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Medical Marijuana Is Not a Libertarian Cause **by Sheldon Richman**

“Medicine by regulation is better than medicine by referendum.” U.S. Supreme Court Justice Stephen Breyer said that during arguments in the much-watched medical-marijuana case, *Ashcroft v. Raich*. Breyer, in other words, prefers that any change in the government’s prohibition of marijuana use be accomplished by an appeal to federal drug-enforcement authorities rather than by a public vote in the states, 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, or self-medication? That this is not even on the table shows how far our society has moved from its individualist foundations.

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 through the prescription laws to permit certain sick people to obtain and use marijuana — tend to favor letting the states partially nullify the federal drug ban by passing such laws. 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 Framers of the U.S. Constitution 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 consented to a scheme in which the states became mere administrative subdivisions of the national government. As a result, 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, a key to maintaining the slave system because it socialized enforcement costs. On this see Jeffrey Rogers Hummel's book, *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War.*)

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 in two cases (*Lopez* and *Morrison*) that Congress's resort to the Commerce Clause was just too transparent to tolerate.

The importance of federalism

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 virtually every other way. It's a topsy-turvy world.

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 the manufacture, sale, and transportation of alcohol in the 1920s. Why then has it been able to ban (other) drugs without an amendment?

It might be asserted that Congress may regulate or ban drugs under its interstate-commerce authority. I don't think so. Power under the Commerce Clause cannot be wielded in conflict with other parts of the Constitution, for example, the General Welfare Clause. Regulating or banning drugs may benefit some people (for example, the sellers of competing drugs), but it harms others; hence, it does not serve the *general* welfare.

The Commerce Clause was included in the Constitution to prevent the states from blocking trade between people in different states. As U.S. Supreme Court Justice Robert Johnson wrote in his concurring opinion in *Gibbons v. Ogden* (1824, striking down New York State's grant of a steamboat monopoly),

If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.

Thus, it is a distortion of logic for the central government to restrict trade under authority of the Commerce Clause. (See in this regard my "[Unconstitutionality of Protectionism](#).")

Freedom and drug use

Once the feds are disarmed in the war on drugs (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. As Thomas Szasz notes, self-medication is as inalienable a right as self-education; Jefferson and Mises thought so too.

It may be counterintuitive, but medical marijuana does not advance liberty. This can easily be demonstrated. Medical marijuana empowers doctors, not the rest of us. It accepts the premise that government ultimately should decide what is medicine and whether doctors should be permitted to give it to sick people. What premise could be more anti-freedom than that?

Ah, but it's a *step* toward drug freedom, say its libertarian proponents. That may be the hope, but there are many reasons to doubt the implied prediction. We're told that medical marijuana will show the mass of people that drugs can be used responsibly and thus prepare them for full decriminalization of drugs. I don't see it. What it will do is confirm for people that the government has the drug matter well in hand: If a particular "dangerous drug" can be shown to have medicinal value, our leaders are enlightened enough to permit its circumscribed use under strict doctor supervision. Why upset such a judicious arrangement with free-wheeling, unpredictable decriminalization of all drugs? That line of thought would doom any hope for real decriminalization.

Here's another reason for doubting the argument that medical marijuana would lead to drug freedom: To reassure people that medical marijuana is *not* a step toward decriminalization, the authorities will redouble their efforts to crack down on nonmedical marijuana, creating an intensified hell for everyone else using the plant. They will also persecute doctors suspected of prescribing marijuana unnecessarily, just as today they hound doctors for prescribing "too many" painkillers. This would be progress?

It's fair to ask what libertarians should do if not embrace medical marijuana. Indeed, many people who could reduce their suffering if they had access to marijuana are unable to do so. That is a tragedy. But we can't let it distract us from the fact that the popular "solution" would harm many others. I would rather see people break the law to obtain marijuana than see the power of government and deputized doctors increased in the name of compassion. We must look beyond the short term to grasp the full harmful consequences of medical marijuana.

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