

Picking Sides in the War on Drugs: When the States Go Against the Federal Government

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Abstract

The war on drugs has four main objectives: eradication of drug-producing crops, interdiction of drug smuggling, investigation and prosecution of drug traffickers, and penalization of drug users (Miranda, Joseph 1998). Since the Regan administration introduced the new drug policy, the states have worked with the federal government, but recently many states have decriminalized or legalized marijuana. Oregon has gone a step further and decriminalized small amounts of all drugs. This shift from the states working with the federal government to opposing the war on drugs may indicate a larger shift away from cooperative federalism and a resurgence of dual federalism.

The war on drugs is the term used to describe the United States drug policy for the last half century. The war on drugs are four main objectives: eradication of drug-producing crops, interdiction of drug smuggling, investigation and prosecution of drug traffickers, and penalization of drug users (Miranda, Joseph 1998). These objectives can further be split into two categories: foreign and domestic. The domestic objectives, investigation and prosecution of drug traffickers and penalization of drug users, originally had unanimous support from the states. However, this era of cooperative federalism seems to be at its end. Given the recent wave of states passing decriminalization and recreational drug use laws, it appears that drug policy may be spearheading a revival of dual federalism.

This paper has four objectives. First, I discuss what is meant by both cooperative and dual federalism. Second, I outline the historical development of federal and state drug policy. Third, I review recent state laws that contradict the federal drug policy, and demonstrate how this affects the type of federalism involved in this policy. Fourth, I discuss the implications of this potential return to dual federalism for intergovernmental relations as a whole.

Cooperative Federalism

In their article “Rethinking Federalism”, Robert Inman and Daniel Rubinfeld(1997) define cooperative federalism as “...prefer[ing] the most decentralized structure of government capable of internalizing all economic externalities, subject to the constitutional constraint that all central government policies are agreed to unanimously by the elected representatives from each of the lower-tier governme” This definition indicates that cooperative federalism grants more power to the states but still has the federal government organizing a national level response.

Cooperative federalism can then be thought of as a mutual partnership of the state and federal government. This view is indicative of early United States drug policy as the federal policies on punishment of drug use were agreed upon and enforced by the states. This decentralized structure worked well at administering the penalties listed by the federal government but perhaps also gave the states more incentive to decide on drug policy themselves.

Dual Federalism

Dual federalism could be considered an antecedent to cooperative federalism. Dual federalism indicates a complete separation of federal and state influence (Young 2014, 35). Dual federalism can be thought of as when the federal government and the state government exert separate powers to enforce separate, often antithetical, polices. With the ever increasing use of federal funds to entice states to enact federal policies, dual federalism in this strictest sense has become increasingly rare.

It is important to note that dual federalism does not mean that the federal government has created no policies regarding a certain policy area but rather that states have full or near full autonomy when deciding on the policy area and can ignore the federal standard. Dual federalism in this regard is both defended and encroached upon by the commerce clause. The commerce

clause grants the federal government the power to regulate interstate commerce and thereby drug importation and transportation between states but not internal drug transportation.¹

History of Drug Policy

The term “war on drugs” was popularized by the media shortly after a press conference given on June 18, 1971, by President Richard Nixon following his address to the Congress on Drug Abuse Prevention and Control (Nixon,1971). President Ronald Regan adopted this theme and policy position and signed the Comprehensive Crime Control Act of 1984, which expanded penalties towards possession of cannabis, established a federal system of mandatory minimum sentences, and established procedures for civil asset forfeiture.²

Most states followed the federal plan, but some states were already wrestling control away from the federal government. In 1973, Oregon became the first state to decriminalize cannabis. Two years later, Alaska, Maine, Colorado, California, and Ohio decriminalized cannabis. This trend continued with more states decriminalizing cannabis despite an increase in federal pressure to incarcerate drug users and distributors.

2014 may be the most important turning point in the federal drug policy. The Rohrabacher–Farr amendment passes the U.S. House and is signed into law. Requiring annual renewal, it prohibits the U.S. Justice Department from interfering with the implementation of state medical cannabis laws.³ The importance of this legislation lies in the tacit admittance that states have the final say on medical cannabis law. By preventing the U.S. Justice Department from interfering with state laws, the federal government conceded a large amount of authority to the states. This law does not actually give the states any additional authority with regards to non-medical cannabis nor does it indicate a reversal on the federal ban of medical cannabis.

Recent State Actions

Over the past decade, sixteen states have legalized small amounts of recreational cannabis as seen in figure 1⁴. This trend also includes several more states decriminalizing small amounts of cannabis. Perhaps the most notable state action has been Oregon's measure 110 which decriminalizes small amounts of drugs such as cocaine and heroin.

These pieces of legislation showcase the growing rift between federal and state drug policies. The war on drugs is still the federal government's stance, but with an ever increasing number of states decriminalizing or legalizing drug usage the federal government is having a harder time implementing its policy on the domestic front.

Cooperative federalism requires the consent and agreement from the states for any federal policy to work, but, as seen with recent state action, the war on drugs lacks both. This then could indicate an eventual splitting of the United States' drug policy in two. The federal government will continue to hold dominion over drug smuggling and trafficking, but the penalization of drug usage will firmly be the domain of the states.

The Future of American Federalism

Cooperative federalism, at least in regards to drug policy, has ended. Dual federalism has taken its place. The lack of interaction or cooperation with regards to drug policy may be indicative of the end of cooperative federalism entirely. With the states actively working against the interests of the federal government's policies, cooperative federalism cannot survive. Once the states gain authority over one area of policy even with federal incentives to do otherwise, what is to prevent the states from growing their authority over other areas? If the trend seen in drug policy continues to other policy areas, there could be a massive change in the policy landscape of the United States.

Conclusion

The federal government has been pursuing a drug policy that many states have now gone against. This turning indicates an end to cooperative drug policy and the return of dual federalism. This then leaves many questions for the future. Does state ownership of drug policies indicate a return to dual federalism, and will such become a defining feature of American government? Is dual federalism better at responding to public desires? Is drug policy a special case or indicative of deeper beliefs about governance? Regardless of the future, dual federalism has been reasserted in the arena of drug policy.

Figure 1

Where recreational marijuana is legal in the U.S.

States that have legalized small amounts of cannabis for adult recreational use, November 2019



Note: The Northern Mariana Islands, a U.S. commonwealth, legalized recreational marijuana in 2018.

Source: National Conference of State Legislatures.

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Notes

1. U.S. Constitution Article I, Section 8, Clause 3. "[t]o regulate **Commerce** with foreign Nations, and among the several States, and with the Indian Tribes."
2. U.S. Congress. Senate - Judiciary; Foreign Relations | House - Judiciary. S.1762 - Comprehensive Crime Control Act of 1984 .,98th Congress., [S.1762 - 98th Congress \(1983-1984\): Comprehensive Crime Control Act of 1984 | Congress.gov | Library of Congress](#)
3. COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2015; Congressional Record Vol. 160, No. 82 [Congressional Record House Articles | Congress.gov | Library of Congress](#)
4. Since the creation of the map in figure 1, Delaware, Hawaii, Connecticut, Rhode Island, and New York have passed legislation legalizing cannabis.

Citation

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