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States Should End the Drug War **by Sheldon Richman**

“Medicine by regulation is better than medicine by referendum.” U.S. Supreme Court Justice Stephen Breyer said that during last week’s arguments over the much-watched medical-marijuana case. Breyer, in other words, prefers that any change in the government’s prohibition of marijuana use be accomplished by an appeal to the federal drug-enforcement authorities rather than by a public vote in the states, such as occurred in California.

But he is really saying that medical oppression by an elite is better than medical oppression by the mob. Are those our only choices? Why must we have medical oppression at all? Why not medicine by free individual choice? That this is not even on the table shows how far our society has moved from its individualist foundations.

The case *Ashcroft v. Raich* has two dimensions, procedural and substantive, and it is important to consider them separately. People who approve of “medical marijuana” — that is, empowering doctors to prescribe pot to certain sick people — tend to favor letting the states partially nullify the federal drug ban. And people who disapprove of medical marijuana tend to favor having the federal government veto such state nullification. But a mix and match is coherent and even sensible. That is, one can oppose the federal government’s effort to stop states from enacting medical-marijuana laws while also opposing those laws. I shall explain.

The Founders of the United States understood the threat to liberty from concentrated political power, so they tried to divide power not only among the three branches of the national government, but also between the national and state governments. Back then, people saw their respective states as sovereign and never would have assented to a scheme in which the states became mere administrative subdivisions of the national government. As a result, the Congress was delegated a few defined powers (to use James Madison’s term) and the states retained other powers by default. (See the Tenth Amendment.)

Unfortunately, the eminently sensible division of powers, called federalism but mislabeled “states’ rights,” acquired a bad name, primarily because of the violations of blacks’ rights after the War between the States. (Before the war, the slave states were not consistent advocates of states’

rights; they self-righteously objected when northern states passed personal-liberty laws that in effect nullified the federal fugitive-slave act.)

Since the New Deal, federalism has essentially been abolished by the Supreme Court's permissive attitude toward Congress and the Constitution's "commerce clause." Until recently, Congress could get away with passing any law as long as it claimed authority under that clause. That has begun to change. In recent years the Court has found two cases in which Congress's resort to the commerce clause was just too transparent to tolerate.

Now it has to contend with *Raich* and state medical marijuana. Here's the rub: most people who say they like federalism want no part of anything that looks like a loosening of the marijuana laws. And those who embrace medical marijuana dislike states' rights in most other cases. It's a topsy-turvy world! The indications at last week's Court session were that federalism will take a hit.

Here's what ought to happen: The Court should endorse federalism and stop the Bush administration from interfering with the states on medical marijuana. It should also recognize that the federal government has no constitutional authority to regulate drugs. It is worth recalling that the Constitution had to be amended before the federal government could prohibit alcohol in the 1920s. Why then has it been able to ban drugs without an amendment?

Once the feds are disarmed in the war on drug makers and consumers, the states should repeal their own laws against production, sale, and possession. All prescription laws should also be repealed. Then we will have real individual freedom and self-responsibility. Self-medication is as inalienable a right as self-education. Medical marijuana does not advance liberty. It only empowers doctors. The idea that government should decide whether marijuana is medicine or not and whether doctors should be permitted to give it to sick people ought to be offensive to any self-responsible American.

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