

FEDERALISM ISSUE: SHOULD STATES BE ALLOWED TO LEGALIZE MARIJUANA DESPITE ITS FEDERAL STATUS AS A CONTROLLED SUBSTANCE?



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The Controlled Substances Act (CSA) of 1970 categorized marijuana as a Schedule I drug; a drug which has a “high potential for abuse,” “no currently accepted medical use,” and “a lack of accepted safety for use... under medical supervision.”¹ In 2005, the Supreme Court examined California’s Compassionate Use Act of 1996, which permitted the manufacture and consumption of marijuana for medical purposes. *Gonzales v. Raich* reaffirmed the federal government’s ability to regulate marijuana cultivation and possession in the states under the Commerce Clause, which grants federal supremacy over interstate commerce.² Despite the ruling, 23 states currently have comprehensive medical marijuana provisions, and 17 additional states allow limited medical marijuana usage.³ Within the last five years, Colorado, Oregon, Washington, and Alaska have passed provisions allowing the recreational use of marijuana, and more than 10 states may consider similar provisions in the 2016 election. After Colorado passed its recreational usage initiative in 2012, questions arose about how federal law regarding cannabis use would be enforced within the state. The Office of the U.S. Attorney General released a memo in 2013 stating it

would defer to state enforcement agencies regarding marijuana regulations, provided states still prioritize particular enforcement objectives.⁴ It is likely the next president will have to address the clash between federal and state regulation of marijuana.

Although it is often seen as a “liberal” position, many libertarians and some conservatives, such as National Review founder William F. Buckley, have long favored loosening marijuana laws. Legalization of marijuana is not an exclusively Democratic party platform, and this is evident when one examines the states that have passed legalization measures. While the state of Oregon is led by both a Democratic governor and legislature, Washington and Colorado have Democrats and Republicans in control of state offices. And while Alaska’s State Senate and House are held by a Republican majority, Governor Bill Walker ran for office as an Independent candidate.⁵

The conflict between state and federal cannabis regulation may soon be evaluated in the Supreme Court. *Nebraska and Oklahoma v. Colorado* is a pending challenge to Colorado’s recreational use provision, in which the plaintiffs claim Colorado violates the Supremacy Clause of the Constitution by legalizing marijuana, and thus the Supreme

Court should hear the case on grounds of original jurisdiction.⁶ Nebraska and Oklahoma further claim that Colorado's law undermines their efforts, as neighboring states, to enforce the federal law within their borders.⁷ The plaintiffs are currently supported by an amicus curiae brief from all nine former DEA administrators, while Colorado is supported by an amicus curiae brief from Washington and Oregon. On December 16, 2015, the federal government filed a brief amicus curiae positing that the circumstances do not meet original jurisdiction standards for the Supreme Court, and the case should not be heard by the court.⁸ *Nebraska and Oklahoma v. Colorado* has the potential to define more clearly the reach of federal supremacy, just as Raich did a decade ago.

THE CANDIDATES

Democratic candidates have addressed the issue of marijuana mainly through their efforts to reform the criminal justice system, and seek to change the federal classification of marijuana as a Schedule I drug. Hillary Clinton's official campaign supports "laboratories of democracy" in states that have legalized marijuana, with certain provisions which parallel those of the Attorney General's office, as well as the rescheduling of marijuana to a Schedule II substance.⁹ Clinton maintains that moving marijuana to a Schedule II would enable research on the drug to help determine appropriate classification.¹⁰ "Laboratories of democracy" alludes to Supreme Court Justice Brandeis's dissenting opinion in *New State Ice Co. v. Liebmann* (1932), as well as Justice Sandra Day O'Connor's reference to the idea in her dissenting Raich opinion.¹¹ Bernie Sanders introduced a Senate bill in November 2015 which would amend the CSA to remove marijuana from the list of scheduled substances altogether, legalizing marijuana at the federal level.¹² His campaign website also calls for this legalization, in addition to immunity from federal prosecution for marijuana users in states where the drug has been legalized.¹³

Republican candidates have made fewer statements on the question of marijuana, but have addressed the issue on the campaign trail and in debates. Many Republican candidates share support for federal deference to state legalization. Donald Trump has been open to the medicinal legalization of cannabis, and, though he has been critical of full legalization in the past, more recently he commented

that, "In terms of marijuana and legalization, I think that should be a state issue, state-by-state."¹⁴ A spokesman for Marco Rubio offered the view that, "states can make decisions about what laws they wish to apply within their own borders," suggesting that the candidate would also defer to state enforcement.¹⁵ Similarly, Ted Cruz recognized state legalization is "a legitimate question," and it is the prerogative of the states to answer the question.¹⁶ Governor John Kasich, in an interview in November, 2015, stated he was against the legalization of marijuana, though if medical experts announced "We need this for people who have seizures," he would support medical marijuana.¹⁷ Kasich did not comment, however, on whether he would enforce federal regulations in Colorado and other states which have legalized the drug. Kasich's state of Ohio is among the numerous states who may consider medical marijuana and legalization on the ballot in November 2016.¹⁸ On the other side of the spectrum, Ben Carson supports medicinal use in compassionate cases, but promises to enforce federal laws in states that have legalized recreational use.¹⁹

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- ¹ Comprehensive Drug Abuse Prevention and Control Act, 1970, Pub. L. No. 91-513, 91st Congress.
- ² Gonzalez, Attorney General, et. al. v. Raich et. al., 545 U.S. 1, No. 3-1454 (June 6, 2005).
- ³ "State Medical Marijuana Laws." National Conference of State Legislatures. December 10, 2015. Accessed December 15, 2015. <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.
- ⁴ "Guidance Regarding Marijuana Enforcement." James M. Cole to All United States Attorneys. August 29, 2013.
- ⁵ "2016 Governors and Legislative Partisan Splits." Stateside Associates. Accessed December 10, 2015. <http://www.stateside.com/states/governors-legislatures-partisan-splits/>.
- ⁶ "Nebraska and Oklahoma v. Colorado." SCOTUSblog. January 6, 2016. <http://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/>.
- ⁷ "Motion for Leave to File Complaint, Complaint, and Brief in Support", Nebraska and Oklahoma v. Colorado. <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Neb.-Okla.-original-suit-vs.-Colorado-12-18-14.pdf>
- ⁸ "Brief for the United States as Amicus Curiae", Nebraska and Oklahoma v. Colorado. <http://www.scotusblog.com/wp-content/uploads/2015/12/Original-No.-144-US-CVSG-Br..pdf>
- ⁹ "Criminal Justice Reform." Hillary Clinton. Accessed December 8, 2015. <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.
- ¹⁰ Seitz-Wald, Alex, and Monica Alba. "Hillary Clinton Calls for Easing Restrictions on Marijuana." MSNBC. November 9, 2015. <http://www.msnbc.com/msnbc/hillary-clinton-calls-easing-restrictions-marijuana>.
- ¹¹ New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), No. 463 (March 21, 1932); Gonzalez, Attorney General, et. al. v. Raich et. al., 545 U.S. 1, No. 3-1454 (June 6, 2005).
- ¹² Ending Federal Marijuana Prohibition Act, S. 2237, 114th Cong. (2015).
- ¹³ "Racial Justice." Bernie 2016. Accessed December 8, 2015. <https://berniesanders.com/issues/racial-justice/>.
- ¹⁴ Johnson, Jenna. "Trump Softens Position on Marijuana Legalization." Washington Post. October 29, 2015. <https://www.washingtonpost.com/news/post-politics/wp/2015/10/29/trump-wants-marijuana-legalization-decided-at-the-state-level/>.
- ¹⁵ Topaz, Jonathan. "Is Pot the New Gay Marriage for the GOP?" Politico, February 2, 2015. <http://www.politico.com/story/2015/01/marijuana-gop-114786#ixzz3t1Baknai>.
- ¹⁶ Hanchett, Ian. "Cruz: Feds Should 'Recognize' State Decisions on Marijuana." Breitbart. April 16, 2015. <http://www.breitbart.com/video/2015/04/16/cruz-feds-should-recognize-state-decisions-on-marijuana/>.
- ¹⁷ Kasich, John. "Stephen Grills John Kasich On Pot Legalization." Interview by Stephen Colbert. Youtube. Transcript. November 7, 2015. <https://www.youtube.com/watch?v=mu2tMTkz4Bk>.
- ¹⁸ Lim, Joshua. "Medical Marijuana Amendment Could Be on on 2016 Ohio Ballot." WCPO Cincinnati, January 26, 2016. <http://www.wcpo.com/news/political/washington-dc-based-group-plans-to-put-medical-marijuana-amendment-on-2016-ballot>.
- ¹⁹ "Ben Carson at Western Conservative Summit 6.27.15." Youtube. June 28, 2015. <https://www.youtube.com/watch?v=SaORB7KW-nI&t=16m59s>.