area may depart from existing precedent.

If immigrants fear the police, and the police fail to provide protection to immigrant communities, then these communities will be overrun by lawlessness. Barred from state health, education and welfare services, undocumented immigrants will become a permanent underclass of our society. Without the traditional defense of preemption to ensure that immigrants have access to basic social and public safety services, this result is likely to become a reality.