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## Federalism and the State Police Power: Why Immigration and Customs Enforcement Must Stay Away from State Courthouses

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# FEDERALISM AND THE STATE POLICE POWER: WHY IMMIGRATION AND CUSTOMS ENFORCEMENT MUST STAY AWAY FROM STATE COURTHOUSES

GEORGE BACH\*

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## I. INTRODUCTION

The Trump Administration's rhetoric and increased immigration enforcement actions have raised the level of fear in immigrant communities. The increased enforcement has included having United States Immigration and Customs Enforcement (ICE) agents appear at state and local courthouses to detain undocumented immigrants when they arrive for court.<sup>1</sup> This enforcement tactic has had a chilling effect on the prosecution of domestic violence, as undocumented victims wish to avert encountering ICE agents at the courthouse.<sup>2</sup> In El Paso, for example, ICE agents detained a woman who was bringing a case

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1. See Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 267 (2017).

2. Heidi Glen, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, NPR (March 21, 2017, 4:43 AM), <http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver>.

of domestic violence against her abuser. There were claims that ICE was tipped off about the victim's immigration status by her alleged abuser.<sup>3</sup>

The direct effect of the presence of federal ICE agents at state and local courthouses extends beyond the victims of domestic violence. It also hampers the ability of state and municipalities to enforce their domestic violence laws. This interference, in turn, undermines state sovereignty and the exercise of the states' police power, both of which are critical in our federalist system.

This Article argues that the ICE initiative to detain undocumented individuals at state and local courthouses runs afoul of the constitutional limits on federal action, as made clear by *United States v. Lopez*<sup>4</sup> and *United States v. Morrison*<sup>5</sup> and, to a lesser extent, other Tenth Amendment cases that robustly protect state police powers and that have set forth a reinvigorated sense of the state's role in our federalism. Accordingly, under the revived notion of state sovereignty and police power in our federalism structure, ICE should be kept away from the state and local courthouses.

## II. REVIVED FEDERALISM PRINCIPLES HAVE STRENGTHENED STATES' POLICE POWERS AGAINST FEDERAL ENCROACHMENT.

### A. *Lopez and Morrison re-drew the lines between federal and state sovereignty.*

In 1995, the Supreme Court signaled a shift in its approach to federalism in the context of its Commerce Clause jurisprudence. At issue in *Lopez* was the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>6</sup> Reversing the tide of Supreme Court opinion that had flowed since *N.L.R.B. v. Jones & Laughlin Steel Corp.*,<sup>7</sup> *United States v. Darby*,<sup>8</sup> and *Wickard v. Filburn*,<sup>9</sup> the Court

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3. Marty Schladen, *ICE Detains Alleged Domestic Violence Victim*, EL PASO TIMES (Feb. 15, 2017, 3:49 PM), <http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/>.

4. 514 U.S. 549 (1995).

5. 529 U.S. 598 (2000).

6. 514 U.S. at 551 (quoting 18 U.S.C. § 922 (2012)).

7. 301 U.S. 1, 37 (1937).

8. 312 U.S. 100 (1941). For example, the Court in *Darby* noted that:

held that the Act was not a proper exercise of Congress's Commerce Clause power. In doing so, the Court revived the importance of state sovereignty and, in particular, the ability of states to exercise their police powers without federal interference, principles that the majority of the Court found (and continues to find) embedded in the Tenth Amendment.

We start with first principles. The Constitution creates a federal government of enumerated powers. As James Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.<sup>10</sup>

The Court emphasized the importance of “meaningful limits” on Congress's power under the Commerce Clause.<sup>11</sup> Those limits are pressed when “national power seeks to intrude upon an area of traditional state concern.”<sup>12</sup> The line in *Lopez* was easy to draw, “for it is well established that education is a traditional concern of the States.”<sup>13</sup> The Court reiterated that, in such cases, it possesses a “particular duty to ensure that the federal-state balance is not destroyed.”<sup>14</sup> The need for the states to retain flexibility to address such complex issues was highlighted by the Court: “If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those

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Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

*Id.* at 114.

9. 317 U.S. 111, 128–29 (1942).

10. *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

11. *Id.* at 580.

12. *Id.*

13. *Id.* at 580 (citing *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974); see also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

14. *Lopez*, 514 U.S. at 581.

measures.”<sup>15</sup> The Court has repeatedly emphasized this flexibility (i.e., preserving the ability of states to serve as “laboratories”).<sup>16</sup>

*Morrison* involved Congress’s creation of a civil cause of action for damages resulting from gender-motivated crimes under the Violence Against Women Act of 1994.<sup>17</sup> In striking down the provision, the Court emphasized that regulation of such crimes falls soundly within the state’s police powers. The Court “accordingly reject[s] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”<sup>18</sup>

The Court noted that it could “think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>19</sup> The Court further explained that even the Fourteenth Amendment, which was drafted to address bad behavior by the states, contains limitations to protect against undue federal intrusion into the arena of state police powers.<sup>20</sup> The Court noted that “[t]hese limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”<sup>21</sup>

As Professor Lash has explained, *Lopez* and *Morrison* signaled a significant resurgence of a “narrow construction of federal power to interfere with matters believed best left under state control.”<sup>22</sup> Relying on James Madison’s Report of 1800, Lash has argued that

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15. *Id.*

16. *See* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015) (acknowledging that the Court has recognized the role of states as laboratories for solving complex legal problems); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

17. 42 U.S.C. § 13981 (1994).

18. *United States v. Morrison*, 529 U.S. 598, at 617 (2000).

19. *Id.* at 618.

20. *Id.* at 661 (Breyer, J., dissenting).

21. *Id.* at 621; *see also* *McCarthy v. Hawkins*, 381 F.3d 407, 433 (5th Cir. 2004) (“Title II of the ADA is not permissible Commerce Clause legislation to the extent that it regulates states’ decisions regarding who will participate in or receive the benefits of state entitlement programs.”).

22. Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 165 (2006).

following the Rehnquist Court's rulings, jurisprudence is returning to the original, 1800 understanding of the Tenth Amendment.<sup>23</sup>

In split opinions, a majority of the Court re-affirmed this approach to federalism in the challenge to the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.<sup>24</sup> In his opinion, Chief Justice Roberts explained:

The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.”<sup>25</sup>

....

Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy.<sup>26</sup>

In refusing to extend the Commerce Clause to cover the passage of the Affordable Care Act, the Court emphasized that “[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”<sup>27</sup>

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23. *Id.* In contrast, Dean Erwin Chemerinsky has argued that the holdings in those cases are founded upon “unsupported assumptions” and that overcoming those basic assumptions is the role of the Courts and the Tenth Amendment to develop a true understanding of federalism. Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1764 (2006).

24. 567 U.S. 519 (2012).

25. *Id.* at 536.

26. *Id.* (quoting THE FEDERALIST NO. 45, at 293 (J. Madison) (Clinton Rossiter ed., 1961)).

27. *Id.* at 557.

Thus, steadily since 1995, the Court has revived the importance of protecting state police power and insuring that it remains free of federal interference. Although this revival has occurred within the context of Commerce Clause cases, there can be little doubt that protecting the police power of the states remains of paramount importance to the Court.

### III. WHY STATE COURTHOUSES MUST BE OFF-LIMITS

Traditionally, one of the most important exercises of state police powers has been the adjudication of misdemeanor crimes and, in particular, domestic violence. Various scholars and organizations have documented the effect of immigration enforcement on domestic violence victims. This Part explains why the interference of ICE agents at state and local courthouses intrudes in the area of state sovereignty, as protected by the Supreme Court under its Tenth Amendment jurisprudence.

ICE enforcement policies have resulted in declining reports for sexual assaults and domestic violence, particularly in Spanish-speaking, Latino communities.<sup>28</sup> The heads of some state high courts have expressed concern (in ways that echo the United States Supreme Court) about state sovereignty and police power in the context of ICE enforcement and undocumented victims. Chief Justice Stuart Rabner of New Jersey, for example, criticized the United States Department of Homeland Security (DHS) and ICE immigration enforcement policies at state courthouses.<sup>29</sup> Chief Justice Rabner argued that these arrests and searches undermine the courts' functions and the legal system.<sup>30</sup> He touched upon how it directly impacts domestic violence cases and requested that courthouses be listed in DHS's list of "sensitive locations."<sup>31</sup> Chief Justice Mary Fairhurst of Washington

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28. Dean DeChairo, *Democrats Want Congress to Limit ICE Enforcement at Sensitive Locations*, CONG. Q. ROLL CALL, June 5, 2017, at 1, 2017 WL 2415384.

29. Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (April 19, 2017), <http://2hqyh93y2sj32lqbnw40aoj0.wpengine.netdna-cdn.com/wp-content/uploads/00069527.pdf>.

30. *Id.*

31. ICE has promulgated a policy that limits enforcements actions at "sensitive locations" such as churches and schools. Memorandum from Jon Morton, Dir., U.S. Immigration and Customs Enft (Oct. 4, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

also sent a letter to then-DHS Secretary John Kelly arguing that ICE enforcement at state court houses is directly impacting due process.<sup>32</sup>

More broadly, Professor Vishnuvajjala has articulated how ICE's "Secure Communities" policies have a disproportionate impact on battered women in immigrant communities.<sup>33</sup> She explained why victims in immigrant communities are already vulnerable to domestic violence due to social, linguistic, and cultural barriers.<sup>34</sup> Further, the cooperative relationships between local law enforcement and ICE directly compounds the problem by bringing federal immigration enforcement to the local level, discouraging these victims from coming forward.<sup>35</sup>

Civil rights activists and organizations have also explained in detail why immigration enforcement at state courthouses affects local law enforcement.<sup>36</sup> The common thread in these pieces is that ICE enforcement causes increased fear, which results in under-reporting and a failure to appear for court. This all results in a lack of state enforcement of domestic violence laws and thus results in increased

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32. *Washington State Chief Justice Objects to Immigration Enforcement Tactics at State Courthouses*, 94 INTERPRETER RELEASES 1, 6 (March 27, 2017).

33. Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J. L. & SOC. JUST. 185 (2012).

34. *Id.*

35. *Id.* Christina Carr has also addressed the impact immigration enforcement has on survivors of domestic violence and sexual assaults. Christina Carr, *Advocates: Female Abuse Victims Need More Help*, CONG. Q. ROLL CALL, Sept. 23, 2014, at 1, 2014 WL 4723862. She did so by analyzing the structural components of immigration enforcement policies that fail to provide support for those survivors. *Id.* The lack of appropriate counseling limits the survivors' ability to access mental health services, petition for asylum, and may in fact, compound trauma. *Id.*

36. See *Thirteen Organizations Call on Top State Officials to Protect RI Immigrants*, ACLU OF R.I. (May 9, 2017), <http://www.riaclu.org/news/post/thirteen-organizations-call-on-top-state-officials-to-protect-ri-immigrants>; Joanne Lin, *Immigration Arrests at State Courthouses Rise in 2017. Here's Why That's Dangerous—For All of Us*, ACLU: SPEAK FREELY (April 6, 2017, 2:45 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/immigration-arrests-state-courthouses-are-rise>; *National LGBTQ Organizations Denounce Arrest of Transgender Survivor of Domestic Violence by ICE El Paso*, EL PASO HERALD-POST (Feb. 16, 2017), <https://elpasoheraldpost.com/lgbtq-orgs-denounce-transgender-ice-arrest/>; Katie McDonough, *Here's the Chilling Effect When ICE Targets Domestic Violence Victims*, SPLINTER (Feb. 16, 2017, 2:58 PM), <https://fusion.kinja.com/heres-the-chilling-effect-when-ice-targets-domestic-vio-1793858690> (analyzing how ICE at state court houses are driving down domestic violence reports and resulting in increased fear); *Review of Feb. 20, 2017 DHS Memoranda: Possible Impacts on Survivors of Domestic and Sexual Violence*, 2017 TAHIRIH JUSTICE CENTER 3, [http://www.ncdsv.org/TJC\\_Review-of-February-20-2017-DHS-Memoranda\\_2-21-2017.pdf](http://www.ncdsv.org/TJC_Review-of-February-20-2017-DHS-Memoranda_2-21-2017.pdf) (explaining how the new DHS enforcement policies would directly hinder and discourage domestic and sexual violence survivors from reporting their claims).



crime. This is exactly the type of federal interference that was at the heart of cases like *Lopez* and *Morrison*.

#### IV. ICE PRESENCE IS TANTAMOUNT TO COMMANDEERING OF THE STATE JUDICIAL PROCESSES

In addition to the renewed focus on state sovereignty and federalism adopted by the Court in *Lopez* and *Morrison*, other cases have strengthened these principles by relying on the Tenth Amendment. *New York v. United States*<sup>37</sup> and *Printz v. United States*<sup>38</sup> both addressed the limit of federal regulation of states. In those cases, the Supreme Court held that the federal government could not commandeer the legislative and executive arms of the states.<sup>39</sup> To do so violates the notion of dual sovereignty built into our federalist system.<sup>40</sup> Although not precisely on point to the topic at

37. *New York v. United States*, 505 U.S. 144, 149 (1992).

38. *Printz v. United States*, 521 U.S. 898, 902 (1997).

39. The Court in *New York* explained that:

A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

505 U.S. at 176. The Court in *Printz* explained that:

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: "The Federal Government may not compel the States to enact or administer a federal regulatory program." The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

521 U.S. at 933 (internal citation omitted).

40. The Court in *New York* explained that:

If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

505 U.S. at 182-83. The Court in *Printz* noted that:

hand, it informs the Court's increasingly bright-line approach to demarcating the boundary between federal and state sovereignty.

Permitting ICE agents to appear and to detain immigrants at state and local courthouses is tantamount to commandeering the state police power to do the bidding of federal law. Commandeering of the legislative and executive arms of the states was soundly rejected as a violation of Tenth Amendment principles in *New York v. U.S.* and *Printz v. U.S.* In *New York*, Congress was deemed to have unlawfully commandeered the legislative arms of the state by requiring the states to implement a federal program or to "take title" of low-level radioactive waste.<sup>41</sup> In *Printz*, local chief law enforcement officers were required by federal law to run background checks. As in *New York*, the federal government was found to have unlawfully commandeered the executive arms of the states.<sup>42</sup>

By allowing state and local courthouses to serve as a "round-up" point for undocumented immigrants who are compelled to be present to testify in state or local prosecutions, ICE is, in essence, commandeering the state judicial process and the states' exercise of their police power. This affront to federalism is worsened by the reality that ICE's presence at state and local courthouses undermines the ability of states to enforce their laws at those courthouses.

Specifically, in the context of immigration, the federal courts have made clear that direct commandeering of state and local officials to do federal bidding runs afoul of federalism principles. "Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the

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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. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

521 U.S. at 935.

41. *New York*, 505 U.S. at 175-76.

42. "Under the Tenth Amendment, federal officers may not conscript or commandeer state officials into administering and enforcing a federal regulatory program." *United States v. White*, 782 F.3d 1118, 1127 (10th Cir. 2015).

request of the federal government.”<sup>43</sup> The Third Circuit went on to explain as follows:

As we have previously recognized, “all powers not explicitly conferred to the federal government are reserved to the states, a maxim reflected in the text of the Tenth Amendment.” It follows that “any law that commandeers the legislative processes [and agencies] of the States by directly compelling them to enact and enforce a federal regulatory program is beyond the inherent limitations on federal power within our dual system.” In other words, a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment.

....

As in *New York* and *Printz*, immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme.<sup>44</sup>

Indeed, the seminal immigration case of recent years, *Arizona v. United States*, underscores the need to clearly demarcate the lines of dual sovereignty.<sup>45</sup> “Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”<sup>46</sup>

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43. *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014).

44. *Id.* at 643–44 (internal citations omitted).

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

46. *Id.* at 398. As Professor Gerken has argued, the strengthening of the Tenth Amendment represents the new nationalism. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L. J. 1889 (2014). She argues that as federalism grows, states will begin to be used to accomplishing national goals. *Id.* Professor Jennifer Chacón has argued that the coercive funding strategies by Congress violate the Tenth Amendment. See Chacón, *supra* note 1. Bill Ong Hing has analyzed how sanctuary polices fall within reserved police powers of the state. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012). Relatedly, Shirley Lin has also argued that “[t]he REAL ID Act requires states to implement the sheer majority of its regulatory scheme, also arguably in violation of the Tenth

## V. CONCLUSION

If state police power is to mean anything, it must mean the ability of state and local entities to enforce laws against domestic violence without federal interference. Even in areas where Congress has enumerated authority, such as, commerce and immigration, there must be a stopping point that protects the states in our federalism structure. As members of the Court have repeatedly emphasized, it is the states that need the ability to protect their citizens from such criminal acts, free from federal interference. ICE's overreach undermines this ability and threatens the boundaries that set apart the dual sovereigns in our federalism.

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Amendment." Shirley Lin, *States of Resistance: The Real ID Act and Constitutional Limits Upon Federal Deputization of State Agencies in the Regulation of Non-Citizens*, 12 N.Y. CITY L. REV. 329, 351 (2009).

