AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Intergovernmental Immunity

**United States v. State of California, No. 18-16496 (9th Cir. 2019)**

*In 2017, the state of California adopted three pieces of legislation pushing the limits of sanctuary jurisdiction policies. AB 450 requires employers in the state to alert employees before any federal immigration inspections. AB103 imposed new state inspection requirements on facilities that hold detainees who are in violation of civil immigration laws. SB54 prohibits state and local law enforcement officers from sharing information with federal immigration authorities. The federal government filed suit in federal district court, arguing that the new state laws unconstitutionally interfered with the administration of federal policy. The trial court largely upheld the laws. The government appealed to the 9th circuit court of appeals, which affirmed the lower court’s ruling.*

Judge [SMITH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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The doctrine of intergovernmental immunity is derived from the Supremacy Clause, U.S. Const., art. VI, which mandates that “the activities of the Federal Government are free from regulation by any state.” *Boeing Co. v. Movassaghi* (9th Cir. 2014). . . .

Under the doctrine of conflict preemption, “state laws are preempted when they conflict with federal law. This includes cases where ‘compliance with both federal and state regulations is a physical impossibility,’ and those instances where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” A*rizona v. United States* (2012). . . .

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. . . . The doctrine [of intergovernmental immunity] has been invoked, to give a few examples, to prevent a state from imposing more onerous clean-up standards on a federal hazardous waste site than a non-federal project; to preclude cities from banning only the U.S. military and its agents from recruiting minors; and to foreclose a state from taxing the lessees of federal property while exempting from the tax lessees of state property. Those cases dealt with laws that directly or indirectly affected the operation of a federal program or contract. The situation here is distinguishable—AB 450 is directed at the conduct of *employers*, not the United States or its agents, and no federal activity is regulated. We agree with California: “The mere fact that those notices contain information about federal inspections does not convert them into a burden on those inspections.” . . .

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Since the advent of the doctrine, intergovernmental immunity has attached where a state’s discrimination negatively affected federal activities in some way. It is not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment.

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The United States also contends that AB 450’s employee-notice provisions are preempted because they seek “to alter the manner in which the federal government conducts inspections, by imposing requirements that neither Congress nor the implementing agency saw fit to impose.” We disagree. The cases to which the United States cites concerned either the disruption of a federal relationship or the undermining of a federal operation. Here, there is indisputably a federal relationship, but it is between federal immigration authorities and the employers they regulate—*not* between employers and their employees. AB 450 impacts the latter relationship, not the former, and imposes no additional or contrary obligations that undermine or disrupt the activities of federal immigration authorities. . . .

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Prior to the enactment of AB 103, California law already required periodic inspections of prisons and detainment facilities. . . . AB 103, however, does not merely replicate this inspection scheme; in addition to requiring “[a] review of the conditions of confinement,” the enactment also calls for reviews of the “standard of care and due process provided to” detainees, and “the circumstances around their apprehension and transfer to the facility.” These additional requirements burden federal operations, and *only* federal operations.

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[W]e are not prepared to recognize a *de minimis* exception to the doctrine of intergovernmental immunity. *Any* economic burden that is discriminatorily imposed on the federal government is unlawful.In relying on a *de minimis* exception, the district court applied incorrect law and therefore abused its discretion.

That is not to say, however, that the United States is likely to succeed on the merits as to the *entirety* of AB 103. Only those provisions that impose an additional economic burden exclusively on the federal government are invalid under the doctrine of intergovernmental immunity.

. . . . At oral argument, California maintained that its Attorney General’s interpretation of “due process” is indeed as limited as its brief suggests, and thus does not compel any additional inspection requirements beyond those applied to other state facilities.

In the context of this appeal from the denial of a preliminary injunction, we accept California’s limited construction. We therefore conclude that AB 103’s due process provision likely does not violate the doctrine of intergovernmental immunity, and that the district court’s denial of a preliminary injunction as to this provision should be affirmed. We note, however, that a broader reading of the term “due process” might empower the California Attorney General to scrutinize, say, an immigration judge’s analysis, the results of the Board of Immigration Appeals, or other related court proceedings—all of which are well outside the purview of a state attorney general, and not duplicative of the inspection requirements otherwise imposed on California’s state and local detention facilities.

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In light of . . . the district court’s erroneous reliance on a de minimis exception to the doctrine of intergovernmental immunity, we reverse the district court’s denial of a preliminary injunction as to . . . the provision of AB 103 requiring examination of the circumstances surrounding the apprehension and transfer of immigration detainees.

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. . . . AB 103 does not regulate whether or where an immigration detainee may be confined, require that federal detention decisions or removal proceedings conform to state law, or mandate that ICE contractors obtain a state license. The law might require some federal action to permit inspections and produce data—a burden that, as discussed above, implicates intergovernmental immunity—but as California persuasively notes, “[M]ere collection of such factual data does not (and cannot) disturb any federal arrest or detention decision.”

. . . . The United States does not dispute that California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders, and neither the provisions of the Immigration and Naturalization Act that permit the federal government to contract with states and localities for detention purposes, nor the contracts themselves, demonstrate *any* intent, let alone “clear and manifest,” that Congress intended to supersede this authority. The district court was correct when it concluded, “Given the Attorney General’s power to conduct investigations related to state law enforcement—a power which [the United States] concedes—the Court does not find this directive in any way constitutes an obstacle to the federal government’s enforcement of its immigration laws or detention scheme.”

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The United States argues that SB 54 unlawfully obstructs the enforcement of federal immigration laws. It focuses on a provision of the law that prohibits California law enforcement agencies from “[t]ransfer[ring] an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination.” . . .

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In short, SB 54 does not directly conflict with any obligations that the INA or other federal statutes impose on state or local governments, because federal law does not actually mandate any state action.

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“The Constitution . . . ‘confers upon Congress the power to regulate individuals, not States.’” . . . Ultimately, we conclude that the specter of the anticommandeering rule distinguishes the case before us from the preemption cases on which the United States relies. Those cases concerned state laws that affirmatively disrupted federal operations by mandating action (or inaction) contrary to the status quo.In each, a state statute affirmatively instituted a regulatory scheme that conflicted with federal law, either by commission (for example, by applying differing standards or mandating affirmative action irreconcilable with federal law) or omission (by demanding inaction that directly conflicted with federal requirements). The solution to avoid conflict preemption was the same: invalidate the state enactment. In each case, the status quo would return—either no future conflicting action would be taken, or active compliance with federal law would recommence—and federal activity would no longer be obstructed.

Here, by contrast, invalidating SB 54 would *not* prevent obstruction of the federal government’s activities, because the INA does not require any particular action on the part of California or its political subdivisions. Federal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities. SB 54 simply makes that choice for California law enforcement agencies.

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Federal schemes are inevitably frustrated when states opt not to participate in federal programs or enforcement efforts. But the choice of a state to refrain from participation cannot be invalid under the doctrine of obstacle preemption where, as here, it retains the right of refusal. . . .

SB 54 may well frustrate the federal government’s immigration enforcement efforts. However, whatever the wisdom of the underlying policy adopted by California, that frustration is permissible, because California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts. The United States stresses that, in crafting the INA, Congress expected cooperation between states and federal immigration authorities. That is likely the case. But when questions of federalism are involved, we must distinguish between expectations and requirements. In this context, the federal government was free to *expect* as much as it wanted, but it could not *require* California’s cooperation without running afoul of the Tenth Amendment.

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*Affirm and Remand.*