

Cooperative Federalism and Substance Regulation: Lessons Learned from the End of Prohibition

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Today we have come to think that federal law is the primary driver behind our public policies. But as the debates and legal changes in the years surrounding the end of Prohibition demonstrate, state law can be far more influential than federal regulation on the use of controlled substances. States can greatly impact the scope and effectiveness of a federal substance ban by limiting the local law enforcement resources available to enforce the ban. States also have a great deal of power to continue to regulate a substance even after a federal ban, like Prohibition, has been repealed. Just as the states continued to control the use of alcohol in a variety of ways after the Twenty-First Amendment was passed, they could likewise limit marijuana use even if it was not a ban substance under federal law. The debates and resulting regulatory decisions at the end of Prohibition demonstrate the variety of tools and powers that states can use to impact when, where, and how their residents use certain substances. This paper will outline the contours of state and federal powers governing controlled substances. It will also look at different local reactions to the debate to end Prohibition, and discuss some of the possible avenues to regulating products like marijuana, even absent a federal ban.

In order to understand how these lessons apply to the current debate on controlled substances, one must first understand the relationship between state and federal laws. Our Constitution is based on a system of federalism, where both the national and state governments play a role in criminalizing and regulating products like alcohol or marijuana. The federal government is supreme in its power, but limited in the scope of those powers. So long as Congress acts within its enumerated powers when it passes a law, any state law that conflicts

with a federal law is void.¹ The Supreme Court has already ruled that the federal government has the power to regulate the sale and distribution of both alcohol and marijuana. Because there is currently a federal law outlawing the possession and sale of marijuana, no state has the power to make these activities completely legal.

Although federal power has grown since the Prohibition era, there is still significant room for states to formulate rules and policies designed to best meet the particular needs of their citizens. States are the “laboratories of democracy” within our federal system. They have been experimenting with a variety of alcohol-related regulations for decades. This experimentation has also resulted in a growing body of court decisions that explain the limits of both federal and state authority to regulate alcohol. That body of law can serve as a useful model for states looking to understand how they can regulate other controlled substances with or without a federal law in place banning the substance.

I. State legalization of a controlled substance while the federal ban remains in place

While states cannot fully legalize a controlled substance in the face of a federal ban, they still have great power to impact the rules governing the use of that substance, and the risks that their citizens face for possessing, using, or selling the substance. The debates surrounding the end of Prohibition suggest that the selective enforcement of the federal ban on a controlled substance may weaken the legitimacy of the law in the eyes of the public, and help bring about the end of the federal ban. This section will outline the reasons that the federal Controlled Substances Act (“CSA”) has not been uniformly enforced across the states, and explain how proponents of the Twenty-First Amendment made use of similar inconsistencies in enforcement to advocate for the repeal of Prohibition.

¹ “The Constitution and laws of the United States are ‘the supreme Law of the Land.’” *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2613 (2013) (quoting U.S. CONST. art. VI, cl. 2). “State legislation may not contravene federal law.” *Id.*

The Eighteenth Amendment prohibited the manufacture, sale, and transport of “intoxicating liquors,” but did not outlaw its possession or consumption.² Congress passed the National Prohibition Act of 1919, known colloquially as the “Volstead Act,” to enforce the Amendment.³ The Volstead Act defined “intoxicating liquor” as any beverage with more than 0.5% alcohol.⁴ Like the Eighteenth Amendment, the Volstead Act did not actually prohibit buying or drinking alcohol, but it did mandate that “no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized by this act.”⁵ The Volstead Act also superseded all existing state laws prohibiting alcohol sales.⁶ There is no analogous constitutional amendment governing the sale of any other controlled substances, such as marijuana. There are, however, similarities between the federal law that currently classifies marijuana as a Schedule I substance, known as the CSA, and the Volstead Act.⁷

From the beginning, implementation of the Volstead Act was problematic. First, there was a lack of support at the federal level. “Successive Congresses refused to appropriate enough money to enforce the law[.]”⁸ Congress also exempted enforcement officers from the Civil Service until 1927, which meant that the jobs could be given out as rewards under the political patronage or “spoils” system.⁹ State and local authorities similarly refused to “commit the resources necessary to enforce the Volstead Act. For example, the state of Maryland refused to

² U.S. Const. amend. XVIII, § 1; *see also* Michael Lerner, *Prohibition: Unintended Consequences*, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/>.

³ David J. Hanson, *Alcohol – Problems and Solutions: The Volstead Act*, <http://www2.potsdam.edu/alcohol/Controversies/Volstead-Act.html#.VAeNvmPMWxM>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See* 21 U.S.C. §§ 841, 844 (2012).

⁸ J.C. Burnham, *New Perspectives on the Prohibition “Experiment” of the 1920’s*, 2 J. SOC. HIST., 52, 56–57 (1968).

⁹ *Id.* at 57.

pass any enforcement issue.”¹⁰ As a result, enforcement of the Volstead Act was spotty at best. “The illegal production and distribution of liquor, or bootlegging, became rampant, and the national government did not have the means or desire to try to enforce every border, lake, river, and speakeasy in America. In fact, by 1925 in New York City alone there were anywhere from 30,000 to 100,000 speakeasy clubs.”¹¹

The same holds true for certain controlled substances governed by the CSA. Federal regulation of marijuana should, in theory, apply uniformly across the nation. In practice, however, the substance has not been regulated identically in each state. This is due in part to the federal government’s decision not to drive enforcement: “Rather than acting as a dictator of state policy, the federal government exercises, at most, a loose control over the general direction taken by lower levels of government”¹² to control marijuana use. As a result, the drug policies among the states “do not exhibit true uniformity from state to state, but instead display a sort of constrained diversity.”¹³

This model of co-governing between state and federal government is known as “cooperative federalism.” It is used to regulate many areas of American life, including the use of alcohol and marijuana. Under the cooperative federalism approach, “the federal government first establishes broad regulatory objectives and then utilizes grants and other incentives in an effort to encourage (but does not, strictly speaking, require) state cooperation in achieving those objectives.”¹⁴ Cooperative federalism allows the states to “maintain formal policymaking autonomy; thus, while states may face significant pressures to conform to federal preferences,

¹⁰ National Archives, *Teachers: Teaching With Documents: The Volstead Act and Related Prohibition Documents*, <http://www.archives.gov/education/lessons/volstead-act/>.

¹¹ *Id.*

¹² Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 788 (2004).

¹³ *Id.*

¹⁴ *Id.* at 806–07.

there is always the possibility that some will choose to deviate.”¹⁵ Simply put, the federal government selects a goal, and the states are free to determine how to achieve the result. This flexible approach allows states to tailor their methods based on local preferences and concerns.

Cooperative federalism provides state and local governments with great power to shape the drug policies for their communities even with a federal ban in place. There are several factors that make this possible. First, federal resources are limited, and federal law enforcement relies heavily on the expertise of state and local authorities to implement the prohibition on marijuana. “[T]he vast majority of police resources in this country—more than three-quarters—are employed not by the states [or federal government], but by local units of government, principally counties and municipalities.”¹⁶ In 2000, state prisons held more than three times as many people convicted of drug crimes than federal institutions.¹⁷ In addition, “[s]tate governments are much better equipped than the federal government to investigate and prosecute local, street-level crimes such as drug possession.”¹⁸ Indeed, “ninety-nine percent of drug-related investigations and arrests are carried out by state agents.”¹⁹ During Prohibition many states enacted their own versions of the Volstead Act, and the original expectation was that states and state resources would play a primary role in enforcing the Act.²⁰ The Eighteenth Amendment itself gave state and local authorities an equal role in enforcing Prohibition alongside the federal government.²¹

¹⁵ *Id.* at 807.

¹⁶ *Id.* at 808.

¹⁷ *Id.* at 810 (citing Paige M. Harrison & Allen J. Beck, BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, BULL. NO. NCJ 195189, Prisoners in 2001, 13–14 (2002)).

¹⁸ Alex Kriet, *Beyond the Prohibition Debate*, 13 CHAP. L. REV. 555, 565 (2010).

¹⁹ Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1, 2 (Fall 2013) (citing Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1283–84 (2009)).

²⁰ Burnham, *supra* note 8 at 58

²¹ *Id.*

When the federal government cannot make use of local resources, it has a much harder time enforcing its policies. During Prohibition only eighteen states funded the enforcement of their state prohibition laws.²² While “[l]ocal enforcement in many Southern and Western areas was both severe and effective; in other areas local enforcement was even more unlikely than federal enforcement. For years the entire government of New Jersey openly defied the Eighteenth Amendment.”²³ The federal government had a difficult time regulating liquor sales in states where the Volstead Act did not enjoy local support. For example, during Prohibition the prosecutors, juries, and judges in certain parts of the country were so unsupportive of the Volstead Act that it became impossible to enforce.²⁴ This local opposition made it hard to convict those who violated the Volstead Act and “contributed greatly to the notable disparities in the effectiveness of [P]rohibition from place to place.”²⁵ The same is true of marijuana regulation under the CSA today: without local buy-in from the police, judges, and prosecutors, federal law enforcement must commit far more resources to investigate and prosecute marijuana cases.

Even aside from their resources, state governments are able to impact the personal behavior of their citizens in a way that the federal government cannot. “[S]tate laws hold greater sway over social norms and personal preferences than federal laws, at least in the area of drug policy. As a result, the existence of a federal ban does little to alter people’s personal beliefs about medical marijuana.”²⁶ For example, despite an ongoing commitment of resources, the federal government has been unable to block California residents from obtaining marijuana under the state’s medical marijuana law. “Federal officials have been no more successful in

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 57 (citation omitted).

²⁵ *Id.*

²⁶ Kriet, *supra* note 18 at 571.

stopping other states from implementing their own medical marijuana laws.”²⁷ As one commentator reflected, “[p]erhaps the most significant, though largely underappreciated, lesson to be learned from fourteen years of state medical marijuana laws is that the ability of the federal government to override or interfere with state drug laws is actually quite limited.”²⁸ Simply put, the federal government cannot effectively regulate products like alcohol and marijuana without the assistance of the states.

As with the end of Prohibition, the federal government has recently shifted its policies and priorities with regard to prosecuting marijuana crimes. On August 29, 2013, the United States Department of Justice issued a memorandum in response to recent state ballot initiatives on marijuana, which focused on using federal resources to prevent: (1) distribution to minors; (2) revenue from going to criminal enterprises; (3) diversion to states where illegal; (4) trafficking of other drugs or illegal activity; (5) violence and use of firearms to distribute; (6) drugged driving and other health consequences; (7) growing marijuana on public lands; and (8) possession on federal property.²⁹ The memorandum went on to explain that, “[o]utside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”³⁰ This indicates that the federal government will continue to allow states to drive marijuana policy within their own borders outside of these core federal priorities. As a result, we can expect to see divergent marijuana policies develop throughout the states.

²⁷ *Id.* at 570–71.

²⁸ *Id.* at 566.

²⁹ Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [“DOJ Memo”], *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³⁰ *Id.* at 2.

In addition, state regulations no longer align with the CSA. The CSA classifies marijuana in Schedule I substance.³¹ Schedule I is the most restrictive federal category, and makes cultivation, distribution, and possession of marijuana a federal crime.³² At least in theory, “[t]he federal government’s steadfast ban on marijuana is categorical and virtually without exception.”³³ In contrast, Washington and Colorado have legalized non-medical marijuana, “medical marijuana has been legal in California since 1996, and is now permitted in one form or another in twenty-one of the fifty states as well as the District of Columbia.”³⁴

These state laws create a legal grey zone for their residents: even when the state permits marijuana’s use and distribution in certain circumstances, the state laws cannot override the federal ban on marijuana. In 2005, the Supreme Court ruled that “persons engaging in the intrastate cultivation, sale, or consumption of medical marijuana—even in full compliance with state laws and regulations—could be prosecuted for violations of the federal [CSA]”.³⁵ In the same case, the Supreme Court ruled that the CSA is constitutional, even when it is applied to local marijuana-related activities. This means that a state resident can be prosecuted under federal law for using marijuana, even if that use is legal under the laws of their state. “Under the

³¹ 21 U.S.C. §§ 841, 844 (2012).

³² Grabarsky, *supra* note 19 at 9.

³³ *Id.*

³⁴ Grabarsky, *supra* note 19 at 5. “[F]orty percent of states have legalized its cultivation, distribution, and consumption for medical purposes. As such, medical marijuana activity is at the same time proscribed (by the federal government) and encouraged (by state governments through their systems of regulation and taxation).” *Id.* at 2. These states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. “See ALASKA STAT. § 17.37.030 (2013); ARIZ. REV. STAT. § 36-2811 (2012); CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2013); COLO. CONST. art. XVIII, § 14; CONN. H.B. No. 5389, 2013 Conn. Acts 12-55 (Reg. Sess.); DEL. CODE ANN. tit. 16, § 4903A (2013); HAW. REV. STAT. § 329-122(2013); ILL. HB 0030 97th Gen. Assem. (2013); ME. REV. STAT. ANN. tit. 22, § 2383 (2012); MD. CODE ANN., CRIM. LAW § 5-601(c)(3)(ii) (2013); 2012 Mass. Acts ch. 369, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter369>; MICH. COMP. LAWS SERV. § 333.26421 (LexisNexis 2013); MONT. CODE ANN. § 50-46-301 (2013); NEV. REV. STAT. § 453A.010(2013); N.H. H.B. 575-FV (2013); N.J. STAT. ANN. § 24:6I-1 (West 2013); N.M. STAT. ANN. § 26-2B-1 (West 2013); OR. REV. STAT. § 475.300 (2013); R.I. GEN. LAWS § 21-28.6-1 (2011); VT. STAT. ANN. tit. 18, § 4471 (2013); WASH. REV. CODE § 69.51A.005 (2013).” See *id.* at n.26.

³⁵ *Id.* at 3–4 (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)).

doctrine of the supremacy of the federal government, those state laws, of course, cannot take precedence over the CSA.”³⁶

Nor can the state laws allowing for medical uses of marijuana protect residents from the CSA. In 2001, the Supreme Court ruled that it is up to Congress to determine whether marijuana has any “medical benefit and has interpreted the CSA in such a way that leaves no room for a common law medical marijuana exception or medical necessity defense.”³⁷ This tension between state and federal laws has left marijuana users in certain parts of the country in a regulatory limbo. The United States Department of Justice announced in August 2013 that “[i]f state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions...”³⁸

The federal government has selectively made good on this threat: “[s]ince October, federal agents have closed nearly two-thirds of the more than 200 medical marijuana distributors in San Diego.”³⁹ “Other executive departments have come to the aid of the DEA and DOJ: The Treasury Department has pressured banks to close accounts of medical marijuana businesses; the IRS has imposed additional taxes on dispensaries; and the Bureau of Alcohol, Tobacco, Firearms and Explosives has ruled that card-carrying patients who receive medical marijuana cannot purchase firearms.”⁴⁰

These factors collectively lead to an unpredictable and uneven regulation of marijuana: the federal government is incapable of fully enforcing the ban, so technically illegal but low-priority drug activities go unpunished in states that do not support the CSA. Each time federal

³⁶ *Id.* at 10.

³⁷ *Id.* at 9 (citing *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001)).

³⁸ DOJ Memo at 3.

³⁹ Grabarsky, *supra* note 19 at 17.

⁴⁰ *Id.* at 18.

priorities shift, the residents in these states could suddenly find that the federal government is no longer willing to look the other way. States can confuse matters more by passing laws that permit certain uses under state law, misleading people into believing that they will not be prosecuted for engaging in these acts.⁴¹

Proponents of the Twenty-First Amendment pointed to these same issues of uneven enforcement during the debates at the end of Prohibition to justify its repeal. The debates surrounding the end of Prohibition indicate that state and federal enforcement policies can have a very real impact on the perceived legitimacy of a substance control ban. An absence of rigorous enforcement can itself undermine the need for a ban in the eyes of the public. The uneven enforcement of the Volstead Act led many law-abiding citizens to believe that Prohibition threatened the rule of law: “The mass violations of national prohibition in the 1920s, followed by the Depression of the 1930s, raised a new specter: prohibition, many came to believe, undermined respect for the law, including property law.”⁴² Viewed in this light, a repeal of Prohibition seemed like the lesser of two evils: better to allow people to drink legally than to allow a break-down of deeper societal values.

Uneven enforcement can also make a law seem irrational or unjust. For example, many have pointed to the disproportionately harsh punishments for marijuana when compared to other substances such as cocaine.⁴³ Once a law is seen as unfair or arbitrary, public support for the law begins to erode. The arguments made by proponents of the Twenty-First Amendment suggest that uneven regulation of marijuana can itself be part of the problem, because it leads the public to see the laws as less legitimate and less fair. Indeed, scholars have made nearly identical

⁴¹ See Ashley Southall, *Answers Sought for When Marijuana Laws Collide*, N.Y. TIMES, September 10, 2013; Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES, July 28, 2014.

⁴² Grabarsky, *supra* note 19 at 9.

⁴³ See, e.g., David Firestone, *Let States Decide on Marijuana*, N.Y. TIMES, July 27, 2014, SR10.

arguments about the current state of marijuana regulation, asserting that “unpredictable enforcement by federal authorities in states that have legalized medical marijuana not only threatens state drug policy, but also the efficacy of federal enforcement.”⁴⁴ Others have noted that “[t]he 44-year refusal of Congress and eight administrations to alter marijuana’s place on Schedule I has made the law a laughingstock, one that states are openly flouting.”⁴⁵

Much like those now advocating for the legalization of marijuana, proponents of the Twenty-First Amendment also argued that legalizing alcohol would “provide jobs, stimulate the economy, increase tax revenue, and reduce the ‘lawlessness’ stimulated by and characteristic of the illegal liquor industry.”⁴⁶ Likewise, a recent report suggested that Washington and Colorado “could see a major economic boon because of the legalization. The new measure is expected to bring the two states more than \$550 million combined, with more than 300 economists previously estimating that legalizing pot could save the U.S. up to \$14 billion a year.”⁴⁷ Supporters of removing the federal ban also point to the high costs of long incarcerations for those convicted under the CSA.⁴⁸ Together, these same kinds arguments about the benefits to the rule of law and the economy helped sway even those who did not drink liquor that society would be better if Prohibition was repealed. These arguments may also bring about a collective shift in opinion (at least on the national level) about the necessity of a federal ban on marijuana.

⁴⁴ *Id.* at 2.

⁴⁵ Firestone, *supra* note 43.

⁴⁶ Harry G. Levine and Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 THE MILBANK QUARTERLY 461, 464 (1991); *see also* Ranjit Dighe, Legalizing It – The Economic Argument, HUFFINGTON POST (January 30, 2014), *available at* http://www.huffingtonpost.com/ranjit-dighe/legalize-marijuana-economic-argument_b_4695023.html.

⁴⁷ Harry Bradford, *14 Ways Marijuana Legalization Could Boost The Economy*, THE HUFFINGTON POST (November 7, 2012), *available at* http://www.huffingtonpost.com/2012/11/07/marijuana-economy-14-reasons_n_2089107.html.

⁴⁸ *See* Wegman, *supra* note 41 (“Each year, enforcing laws on possession costs more than \$3.6 billion, according to the American Civil Liberties Union. It can take a police officer many hours to arrest and book a suspect. That person will often spend a night or more in the local jail, and be in court multiple times to resolve the case.”).

II. State regulation if there is no longer a federal ban

If marijuana were no longer subject to a federal ban, the states would still have the power to regulate the substance through a variety of criminal and civil sanctions, just as they currently do with alcohol.⁴⁹ Indeed, the aftermath of Prohibition demonstrates that states may be able to regulate the controlled substance more effectively when there is no federal law governing the issue. As one commentator has explained, “the federal government cannot legalize marijuana on its own, but it also cannot stop a state from doing so.”⁵⁰ “As a result, if we approach proposals to reform federal drug laws from the prohibition/legalization framework, we will be asking the wrong questions.”⁵¹ We would, therefore, “be much better served by thinking about these issues in terms of the role of federal government in light of state laws.”⁵²

States have great authority under their traditional police powers to regulate for health and safety purposes. This is why the states have continued to play a primary role in the regulation of alcohol even after the end of Prohibition. Indeed, the state regulatory regimes designed to deal with liquor provide helpful models of how the states might address issues related to marijuana if the federal ban is repealed.

The federal Prohibition on alcohol ended in 1933.⁵³ Around that time states began forming state alcohol control agencies based on models created by “policy-oriented researchers and attorneys.”⁵⁴ Within two years of the national repeal, nearly every state had such an

⁴⁹ “Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens.” *Shelby Cnty*, 133 S. Ct. at 2623 (citing U.S. CONST. amend. X). Because federal law is supreme to state law in any area where the federal government has the power to regulate, the exact contours of the state’s ability to regulate these products depends on the specific language of any federal statutes passed in this area.

⁵⁰ Kriet, *supra* note 18 at 581.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Levine and Reinerman, *supra* note 46 at 466.

⁵⁴ *Id.* at 466.

agency.⁵⁵ These state agencies proved to be incredibly effective at maintaining limits on the distribution and use of alcohol after the end of federal Prohibition. “[P]ostprohibition regulatory policies kept alcohol use sufficiently low that it was not until the end of the 1960s, 35 years after repeal, that per capita alcohol consumption rose to the levels of 1915.”⁵⁶ In fact, “until at least 1960, alcohol control worked almost as well as prohibition in limiting alcohol consumption, and more effectively than preprohibition policies.”⁵⁷ These historic results suggest that states can also effectively limit the distribution, sale, and use of marijuana even if the federal ban is removed.

After Prohibition, states were primarily responsible for “devising and implementing a regulatory system. States could, and often did, then allow for considerable local option and variation.”⁵⁸ One particularly thorny issue that these new state agencies had to wrestle with was how to create an alcohol control system that could effectively monitor the sprawling and diverse sources of alcohol that had emerged during Prohibition.⁵⁹ In the decades before the national repeal, a number of “small independent distributors and producers” cropped up across the nation, as well as numerous speakeasies that “sold whatever they wanted, to whomever they cared to, at whatever price they chose.”⁶⁰ Because these businesses were all illegal during the Prohibition years, none had been subject to regulation or taxation.⁶¹ Suddenly, state policymakers were in a position to make decisions about the sale of alcohol ranging from age and drink limits, to what other activities could occur under the same roof.⁶² States experimented with a wide variety of regulations. Some forms of regulation were more effective than others, and some forms of

⁵⁵ *Id.*

⁵⁶ *Id.* at 469–70.

⁵⁷ *Id.* at 470.

⁵⁸ *Id.* at 475.

⁵⁹ *Id.* at 473–74.

⁶⁰ *Id.* at 474.

⁶¹ *Id.*

⁶² *Id.*

regulation were struck down by courts as violations of the United States Constitution. The court decisions regarding the ways that states may, and may not, regulate alcohol are instructive for policymakers considering what options they have with regard to marijuana regulation in the absence of a federal statute criminalizing the substance.

A. Direct regulation

States have been able to effectively reach many of the goals underlying the Prohibition movement through direct regulation of alcohol. Many of these same methods of regulation could be used to prevent health and safety concerns related to a substance like marijuana. The Supreme Court has recognized the states' traditional police powers provide them with ample authority to directly regulate substances. True, alcohol enjoys a somewhat unique place in our Constitutional jurisprudence because it is the only substance to be the topic of its own amendment. Both courts and commentators have, however, noted that the states have the power to regulate products like alcohol “[e]ntirely apart from the Twenty-[F]irst Amendment.”⁶³

One of the major concerns underlying the Prohibition movement was that drinking in certain settings—such as in a saloon—encouraged crime and sexually deviant behavior.⁶⁴ After the Twenty-First Amendment was passed, states sought ways to address these same concerns under their police powers.⁶⁵ State legislatures passed a number of laws designed to specifically target the saloon drinking culture, rather than drinking in general. These laws distinguished between drinking in places closed off to the family (private male saloons) and more family-friendly drinking establishments like beer gardens.⁶⁶ States also passed laws distinguishing between the *type* of alcohol these establishments could serve. For example, “[a]though Texas

⁶³ Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 575 (2006).

⁶⁴ *Id.* at 564.

⁶⁵ *Id.* at 565.

⁶⁶ *Id.*

bars that sold liquor by the drink were banned for decades after repeal, beer parlors were allowed to return almost immediately.”⁶⁷

These historic liquor regulations, and the court cases discussing them, provide helpful guidance for the ways that states can distinguish between different types of marijuana products, and the places that sell them. Prohibitionists were concerned with drinking establishments that kept out the rest of the family, and thus limited their time together. In contrast, policymakers will likely be more concerned with keeping children away from marijuana. Some marijuana-laced foods, especially baked goods and candies, can be particularly appealing to children.⁶⁸ There have already been reports of children being hospitalized from consuming marijuana food items in states like Colorado where these products are currently available.⁶⁹ As a result, states may want to take additional measures to limit children’s access to the places selling these products.

The case law regarding alcohol regulation demonstrates that states have a number of tools to help prevent children from accessing substances like marijuana. States may also regulate the age of those allowed to purchase the products.⁷⁰ In addition, state and local governments can use zoning regulations to limit the geographic areas where these products are sold.⁷¹ This might include, for example, keeping dispensaries a certain distance away from schools.⁷² These regulations allow policymakers to take health and social science data into account when determining how to allow certain members of the population to use these substances without

⁶⁷ *Id.* (citing Mark Davidson, “Let’s Go Across the Street for a Cold One!”: The Harris County Courthouse Square Over the Years, HOUSTON LAWYER, Mar.-Apr. 1996, at 48).

⁶⁸ Jack Healy, *New Scrutiny on Sweets With Ascent of Marijuana in Colorado*, N.Y. TIMES, Oct. 30, 2014, A13.

⁶⁹ *Id.*

⁷⁰ *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987). States have universally enacted legislation limiting or prohibiting alcohol consumption by minors. *See* <http://www.nhtsa.gov/people/injury/research/FewerYoungDrivers/appendix.htm>

⁷¹ *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62–63 (1976).

⁷² *See, e.g. Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal. App. 4th 376, 382–383, 390 (1994).

posing a threat to other members of the community. It also lets the community make value judgments about what activities are beneficial or harmful to its members. States may also regulate the times when the products are available. For example, there are state regulations limiting the hours of the day, or days of the week, when citizens may purchase alcohol.⁷³ States may also regulate the amount of a substance that their citizens consume. This includes setting legal limits for both driving and public intoxication.⁷⁴

In addition to regulating the actual substance, states may also use their police powers to regulate the “secondary effects” that selling that substance could have on its citizens. “Secondary effects” refer to a substance’s association with other undesirable activities. In the alcohol context, many people wanted to regulate “saloon culture,” which they believed had a corrupting influence on the patrons, lead to increases in crime, and weakened the family structure.⁷⁵ Courts have upheld a variety of regulations aimed at limiting these secondary effects. Several instructive cases involve the intersection of alcohol and nude dancing. For example, in *Sammy’s of Mobile v. City of Mobile, Ltd.*, the Eleventh Circuit upheld a regulation of alcohol sales in nude dancing establishment.⁷⁶ The court agreed that the “regulation of public health, safety, and morals is a valid and substantial state interest; the Mobile ordinance’s statement of purpose and findings as to the problems created by the combination of alcohol and nude entertainment are sufficient to support the requirement that the regulation further this

⁷³ See, e.g., Alcohol Blue Laws (Laws Prohibiting Sunday Sales of Alcoholic Beverages) available at <http://www2.potsdam.edu/alcohol/Controversies/Alcohol-Blue-Laws.html#.VGgGlfzRVI>.

⁷⁴ See, e.g., Cal. Pen. Code § 639; R.S.Mo 67.305; Tex. Penal Code Ann. § 49.02.

⁷⁵ “Saloons were places that men went by themselves, separate from their wives and children. In the Nineteenth Century, women were exceedingly unwelcome in saloons. At this time, a woman’s place was in the home, but many men felt most at home in the neighborhood saloon. The saloon thereby served to effectively divorce husbands from wives’ and ‘pose[d] a serious threat to . . . family values.’”

Yablon, *supra* note 63 at 559 (quoting Kevin Wendell Swain, Note, *Liquor By the Book In Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 324 (1996)).

⁷⁶ 140 F.3d 993 (11th Cir. 1998).

interest; this interest is unrelated to the suppression of free expression; and the ordinance is narrowly tailored to the perceived problem.”⁷⁷

The Supreme Court weighed in on the same issue in *California v. La Rue*.⁷⁸ California passed rules that prevented certain kinds of sexual conduct from occurring at establishments with liquor licenses.⁷⁹ In upholding the state rule, the Court cited the secondary effects surrounding these establishments: “Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.”⁸⁰ The Court also strongly suggested states are given additional leeway in what behavior they can regulate in places selling substances like alcohol. As the Court noted, “[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink.”⁸¹

While states may regulate the sales and consumption of substances within their state, the Constitution prevents states from placing certain restriction on those substances passing through the state. Because the Commerce Clause gives Congress the power “to regulate Commerce . . . among the several States,”⁸² courts have held that this same clause also prevents states from improperly burdening or discriminating against interstate commerce under the so-called “Dormant Commerce Clause.”⁸³ In this area of regulation, the analogy between alcohol and other substances is imperfect because the Twenty-First Amendment imposes some additional

⁷⁷ *Id.*; see also Yablon, *supra* note 63 at 567.

⁷⁸ 409 U.S. 109 (1972). There are a number of open questions about the relationship between the Twenty First Amendment and the Commerce Clause, as well as the scope of state regulation in this area, which are beyond the scope of this paper.

⁷⁹ *Id.* at 111–12.

⁸⁰ *Id.* at 111.

⁸¹ *Id.* at 114.

⁸² U.S. Const. art. I, sec. 8, cl. 3.

⁸³ See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

considerations on the relationship between state and federal power that are unique to alcohol. “Section 1 of the Twenty-[F]irst Amendment repealed that prohibition, and § 2 delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages. The States’ regulatory power over this segment of commerce is therefore largely ‘unfettered by the Commerce Clause.[’]”⁸⁴ In contrast, the Supreme Court held in *Gonzales v. Raich*, that the Commerce Clause applies to even local marijuana sales.⁸⁵ Because of these differences, states interest in regulating substances like marijuana should look to the court decisions governing general interstate commerce, rather than the specific interstate commerce of alcohol.

B. Regulation of advertisements

While it may seem counterintuitive, states actually enjoy greater freedom to directly regulate substances like alcohol and marijuana than to regulate the advertisements for these products. Advertisements are considered a type of “commercial speech” and therefore receive certain protections under the First Amendment.⁸⁶ The courts view rules that constrain the public’s access to truthful information with disfavor. As a result, a state must demonstrate that the advertising regulations will be effective in limiting consumption of a substance.

In *44 Liquormart*, the Supreme Court reviewed two separate prohibitions against advertising the retail price of alcoholic beverages enacted by the Rhode Island legislature.⁸⁷ The Court acknowledged that the state had an interest in passing the advertisement bans. Specifically, the Court explained that the state had a legitimate interest in promoting temperance.⁸⁸ The fact that the Court accepted temperance as a legitimate state interest suggests

⁸⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514–15 (1996) (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)).

⁸⁵ 545 U.S. 1, 57 (2005).

⁸⁶ *44 Liquormart*, 517 U.S. at 495.

⁸⁷ *Id.* at 489.

⁸⁸ *Id.* at 505.

that states could likewise regulate advertisements of marijuana products or other substances that affect a person's sobriety in order to limit use of the substance.

As the Supreme Court explained, it is not enough for the state to have a legitimate interest in promoting temperance; in order to regulate commercial speech, the regulation must do more than “provide[] only ineffective or remote support for the government’s purpose.”⁸⁹ “For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree.”⁹⁰ In other words, the state needs to provide proof that its regulations will actually have a meaningful impact on the issue that it is trying to solve. Courts are particularly suspicious of blanket bans or other broad restrictions on advertisements: “The need for the State to make such a showing is particularly great given the drastic nature of its chosen means—the wholesale suppression of truthful, nonmisleading information.”⁹¹ In such cases, the state must show “that the price advertising ban will *significantly* reduce alcohol consumption.”⁹²

In *44 Liquormart*, the Supreme Court found that Rhode Island had not made this showing, and therefore overturned the advertisement regulations. The Court’s reasons for doing so are instructive to states interested in passing similar limitations on marijuana advertisements. The Court explained that Rhode Island had “not identified what price level would lead to a significant reduction in alcohol consumption, nor [had] it identified the amount that it believe[d] prices would decrease without the ban.”⁹³ The Court concluded that “without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the

⁸⁹ *Id.* at 486 (internal quotation marks and citations omitted).

⁹⁰ *Id.* (internal quotation marks and citations omitted).

⁹¹ *Id.* at 505.

⁹² *Id.* (emphasis in original).

⁹³ *Id.* at 506–07.

price advertising ban will significantly advance the State’s interest in promoting temperance.”⁹⁴ “Thus, the State’s own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous. As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of ‘speculation or conjecture’ that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State’s asserted interest.”⁹⁵ The Court’s discussion suggests that if a state wishes to pass limits on marijuana advertisements that will not run afoul of the First Amendment, the state should first conduct research regarding potential harmful effects of the product, and design a regulation directly targeted at those harmful effects.

The *44 Liquormart* decision also indicates that state legislatures cannot expect special treatment for advertisement bans aimed at “vice” products like alcohol or marijuana. The Supreme Court dismissed this argument, stating that “[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to ‘vice activity.’ Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market.”⁹⁶ The Court expressed concern that “[t]he recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the ‘vice’ label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice.”⁹⁷

⁹⁴ *Id.* at 505.

⁹⁵ *Id.* at 507.

⁹⁶ *Id.* at 514.

⁹⁷ *Id.*

Finally, the opinion in *44 Liquormart* also shows how much the Court disfavors bans on speech. Instead, Court encourages states to use direct regulation of the underlying product. As the Supreme Court explained: “It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance.”⁹⁸ Rather than trying to limit substance use through advertisement bans, the state could achieve the same result “either by direct regulation or by increased taxation. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.”⁹⁹ These areas of “direct regulation” described by the Court provide states with a variety of ways in which they can regulate substances like alcohol and marijuana. States should look to the methods of regulating and influencing public opinion that have been most successful in curbing excessive alcohol as a starting place for developing marijuana policies.

III. Conclusion

As the debates surrounding the end of Prohibition indicate, a disconnect between federal and state policies can undermine the rule of law and ultimately lead to the legalization of a substance. A federal ban in the face of state legalization creates legal risk for state residents who do not comply with federal law. Once a federal ban is removed, states retain broad discretion to regulate many aspects of these products. While the First Amendment and the Commerce Clause place restrictions on what states may do, the states still retain the ability to place a number of conditions on the sale and consumption of these products under their police powers.

⁹⁸ *Id.* at 507.

⁹⁹ *Id.* (internal citation omitted).