



## **We might soon have 9 states where pot is simultaneously legal and illegal. That's a problem.**

Trevor Burrus

November 2, 2016

A few weeks ago, the Washington Post reported that support for marijuana legalization is slightly leading in all five states where it will be on the ballot in November — California, Massachusetts, Maine, Nevada, and Arizona.

Whatever happens, it seems almost certain that at least one of these states — and possibly all five — will legalize marijuana and join the ranks of Colorado, Washington, Alaska, and Oregon. By November, we may have nine states where marijuana is simultaneously legal and illegal.

That's because under the federal Controlled Substances Act, marijuana possession is illegal, even for small-time users. And when something is simultaneously illegal and legal in the same place, you know someone screwed up somewhere. True, the federal government does not spend much time going after teenagers with joints in their pockets, but they could if they wanted to.

State legalization exists only at the discretion of the feds

How does state law in Colorado, Washington, Alaska, and Oregon interact with federal drug law today? Very precariously. Currently, state marijuana "legalization" exists at the sufferance of the federal government, which has decided not to pursue local users. With a simple change in the whims of a presidential administration, the feds could arrest everyone using marijuana in the legalized states. This is problematic, to say the least. And soon Congress will have to decide how it will deal with more states pushing back against federal control.

Understanding how this situation came to pass can help us understand how we can start to extricate ourselves from this bizarre situation.

Why can the federal government ban marijuana? In short, the New Deal.

Much of the confusion over whether states or the feds have power over local marijuana ultimately comes from assertions of federal power over local commerce that first occurred during the New Deal. Federal power continued to wax into the 1960s and beyond, before being rolled back somewhat during the so-called federalism revolution of the Rehnquist court. After decades in which the Court had upheld every assertion of federal power, in *United States v. Lopez* (1995)

and *United States v. Morrison* (2000) the Court affirmed that guns in school zones and violent crimes committed against women were matters of local concern.

Nevertheless, in 2005, in *Gonzales v. Raich*, the Court, including Justice Antonin Scalia, held that local medical marijuana use was still in federal jurisdiction. So the legal situation is a confused and confusing one. One way to explore this vexing set of issues starts with a simple question: Have you ever wondered why it took a constitutional amendment to prohibit alcohol but the federal government now prohibits drugs by statute?

By 1918, when what would be the 18th Amendment began its ratification process, 17 states already prohibited alcohol. Many dry states and temperance advocates were frustrated, however, because the Supreme Court had ruled in 1898, in *Vance v. W.A. Vandercook Co.*, that the Constitution prevents a dry state from entirely prohibiting alcohol from coming over its borders. In an 1890 law called the Wilson Act, Congress allowed states to regulate the sale of alcohol shipped over the borders, but the Court struck it down, holding that "the receiver of intoxicating liquors in one state, sent from another state, has the constitutional right to receive them *for his own use*, without regard to the state laws to the contrary."

A Century Ago, The Town Drunk Was Outside Of Congressional Jurisdiction, According To The Jurisprudence Of The Time. To Think Otherwise Was Contrary To The Plain Meaning Of The Constitution.

To allow states to prohibit shipments for personal use, said the Court, would be to essentially let them regulate interstate commerce; however, the Constitution gives only Congress the power to "regulate commerce ... among the several states." Following the *Vance*, prohibition states were deluged with alcohol imports.

In other words, at that time, well before our federal government became the lumbering behemoth it is today, the Supreme Court took the view that the Constitution's Commerce Clause was primarily a "free-trade zone" clause. States were prevented from interfering with the free flow of goods and services across their borders because that was Congress's prerogative. At the same time, Congress did not have the power to reach inside the states and legislate on local issues in the name of regulating interstate commerce. The town drunk was outside of congressional jurisdiction, according to the jurisprudence of the time; to think otherwise was contrary to the plain meaning of the Constitution.

This meant, as of 1918, that there was no single entity that had the power to prohibit alcohol within the entire United States — and that was a good thing. The states had given up some of their powers when they ratified a Constitution that created a government of limited and enumerated powers, and a prohibition on local regulation was one of the limitations on congressional power.

If a state wanted to keep alcohol within its borders legal, then Congress had no power to override that decision. And, given that dry states were also prohibited from entirely stopping the importation of alcohol, temperance advocates found themselves in a constitutional bind. Thus, they sought a constitutional amendment that would increase the powers of Congress not generally, but only over the sale and production of alcohol.

So what happened between 1918 and 1970, when the Controlled Substances Act was passed? Quite simply, the New Deal. Franklin Roosevelt demanded legislation that would give the federal government power over the national economy, including, and especially, control over the local economy within the states.

Banning private drug use was a logical outgrowth of banning private wheat-growing

Whether you agree with them or not, New Dealers believed that, to fix the ailing economy, Congress needed broad and sweeping powers over local economies, including local agriculture, local wages, and even local prices. Critics argued that the powers FDR sought had no feasible stopping point, and that soon every aspect of our lives would be ultimately controlled from Washington, DC.

Despite resistance from Supreme Court justices, eventually the powers Roosevelt sought were granted. In the last major Commerce Clause case before the 1990s, 1942's *Wickard v. Filburn*, the Court ruled that a farmer's "personal use" of wheat — that is, wheat that was not sold in interstate commerce but merely used to feed his family and his livestock — fell under the auspices of Congress's Commerce Clause jurisdiction.

The Court reasoned that, although Roscoe Filburn's home-grown wheat may not have greatly affected interstate commerce by itself, if everyone was allowed to grow and consume their own wheat, then Congress's attempt to stabilize national wheat prices would be stymied. Thus, everything from large, interstate agriculture companies to the lowliest backyard garden was placed under federal jurisdiction.

In the ensuing decades, other cases were decided that solidified Congress's power over local matters, most notably cases that upheld the Civil Rights Act of 1964 and made clear Congress's jurisdiction over local discrimination. By the late 1960s, when a new comprehensive, national drug law began to be contemplated, no one really questioned whether the federal government could ban or regulate everything from an international drug cartel to a teenager smoking weed in his basement.

The advantages of constitutional amendments over Supreme Court decrees

Regardless of whether you think increasing the federal government's power over the economy was a good thing, the powers authorized during the New Deal were broader than just power over "the economy." Unlike the 18th Amendment, the prohibition amendment, which expanded the federal government's power in a very specific and limited way, when you increase Congress's power via broadly applicable Supreme Court decisions, the consequences are far less predictable. One of those consequences is the federal drug war as it is fought today.

There is a whiff of federalist revolution in states' pushback against federal control over local marijuana, but the legal foundations of that revolution are weak. As mentioned previously, the federal government is merely allowing the legalizing states to continue, at its discretion; there is no constitutional barrier to the feds reasserting their power.

And so we have an unstable and undesirable situation, one that will grow more unstable as more states legalize marijuana. If five more states legalize, especially our most populous state, California, then the tensions in our federal structure will have to be dealt with.

The tension between state and federal drug laws creates concrete problems

Many federal laws are intertwined with our drug laws. Federal banking laws, for example, still treat banks that deal in proceeds from legal marijuana sales as essentially money launderers. Because of fear of federal prosecution, most marijuana businesses were once unable to get bank accounts.

In 2014, however, the Department of Treasury freed up banks to work with the marijuana industry, but it also required those banks to monitor marijuana businesses. Banks must ensure that their clients are not distributing marijuana to minors, getting involved with the illegal drug trade, or facilitating interstate shipments of marijuana. Understandably, many banks are fearful about to take on marijuana businesses because of these difficult and legally vague requirements — smaller banks in particular don't need the hassle.

Nevertheless, the industry is too lucrative for the banks to ignore. So banks will remain in a very precarious spot — legally vulnerable — until Congress steps in to reduce or remove the regulators' discretion

Here's another example of where the conflict between federal and state drug laws causes problems: Federal firearm law prohibits persons who are unlawful users of controlled substances from purchasing firearms. In those states where marijuana is legal, marijuana-using citizens are faced with a choice: Either lie about their marijuana use on their gun-permit application, which is a felony punishable by up to five years in prison, or do not purchase a gun. The Ninth Circuit recently ruled that just having a medical marijuana card, but not using the drug, is sufficient to prohibit someone from purchasing a gun. Congress should act quickly to rectify this, particularly if additional states legalize in November.

Small steps toward a federalist compromise

The Constitution will never return to the pre-New Deal era of limited government, and maybe that's a good thing. In the area of controlled substances, however, federalism should be allowed to reassert itself to some degree, something Congress can partially accomplish by statute.

Ideally, Congress would legalize marijuana, or, at minimum, remove it from the schedule 1 of the Controlled Substances Act, the section reserved for the most harmful drugs. Rescheduling marijuana would ease up many federal restrictions, including on banking, and significantly alter the enforcement priorities of the Justice Department.

Alternatively, Congress can help return local control over marijuana laws by only regulating marijuana in cases where there is a clear interstate connection — a person with 1,000 pounds of marijuana driving on I-70 from Colorado to Kansas, for example. To some extent the Justice Department already voluntarily limits itself to cases like that, but Congress can make it official via a statute.

There is also a lesson here to be learned about how best to expand federal power, if doing so is necessary. The 18th Amendment gave Congress specific power over a specific thing: It prohibited alcohol. The New Deal cases gave Congress unspecific power over a lot of things. The justices who resisted Roosevelt's laws were concerned with how a broad authorization for control over "local" matters could upset the relationship between the states and the federal government. For their resistance to the New Deal, they were lambasted as philistines resisting progress through a "horse and buggy" interpretation of the Constitution.

Yet those justices foresaw that the court's path would lead to an untenable tension between state and federal power. We're seeing that tension today, in our drug laws. Marijuana is the unlikely force behind a course correction in modern federalism.

*Trevor Burrus is a research fellow at the Cato Institute's Center for Constitutional Studies.*