



Drug Legalization and the Right to Control Your Body

David Boaz - October 25th, 2010

There are many reasons to end the war on drugs and relegalize substances such as **cocaine** and **heroin**: Prohibition causes crime and corruption. It diverts law enforcement resources. It channels money to criminals here and abroad. It devastates our inner cities. It imposes huge social costs on such countries as Colombia and Mexico.

But the most important reasons are that federal drug prohibition is not authorized by the **Constitution** and that adult individuals should be free to make their own choices.

When we talk about **marijuana** and freedom, after decades of the war on drugs, it's hard to know where to start.

Here's a good place to start: Where does the federal government get the power to prohibit marijuana?

We usually discuss the Constitution in terms of rights—does the government's action infringe on some enumerated or unenumerated right of individuals? But this emphasis on rights may be misplaced—and even counterproductive. No question, the Constitution does indeed secure our rights. But at bottom the Constitution is a document through which the founders authorized the federal government's powers. Indeed, it was two years after ratification before we even had a **Bill of Rights**. It cannot be thought that we had no freedoms between 1789 and 1791.

Through the Constitution we delegated certain of our powers to the federal government. We enumerated those powers in the Constitution. And by enumerating them, we made clear that the federal government's powers were limited.

After a short period it was decided to add a Bill of Rights to the Constitution—"for greater caution," in **James Madison's** words. And because no one could enumerate all the rights that individuals retained, Congress added the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And then they added the Tenth Amendment, which reserves to the states or to the people all the powers not explicitly granted to the federal government.

So the first question we should ask when we think about the Supreme Court and the Constitution is not what rights the Court will find there. More basic is the question of whether the power the government claims has ever been authorized.

As my colleague **Roger Pilon** has argued, by first asking not whether the individual has a right but whether the government has a power, not only do we get the order right but, more importantly, we shift the focus to the government—to the source, if any, of its



authority. That puts the burden of proof where it belongs. It is not up to the individual to try to tease a right out of the Constitution, but for the government to show where it gets its authority—to nationalize retirement, for example, or to prohibit the use of marijuana. Ours is a limited government; government can act only under some enumerated power. So we should insist that this authority be shown, failing which the presumption in favor of individual liberty has not been overturned.

In that light, where in the Constitution does the federal government find the power to ban or regulate drugs? In 1920, people understood this; when they wanted to ban alcohol, they passed a constitutional amendment. You can't say much good about the prohibitionists, but at least they had enough respect for the Constitution to go through the formal amendment process.

But we have never passed a constitutional amendment granting the federal government any power to ban marijuana, or cocaine or other drugs. The federal government's contemporary prohibition policy is an illegal and unconstitutional usurpation of a power never granted to it.

People have rights that governments may not violate. **Thomas Jefferson** defined them as the rights of life, liberty, and the pursuit of happiness. When I'm asked what **libertarianism** is, I often say that it is the idea that adult individuals have the right and the responsibility to make the important decisions about their own lives. More categorically, I would say that people have the right to live their lives in any way they choose so long as they don't violate the equal rights of others. What right could be more basic, more inherent in human nature, than the right to choose what substances to put in one's own body? Whether we're talking about alcohol, tobacco, herbal cures, saturated fat, or marijuana, this is a decision that should be made by the individual, not the government. If government can tell us what we can put into our own bodies, what can it not tell us? What limits on government action are there?

Californians are going to vote on that question in a few days. Polls show a close vote on **Proposition 19**, but the combined opposition of politicians in both parties may be enough to defeat it. Still, the journalist Jacob Weisberg foresees the **imminent end to various kinds of prohibition** in these United States:

Within 10 years, it seems a reasonable guess that Americans will travel freely to Cuba, that all states will recognize gay unions, and that few will retain criminal penalties for marijuana use by individuals. Whether or not Democrats retain control of Congress, whether or not Obama is re-elected, and whether they happen sooner or later than expected, these reforms are inevitable—not because politics has changed but because society has.

For good measure, he adds that we're not going to prohibit either abortion or gun ownership. "Conservatives would be wise to give up on the one, liberals on the other. In each of these cases, popular demand for an individual right is simply too powerful to overcome."

Sounds like libertarian heaven:

The chief reason these prohibitions are falling away is the evolving definition of the pursuit of happiness....

Republicans face a risk in resisting these new realities. Freedom is part of their brand; if the GOP remains the party of prohibition, it will increasingly alienate libertarian-leaningers and the young. But the party as presently constituted has very little capacity to accept social change. Democrats face a danger in embracing cultural transformations too eagerly. Nearly four decades after George McGovern became known as the candidate of amnesty, abortion, and

acid, cultural issues are still treacherous territory for them. Why get in front of change when you can follow from a safe distance and end up with the same result?

Weisberg may well be right. I'd say that I'm amazed that the concept of gay marriage has progressed as fast as it has, and equally amazed that the Cuban embargo and marijuana prohibition have lasted as long as they have.

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