



Congress and Law Enforcement Reform: Constitutional Authority

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[Nationwide protests](#) in response to the publication of video footage of a Minneapolis police officer pressing his knee into the neck of George Floyd leading to his death have generated [renewed interest](#) in the issue of reforming the policing practices of state and local officials. As discussed in more detail in this [companion sidebar](#), several *existing* federal laws seek to prevent and redress constitutional violations by state and local law enforcement officials. However, because the Constitution generally grants states the authority to regulate issues of local concern—which includes policing and criminal law—Congress is limited in its ability to legislate on matters related to state and local law enforcement—limits that may inform any *new* laws Congress seeks to enact on this evolving issue. This Sidebar begins with an overview of Congress’s authority to enact legislation and the limits on those powers. It then discusses in more detail two of the enumerated powers—congressional powers that are found within the Constitution—that may be most relevant when Congress legislates on matters relating to state and local law enforcement.

Limits to Congressional Authority

The Constitution establishes a “system of [dual sovereignty](#) between the States and the Federal Government.” Under the [Tenth Amendment](#), “[t]he 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.” Thus, states generally have [broad authority](#) to enact legislation, including to regulate the states and its localities’ law enforcement approaches. In contrast, Congress may only enact legislation under a [specific power that is enumerated](#) in the Constitution and cannot use its power to intrude impermissibly on the sovereign powers of the states. In this vein, the Supreme Court has recognized that there are certain subjects that are largely of a local concern where states “[historically have been sovereign](#),” such as issues related to the family, crime, and education.

Because of these principles, the Supreme Court has [recognized](#) various limitations on Congress’s power to legislate in areas that fall within a state’s purview, observing that congressional power is “subject to outer limits,” and that Congress must take care not to “effectually obliterate the distinction between what is national and what is local.” In addition, under the [anti-commandeering doctrine](#), Congress is prohibited from passing laws requiring states or localities to adopt or enforce federal policies. Although these

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principles constrain Congress's power, Congress can rely on its enumerated powers to regulate in areas it could not otherwise reach. The spending power and section 5 of the Fourteenth Amendment are two of the most relevant authorities that Congress has used in the past to address local law enforcement issues.

Spending Power and Regulating Law Enforcement Activities

The [Spending Clause](#) empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” The Supreme Court has held that incident to the spending power, Congress may further its policy objectives by [attaching conditions](#) on the receipt of federal funds. These conditions often involve compliance with statutory or administrative directives and can apply to any entity receiving federal funds, including states and localities. In *South Dakota v. Dole*, for example, the Supreme Court upheld as a valid exercise of Congress's spending power a statute that conditioned the grant of federal highway funds to any state upon that state prohibiting the legal purchase or possession of alcohol by individuals less than 21 years old.

There are, however, [four limitations](#) on Congress's authority to attach conditions to federal funds. First, a funding condition must be “[in pursuit of the general welfare](#).” However, courts generally afford Congress substantial deference in determining what expenditures are “[intended to serve general public purposes](#).” Second, if Congress intends to place conditions on federal funds, it must do so “[unambiguously](#)” so that states can knowingly choose whether or not to accept the funds. Third, conditions on federal funding must be related or “germane” to “[the federal interest in particular national projects or programs](#).” Fourth, other constitutional provisions may bar the conditions placed on the grant of federal funds. For instance, Congress may not condition a monetary grant on “[discriminatory state action or the infliction of cruel and unusual punishment](#).” Relatedly, conditions on federal funding are unconstitutional when they become coercive to the point that “[pressure turns into compulsion](#)” or commandeering. For example, in *National Federation of Independent Business (NFIB) v. Sebelius*, the Supreme Court held that a provision in the Affordable Care Act that withheld all Medicaid grants from any state that refused to accept expanded Medicaid funding was unconstitutionally coercive because it threatened to terminate “[significant independent grants](#)” that were already provided to the states.

Courts have [rarely used](#) these spending power limitations to invalidate conditions placed on the receipt of federal funds. *NFIB* remains the only instance in the modern era of the Supreme Court [invalidating](#) an exercise of the congressional spending power. Post-*NFIB* Spending Clause challenges have largely been unsuccessful in the lower courts.

Using its spending power, Congress has enacted legislation to influence the activities of state and local law enforcement. Federal regulation of state and local law enforcement primarily comes in the form of grant programs that provide money to local governments and police forces. For example, the [Community Oriented Policing Services \(COPS\)](#) program authorizes the Department of Justice to distribute grants to support community policing. Recipients can use these grants for hiring officers, procuring equipment, or establishing partnerships between local law enforcement agencies and local school districts. And the [Edward Byrne Memorial Justice Assistance Grant \(Byrne JAG\)](#) program provides [federal financial support for state and local criminal justice programs](#). Funding for these grant programs are subject to various conditions that may further federal interests in regulating law enforcement activities. For instance, grants under the COPS program prohibit the grantee from subjecting any person to discrimination on the basis of race, color, or national origin (among other protected classes) in connection with any programs or activities funded in whole or in part with federal funds. Funds under the JAG program are conditioned on, among other things, compliance with the [Death in Custody Reporting Act \(DCRA\)](#), which requires states to report information regarding the deaths of individuals in law enforcement custody.

Section 5 of the Fourteenth Amendment and Regulating Law Enforcement Activities

The [Fourteenth Amendment](#), in relevant part, provides that no state shall “deprive any person of life, liberty, or property, without due process of law” or “deny to any person within its jurisdiction the equal protection of the laws.” And the Supreme Court has [interpreted](#) the substantive component of the Due Process Clause as incorporating against state actors nearly all the rights found in the Bill of Rights, including those that pertain to criminal procedure and regulate the conduct of the police. In turn, [Section 5](#) of the Fourteenth Amendment grants Congress the power to enforce the Amendment through “appropriate legislation.” Section 5’s “[positive grant of legislative power](#)” authorizes Congress to both deter and remedy constitutional violations; and in doing so, Congress may prohibit otherwise constitutional conduct that intrudes into “[legislative spheres of autonomy previously reserved to the States](#).” The section 5 enforcement power (and the parallel enforcement powers found in the [Thirteenth](#) and [Fifteenth Amendments](#)) has been used to, for example, [ban the use of literacy tests](#) in state and national elections and abolish “[all badges and incidents of slavery](#)” by banning racial discrimination in the acquisition of real and personal property. Congress has also used its [section 5 power](#) to provide remedies for the deprivation of constitutional rights. For example, [42 U.S.C. § 1983](#) (Section 1983) provides a private cause of action for individuals claiming that their constitutional rights were violated by state actors acting pursuant to state law. And [18 U.S.C. § 242](#) ([Section 242](#))—also passed using the [section 5 power](#)—imposes criminal liability on state actors who deprive individuals of their constitutional rights.

While Congress’s section 5 enforcement power is broad, it is not [unlimited](#). Section 5 allows Congress to directly enforce constitutional rights through laws like Section 1983 and Section 242, however, the power does not allow Congress to supplement those rights through prophylactic legislation that regulates state and local matters without evidence of a [history and pattern](#) of past constitutional violations by the state. And, according to the Supreme Court, when Congress exercises its section 5 authority, its response must be [congruent and proportional](#) to a demonstrated harm. Congress may justify the need for section 5 legislation by establishing a legislative record that shows “[evidence . . . of a constitutional wrong](#).” For example, in holding that Congress exceeded its section 5 authority in enacting the Religious Freedom Restoration Act (RFRA)—which, in relevant part, supplanted normal First Amendment standards to impose a heightened standard of review for state government actions that substantially burdened a person’s religious exercise—the [Supreme Court](#) determined that Congress had failed to establish a widespread pattern of religious discrimination by the states. As a result, RFRA could not be justified as a remedial measure designed to prevent unconstitutional conduct and was outside of Congress’s power over the states. As a result, the Court struck down the law in so far as it applied to the states.

As a consequence of this case law, the scope of Congress’s section 5 power hinges in part on the scope of the constitutional right that a given law aims to protect. With respect to regulating state and local police forces, one constitutional right that may be particularly relevant to Congress’s use of its section 5 power is the [Fourth Amendment](#), which prohibits unreasonable searches and seizures by the government. The Fourth Amendment applies to many situations involving law enforcement including when police stop an [individual on the street for questioning](#), when police conduct [traffic stops](#), or when police make an [arrest](#). Police violate the Fourth Amendment, for example, if they use [excessive force](#) during an investigatory stop or arrest. According to the Supreme Court, the force used by law enforcement during an investigatory stop or arrest violates the constitution when it is [unreasonable](#) considering the facts and circumstances of the case. This analysis requires a careful [balancing](#) of “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” For example, the Supreme Court has [held](#) that police use of deadly force against a fleeing suspect who poses no immediate safety threat is unreasonable in violation of the Fourth Amendment. Determining whether an act of force is excessive in violation of the constitution, however, requires a fact specific analysis—a certain act may be reasonable under some facts while in a different

case, the same act may amount to excessive force. For example, [some courts](#) have ruled that police use of a chokehold is objectively unreasonable when used against individuals who are already under restraint and not a danger to others. In other circumstances, [courts](#) have upheld police use of a chokehold as reasonable in instances where an individual was unrestrained and continued to pose a threat of serious harm.

Considerations for Congress

Although Congress is limited in its ability to regulate local policing, the constitution does provide authority for some congressional reform and oversight into matters of state and local law enforcement. Some Members of Congress has [expressed interest](#) in proposing legislation to address police reforms in the wake of the response to George Floyd’s death. Several bills on the issue have already been introduced in the 116th Congress. These include those that utilize Congress’s Spending Clause authority to impose new conditions on existing grant programs to states and localities, such as H.R. 120, the Police CAMERA Act of 2019; H.R. 5777, the Police Accountability Act of 2020; H.R. 4359, the Police Exercising Absolute Care With Everyone Act of 2019, H.R. 2927; the Preventing Tragedies Between Police Communities Act of 2019; and H.R. 125, the Police Training and Independent Review Act of 2019. Other proposals, such as H.R. 4408—the Eric Garner Excessive Use of Force Prevention Act of 2019—would utilize Congress’s section 5 authority to amend 18 U.S.C. § 242 to criminalize the use of chokeholds. While [a companion to this Sidebar](#) provides a look at some of these proposals, the limitations to Congress’s constitutional authority to regulate state and local police forces may be a consideration when evaluating these and other reforms.

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