

NATIONAL AFFAIRS

This is Your Constitution on Drugs

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Can something be legal and illegal at the same time? That may sound impossible, but it has increasingly become reality for cannabis in the United States. As more and more states legalize marijuana while Congress stands pat and the executive branch works out enforcement complexities, people across the country are asking themselves: What is this magical Schrödinger's weed?

The answer lies not in the nature of marijuana itself, but in America's system of dual sovereignty, which divides powers between the federal and state governments. When two overlapping sovereigns have policymaking authority, their laws and enforcement policies are bound to clash at times. Indeed, marijuana regulation is not the only policy area where state and federal laws have come into conflict, either historically or in recent years. States today are increasingly reasserting sovereignty in areas as diverse as health care, gun control, and immigration. Given the near inevitability of separate sovereigns' adopting contradictory laws, the real question is not whether conflicts will occur, but which law takes precedent when they do.

The Constitution's Supremacy Clause, which states that federal law trumps any state law to the contrary, appears to resolve the matter in favor of the federal government. Yet the answer is not so simple. The Supreme Court recognizes two limits on federal supremacy. First, the federal policy in question must have a valid constitutional basis, because the national government's powers are enumerated and thus limited. And second, even in areas where Congress can properly enact law, the Tenth Amendment prevents the federal government from using the states as instruments of governance.

The Supreme Court reiterated this latter limit — known as the "anti-commandeering" principle — as recently as the 2018 case of *Murphy v. NCAA*, a challenge to New Jersey's legalization of sports betting in the face of federal law that purported to stop states from taking such legislative action. Put simply, the doctrine asserts that Congress cannot compel the states to carry out federal law. In the marijuana context, a federal ban can only be implemented, practically speaking, through the greater law-enforcement resources of the states, as the federal government is responsible for just 1% of the 800,000 annual marijuana arrests. Meanwhile, an appropriations rider prevents the Justice Department from using federal funds to prosecute those who use medical marijuana in the 33 states (and the District of Columbia) where this activity is lawful. In

any case, even in the shadow of the federal ban, state-level marijuana legalization has flourished, indicating that federal supremacy has its limits.

As for Congress's authority to prohibit the cultivation and use of marijuana in the first place — the first limit on federal supremacy noted above — the culprit is the Commerce Clause. More specifically, the authority derives from the Supreme Court's expansive interpretation of Congress's Article I, Section 8 power to regulate commerce "among the several States." This interpretation stems from the 1942 case *Wickard v. Filburn*, in which the Court ruled that Congress could regulate the wheat a farmer grew for noncommercial purposes because, in the aggregate, growing wheat affects interstate commerce.

Despite this flimsy rationale for allowing Congress's lawmaking reach to extend beyond trade among the states, the decision remains good law. Moving from wheat to weed, the Court declined the opportunity to push back on *Wickard* 63 years later, instead holding in *Gonzales v. Raich* that prohibiting the private cultivation and use of marijuana was still within the scope of the Commerce Clause; these, too, are economic activities that, in the aggregate, affect interstate commerce. It further held that banning the growth of marijuana for medical use — permitted in California, where the case originated — was a permissible way for the federal government to prevent access to marijuana for other uses.

The vote in *Raich* was 6-3. Justice John Paul Stevens wrote for the majority, with the other three liberal justices and Justice Anthony Kennedy joining his opinion. Meanwhile, Justice Antonin Scalia wrote a concurring opinion asserting that Congress can regulate noneconomic intrastate activities where failing to do so would undermine a broader regulation of interstate commerce. He grounded his concurrence in the Necessary and Proper Clause, which gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers.

Since Scalia had voted with the pro-federalism majorities that held unconstitutional Congress's creation of gun-free school zones (*United States v. Lopez* in 1995) and a cause of action for victims of gender-motivated violence (*United States v. Morrison* in 2000), *Raich* became known as the late justice's "drug-war exception" to the Constitution. To paraphrase Justice Clarence Thomas's *Raich* dissent, growing pot in one's own backyard for private use is emphatically not a form of interstate commerce. What's more, Thomas observed, "if the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce but because it is inextricably bound up with interstate commerce), then Congress' Article I powers — as expanded by the Necessary and Proper Clause — have no meaningful limits."

Ironically, the excessive regulation of commerce was one of the complaints the colonists laid at the feet of George III in the Declaration of Independence. Even if the founders *had* contemplated an expansive Commerce Clause that allowed for a federal police force and prison system to prosecute and punish local, often noncommercial, behavior, is it possible they understood the clause to allow for nearly half of federal prisoners to be imprisoned on drug charges? After all, when drawing up the list of crimes that had to be dealt with nationally, the framers chose just four: treason, piracy, counterfeiting, and crimes against the law of nations.

But this essay isn't just about marijuana federalism or the growth of federal power since the New Deal. Those are just gateways to a broader discussion of how drug policy — including at the state level, where most of the action is — has perverted constitutional understandings, undermining the idea that the federal government is one of limited powers, but also weakening our rights and freedoms more broadly. We are in the midst of a war on drugs that is at war with the Constitution. Indeed, the drug war has altered our constitutional consciousness.

THE PHILOSOPHICAL ROOTS OF THE WAR ON DRUGS

Our analysis starts at the Constitution's preamble. This introductory statement declares:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

While rhetorically powerful, the preamble has no direct legal effect; as Joseph Story wrote in his *Commentaries on the Constitution of the United States*, the "true office" of the preamble is "to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them." Similarly, the General Welfare Clause — which echoes the preamble's reference to the "general Welfare" in opening the enumeration of legislative powers in Article I, Section 8 — does not grant Congress a general power to pass whatever laws it wants. Indeed, the idea that the clause justifies any legislation that gains a congressional majority — as opposed to *limiting* federal reach to truly national issues — emerged during the progressive era. After 1937's so-called "switch in time that saved nine," no legislation would be invalidated on federalism grounds until *Lopez* in 1995.

Yet promoting the general welfare is ostensibly the underlying justification for federal drug regulation. Consider the Controlled Substances Act (CSA), the statute that first established federal drug policy in 1971. The CSA reads, "The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." According to this statement, federal lawmakers clearly thought (and still think) they have the power to decide which assortments of chemicals Americans can and cannot put into their bodies, based on whether consuming such chemicals is good or bad for the nation's general welfare.

President Richard Nixon agreed. When he signed the CSA, he said he wanted to help "save the lives of hundreds of thousands of our young people who otherwise would become hooked on drugs and be physically, mentally and morally destroyed." That may be a noble cause — especially for those who believe drug use is not only unhealthy but immoral — yet neither the president nor Congress is empowered to act as an arbiter or enforcer of morality in this way. As Justice Kennedy announced in one of the few clear-cut rules he articulated — with respect to both the LGBT community (*Lawrence v. Texas* in 2003) and religious believers (*Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018) — moral disapproval is not a sufficient basis for government action.

It appears that the General Welfare Clause serves as the *philosophical* justification for federal drug legislation, but it does not suffice as a *legal* justification. To find the latter, one must look to Congress's powers as enumerated in Article I of the Constitution.

CONGRESS'S ENUMERATED POWERS

We begin our analysis of the Constitution's enforceable provisions in the drug-war context with Article I, Section 8. This section contains a list of Congress's enumerated powers, those powers that the Constitution expressly delegates to the federal legislature. The war on drugs has touched on, and at times twisted beyond recognition, our understanding of several of these provisions.

As discussed above, Congress has the express constitutional authority "[t]o regulate Commerce...among the several States." Setting aside *Wickard* and its progeny — through which Congress has extended its *presence* far beyond any limit set by this clause — the fledgling marijuana industry has also brought to light the harm caused by Congress's *absence* in the interstate-commerce realm. Interestingly, the Commerce Clause does not just authorize Congress to regulate interstate commerce; it has also been read to ensure the free flow of goods and services across state lines. This "dormant" Commerce Clause prohibits states from discriminating against out-of-state commercial interests or otherwise attempting to regulate conduct beyond their borders. Yet the federal ban on transporting marijuana across state lines means that businesses in the industry must vertically integrate all commerce within balkanized state marketplaces where marijuana is legal, leading to inefficiencies and by-design state protectionism. In other words, states that have legalized marijuana must show preference to in-state growers and sellers by default. When Congress gets around to modernizing federal cannabis law, it will need to ensure that, for residents of those states that legalize marijuana, trade among them is free, fair, and regular.

Also as mentioned above, the Constitution lists four federal crimes — counterfeiting, treason, piracy, and violations of the law of nations. The original federal code expanded that list to approximately 30 crimes, focusing solely on those offenses worthy of national attention. By the early 1980s — just after the drug war was declared — the number of federal criminal offenses stood at around 3,000. Today, researchers estimate that 5,000 federal statutes include criminal penalties. This number doesn't even include the penalties contained in an estimated 300,000 federal regulations. While the number of federal crimes had certainly risen between 1789 and 1980, the drug war has triggered nothing short of an explosion in these numbers.

Article I, Section 8 also contains a Postal Clause, which delegates to Congress the power "[t]o establish Post Offices." The skyrocketing number of mail- and wire-fraud crimes in the federal criminal code — the intersection of the Postal and Commerce Clauses — can in significant part be traced to the war on drugs. And that war has also affected the privacy of our mail. In the 1878 case *Ex parte Jackson*, the Supreme Court held that "[n]o law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail." Yet with the Anti-Drug Abuse Act of 1988, Congress granted the U.S. Postal Service the authority to inspect any packages it thinks might contain drugs using dogs, scanning technology, and inferences akin to what the police use in establishing probable cause.

The next clause grants Congress the power to secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In other words, Congress can protect inventors' intellectual property by granting them patents, which gives them incentive to pursue new and potentially beneficial research. But because certain drugs are illegal at the federal level, most narcotics-related inventions cannot benefit from patent protection. Instead, the development of pharmaceuticals using illicit narcotics is contingent on executive-branch decisions regarding which drugs to prohibit and which research projects to allow. This gives the president, not Congress, authority over intellectual property.

Meanwhile, Article I, Section 8 could not be more clear in vesting Congress, not the executive, with the power to declare war. But it was President Nixon who first declared war on drugs. The phrase itself was initially just a rhetorical label, but it has since come to involve the extensive use of military force both within the United States and abroad. A prime example is Operation Just Cause — the 1989 invasion of Panama — where combating drug trafficking was one of President George Bush's stated goals. During the operation, nearly 26,000 American servicemen invaded Panama without any congressional declaration of war.

Then there's the Posse Comitatus Act, which deals with the government enlistment of civilians in law-enforcement tasks. The Act generally prevents the use of armed forces for domestic law enforcement but carves out an exception for military support of civilian agencies engaged in "drug interdiction and counter-drug activities." President Donald Trump invoked an exception to the Act in his 2019 emergency declaration regarding the southern border, which re-apportioned Defense Department funds to the construction of a wall between the United States and Mexico. The president justified his decision in part by pointing to the southern border as a "major entry point for...illicit narcotics."

The power "[t]o exercise exclusive Legislation" over the District of Columbia belongs to Congress as well, though in 1973, Congress granted the district home rule. D.C. is now largely governed by a mayor and city council, but Congress retains authority over the district's budget and can block any laws the council passes. This unique arrangement has had unusual consequences for marijuana policy. In 2014, D.C. residents passed Initiative 71, which legalized marijuana for recreational use. Congress then stepped in to prevent the district from regulating or taxing the drug. The result puts marijuana in a sort of legal limbo: Although people can legally possess and use marijuana in the nation's capital, it remains illegal to purchase it there.

In addition to exceeding the powers enumerated in Article I, Section 8, federal drug laws also allow the executive branch to bypass the legislative process, violating the separation of powers. For instance, the attorney general — in reality, bureaucrats at the Justice Department, the Food and Drug Administration, and the Drug Enforcement Administration — can add substances to the CSA schedules, in effect establishing new criminal offenses, without legislative or judicial review. Substances can also be de-scheduled or reclassified, thereby abolishing offenses or changing associated penalties and collateral consequences without congressional input.

In sum, there's no dispute that Congress has the constitutional authority to tax drugs, to borrow money to fund anti-drug programs, to regulate or restrict the interstate and international drug trade, and to otherwise exercise its Article I, Section 8 powers — in addition to passing all laws

"necessary and proper" for carrying out these listed powers. But the source of its authority to prohibit the production, possession, sale, or use of drugs — at least within the states — remains questionable at best. The drug war has distorted our understanding of much of the Constitution, and that's even before we consider the Bill of Rights.

THE BILL OF RIGHTS

Although originally an afterthought, the Bill of Rights — comprising the first ten amendments to the Constitution — has come to represent America's enduring commitment to liberty. Yet here again, the war on drugs has chipped away at some of Americans' most cherished freedoms.

The First Amendment begins with the religion clauses, which bar Congress from interfering with the free exercise of religion and establishing a national religion. (Both clauses, like almost all Bill of Rights provisions, have also been applied to the states through the 14th Amendment.) Regarding the former, ongoing controversies over Obamacare's contraceptive mandate have thrust into prominence an unusual case called *Employment Division v. Smith* (1990). In that case, Native American employees of a drug-rehabilitation clinic were fired and rendered ineligible for unemployment insurance after they ingested peyote for religious purposes. The Supreme Court upheld that result, holding that neutral laws of general applicability — like Oregon's zero-tolerance drug policy — do not violate the right of religious exercise. Many, however, characterize the decision as undermining the Free Exercise Clause, even if it was written by Justice Scalia.

In response to public backlash against *Smith*, the House unanimously, and the Senate by a vote of 97-3, passed the Religious Freedom Restoration Act (RFRA), to ensure that courts would apply the highest level of scrutiny to laws that interfere with Americans' free exercise of religion. After the Supreme Court invalidated RFRA's application to the states in *City of Boerne v. Flores* (1997), 21 states adopted their own versions of the law, and state courts have added RFRA-like provisions in 10 others. As scholarly and public debate over *Smith* continues, the case itself would not have come about if Oregon hadn't adopted a zero-tolerance drug policy; even Prohibition-era laws allowed the production, sale, and use of sacramental wine.

There could also be an Establishment Clause problem with the drug war, because many diversion programs — which allow people to avoid being jailed for low-level drug crimes — require completing a 12-step program akin to Alcoholics Anonymous. It turns out that most of these programs require people to turn themselves over to God, ask God to cure them of moral defects, and otherwise share in a spiritual awakening. Several federal appeals courts have declared such coerced participation in religious activity by prisoners, parolees, and probationers unconstitutional.

In addition to protecting religious expression, the First Amendment also prohibits laws that interfere with the freedom of speech. Yet government actors appear all-too-ready to ignore this clause in situations involving drugs. In 2004, for instance, the American Civil Liberties Union and several drug-policy groups sued the U.S. Department of Transportation when the Washington Metropolitan Area Transit Authority (WMATA) refused to place an ad saying that "marijuana laws waste billions of taxpayer dollars to lock up non-violent Americans." Following

the government's loss at trial, then-solicitor general and perennial appellate superstar Paul Clement refused to defend WMATA or congressional efforts to block similar ads nationwide, saying that he lacked a viable argument.

Public school students are also afforded expressive rights under the First Amendment; as Justice Abe Fortas declared in *Tinker v. Des Moines Independent Community School District* (1969), students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Unless, of course, it involves speech that alludes to illicit drugs. In *Morse v. Frederick* (2007), the Supreme Court upheld the suspension of a high-school student who displayed a banner reading "Bong Hits 4 Jesus" across the street from his school during the 2002 Olympic torch relay. Nobody really knows what the banner meant (if anything), but it *could* be interpreted as promoting drug use. A majority of the Court held that suppressing this kind of speech was a necessary part of the school's mission. In doing so, as Justice Stevens pointed out in dissent, the majority abandoned the general rule that speech advocating dangerous or unlawful activity could only be punished if it is likely to "incite imminent lawless action."

The First Amendment also preserves the right to assemble peacefully, yet many local ordinances targeting drug-gang activity throw the status of this right into question. A particularly egregious example occurred in the 1997 case of *People ex rel. Gallo v. Acuna*, where the California Supreme Court held that an injunction prohibiting suspected gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with other suspected gang members did not violate the freedom of association.

The final clause of the First Amendment protects Americans' right "to petition the Government for a redress of grievances." Somehow, this message did not reach Washington state. In the run-up to a marijuana ballot measure that voters eventually approved, state police harassed and arrested activists collecting signatures to support legalization. Likewise, in Nevada, once it became clear that proponents of a similar measure would gather the requisite 10% of the population's signatures for approval, the government changed the rules and called for an additional 30,000 signatures. Fortunately, a judge set aside the new requirement, but the fact this case came about shows how far some officials will go to fight the drug war.

The Second Amendment prohibits the government from infringing the people's right to bear arms. But considering the fact that anyone convicted in any court of any offense where the potential — not actual — sentence is more than a year in prison cannot use a firearm, large swathes of Americans are forbidden from exercising this right. Moreover, anyone who is an unlawful user of, or is addicted to, any controlled substance cannot possess firearms or ammunition. This issue has come to the forefront recently in Hawaii, as the state both requires the registration of all firearms and allows the use of marijuana for medicinal purposes. Aside from the Second Amendment concerns such measures raise, the ban on firearms possession for those who use drugs reaches staggering levels of hypocrisy considering that Bill Clinton, Barack Obama, and George W. Bush have admitted to using illicit substances. But because they were never convicted, they were allowed to control the most powerful military in history — including its nuclear arsenal.

The war on drugs' biggest constitutional impact is undeniably in the area of criminal procedure, which implicates the Fourth Amendment. This amendment preserves the public's right against unreasonable searches and seizures. In *Criminal Procedure* — a leading law-school casebook by Joseph Cook, Paul Marcus, and Melanie Wilson — 12 of 18 cases on probable cause, and 20 of 27 on warrantless searches and seizures, involve drugs. In most of these cases, the Court has whittled away or otherwise made exceptions to the Fourth Amendment.

Take the various exceptions to the amendment's warrant requirement for searches, many of which the Supreme Court either created or greatly expanded in cases arising from drug crimes. Typically, the Fourth Amendment guarantees protection from warrantless searches in places where people have a reasonable expectation of privacy. According to the amendment's text, these areas include one's person and one's home. Yet in *United States v. Robinson* (1973), the Court held it reasonable for police to search a person in custody not just for weapons that might pose a threat to the police, but for any contraband, even without reasonable suspicion that the person is carrying drugs. Ten years earlier, in *Ker v. California*, the Court established the imminent-destruction-of-evidence exception to the warrant requirement, which allows police to break into suspects' homes without knocking to prevent the destruction of narcotics or other contraband. And in 1984, the Court held in *Oliver v. United States* that landowners have no reasonable expectation of privacy in their land even if it is hidden from public view by a fence or other obstruction. In that case, police were acting on a tip that the landowner was growing marijuana on his property.

The Supreme Court has also read the Fourth Amendment to extend to one's automobile. Yet *United States v. Ross* (1982) all but did away with the amendment's warrant requirement in many circumstances involving vehicles by holding that if police have probable cause to believe that a car contains drugs, they can search it without a warrant. And in 1976, *South Dakota v. Opperman* authorized inventory searches of towed and impounded vehicles even without probable cause.

In terms of seizures of persons, otherwise known as "detentions," the Fourth Amendment forbids such action without probable cause — at least according to the text. Yet in *United States v. Sokolow*, the Supreme Court upheld the Drug Enforcement Administration's use of a "drug courier profile" to detain people at airports. Courier profiles — which vary based on the professional experiences of a given group of law enforcement officers — comprise a list of behavioral traits that tend to distinguish travelers carrying illicit drugs. Such traits include appearing nervous, making a phone call shortly after arriving, having little or no luggage, having a significant amount of luggage, using public transit, and paying cash for a ticket (the case was decided in 1989). In certain police departments, the list also includes activities like departing the plane first, last, or somewhere in between. The profile varies among agencies and transit hubs without any sort of consistency.

Warrantless seizures and searches can also take place in schools. A particularly egregious example occurred in *Safford Unified School District v. Redding* (2009), when the Supreme Court ruled that two school staff members who forced a 13-year-old girl to remove her clothes and shake out her underwear because they thought she was hiding contraband — ibuprofen (Advil) — could not be held liable for their actions. The Court found that the search was unreasonable

but not *obviously* unconstitutional, meaning that the school employees were protected by the doctrine of qualified immunity. That is, the Court felt it was not clear that strip-searching a young girl to look for headache pills violated her rights. Why? Because until this case, several lower courts had upheld these types of searches based on schools' zero-tolerance drug policies.

The Fifth Amendment also preserves people's rights in the criminal-procedure context. Among the most crucial of these is the right to due process, which affords protection from government deprivations of one's life, liberty, and property without due process of law. At minimum, due process requires notice of the charges and an opportunity to be heard before a neutral judge. The practice of civil asset forfeiture, which often coincides with suspected drug activity, calls into question the government's commitment to upholding due process.

Civil forfeiture laws allow police to seize people's property without a hearing or even notice, much less a finding of guilt. In theory, the practice is authorized based on the property's suspected connection with criminal activity. Yet asset-forfeiture statutes frequently fail to distinguish between illicit proceeds from criminal activity and property that belongs to criminals or their family members but has no connection to any crime. (Incidentally, this implicates not only due process, but the Fifth Amendment's Takings Clause, which protects against government seizure of property without just compensation.) The burden of proving the forfeiture illegitimate is placed on either the owner or, oddly enough, the inanimate object itself. What's more, police are allowed to keep most of the proceeds acquired from the sale of seized property, creating a perverse incentive for officers to initiate forfeiture proceedings. Suffice it to say, most of the property forfeited under such laws is acquired pursuant to a narcotics investigation.

The courts have yet to outline a standard for the right to trial "without unnecessary delay" under the Sixth Amendment, but wait times for trial frequently exceed any reasonable interpretation of that phrase. In New York City, the average wait time for all criminal jury trials in 2011 was 414 days, up from 274 just 10 years earlier. The average wait time for a murder trial in 2011 was over 750 days. These numbers have only grown. And though not all crimes are drug-related, non-violent drug offenses are responsible for a substantial portion of all arrests. If these cases were eliminated, the entire system would move more quickly.

The massive number of people arrested and charged with drug offenses affects not only how long defendants have to wait for trial, but also the quality of their legal representation, which implicates the Sixth Amendment's right to assistance of counsel. The Bureau of Justice Statistics (BJS) estimates that more than three-quarters of indigent prisoners across the country are represented by a public defender. Thanks in large part to the drug war, public defenders' caseloads have increased dramatically since the 1970s, now far exceeding the maximum caseloads that the National Advisory Commission on Criminal Justice Standards and Goals recommended in 1973. What's more, public defenders are at a severe disadvantage when it comes to financial resources: A 2007 study of indigent defendants in Tennessee found that public defenders in these cases had less than half the funding of prosecutors (and this doesn't account for the free resources that the prosecutors can access, like crime labs and the police themselves). Citing BJS statistics, a 2011 meta-study found that spending in constant dollars per indigent defendant began to decrease rapidly in the early 1980s, which is right when the drug war kicked into high gear and the number of indigent defendants started to skyrocket. The decline in time

and resources devoted to the defense of indigent defendants — many of whom are arrested on drug-related charges — is yet another undesirable consequence of the drug war that undermines Americans' constitutional rights.

The war on drugs has implications not only for the criminal-procedure protections of the Fourth, Fifth, and Sixth Amendments, but for the Eighth Amendment as well. The latter prohibits "excessive fines" and "cruel and unusual punishment," both of which have been interpreted to demand proportionality between sentence and offense. The Supreme Court applied the Excessive Fines Clause against the states just last year in *Timbs v. Indiana*. The plaintiff in that case, Tyson Timbs, had sold \$400 worth of heroin to undercover police. He pleaded guilty and was sentenced to home-detention and probation. The state also ordered him to forfeit his \$42,000 Land Rover, which he had acquired with funds from an inheritance, not proceeds from a crime. The vehicle was worth more than four times the maximum fine for his charge. An Indiana trial court found the forfeiture amount "excessive" and "grossly disproportional to the gravity of the Defendant's offense." Meanwhile, in South Carolina last year, a judge ruled that that state's civil forfeiture laws ran afoul of the Excessive Fines Clause.

Further on the subject of disproportionate punishment, in 2010, the average mandatory minimum for drug offenders was 132 months. That 11-year average sentence is equivalent to the sentence for a Class C felony, which covers voluntary manslaughter, bank robbery, and selling a person into slavery. The U.S. Sentencing Commission likes to brag that, with relief, the average sentence for drug offenders is reduced to 61 months, but this is not something to be proud of, either. Other offenses that carry a maximum sentence of less than 61 months include domestic assault, assault of a child with substantial bodily injury, female genital mutilation, and incitement of genocide.

Jurisdictions with habitual-offender laws — where the sentences imposed have no relationship to the severity of the crime — can inflict punishments for drug offenses that are outrageously disproportionate to the wrong committed. California is probably the worst offender: Under its three-strikes law, certain non-violent felony drug offenses can count as a third strike if the first two offenses were considered violent or serious. Committing three strikes can earn a defendant 25 years to life in prison. Non-violent possession offenses represent the archetypal victimless crime, so the harm caused to society is an abstraction at best. Yet even if the law should prevent people from harming themselves, one still has to ask which option is worse for a person's health and life prospects: smoking marijuana, or spending serious time in prison.

These excessive sentence lengths for drug-related offenses, coupled with the ramping up of drug-war enforcement efforts, are at least partially responsible for the grim conditions in many of our nation's prisons. Again, California provides a useful example. The state's prisons were built to hold 80,000 inmates; a decade ago, they held double that number. Because of this overcrowding, California was unable to provide inmates with adequate and timely medical care, and resorted to throwing the ill into "administrative segregation." One guard testified that up to 50 prisoners at a time would be held in a 12-by-20 foot cage for up to five hours while awaiting medical care, which works out to 4.8 square feet per person. By way of comparison, during the transatlantic slave trade, experts estimate that each slave had about six square feet. In *Brown v. Plata* (2011),

the Supreme Court held that the unsanitary conditions created by overcrowding in California's prisons constituted cruel and unusual punishment in violation of the Eighth Amendment.

THE POST-CIVIL WAR AMENDMENTS

Between 1791 — when the Bill of Rights was ratified — and 1864, the Constitution was amended only twice. Then between 1865 and 1870, the 13th, 14th, and 15th Amendments were adopted in the wake of the Civil War. Collectively, these amendments abolished slavery, guaranteed constitutional rights against state action, and extended the right to vote to all citizens without regard to color or previous status as a slave. Yet despite these efforts to extend the blessings of liberty to all Americans, campaigns to prohibit or end drug use have had decidedly racial overtones.

For instance, the 14th Amendment promises equal protection of the laws, but in 1875, San Francisco passed an ordinance banning opium dens — probably the first narcotics prohibition in America — out of concern that Chinese proprietors were using them to lure white women. Early marijuana regulations targeted supposed Mexican lawlessness. And alcohol-prohibition campaigns, culminating in the 18th Amendment in 1919, were partly motivated by animus toward German Americans.

Even discounting racial motives, the enforcement of modern drug laws yields disproportionate results among different races. While marijuana-usage levels are relatively constant across racial groups, African Americans are nearly four times more likely to be arrested for possession than whites — a disparity that has only increased in the last 20 years. Stop-and-frisks — also known as *Terry stops*, where police pat down a suspect for weapons — have a racial dimension, too. Of the 685,000 people stopped by the New York Police Department in 2011 alone, 87% were black or Latino, even though the white individuals stopped were twice as likely to be found with a weapon. (Of the total number stopped, about 88% were innocent of any crime.)

While the 15th Amendment expanded the franchise to all male citizens regardless of color in 1870, tens of thousands of African Americans continue to be disenfranchised today due to the war on drugs. This is because they make up 40% of the nation's prisoners serving time for drug-related offenses, and many states restrict the voting rights of those with criminal records. Currently, 16 states and the District of Columbia restrict voting rights only during incarceration, and nearly half the states add restrictions during probation and parole. In some states, the restoration of voting rights post-confinement or supervision depends on certain conditions or individual petitions. And in three states — Iowa, Kentucky, and Virginia — a felony conviction means permanent disenfranchisement (although governors in Kentucky and Virginia have sought to relax or otherwise sidestep these bans in recent years). There are valid reasons for prohibiting felons from voting until and unless they've paid their debt to society — Maine and Vermont are real outliers in allowing them to vote *from prison* — but it is hardly reasonable to deny these kinds of rights to non-violent drug offenders.

THE RULE OF LAW

The war on drugs has been fought largely with laws that were beyond Congress's powers to enact. Although it took a constitutional amendment to allow Congress to prohibit alcohol nationwide, the prohibition of now-illicit substances under the CSA took place without any such amendment. This is perhaps mainly a commentary on the Supreme Court's expansive reading of the Commerce Clause, but it should give pause to anyone who takes the Constitution seriously.

Beyond the modern drug war's legally dubious initiation, the strained legal interpretations and yawning exceptions officials have made to sustain the effort continue to warp our constitutional system. In prosecuting and expanding the war on drugs, the federal government has racked up colossal amounts of debt, fostered state protectionism, adopted countless new federal crimes, and invaded foreign countries without congressional authorization. Meanwhile, government actors at all levels have undermined Americans' freedoms of expression and religious exercise, deprived citizens of their rights to vote and bear arms, authorized warrantless searches and seizures of property without due process, and thrown tens of thousands of people — disproportionately racial minorities — into overcrowded prisons for sentences that are out of step with the crimes they've committed. These actions have changed our understanding of such foundational principles as limited government, federalism, and the separation of powers, all while casting doubt on America's commitment to the rule of law.

The Declaration of Independence may have affirmed Americans' unalienable rights to life, liberty, and the pursuit of happiness, but the drug war has undercut those rights at every turn. That fact does not argue for any particular reform, but it does demand that we consider the ongoing constitutional costs when we decide where to go from here.

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