

S.208

Constitutional Issues

House Committee on Judiciary

February 17, 2026

Police Power of Vermont

10th Amendment to the U.S. Constitution

Powers retained by the States and the people:

“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.”

State Police Powers

Constitution of Vermont, Chapter I, Article 5

“That the people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.”

Federal Authority The Supremacy Clause

U.S. Constitution, Article VI, Clause 2

“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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Preemption

Three types of preemption:

- **Express preemption** - occurs when a federal law explicitly states that it overrides state laws
- **Field preemption** - occurs when the federal regulation is so extensive that states have no room to add further regulations
- **Conflict preemption** - occurs when it is impossible to comply with both sets of laws

Preemption - California district court case

“Here, the United States does not invoke express preemption, implied field preemption, or conflict preemption as bases for its challenge to the Acts. There is no federal law or regulation that requires federal law enforcement officers to wear facial coverings or to conceal their agency, name, or badge number while exercising federal law enforcement duties. In fact, some federal laws and regulations require visible identification in certain circumstances.”

United States v. California, 2:25-c-10999-CAS-AJRx (2/9/26)

Intergovernmental Immunity Doctrine

McCulloch v. Maryland, 17 U.S. 316 (1819)

Established that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

Intergovernmental Immunity Doctrine

Immunizes the federal government from state and local laws that either:

- (1) regulate the United States directly; OR
- (2) discriminate against the federal government and those with whom it deals.

Intergovernmental Immunity Doctrine

(1) Does a law enforcement identification and anti-masking law regulate the U.S. directly?

No - per the California District Court, holding:

- it does not interfere with or control federal law enforcement operations; and
- it is analogous to traffic laws, which are enforceable against federal officers.

Intergovernmental Immunity Doctrine

(2) Does the bill discriminate against the federal government and those with whom it deals (e.g., contractors)?

No - unlike the anti-masking bill in California, S.208 does not discriminate between local, state, or federal law enforcement officers.

Supremacy Clause Immunity

Prohibits states from undermining federal law by criminally charging officials who are properly carrying out their federal duties.

In re Neagle, 135 U.S. 1 (1890)

Two-part test:

- (1) Was the official doing something authorized by federal law? AND
- (2) Were the official's actions "necessary and proper" to fulfil their federal responsibilities?

Supremacy Clause Immunity

- There is no federal statute, nor officially enacted policy or promulgated rule explicitly authorizing or requiring masking by federal officers.
- Officials with the Department of Homeland Security have publicly stated that it is up to individual agents to decide whether to mask.

Questions?