



The Police Power

Committee on
Federalism

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September 25, 2024

Overview

- Background: Reserved Powers
- The Police Power
- Limitations on the Police Power
- Suggestions for Police Laws

Reserved Powers

- Tenth Amendment, U.S. Constitution
 - “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.”
- States have powers of the British Parliament, except:
 - Those granted to Federal Government; and
 - Those prohibited by U.S. and state constitutions.
- Most important reserved power is the **police power**.

What Is the Police Power?

- The police power is the sovereign power of the state to:
 - Protect the lives, health, safety, morals, and comfort of all persons;
 - Prevent offenses against the state;
 - Preserve the public order; and
 - Promote the common good and the general welfare of society.
- Inherent power of the state that is vested in the Legislature.

Police Power, cont.

- Part of the Legislature's plenary power to make law.
- Exercised through the enactment of *police laws*.
 - A police law is not necessarily a criminal statute.
 - Rather, a police law is one enacted for the purpose of exercising the police power.

Delegation

- A police law may *delegate* the state's exercise of the police power to:
 - A state officer or agency;
 - A political subdivision; or
 - An instrumentality of the state.
- But the police power *may not* be delegated to private parties.

Limitations on the Police Power

- Police power is “sweeping,” and its limits “**cannot be defined with precision.**”
 - *Ex parte Hinkle*, 33 Idaho 605 (1921)
- The police power is “one of the most essential of powers, at times the most insistent, and always one of the **least limitable of the powers of government.**”
 - *District of Columbia v. Brooke*, 214 U.S. 138 (1909)

Limitations, cont.

“We deal, in other words, with what traditionally has been known as the police power. **An attempt to define its reach or trace its outer limits is fruitless**, for each case must turn on its own facts.”

Berman v. Parker, 348 U.S. 26 (1954)

Limitations, cont.

- But!
 - A bill to enact a police law is subject to the same constitutional requirements as any other bill.
 - A police law cannot be the type of law specifically prohibited by the federal or state constitution, such as:
 - A bill of attainder; or
 - An ex post facto law.
 - A police law is **still subject to constitutional rights**.
 - Depending on the circumstances, a police law may restrict certain rights.
 - **But it cannot destroy them.**

Limitations, cont.

- When considering whether a police law is constitutional, courts will consider:
 - The law's purpose;
 - The extent to which the law restricts rights;
 - Whether the restrictions bear a substantial relation to the purpose; and
 - Whether the purpose legitimately falls within the police power.
- Police laws must be reasonable and should not be arbitrary, oppressive, or discriminatory.

Federal Preemption

- The police power of the state **extends to the federal domain**.
 - *Omaechevarria v. State of Idaho*, 246 U.S. 343 (1918).
- But if Congress has enacted laws relating to federal lands, federal law **might** preempt state law.
 - Property Clause: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” (Article IV, Section 3, Clause 2, U.S. Constitution)
 - Supremacy Clause: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” (Article VI, Clause 2, U.S. Constitution)



Preemption, cont.

- Federal law prevails if:
 - State law conflicts with federal law;
 - State law is an obstacle to achieving the objective of Congress; or
 - Congress intends to preempt state law.
- But courts are often reluctant to find preemption in the absence of clear intent from Congress.

Regarding Wildfires....

- Restrictions on land use to protect state forests from wildfire is a valid exercise of the police power.
- See the case *Chambers v. McCollum*, 47 Idaho 74 (1928).

Suggestions for Police Legislation

- Comply with all constitutional requirements for bills.
- Be clear about the purpose of the bill.
- Limit any restrictions on rights to those necessary to accomplish the purpose of the bill.
- Avoid provisions that would conflict with or otherwise be preempted by federal law.

Questions?

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