Pot or Not: State or Federal Government Regulation and (De)Criminalization of Marijuana?

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With two states recently granting their citizens the right to use marijuana for recreational purposes,[fn 1] at least sixteen states (and the District of Columbia) recognizing the right to use medical marijuana,[fn 2] approximately 73% of Americans in favor of medical marijuana, and, according to one national poll, 56% of likely voters in the United States in 2012 favoring the legalization and regulation of marijuana for any use,[fn 3] will the United States government ever give up its power to prosecute anyone in possession of marijuana?

This brief overview: reviews the tension between the federal government and individual states regarding the use, cultivation and distribution of marijuana; addresses some of the pros and cons cited for decriminalization of marijuana; and offers some possible resolutions to this increasingly divisive issue.

Who has the final say?

Under the Tenth Amendment of the United States Constitution, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”[fn 4] The question of whether the federal government or individual states have the authority to regulate a particular issue is often a bone of contention. While there are many areas where both governments can assert concurrent authority, there is often a question regarding which authority has the ultimate say, especially when the two entities’ regulations conflict.

Tenth Amendment case law addressing this tension has covered such varying topics as: minimum wage and overtime standards for state employees;[fn 5] recognition of same-sex marriages by various governmental agencies;[fn 6] and reimbursement requirements for undocumented immigrants.[fn 7]

One of the most frequently cited sources of the federal government’s power to regulate and criminalize behavior is under the Commerce Clause, found in article I, section 8 of the United States Constitution.[fn 8] Under the Commerce Clause, “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”[fn 9]

The United States government has used its authority under the Commerce Clause to regulate and criminalize drug use under the Controlled Substances Act[fn 10] (CSA). Since 1970, the CSA has divided
controlled substances into five “schedules” of drugs, Schedules I, II, III, IV and V, with each schedule representing a different level of usefulness and/or dangerousness of each drug.[fn 11] For example, a Schedule I drug is a drug that has a “high potential for abuse,” has “no currently accepted medical use in treatment in the United States,” and is unsafe to use under medical supervision.[fn 12] In contrast, a Schedule V drug is one that has “a low potential for abuse” compared to the higher scheduled drugs, has “a currently accepted medical use in treatment in the United States,” and, if abused, will only lead to “limited physical dependence or psychological dependence” compared to the higher scheduled drugs.[fn 13]

Since 1970, marijuana is classified as a Schedule I drug under the CSA, the same as ecstasy, LSD and heroin.[fn 14] Therefore, the federal government views marijuana as having a high potential for abuse, no accepted medical use, and finds it unsafe to use, even under medical supervision.

This idea of marijuana’s supposed dangerousness can be found in federal law since the 1930s, most dramatically pronounced in testimony before the House Ways and Means Committee on the proposed Marihuana Tax Act of 1937.[fn 15] During the hearing, Harry J. Anslinger, the country’s first drug czar, claimed that while opium “has all the good of Dr. Jekyll and all the evil of Mr. Hyde,” marijuana “is entirely the monster Hyde, the harmful effect of which cannot be measured.”[fn 16] He cited marijuana as the cause of seven men committing a string of thirty-eight robberies; another man robbing a hotel clerk before killing him; two men killing a policeman; a fifteen-year-old going insane from the drug; and an ax murderer allegedly killing his mother, father, three siblings and wounding a dog after smoking marijuana.[fn 17]

While recent arguments against marijuana have certainly been based upon more sound and concrete rationale than the histrionics used by Anslinger in the 1930s, even recent anti-marijuana arguments are in stark contrast with the ever-increasing amount of research demonstrating the positive effects of marijuana for those with ailing medical conditions and its minimal negative effects on the average user.[fn 18] Some scientifically established benefits include: 1) reducing nausea, vomiting and pain, and improving appetite and sleep in cancer patients undergoing chemotherapy; 2) treating and preventing glaucoma; 3) preventing epileptic seizures; 4) preventing cancer cells from spreading; 5) reducing anxiety (when used in small doses); 6) slowing the progression of Alzheimer’s; 7) easing the pain felt from muscle contractions in MS patients; 8) relieving the painful side-effects from Hepatitis-C treatment; 9) helping treat Crohn’s disease and ulcerative colitis; and 10) relieving arthritis pain.[fn 19]

While medical marijuana advocates worked for decades to change the federal government’s policy towards marijuana, states have taken the matter into their own hands. Although most states still criminalize recreational marijuana use and distribution, an increasing number of states have been legalizing medical marijuana use and cultivation since the mid-1990s.

For example, in 1996, California voters passed the state’s Compassionate Use Act, which allowed “seriously ill” residents to possess and use marijuana for medical purposes.[fn 20] It also allowed for primary caregivers (those who grow marijuana and provide it to patients unable to cultivate the marijuana themselves) exemption from criminal prosecution for possession and distribution of marijuana for medical purposes.[fn 21]
Unfortunately, state medical marijuana laws such as California’s have not stopped the federal government from arresting and prosecuting medical marijuana patients and caregivers. In 2002, the federal Drug Enforcement Administration (DEA), along with local law enforcement, raided the home of Diane Monson, a California resident and valid medical marijuana patient.[fn 22] While local law enforcement concluded that Ms. Monson was in compliance with state law, the DEA seized and destroyed all of her medicine.[fn 23]

Ms. Monson and another patient, Angel Raich, filed for injunctive relief and declaratory judgment in United States District Court against the federal government to prohibit the government from arresting and/or prosecuting them for possession of a controlled substance (i.e., marijuana).[fn 24] They argued that the United States should not be able to criminalize their medical marijuana possession or cultivation under the Commerce Clause because their activity did not affect interstate commerce.[fn 25]

The Court rejected the plaintiffs’ arguments, finding that Congress had the authority to criminalize medical marijuana, even if the individual is cultivating the plant entirely for home consumption. The Raich Court did so without determining whether individual medical marijuana growers substantially affect interstate commerce. Instead, it upheld Congress’ authority by determining that there was a “rational basis” for the regulation.[fn 26]

Is the Federal government’s stance on medical marijuana cost-effective?

Since 1970, the United States has spent approximately $1 trillion and arrested approximately 17 million marijuana users in President Nixon’s declared “War on Drugs.”[fn 27] In recent years, the federal government has reconsidered the priority previously given to prosecuting marijuana offenses. In fact, in October 2009, Attorney General Eric Holder, through Deputy Attorney General David W. Ogden, sent a memorandum (the Ogden memo) to United States Attorneys in states that had enacted medical marijuana laws.[fn 28] The Ogden memo notes that while marijuana is still viewed by the federal government as a “dangerous drug,” the Department of Justice is “committed to making efficient and rational use of its limited investigative and prosecutorial resources.”[fn 29] Therefore, Ogden concludes, United States Attorneys should still prioritize prosecuting significant drug traffickers, while lowering their priorities on prosecuting “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”[fn 30]

Despite the 2009 Ogden memo, as well as the continuing number of states approving medical marijuana use and cultivation, the federal government has made it clear it will not tolerate even well-regulated medical marijuana programs.

California and Colorado, arguably the two most liberal states on medical marijuana use thus far, have been targeted especially hard by federal law enforcement.[fn 31] In January 2012, the federal government sent letters to almost two-dozen medical marijuana businesses in Colorado giving them forty-five days to shut down or be criminally charged.[fn 32] This was done, despite the fact that Colorado’s medical marijuana program is known to be the most highly regulated in the country.[fn 33]
What is Rhode Island’s stance on marijuana?

As of April 1, 2013, possession of an ounce (28 grams) or less of marijuana is a fine-only offense in Rhode Island,[fn 34] making our state one of over a dozen to recently decriminalize possession of small amounts of the substance.[fn 35] This is in addition to our already-existing medical marijuana law, which first went into effect in January of 2006.[fn 36]

Since 2006, our medical marijuana law has experienced some bumps in the road, especially with regard to the establishment of marijuana dispensaries. For several years, those who applied for approval from the Rhode Island Health Department were denied. In September 2011, the Health Department approved three dispensaries, but Governor Chafee refused to issue the licenses, citing a concern that the federal government would prosecute owners and employees of the dispensaries.[fn 37]

Last winter, the Governor endorsed bills introduced in the General Assembly to scale back the size of the dispensaries, promising to license the dispensaries under the amended law.[fn 38] The amendment did pass, going into effect on June 14, 2012,[fn 39] and the dispensaries are projected to open this year.[fn 40]

While the Governor ended up changing his stance, the United States Attorney’s Office for the District of Rhode Island issued a statement on March 5, 2012, noting that the Department of Justice’s policies regarding the prosecution of those cultivating and/or distributing marijuana, even for medical use, had not changed since the announcement of the state’s proposed legislation.[fn 41] Therefore, the federal government may still prosecute anyone involved with the dispensaries once they open.

What is the solution?

The federal government is undoubtedly allotted the ultimate say over the criminalization and regulation of marijuana. But now that public opinion and a growing number of states are at odds with federal law and policy regarding marijuana, can anything be done to resolve the tension?

In October 2012, a number of those in favor of medical marijuana argued in front of the United States Court of Appeals in the District of Columbia, asking that the Court order the DEA to at least reconsider rescheduling marijuana under the CSA.[fn 42] The case was prompted after the DEA once again rejected a petition (filed ten years ago) to consider changing marijuana from its current Schedule I designation.[fn 43] Certainly, a reclassification of the drug to a lower schedule under the CSA would loosen the federal government’s regulations. But would that be enough?

Perhaps if more states continue to decriminalize and regulate marijuana in a safe, controlled manner, and more research is able to document the real risks and benefits from using the drug, then the federal government will feel less need to combat its presence in the United States.

Another policy change from the United States Attorney General could help reduce the amount of federal funds used to combat legitimate medical marijuana users and cultivators. However, as we have seen from the Obama Administration’s actions following the release of the Ogden memo in 2009, a policy change is no
guarantee. Indeed, since the memo was issued, the Obama Administration has instituted a crackdown on marijuana dispensaries that far exceeds anything done under the Bush Administration.[fn 44] So what was the point of the memo?

What is a more concrete, yet perhaps less likely solution is to change federal law regarding marijuana. Until that happens, citizens in states that decriminalize marijuana for any purpose will remain in a haze as to whether they will be arrested and prosecuted for possessing, manufacturing or distributing the Schedule I narcotic.

Endnotes


4 U.S. Const. Amend. X.


8 U.S. Const. Art. I, § 8, cl. 3.


15 Greg Campbell, Pot, Inc. 50-51 (2012).

16 Id. at 51.

17 Id. at 51-52.

18 A frequently used argument against marijuana is the allegation that it is a “gateway drug” to more dangerous substances. However, research has shown that even though many hard drug users have used marijuana in the past, trying or using marijuana does not cause the person to try or use harder drugs. Campbell, supra, at 110-12.
Another argument is that marijuana causes lung cancer, yet the effect of marijuana on a person’s lungs seems to be less damaging than tobacco, may actually increase lung capacity if used in moderate doses, and may even help to fight cancer by attacking cancer cells while leaving healthy cells alone. Id. at 112; Randy Astaiza, All The Reasons Pot Is Good For You, Business Insider, November 8, 2012, available at http://www.businessinsider.com/health-benefits-of-medical-marijuana-2012-11?op=1; Jennifer L. Huget, Moderate marijuana use not linked to lung damage, The Washington Post, January 10, 2012, available at http://www.washingtonpost.com/blogs/the-checkup/post/moderate-marijuana-use-not-linked-to-lung-damage/2010/12/20/gIQAjm3roP_blog.html. And while many cite the argument that marijuana can be addictive, science demonstrates that marijuana is less likely to create dependence and withdrawal than nicotine, alcohol and caffeine, all of which are legal in America. Campbell, supra, at 113. Notably, there are still no reported deaths caused by overdosing on marijuana. Id. at 116. In fact, one study found that a person would have to ingest 1,500 pounds of marijuana in fifteen minutes in order to overdose on the drug. Id. at 116-17.

19 Astaiza, supra.
21 Id.
22 Raich, 545 U.S. at 6-7.
23 Id. at 7.
24 Id.
25 Id. at 19-20.
26 Id. at 20-22.
27 Campbell, supra, at 42.
29 Id. at 1.
30 Id. at 1-2.
32 Wyatt, supra.
33 Id.
35 See AK ST § 11.71.040; Cal. Health & Safety Code § 11357; CO ST § 18-18-406; C.G.S.A. § 21a-279a; 22 M.R.S.A. § 2383; M.G.L.A. c. 94C, § 32L; M.S.A. § 152.027; Miss. Code Ann. § 41-29-139; Neb. Rev. St. § 28-
416; N.R.S. § 453-336; N.Y. Penal § 221.05; N.C.G.S.A. § 90-95(d)(4); OH ST § 2925.11; OR ST § 475.864.