

Effective Drug Control – Toward A New Legal Framework

State Regulation and Control of Psychoactive Substances as a Workable Alternative to the “War on Drugs”

PART IV – States’ Rights: Toward a Federalist Drug Policy

Summary/Outline

Until the early 20th century, states traditionally enjoyed exclusive police powers independent of federal authority, to protect the “health, welfare, safety and morals” of their citizens. With the advent of the New Deal in the 1930s came case law interpreting the Commerce Clause to give Congress powers to regulate intrastate affairs that “affected” interstate commerce and by the 1960s, cases coming out of the civil rights struggle gave Congress the right to regulate social policy in the states. Federal commerce power is now so expansive that the individual states seem to have no discretion left to exercise their traditional police powers. The Rehnquist Court has revived the “states’ rights” principle under the Tenth Amendment to a limited degree and in selected cases, but only marginally dampening federal commerce power.

The federal Controlled Substances Act is grounded in federal commerce power and states explicitly that any state law that is in “positive conflict” with the Act is preempted by federal law. The Act includes the statement from Congress that drug abuse is a “national” problem requiring federal control. In 2005 the decision in a California medical marijuana case currently before the U.S. Supreme Court, where two patients permitted under state law to use marijuana either grow their own or are given free supplies, which constitutes entirely non-commercial, intrastate activity, may push federal commerce power to its furthest limit yet.

Through enactment of the state-level Uniform Controlled Substances Act, Washington and the other states have *voluntarily* integrated their drug control laws into the federal scheme of drug prohibition, exercising their concurrent commerce power. It is arguable that a state, therefore, could also voluntarily diverge from the federal scheme. Whether Washington or any other state could now promulgate its own regulatory system for controlling the production and distribution of those psychoactive substances that are currently prohibited under federal law is a critical open question.

Despite the case law validating the federal Controlled Substances Act under the Commerce Clause, there is still the traditional federalist argument that the federal government is one of enumerated powers and that Congress possesses only those powers specifically delegated to it under the U.S. Constitution. States still retain the inherent power, independent of any congressional legislation or statement that drug abuse is a “national problem,” to protect their own citizens by controlling drugs and combating drug abuse locally, in view of the dangerous nature and injurious effects of unregulated drug use. According to this traditional view, any federal challenge to Washington State's new regulatory system for psychoactive substances must yield to the state's legitimate exercise

of its police powers, which would have taken place through the state's own political process, whether through legislative action and/or the passage of ballot initiatives.

A more limited view of states' rights, reflected in the long line of cases supporting virtual federal preemption under the Commerce Clause, still yields a few important openings for states to enact their own regulatory systems to control psychoactive substances, even within the context of the current Controlled Substances Act. Three specific exceptions to federal commerce power would allow Washington State, in its attempt to control psychoactive substances more effectively, to enact a state-level regulatory system that might conflict with federal drug laws:

1) There is a strong argument that states' exercise of their exclusive 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 responses. Assuming that the U.S. Supreme Court would not second-guess a state-level legislative policy decision made in Washington, the state could confidently establish its own regulatory system to control those psychoactive substances currently produced and distributed exclusively in illegal markets. The federal government cannot "commandeer" the states to enact or enforce certain laws, so the state legislature, having put in place a regulatory system to control currently prohibited drugs, could refuse to appropriate resources for the enforcement of federal drug laws and the legislature could also prohibit state law enforcement officers from cooperating with federal agents.

2) The federal Controlled Substances Act, the cornerstone of federal drug policy, has been held by federal courts not to allow the federal government to usurp states' exclusive rights (pursuant to their inherent police powers) to regulate the practice of medicine. Therefore, to the extent that Washington State's new regulatory system were to permit the medical prescription of psychoactive substances for use in state-controlled addiction treatment programs, federal government intervention would encroach on the state's exclusive police powers to regulate such medical practices.

3) 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 beyond the reach of federal commerce power. 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.

Through its spending power, Congress could still "punish" Washington by denying resources to the state, and federal agents might still attempt to arrest, prosecute and punish drug offenders under federal law. However, if a state-level regulatory system greatly reduced disorder and crime, including illegal sales by individuals, federal jurisdiction 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 prohibited activity conducted on federal property.