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Marijuana and the 10th Amendment: Strange Bedfellows or Natural Allies?

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The 10th Amendment to the Bill of Rights, established in 1791, created the concept of federalism, wherein the federal government possesses only those powers delegated to it by the U.S. Constitution and all remaining powers are reserved for the states. Conversations about the 10th Amendment are often centered around gun control, same sex marriage and health care, to name a few. But since 1996, when California first legalized marijuana for medical use, marijuana advocates have more frequently and firmly held the hand of the 10th Amendment, and such efforts are now gaining serious traction on Capitol Hill.

National polling indicates that 60 percent of Americans favor marijuana legalization, and nearly three-quarters oppose federal interference in state cannabis laws.

Thirty-three states have legalized marijuana for medical use, and another 10, plus the District of Columbia, have authorized recreational consumption. Canada is fully legal. Mexico is about to be. And once again, the U.S. is giving up market share of a massive industry — recall the boom of Canadian whiskey during American Prohibition — and allowing businesses in other countries to be first to market where the U.S. potentially had first-mover advantage for decades.

Will the federal government finally

act to fix the incompatibility between state and federal law on marijuana? Republican Sen. Cory Gardner hopes so. Gardner on April 4 introduced the STATES Act, an expanded version of the measure he introduced last year. He and his Democratic colleague Sen. Elizabeth Warren of Massachusetts hope this will be the year that Congress finally catches up with 33 state laws that not only have legalized cannabis but have established robust, highly regulated markets for the product that have produced billions in tax revenue in less than a decade. Colorado alone has collected \$968 million in marijuana tax revenue since Jan. 1, 2014, and is poised to surpass the \$1 billion mark before the end of 2019.

The STATES Act is gorgeous in its simplicity and is in direct harmony with the 10th Amendment. Plainly stated, the bill keeps marijuana on the Schedule 1 list of controlled substances but deems the Controlled Substances Act inapplicable to marijuana businesses acting in compliance with state marijuana laws. Furthermore, and most uniquely, the STATES Act changes absolutely nothing in states where marijuana is not yet legal. Read: nothing changes in the South and parts of the Midwest where state legislatures and governors have been slower to embrace the legalization of cannabis.

It is highly anticipated that several pieces of marijuana legislation will emerge this Congress from the Democratic-controlled House of Representatives. Measures addressing bank-

ing, decriminalization, expungement and social equity are all expected to move. This package of bills includes a House version of the STATES Act, carried by Rep. Earl Blumenauer (D-OR) and Rep. David Joyce (R-OH). Blumenauer, a long-time marijuana advocate, and Joyce, a former prosecutor, have teamed up to make sure that the STATES Act passes the House, at which point it will land squarely at the feet of Senate Majority Leader Mitch McConnell (R-KY) in short order.

Interestingly, McConnell, who hails from the not-quite-legal-yet state of Kentucky, was the proud champion of marijuana's cousin, industrial hemp, and fought vigorously for its removal from the Schedule 1 list in the 2018 Farm Bill, which is now law. Efforts are underway, led by Gardner and the Cannabis Trade Federation, a Denver-based national trade association, to convince McConnell that fixing the incongruity between state and federal laws as they relate to cannabis is an endeavor whose time has come.

State and local governments are regulating and taxing the marijuana industry and are putting pressure on members of Congress to act.

If states are not quite legal yet, they eventually will be. Soon enough, every state in the country will have some form of legal cannabis, whether hemp/CBD (products containing THC content of less than 0.3%), medical or adult use and Congress will have to address the issue. The tug of war between Department of Justice enforcement and non-

enforcement, the inability for cannabis companies to have bank accounts or traditional lending opportunities, and the punitive nature of the IRS code on marijuana businesses will create intense pressure on Congress and something will need to be done.

Political observers overwhelmingly agree that the STATES Act is the fix most likely to pass. And, the president has said he would likely sign it. Attorney General Bill Barr even told a Senate panel recently that he would prefer Congress pass legislation allowing states to decide their own marijuana laws over the current situation.

As the clock ticks toward the 2020 election, marijuana policy will take its foothold as a key question for voters, particularly in the Democratic presidential primary.

Furthermore, the president will likely need an answer on marijuana policy as he focuses his efforts on crucial swing states like Michigan, Pennsylvania and Florida, all of which have some form of legal cannabis. Given the split control of Congress and a president looking at his re-election prospects, the STATES Act remains the only bill at the federal level with a true chance to be signed into law. And, unlike the era of Trump's first attorney general, Jeff Sessions, it would appear that the STATES Act is in alignment with new Attorney General Barr as the measure is currently under review with the Department of Justice.

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