

**Report of the Legal Frameworks Group
to the King County Bar Association Board of Trustees:**

**States' Rights:
Toward a Federalist Drug Policy**

**King County Bar Association
Drug Policy Project**

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Introduction

This report is the product the Legal Frameworks Group of the King County Bar Association Drug Policy Project, which included the participation of more than two dozen attorneys and other professionals, as well as scholars, public health experts, state and local legislative staff, current and former law enforcement representatives and current and former elected officials. The Legal Frameworks Group was established as an outgrowth of the work of the Task Force on the Use of Criminal Sanctions, which published its own report in 2001 examining the effectiveness and appropriateness of the use of criminal sanctions related to psychoactive drug use.

The Criminal Sanctions Task Force report found that the continued arrest, prosecution and incarceration of persons violating the drug laws has failed to reduce the chronic societal problem of drug abuse and its attendant public and economic costs. Further, the Task Force found that toughening drug-related penalties has not resulted in enhanced public safety nor has it deterred drug-related crime nor reduced recidivism by removing drug offenders from the community. The Task Force also chronicled the numerous “collateral” effects of current drug policy, including the erosion of public health, compromises in civil rights, clogging of the courts, disproportionately adverse effects of drug law enforcement on poor and minority communities, corruption of public officials and loss of respect for the law. Based on those findings, the Task Force concluded that the use of criminal sanctions is an ineffective means to discourage drug use or to address the problems arising from drug abuse, and it is extremely costly in both financial and human terms, unduly burdening the taxpayer and causing more harm to people than the use of drugs themselves.

The Legal Frameworks Group, building on the work of the Criminal Sanctions Task Force, moved beyond the mere criticism of the current drug control regime and set out to lay the foundation for the development of a new, state-level regulatory system to control psychoactive substances that are currently produced and distributed exclusively in illegal markets. The purposes of such a system would be to render the illegal markets in psychoactive substances unprofitable, to improve restrictions on access by young persons to psychoactive substances and to expand dramatically the opportunities for substance abuse treatment in the community. Those purposes conform to the primary objectives of drug policy reform identified by the King County Bar Association in 2001: to reduce crime and public disorder; to enhance public health; to protect children better; and to use scarce public resources more wisely.

This report is the fourth of five major research initiatives supporting a resolution by the King County Bar Association seeking legislative authorization for a state-sponsored study of the feasibility of establishing a regulatory system for psychoactive substances. The premise of this report is that federal law should yield to the primacy of the states, permitting the states to develop their own drug control systems, and restoring the balance that allows states to be the laboratories to change and improve laws and public policy. This report argues for the rights of individual states to develop their own respective drug control models and questions the reach of federal authority over drug control policy.

STATES' RIGHTS: TOWARD A FEDERALIST DRUG POLICY

State leaders across the country are bristling at expanding federal mandates and preemptions in areas from tort law to environmental protection to education.¹ A growing fissure is also developing between federal and state authorities over the general direction of criminal law enforcement, as federal prosecutors have been directed to seek long prison terms for “child predators, criminal bosses, drug kingpins and violent gun criminals” while, at the state level, many legislatures and governors facing fiscal constraints are eagerly seeking to reduce prison sentences and to expand rehabilitative alternatives to incarceration.² States are particularly beginning to depart from the more draconian federal approach to drug law enforcement, recognizing that most drug law violators are nonviolent and pose little or no threat to community safety.³

Within the federal legal framework of drug prohibition, states and localities enjoy some discretion to employ different methods for controlling drug abuse and drug-related crime, but such discretion is limited. The “drug court” is currently the most popular innovation at the local level, a new tool for the justice system in its struggle to rein in court costs and to reduce persistently high recidivism rates among drug law violators.⁴ The drug court model, however, fully conforms to the federal framework, employing the threat of criminal sanctions to coerce abstinence and often imposing such sanctions on those who fail to comply with court-imposed conditions. Drug courts are valuable and effective in reducing public costs and in reducing rates of recidivism and substance abuse among their participants, but they cannot abate the illegal markets for psychoactive drugs, as incentives remain strong for criminal enterprises to engage in the illegal drug trade.

Every state in the United States still prohibits and punishes the use and sale of the same psychoactive substances that are prohibited and punished under federal law. No

¹ James Dao (2005), “Rebellion of the States: Red, Blue and Angry All Over,” *The New York Times*, January 16, 2005, p. WK1.

² Paul von Zielbauer (2003), “The American Agenda for Fighting Crime: More Prison Time ... and Less,” *The New York Times*, September 28, 2003, p. 25. Despite federal concerns over violent and dangerous criminals, a careful look at the federal prison population shows that it is comprised mostly of non-violent offenders, as murderers and sex offenders account for only five percent and major drug traffickers make up only one percent of all federal prisoners. *Id.*

³ The Western Governors Association asserted in 2000 that “states, rather than the federal government, are in a better position to understand the substance abuse problem confronting them. The federal government needs to work closely with the states to provide the resources necessary to meet the individual and unique needs of each state rather than approaching the issue in a one-size-fits-all manner.” Western Governors’ Association (2000), *Drug Policy in the West*, Governors’ Policy Statement, Denver, Colorado, p. 2. In the last few years a number of states have enacted reforms providing for mandatory drug treatment in lieu of incarceration, including Arizona, California and Hawaii, and other states, including Washington, Michigan, Kansas, Delaware, Maryland and Pennsylvania, have amended their criminal codes to reduce sentences for drug crimes, to allow for greater judicial discretion in drug cases and to express the preference for treatment in lieu of incarceration.

⁴ See King County Bar Association (2005) “Controlling Psychoactive Substances: The Current System and Alternative Models,” *Legal Frameworks Group Report to the King County Bar Association Board of Trustees*, pp. 13-14, surveying research showing drug courts’ effectiveness.

state has yet proposed or enacted a state-level regulatory system as an alternative model to control more effectively those psychoactive substances that are now produced and distributed exclusively in illegal markets. The extent to which the state of Washington or any other state could promulgate such a system, diverging so fundamentally from the federal legal framework, remains a critical open question.

POWERS RESERVED TO THE STATES

States purportedly enjoy sovereign powers exclusive of federal interference. Accordingly, federal authority is supposed to be restricted only to powers specifically enumerated in the U.S. Constitution or otherwise delegated to the federal government by the people.⁵ The framers of the Constitution designed the American federal system of government "for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control."⁶

Police Power and State Sovereignty

The notion of limited federal authority with generalized police powers reserved to the states is "deeply ingrained in our constitutional history."⁷ States are supposed to have exclusive authority to exercise their police powers, commonly understood as the protection of "health, welfare, safety and morals," defined by a Washington court as:

[an] attribute of sovereignty and an essential element of a state's power to govern, which cannot be surrendered, in the exercise of which a state may prescribe laws intended to promote health, peace, morals, education, good order and the welfare of the people, and the only limitation upon which is that it must reasonably tend to correct some evil or promote some interest of the state.⁸

In the federal system, states' police powers give them primary authority for defining and enforcing the criminal law in particular.⁹ States not only have the authority to protect the health, welfare and safety of their citizens pursuant to their police powers, but also the constitutional *obligation* to do so.¹⁰

⁵ "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁶ *Alden v. Maine*, 527 U.S. 706, 759 (1999). In 1788 James Madison stated in *The Federalist* No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Edward Mead Earle, intro. (1937), *The Federalist*, New York: Random House, p. 303.

⁷ *New York v. United States*, 505 U.S. 144, 155 (1992).

⁸ *Peden v. City of Seattle*, 510 P.2d 1169, 9 Wash.App. 106, review denied 82 Wash.2d 1010 (1973).

⁹ *Engle v. Issac*, 456 U.S. 107, 128 (1982); *Screws v. United States*, 325 U.S. 91, 109 (1945).

¹⁰ "No state may...excuse its failure to perform a public duty." *Champion v. Ames*, 188 U.S. 321 (1903), citing *Stone v. Mississippi*, 101 U.S. 874 (1879). Even if a state wanted to allow Congress to exceed its constitutional authority, it could not do so: "State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *New York v. United States*, *supra*, at 168-69 (1992).

Until the early 20th century the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, including the power to regulate commerce and to lay and collect taxes.¹¹ The modern recognition of federal power under the Commerce Clause, however, has rendered the Tenth Amendment merely a truism and little more than a quaint notion of constitutional history. The U.S. Supreme Court under Chief Justice Rehnquist has attempted to revive the “states’ rights” doctrine as embodied in the Tenth Amendment, but only tentatively and in selected cases.¹²

FEDERAL ENCROACHMENT ON STATES’ RIGHTS

There is a growing body of federal criminal law, which most prominently includes drug-related crimes, some of which are capital offenses. No general police power is supposed to exist on the federal level, but the courts have long recognized that law enforcement activity by federal agents may look like the exercise of police power.¹³ The authority to “regulate” such criminal conduct on the federal level is founded on other constitutional provisions, especially the Commerce Clause today.

Federal Commerce Power

The U.S. Constitution grants the Congress “the power to ... regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁴ Federal commerce power was initially understood by the courts simply as the authority to reduce barriers to free trade between the states.¹⁵ In the early 20th century, however, the interpretation of federal commerce power began to expand, allowing congressional intervention in activities that had only a “substantial economic effect” or “close and substantial relation” to interstate commerce,¹⁶ and to activities that were part of the “stream of commerce.”¹⁷

With the New Deal in the 1930s came a vast expansion of federal authority and the courts’ validation of that authority, particularly through broader interpretations of

¹¹ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); and *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

¹² See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995). It is important to note, however, that the Rehnquist Court has invoked the Tenth Amendment to limit the reach of federal criminal law under the Commerce Clause, upon which current federal drug laws principally rely for their legitimacy. See Linda Greenhouse (2003), “For a Supreme Court Graybeard, States’ Rights Can Do No Wrong,” *The New York Times*, March 16, 2003, p.WK5.

¹³ *Champion v. Ames*, 188 U.S. 321 (1903); *Hoke v. United States*, 277 U.S. 308 (1913). In *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919), the Court stated: “That the United States lacks the police power, and that this is reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the...United States exerts any of the powers conferred on it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power.” at 151.

¹⁴ U.S. CONST. Art. I, sec. 8[3]

¹⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824), firmly established Congress’ broad power to regulate interstate commerce but such commerce was not deemed to include business activities solely within any state. See, e.g., *Paul v. Virginia*, 8 Wall. 180 (1869); and *Kidd v. Pearson*, 128 U.S. 1 (1888).

¹⁶ *Interstate Commerce Commission v. Atchison Topeka & Santa Fe Railroad Co.*, 234 U.S. 294 (1914).

¹⁷ *Stafford v. Wallace*, 258 U.S. 495 (1922), relying on *Swift v. United States*, 196 U.S. 375 (1905).

federal commerce power.¹⁸ By the 1940s, activities that, in their "cumulative effects," would affect interstate commerce were deemed within federal jurisdiction, even trivial intrastate instances of such activities.¹⁹ Invoked to legitimate the civil rights legislation of the 1960s, federal commerce power widened to encompass social welfare objectives.²⁰

The U.S. Supreme Court has recently acknowledged that federal commerce power is still subject to "outer limits."²¹ Legal scholars have squelched predictions, however, that the Court would ever reign in congressional power under the Commerce Clause to impose federal criminal laws that overlap with state authority.²²

Prohibition and "Regulation" of Illicit Commerce

The Commerce Clause arguably gives Congress authority over "regular" commerce but not over *illicit* commerce, where the only means to "regulate" illicit commerce is through the use of police power, which is traditionally reserved to the states. However, long-established case law recognizes that federal authority to regulate commerce among the states extends even to illicit commerce, as Congress may prohibit interstate transport of articles that "are injurious to public morals," and such "regulation" may even look like police power.²³ The power to regulate commerce extends to the prohibition of shipments in such commerce, and such power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the Constitution."²⁴

THE PREEMPTIVE EFFECT OF FEDERAL DRUG LAWS

Unlike the prohibition of alcohol in the 1920s, which was achieved by means of a constitutional amendment, the basis for the legitimacy of the federal drug laws under the Constitution continued to evolve during the 20th century.²⁵ In the early 1900s federal authority to regulate the possession and sale of narcotics was founded on the express

¹⁸ See, e.g., *National Labor Relations Board v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), recognizing federal commerce power over local manufacturing; and *United States v. Darby*, 312 U.S. 100 (1941), justifying any reasonable means to achieve federal ends. Even before the 1930s, the U.S. Supreme Court upheld federal powers in areas that had traditionally been seen as states' responsibilities. See, e.g., *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919).

¹⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1970).

²⁰ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul* (lake club snack bar) (1969).

²¹ Congress may regulate: (1) the channels of commerce; (2) the instrumentalities of commerce; and (3) those activities that substantially affect interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 556-557 (1995).

²² David G. Savage (2004), "Finite Federalism," *American Bar Association Journal*, July 2004, p. 22

²³ *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92 (1902); and *Champion v. Ames*, 188 U.S. 321 (1903). The *Champion* case also held, however, that "interstate commerce does not comprehend activities that take place entirely within a state's borders." at 346.

²⁴ *Gibbons v. Ogden*, supra, 9 Wheat, 1, 196; see also *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92 (1902); *United States v. Delaware & Hudson Co.*, 213 U.S. 366 (1909); *James Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U.S. 311 (1917); *United States v. Hill*, 248 U.S. 420, 39 S.Ct. 143 (1919); and *McCormick & Co., Inc. v. Brown*, 286 U.S. 131, 52 S.Ct. 522, 87 A.L.R. 448 (1932).

²⁵ See King County Bar Association (2005), "Drugs and the Drug Laws: Historical and Cultural Contexts," *Report of the Legal Frameworks Group to the KCBA Board of Trustees*, discussion of the strengthening of federal authority over drug control through judicial interpretation of the Harrison Act of 1914, pp. 19-21.

taxing power of Congress, through the Harrison Act of 1914 and its aggressive enforcement against doctors and pharmacists. Early federal authority over drug policy also relied on the implied foreign affairs power, first through the enactment of the Narcotic Drugs Import and Export Act of 1922, which set strict quotas on the quantity of drugs that could be imported into the United States.²⁶ That measure allowed possession of narcotics without a prescription to become presumptive evidence of having illegally imported drugs.²⁷ The Porter Act of 1930, which established the powerful federal Bureau of Narcotics, the Marijuana Tax Act of 1937, and subsequent federal laws that stiffened penalties in the 1950s and 1960s were all based on federal taxing power.²⁸

The Controlled Substances Act

Not until 1970, with the passage of the Comprehensive Drug Abuse Prevention and Control Act, or the “Controlled Substances Act,”²⁹ was federal preemptive authority over drug policy firmly grounded in federal commerce power. What had begun rather innocuously in the early 20th century as a federal system of medically-related registration and taxation became a blanket prohibition of the use and sale of particular drugs. While members of Congress in the early 20th century expressed concern that the new federal role in this area was an unconstitutional exercise of police power infringing on the rights of states, by the end of that century Congress took such federal preemptive power for granted.

To bolster its primacy over drug control policy through the Controlled Substances Act, Congress found that “[t]he 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” and in particular, Congress made the following express findings:

A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because:

- (A) after manufacture, many controlled substances are transported in interstate commerce;
- (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution; and
- (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

²⁶ Daniel K. Benjamin & Roger Leroy Miller (1991) *Undoing Drugs: Beyond Legalization*, New York: Basic Books, p. 266.

²⁷ Richard J. Bonnie & Charles H. Whitebread II (1974), *The Marijuana Conviction*, Charlottesville: University Press of Virginia, p. 61.

²⁸ King County Bar Association (2005), “Drugs and the Drug Laws: Historical and Cultural Contexts,” *op. cit.*, pp. 22-26.

²⁹ Pub.L. 91-513, October 27, 1970, 84 Stat. 1236.

Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances....Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate....Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.³⁰

Almost every state has enacted the Uniform Controlled Substances Act, intended to provide a foundation for a coordinated, federal-state system of drug control.³¹ This system allows for some state discretion in prescribing fines and sentences, and some case law has interpreted the federal Controlled Substances Act as not preempting the states' role in drug control.³² Closer scrutiny of the Act, however, reveals a clear congressional intent to preempt state laws that conflict with the federal law. Section 903 of the Act reads:

“No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*”³³

This provision precludes any state from promulgating laws that might diverge from the federal model of drug prohibition, although no state has yet enacted any such laws.

Growing Federal Commerce Power– Pending Supreme Court Decisions

Decisions in two separate matters argued before the U.S. Supreme Court in the 2004-05 term will further define the scope of federal commerce power in the area of drug control. In *Ashcroft v. Raich*³⁴, individuals permitted under California law to use marijuana for medical purposes either grow their own or are given free supplies, an arrangement that arguably constitutes entirely non-commercial, intrastate activity beyond the reach of Congress. Whether the Court agrees with this argument remains to be seen; a Court ruling against the California respondents in this case would enlarge federal commerce power to an historic level.³⁵

³⁰ 21 U.S.C. §§ 801(2)-(6).

³¹ The Uniform Controlled Substances Act, drafted in 1970 by the National Conference of Commissioners on Uniform State Laws, was adopted by the state of Washington on May 21, 1971. 1st Ex. Sess., c. 308, Laws of 1971; codified in chapter 69.50 R.C.W.

³² See, e.g., *Nichols v. Board of Pharmacy*, 61 Or. App. 274, 657 P.2d 216 (1983), Sup.Ct. review denied.

³³ Pub. L. 91-513, title II, s 708, Oct. 27, 1970, 84 Stat. 1284 (emphasis added), cited in Daniel K. Benjamin & Roger Leroy Miller (1991), *op. cit.*, p. 264.

³⁴ Docket No. 03-1454, appealed from Ninth Circuit Court of Appeals (Dec. 16, 2003).

³⁵ Linda Greenhouse (2004), “States’ Rights Defense Falters in Medical Marijuana Case,” *The New York Times*, November 30, 2004, p. A18.

The other relevant matter pending before the Court involves out-of-state wineries and their interest in boosting internet sales by being allowed to ship directly into states that have more restrictive alcohol control laws.³⁶ These consolidated cases pit federal commerce power against the 21st Amendment, with winemakers arguing that the Commerce Clause, which prohibits states from limiting interstate commerce, takes precedence over the 21st Amendment, which gives states the right to regulate alcohol. Numerous conflicting decisions on this issue in the lower courts across the country necessitated U.S. Supreme Court action.³⁷ A decision in the winemakers' favor would further erode the states' purportedly exclusive control over alcohol regulation.³⁸

THE COMMERCE CLAUSE TURNED ON ITS HEAD

In the early days of American legal history, the Commerce Clause was interpreted to embody a national policy of free trade, implying that states may not discriminate against one another and that Congress may act to reduce discriminatory barriers to commerce between the states. After a century of expanded interpretation, however, the Commerce Clause has not so much served to reduce barriers to free trade between the states as it has served to permit federal intervention in matters that once were the sole province of the states.

In the drug policy arena, broad federal commerce power has arguably stifled innovation on the state level and limited the states' discretion to exercise their inherent police powers. Although states currently comply willingly with the framework of federal preemption over drug policy, dissent is growing, not only regarding the continued federal prohibition of the use of marijuana for medical purposes, but also in reaction to federal intervention in the medical profession regarding the treatment of chronic pain.³⁹ However, if Washington or any other state were to depart fundamentally from the federal model of drug prohibition and attempt to establish an alternative regulatory system to control psychoactive substances, such efforts might run headlong into a century of case law supporting federal preemption.

Tests for State Police Power – A Drug Policy Scenario

To test a hypothetical scenario in which the state of Washington were to establish its own regulatory framework for drug control as an alternative to prohibition, certain key principles from landmark cases interpreting the reach of federal commerce power may

³⁶ The consolidated wine cases are *Granholm v. Heald*, Docket No. 03-1116, appealed from Sixth Circuit Court of Appeals (Aug. 28, 2003) and *Swedenburg v. Kelly*, Docket No. 03-1274, appealed from the Second Circuit Court of Appeals (Feb. 12, 2004). Winemakers are banned in about 24 states from directly shipping their products to consumers. Meanwhile, other states allow online and telephone sales of wine that consumers cannot find in their home states, for shipments to their home address.

³⁷ See, e.g., *Beskind v. Easley*, 325 F.3d 506 (4th Cir.2003) and *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir.2002), each finding discrimination against interstate commerce that could not be "saved" by the 21st Amendment; and *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir.2000), validating state power under the 21st Amendment because the state is empowered "to control alcohol in ways that it cannot control cheese." at 851.

³⁸ See Linda Greenhouse (2004), "Justices Question Ban on Wine Sales From Out of State," *The New York Times*, December 8, 2004, p. 1.

³⁹ See note 69, *infra*.

help to guide whether such state action would be permissible:

Anti-discrimination. The fundamental principle underlying the Commerce Clause is that a state may use its police powers to protect public health in a way that incidentally affects interstate commerce *as long as the act is not discriminatory toward interstate commerce*.⁴⁰ Accordingly, if Washington chose to use its police powers to protect public health by regulating and controlling psychoactive substances, rather than leaving them in the hands of criminal enterprises, such action might not be upheld where Washington is intentionally “discriminating” against interstate commerce. Albeit, the commerce is illicit, but the Commerce Clause has long been interpreted to give Congress the power to regulate even illicit commerce through means that resemble police power.⁴¹

Local nature of problems. Under the “Cooley Doctrine,” states are free to regulate things of a local nature that require different treatment from state to state and may not regulate things that require a uniform national treatment.⁴² The diversion and misuse of controlled substances has been declared by Congress to be a national problem requiring a national solution, justifying federal preemption in this policy area. However, the U.S. Supreme Court has held in other cases that “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so” and that “the Constitution requires a distinction between what is truly national and what is truly local.”⁴³ The Court has not yet considered whether the Controlled Substances Act improperly prevents states from effectively regulating the “local nature” of their respective drug abuse problems.⁴⁴

Rational means to legitimate ends. Any state action affecting interstate commerce requires a legitimate state end and a rational means to that end.⁴⁵ Under this balancing test, the state of Washington’s new regulatory framework for controlling psychoactive substances should satisfy the requirement that the local benefit outweigh the burden on commerce, where the commerce that is “burdened” is illicit commerce controlled by criminal enterprises.

Some discrimination allowed. When there is a legitimate local interest and no nondiscriminatory means to achieve it, a discriminatory means may be used to limit interstate commerce.⁴⁶ By establishing its own, intrastate system of psychoactive drug control in order to render the violent black market unprofitable, to restrict access by young persons to drugs and to open new gateways to treat hard-to-reach populations, the state of Washington could clearly demonstrate a “legitimate local interest,” and with no non-discriminatory means to achieve it, where the “competition” is organized crime.

⁴⁰ *Willson v. Blackbird Creek Marsh Co.* (1829), *supra*; *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935).

⁴¹ *Champion v. Ames*, 188 U.S. 321, *supra*.

⁴² *Cooley v. Board of Wardens of Port of Philadelphia*, 52 U.S. 299 (1851).

⁴³ *United States v. Morrison*, 529 U.S. 598, *supra*, at 614, 617-618; *see also United States v. Lopez*, 514 U.S. 549, *supra*.

⁴⁴ *See* John C. Haaga & Peter Reuter (1990), “The Limits of the Czar’s Ukase: Drug Policy at the Local Level,” 8 *YALE L. & POL’Y REV.* 36.

⁴⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁴⁶ *Maine v. Taylor*, 477 U.S. 131 (1986).

The principles above are used to test state action only in the *absence* of federal legislation – the notion of the “Dormant Commerce Clause.”⁴⁷ Nevertheless, even though Congress has “spoken” definitively in the area of drug control, applying these federalist principles to current drug policy reveals the perverse outcomes that have arisen from federal preemption in this area of the law. Federal drug prohibition has not only guaranteed a thriving illicit market controlled by criminal enterprises, it has also put that illicit market beyond the reach of the police powers of states that might elect to address their societal drug abuse problems through means other than drug prohibition.

STEPS TOWARD A FEDERALIST DRUG POLICY

The debate over the balance of power between the federal government and the several states is as old as the Republic.⁴⁸ Over the course of the last century, enhanced federal authority in almost every realm of the law has marginalized the importance of “states’ rights,” despite some resurgence of the principle embodied in the Tenth Amendment invoked by the Rehnquist Court.⁴⁹ Nevertheless, states’ efforts to find more effective drug policies will inevitably challenge the current federal balance of power as states begin to depart from the federal drug control scheme.

States as Laboratories

Justice Brandeis famously declared that “denial of the right to experiment may be fraught with serious consequences to the nation” and that states should be encouraged to “serve as a laboratory” in the trial of “novel social and economic experiments” because by so doing knowledge and perspective could be gained “without risk to the rest of the country.”⁵⁰ This concept was reiterated recently in a drug policy case, as Justice Stevens emphasized “the importance of showing respect for the sovereign States that comprise our Federal Union, [which] imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to try a different approach.”⁵¹

⁴⁷ The tests in the context of the Dormant Commerce Clause allow certain state and local laws to be found unduly burdensome on interstate commerce even if Congress has not legislated in the area. First articulated by Justice Marshall in *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. 245 (1829).

⁴⁸ See, e.g. James Madison (1788), “The Federalist No. 46: An Examination of the Comparative Means of Influence of the Federal and State Governments,” in *The Federalist*, Edward Mead Earle, intro. (1937), *op. cit.*, pp. 304-312. Early congressional debate also reflected concern over the specter of a centralized federal government: “Interference with the power of the States is no constitutional criterion of the power of Congress. If the power was not given, Congress may not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.” *5 Annals of Congress* 1897 (1791).

⁴⁹ Where the term “states’ rights” has commonly conjured up associations with reactionary and racist positions of the past, many current attempts to revive federalist doctrine involve politically “liberal” states departing from social policies established by a “conservative” federal government. See, e.g., Ernest A Young (2004), “Marijuana and Federalism: Let Homegrowers Be,” *National Law Journal*, December 13, 2004, p. 23; and Jim Holt (2004), “A States’ Rights Left?,” *The New York Times Magazine*, November 21, 2004, p. 27

⁵⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting).

⁵¹ Despite his acknowledgment of the need for a healthy federal balance of power, Justice Stevens offered his statement as part of his concurring opinion in *U.S. v. Oakland Cannabis Buyers’ Coop*, 532 U.S. 483,

Certain states have been more “progressive” or “liberal” than the federal government in areas of social policy, providing, for example, constitutional and statutory protection against discrimination on the basis of sexual orientation and protection of physician-assisted suicide, welfare rights and freedom of expression.⁵² In other areas of the law, states have fallen victim to federal “homogenization” by Congress, whether through direct regulation, conditional federal spending or, in the case of drug policy, through preemption.⁵³ Such overbroad federal authority forecloses opportunities for the states, especially where there is compelling evidence that policymaking decentralized to the state level leads to more innovative and cost effective policy measures and that the states as laboratories provide useful demonstrations for other jurisdictions.⁵⁴

Federal drug control policy is also grounded in a particular moral perspective – that the use of certain prohibited substances is “wrong.”⁵⁵ Federal preemption in the area of drug policy thus extends beyond mere statutory or practical limitations on the states; federal authority is used to impose a centralized morality on the states.⁵⁶ Even the fervent federalist, Alexander Hamilton, argued at the dawn of the Republic that any national attempt to impose morality or to dictate civic virtue to the states would be “as troublesome as it would be nugatory,” further justifying how local administration of justice is “the most powerful, most universal and most attractive source of popular obedience and attachment.”⁵⁷ In short, “federalism is good for the soul as well as the body.”⁵⁸

495 (2001), in which the Court upheld a federal injunction against a cooperative organization permitted under California law to distribute marijuana to medically certified patients.

⁵² Lynn Baker (2002), “Should Liberals Fear Federalism?” 2001 William Howard Taft Lecture on Constitutional Law, 70 *U. CINN. L. REV.* 433.

⁵³ *Id.*

⁵⁴ See David Osborne (1990), *Laboratories of Democracy*, Cambridge: Harvard Business School Press. Beyond merely allowing states more latitude in drug policy, “it might be feasible for different jurisdictions to set up some natural experiments by adopting different specific regulations within a broad pattern of liberalization. In that way, we could soon anticipate quasi-scientific evaluation of the outcomes, valuable information that could eventually serve as substantive data for making more confident choices among alternatives in terms of public health and social welfare, as well as efficiency and efficacy.” Dwight B. Heath (1992), “U.S. Drug Control Policy: A Cultural Perspective,” in *Political Pharmacology: Thinking About Drugs*, Cambridge, MA: Proceedings of the American Academy of Arts and Sciences, v.121, no.3, p. 288.

⁵⁵ See Erich Goode (2005), *Drugs in American Society*, 6th ed., New York: McGraw-Hill, Ch. 4.

⁵⁶ See Editors (2003), “Steamroller Ashcroft,” *The Economist*, May 3, 2003.

⁵⁷ Alexander Hamilton (1788), “The Federalist No. 17,” in *The Federalist*, Edward Mead Earle, intro. (1937), *op. cit.*, p. 103.

⁵⁸ David Marion, Director of the Wilson Center for Leadership in the Public Interest at Hampden-Sydney College, argues, “A persuasive ‘quality of life’ argument can be made for reserving a major role for the states in our constitutional system. Leaving important responsibilities with the states provides the American people with many opportunities to become ‘big fish in little ponds.’ In addition to promoting good civic virtues, decentralized decision-making improves the likelihood governmental decisions will address the real (not just perceived) needs of the people. David Marion, (2005), “Body and Soul of Federalism,” *Washington Times*, January 16, 2005.

Key Amendments to Federal Drug Law

As a first step in the decentralization of national drug policy, certain amendments to federal law would help spur the “laboratories of democracy” among the states, allowing them to develop reforms more compatible with their local political climates. One simple amendment to Section 903 of the Controlled Substances Act, the “positive conflict” clause,⁵⁹ would arguably be sufficient to restore the federal-state balance in drug policy, whereby preeminence would be given to state law instead of federal law whenever conflicts arose between the two.⁶⁰

Another simple regulatory change – the removal of marijuana from the federal list of Schedule I (prohibited) substances – which could be promulgated by the U.S. Attorney General, would create enormous opportunities for state and local governments to realize significant cost savings in law enforcement, prosecution and incarceration, without necessarily compromising community health and safety. States and localities would be responsible not only for their respective policies toward marijuana control but also for their budgets for drug enforcement, which would force a “candid conversation” in the local political arena about the wisest use of scarce public resources and about the best means to protect public health and safety.⁶¹

Some perverse incentives have been created by federal dominance in drug policy, which have had the effect of boosting intensified law enforcement activity, prosecution and incarceration. The most notable policy incentives of this sort are drug-related asset forfeiture and mandatory minimum sentences, each of which would be ripe for reform in a more federalist drug policy environment.⁶²

CURRENT OPTIONS AVAILABLE TO THE STATES

Through enactment of the Uniform Controlled Substances Act, Washington and the states have *voluntarily* integrated their drug control laws into the federal scheme. Could a state, therefore, voluntarily diverge from the federal scheme just as easily? Even without any amendment to the federal Controlled Substances Act, could a state enact its own regulatory system for controlling those psychoactive substances that are currently produced and distributed exclusively in illegal markets? May the state of Washington establish its own system and structures for drug control in an attempt to find a more workable alternative to federal drug prohibition?

Reassertion of Inherent Police Powers

There is a strong argument that states’ exercise of police powers should be respected at the federal level, especially regarding a public health issue such as drug abuse. Drug problems vary significantly from state to state and between regions, which should allow state and local jurisdictions wider discretion to develop more creative policy

⁵⁹ Pub. L. 91-513, title II, s 708, Oct. 27, 1970, 84 Stat. 1284, section fully cited, *supra*, at p. 7.

⁶⁰ Daniel K. Benjamin & Roger Leroy Miller (1991), *op. cit.*, p. 266.

⁶¹ David W. Rasmussen & Bruce L. Benson (2003), “Rationalizing Drug Policy Under Federalism,” 30 *FLA. ST. U. L. REV.* 728-29.

⁶² *Id.* at pp. 730-32.

responses. The power of states to control drugs exists independent of federal legislation; case law from Washington, in fact, affords the state the maximum permissible authority to fight the drug abuse problem, in view of the “dangerous nature and injurious effect of unregulated drug use.”⁶³

Assuming that the U.S. Supreme Court would not second-guess a legislative policy decision made in Washington, or in any other state, pursuant to its police powers to protect health, welfare and safety, Washington could confidently establish its own state-level regulatory system to control those psychoactive substances currently produced and distributed exclusively in illegal markets. Whether or not the state were to create its own regulatory system, Washington may still decline to enforce or provide appropriations for its share of the enforcement of federal drug laws, which many states did during national prohibition of alcohol in the 1920s.⁶⁴ A long line of cases supports the principle that the federal government may not “commandeer” states,⁶⁵ nor may it compel state and local law enforcement officers to enforce federal laws.⁶⁶ The state legislature may even prohibit state law enforcement officers from cooperating with federal agents, which has already happened in California localities in connection with its medical marijuana laws.

Exclusive Regulation of Medical Practice

Recent case law has limited federal authority to meddle in the states’ regulation of medical practice, particularly limiting the use of the federal Controlled Substances Act to override a state’s decisions concerning what constitutes legitimate medical practice.⁶⁷ Drafters of the Uniform Controlled Substances Act acknowledged that the federal focus on controlling drug use might chill the legitimate practice of medicine, especially regarding the prescription of narcotics.⁶⁸ However, Congress never intended, through the Controlled Substances Act or other federal laws, to grant blanket authority to the U.S. Attorney General or to the federal Drug Enforcement Agency to define, as a matter of federal policy, what constitutes the legitimate practice of medicine.

Despite questioning by the courts, federal authorities are pressing ahead to regulate doctors’ use of drugs, particularly for the purpose of treating chronic pain. As a result, the antipathy of medical practitioners toward the federal bureaucracy is reaching

⁶³ Daniel K. Benjamin & Roger Leroy Miller (1991), *op. cit.*, p. 265. See *State v. Lee*, 382 P.Ed. 491, 62 Wash.2d 228 (1963); and *City of Seattle v. Ross*, 344 P.2d 216, 54 Wash.2d 655 (1959).

⁶⁴ By 1927, after a little more than seven years of alcohol prohibition, only eighteen U.S. states were still funding their share of the enforcement of the Volstead Act and the Eighteenth Amendment. David L. Teasley (1992), “Drug Legalization and the ‘lessons’ of Prohibition,” *Contemporary Drug Problems*, Spring 1992, p. 34, citing the historian J.C. Burnham.

⁶⁵ *New York v. United States*, 505 U.S. 144, 166 (1992). Where Congress has authority under the U.S. Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts. *Reno v. Condon*, 528 U.S. 141, 149 (2000).

⁶⁶ *Printz v. United States*, 521 U.S. 98 (1997).

⁶⁷ In *Oregon v. Ashcroft*, 192 F.Supp.2d 1077 (D.Or. 2002), the Ninth Circuit enjoined the U.S. Justice Department from attempting to use the Controlled Substances Act to halt the implementation of Oregon’s “Death with Dignity Act.” The U.S. Supreme Court granted a writ of *certiorari* on February 22, 2005 on the federal challenge to the lower court decision and will hear arguments in *Gonzales v. Oregon*, No. 04-623, in the upcoming term.

⁶⁸ See Prefatory Note to the Uniform Controlled Substances Act (1970), U.L.A. vol. 9, part IV, p. 645.

the boiling point.⁶⁹

States' broad police powers are supposed to preclude the federal exercise of authority in matters of medical practice.⁷⁰ The regulation of the medical field has historically come under the primary control of the individual states, including the power to regulate the administration of drugs by health professionals.⁷¹ Accordingly, to the extent that the regulation of drugs is a medical issue, a state could authorize the creation of medical prescription programs as a new addiction treatment modality, along the model of the successful prescription programs now operating in Europe and Canada.⁷²

State as "Market Participant"

When a state functions like a commercial enterprise it may "discriminate" in favor of its own residents and, as a business proprietor (or "market participant"), it is free of Commerce Clause limitations and the reach of federal commerce power.⁷³ Accordingly, if the state of Washington or any other state sought to undercut the illicit market in psychoactive substances by becoming the exclusive purveyor of such substances to qualified state residents, it might be allowed to set restrictive rules that "discriminate" against out-of-state residents and that impose burdens on interstate commerce that would otherwise not be permitted.⁷⁴

CONTINUED FEDERAL INTERFERENCE?

Even if a state were to enact statutes and promulgate regulations to establish a new, state-level regulatory system to control "black market" psychoactive substances, the federal government might still intervene in the state's affairs under the following authorities:

⁶⁹ The Association of American Physicians and Surgeons' counsel stated: "The war on drugs has turned into a war on doctors ... and the suffering patients who need to drugs to attempt anything approaching a normal life Physicians are being threatened, de-licensed and imprisoned for prescribing in good faith with the intention of relieving pain." quoted in Joe Cantlupe and David Hasemyer (2004), "Painful remedy? Patients, advocates and government spar over tighter controls on painkillers," *San Diego Union-Tribune*, September 28, 2004.

⁷⁰ The concept of states' authority over medical practice, articulated in *Linder v. U.S.*, 268 U.S. 5, 18 (1925), which limited federal power under the Harrison Narcotic Act of 1914, is still a valid legal principle.

⁷¹ *Whalen v. Roe*, 429 U.S. 589 (1977); *See also Maryland v. Wirtz*, 392 U.S. 183, 193. (1968).

⁷² *See* summary of drug prescription programs in King County Bar Association (2005), "International Trends in Drug Policy: Lessons Learned from Abroad," *Report of the Legal Frameworks Group to the King County Bar Association Board of Trustees*, pp. 22-26.

⁷³ *Reeves v. William Stake*, 447 U.S. 429 (1980); and *South-Central Timber v. Alaska*, 467 U.S. 82 (1984).

Even if a state acts as a "market participant," the federal government may still directly regulate state activity, burdening the state not as a sovereign power but only in its "enterprise" capacity. *See Brown v. Environmental Protection Agency*, 566 F.2d 665, 672 (9th Cir. 1977).

⁷⁴ The "market participant" exception to federal commerce power is only applicable in the context of the "Dormant Commerce Clause," when Congress has left a vacuum in the law and states attempt to fill it. In the instant case, Congress has arguably left a vacuum in the law by failing to regulate the many aspects of production and distribution of the psychoactive substances it has prohibited. Alternatively, where Congress has practically occupied the field of psychoactive drug control through its policy of prohibition, the "market participant" exception might not apply. It is instructive to acknowledge this exception, however, to help guide state efforts to exercise their police powers in the effort to address their drug abuse problems.

Federal Police Power

Federal agents might continue to arrest, prosecute and punish individuals for violating federal drug laws, justifying their broad authority on the weight of the modern case law supporting federal drug control authority under the Commerce Clause. In practical terms, federal agents would likely continue to pursue larger-scale illicit producers and traffickers, as they do today. However, if a state were to establish a regulatory system, including state-controlled drug prescription clinics and state-controlled production of cannabis, the extent of any large-scale, illicit production and distribution would be very limited, where the “black market” demand will have been significantly reduced. A flourishing “gray market” in legally-produced substances would likely continue, however.

Nevertheless, if a state were to establish its own regulatory system for drug control, the U.S. Justice Department might seek injunctive action against the state. In such a case, the limits of states’ rights to exercise their police powers to control drugs would be put to the ultimate test. If the U.S. Supreme Court were to validate a state-level regulatory framework that diverged from the federal law, federal jurisdiction over the psychoactive substances controlled by a state would attach only in limited circumstances, not based on the Commerce Clause but on the federal criminal law, involving only matters involving the actual interstate transport of federally-prohibited substances and any activity conducted on federal property.

Taxing and Spending Powers

Congress’ spending power is not limited to supporting other enumerated powers, it is an enumerated power itself and may be used directly to support the “general welfare.”⁷⁵ The federal government broadly uses its spending power to coax states into compliance with federal regulations.⁷⁶ In the drug policy context, enormous federal outlays to the states serve as strong financial incentives to continue the prosecution of federal drug control imperatives – a practice that could be regarded as “back-door commandeering” of the states to enforce federal drug policy. A state might pause at the prospect of losing millions of dollars for law enforcement, prosecution and incarceration, fearing “punishment” by the federal government for having diverged from the prohibition model. However, if the state-level regulatory system were to achieve its objectives, the need for criminal justice resources would significantly diminish.

Implied Foreign Affairs Power

Federal authority over drug policy was secured early in the 20th century through the implied foreign affairs power of the federal government.⁷⁷ Two years before the passage of the Harrison Narcotic Act, the United States purposefully engineered the

⁷⁵ U.S. CONST. Art. I, sec. 8[3].

⁷⁶ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987). The spending power may be used when only a national power “can serve the interests of all,” however. *Helvering v. Davis*, 301 U.S. 619 (1937).

⁷⁷ The implied foreign affairs power exclusive to the federal government is founded on the “necessary and proper” clause of Article 1, Section 8 of the Constitution, a phrase that “has been construed as permitting any measures which are ‘appropriate,’ not merely those which are essential or indispensable.” Daniel K. Benjamin and Roger Leroy Miller (1991), *op. cit.*, p. 285, n. 17.

Hague Opium Convention of 1912 in order to establish a mandatory international legal foundation on which U.S. drug laws would be built.⁷⁸ Current U.S. drug laws continue to be founded partly on federal treaty power, under a series of United Nations conventions sponsored by the U.S. to buttress its domestic drug laws.⁷⁹

There are no real limits on the treaty power of the federal government, and the Tenth Amendment does not prohibit the federal government from going beyond the Constitution to enforce treaty obligations at the state level.⁸⁰ To the extent that a treaty violates a specific constitutional provision, however, it is void.⁸¹ Barring such violations, the federal government could conceivably use its treaty power to quash state and local drug policy reforms. Unfortunately, the U.S. has an interest in maintaining the current model of drug prohibition, as its “unwavering commitment to abide by the international agreements it engineered as long as four decades ago freezes drug policy in time and is ...a commitment to ignorance since it discards new evidence in favor of past prejudice.”⁸²

SUMMARY

Despite the case law validating the federal Controlled Substances Act under the Commerce Clause, the federalist tradition still regards the federal government as one of enumerated powers and Congress as possessing only those powers specifically delegated to it under the U.S. Constitution. In view of the potential harms of unregulated drug use, states still retain the inherent power to protect their own citizens by controlling drugs and combating drug abuse locally, independent of any congressional legislation or statement that drug abuse is a “national problem.” Any federal challenge to the state of Washington or any other state that might establish a new regulatory system to control psychoactive substances that are currently produced and distributed exclusively in illegal markets should yield to the state's legitimate exercise of its police powers, which would take place through the state's own political processes, whether through legislative action and/or the passage of ballot initiatives.

⁷⁸ See King County Bar Association (2005) “Drugs and the Drug Laws: Historical and Cultural Contexts,” *op. cit.*, pp. 18-20.

⁷⁹ U.N. ECON. & SOC. COUNCIL, SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, U.N. Doc. UNE/CN.7/GP/1, U.N. Sales No. 62.XI.1 (1961); U.N. ECON. & SOC. COUNCIL, CONVENTION ON PSYCHOTROPIC SUBSTANCES, 1971, U.N. Sales No. E.78.XI.3 (1977); and U.N., CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, 1988 (1988).

⁸⁰ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁸¹ *Reid v. Covert*, 354 U.S. 1 (1957).

⁸² David W. Rasmussen & Bruce L. Benson (2003), *op. cit.*, p. 727.