Forbes

Forgetting Federalism, Oklahoma And Nebraska Demand That Colorado Ban Marijuana

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January 8, 2015

Last week seven Republican members of Oklahoma's legislature, including five of the most conservative, publicly criticized that state's Republican attorney general, Scott Pruitt, for trying to reverse marijuana legalization in Colorado. "Oklahoma has been a pioneer and a leader in standing up to federal usurpations of power on everything from gun control to Obamacare," they wrote in a letter to Pruitt, who last month joined Nebraska Attorney General Jon Bruning in asking the U.S. Supreme Court to stop Colorado from regulating marijuana businesses. "We believe this lawsuit against our sister state has the potential, if it were to be successful at the Supreme Court, to undermine all of those efforts to protect our own state's right to govern itself under the Tenth Amendment to the U.S. Constitution."

The letter, spearheaded by state Rep. Mike Ritze (R-Broken Arrow), was a striking illustration of the split that the ongoing collapse of marijuana prohibition has created among Republicans, pitting their anti-pot prejudices against their avowed devotion to federalism. For Ritze, the choice was clear. "This is not about marijuana at its core," he said in a press release. "It is about the U.S. Constitution, the Tenth Amendment, and the right of states to govern themselves as they see fit. If the Supreme Court can force Colorado to criminalize a substance or activity and commandeer state resources to enforce extra-constitutional federal statutes and UN agreements, then it can essentially do anything, and states become mere administrative units for Washington, D.C.…If the people of Colorado want to end prohibition of marijuana, while I may personally disagree with the decision, constitutionally speaking, they are entitled to do so."

Pruitt and Bruning, by contrast, elevated their antipathy to marijuana above their fealty to the Constitution. "It is curious—and disappointing—to see a suit like this filed by two states that have taken the lead in defending state prerogatives in other policy areas," writes Case Western University law professor Jonathan Adler at *The Volokh Conspiracy*. "It is as if their arguments about federalism and state autonomy were not arguments of principle but rather an opportunistic effort to challenge federal policies they don't like on other grounds. It makes Oklahoma and Nebraska look like fair-weather federalists."

In their lawsuit, Pruitt and Bruning complain that Colorado marijuana ends up in neighboring Oklahoma and Nebraska, causing "the diversion of limited manpower and resources to arrest and process suspected and convicted felons involved in the increased illegal marijuana trafficking or transportation." Some might argue that Oklahoma and Nebraska's determination to stop people from getting high is the real cause of this strain on their law enforcement resources. But according to Pruitt and Bruning, "Colorado's actions amount to what would be *casus belli* if the states were fully sovereign nations." That is like saying Iran would be justified in waging war on Iraq or Turkey because the governments of those neighboring countries refuse to ban alcoholic beverages.

Oklahoma and Nebraska argue that the Supreme Court should overturn Amendment 64, the legalization measure that Colorado voters approved in 2012, because it "directly conflicts with federal law," which the Constitution makes "the supreme law of the land." Specifically, they maintain that Amendment 64 and the regulatory system it created are preempted by the Controlled Substances Act (CSA), which bans marijuana. Yet as the lawsuit concedes, the CSA itself expressly limits preemption to situations where there is "a positive conflict" between state and federal law "so that the two cannot consistently stand together."

In a 2012 Cato Institute paper, Vanderbilt University law professor Robert Mikos explains that "a positive conflict would seem to arise anytime a state engages in, or requires others to engage in, conduct or inaction that violates the CSA." If state officials grew medical marijuana or distributed it to patients, for example, they would be violating the CSA, and the law establishing that program would be preempted. But specifying the criteria for exemption from state penalties, which is essentially what the regulations mandated by Amendment 64 do, does not require anyone to violate the CSA. Mikos concludes that Congress "has left [states] free to regulate marijuana, so long as their regulations do not positively conflict with the CSA."

Oklahoma and Nebraska are asking the Supreme Court to overturn the provisions of Amendment 64 that authorize the state to regulate marijuana businesses, which would leave in place the provisions eliminating state penalties for possession, sharing, and home cultivation. The two states argue that Colorado's regulations "embed state and local government actors with private actors in a state-sanctioned and state-supervised industry which is intended to, and does, cultivate, package, and distribute marijuana for commercial and private possession and use in violation of the CSA." Yet with the possible exception of tax collection, which might be construed as money laundering, none of the actions that Amendment 64 requires state and local officials to perform violates federal law. They are instead focused on making sure that producers and retailers meet the conditions for avoiding prosecution under state law, an area where the Constitution leaves Colorado a lot of leeway.

Under our federal system, states have no obligation to punish every activity that Congress decides to treat as a crime. Colorado therefore could repeal all marijuana-related penalties, leaving people free to grow, possess, buy, and sell marijuana without restriction and without fear of prosecution under state law. Yet Oklahoma and Nebraska argue that a lesser step, repealing penalties with conditions, somehow violates the Constitution.

The states' lawsuit leans heavily on *Gonzales v. Raich*, the 2005 case in which the Supreme Court said the Commerce Clause gives the federal government the authority to prosecute people for growing and possessing marijuana, even if it is for their own medical use and they are permitted to do so under state law. According to *Raich*, the federal government's power to "regulate commerce…among the several states" encompasses the tiniest speck of marijuana in a cancer patient's bedstand, even if she grew it at home and it never left her property, let alone the state. As Justice Clarence Thomas noted in his dissent, "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."

Even so, *Raich* cannot do the work that Pruitt and Bruning want it to do, as Randy Barnett, the Georgetown law professor who litigated the case, points out. To say that the federal government can enforce its own ban on marijuana even in states that have legalized it for medical or recreational use is not the same as saying the federal government can compel states to assist that effort. In fact, as Ritze and his colleagues note in their letter to Pruitt, the Supreme Court made it clear in the 1997 case *Printz v. United States* that Congress may not "commandeer" state and local officials to enforce its laws. The issue in *Printz* was a federal law requiring police chiefs to run background checks on gun buyers, a minor mandate compared to conscripting state officials in a war on marijuana they have rejected.

In light of *Raich*, Pruitt and Bruning claim, federal law clearly preempts Amendment 64, since "there is no doubt that Congress intended the CSA to serve the purpose of making *all* manufacture, sale, and possession of regulated drugs illegal, except to the extent explicitly authorized by the CSA." By legalizing marijuana, they argue, Colorado frustrates that intent. But regardless of what Congress may have wanted to do, it does not have the constitutional authority to make Colorado ban marijuana, and *Raich* does not change that fact.

Pruitt and Bruning's reliance on *Raich*, which was the Obama administration's chief crutch in defending the requirement that every American obtain government-approved medical coverage, dismayed many conservatives who admired their resistance to the Patient Protection and Affordable Care Act. *Raich* epitomizes the Court's willingness to find justification for nearly any congressional whim in the Commerce Clause, a tendency conservatives usually bemoan.

That complaint is reflected in the letter that Ritze and his colleagues sent to Pruitt. They not only defend the anti-commandeering doctrine enunciated in *Printz* but join Justice Thomas in questioning the super-elastic Commerce Clause described in *Raich*.

The legislators argue that the power to "regulate commerce…among the several states," properly understood, does not apply to purely intrastate activity. "For the same reason that alcohol

prohibition required a constitutional amendment," they say, "we believe a strong argument can be made that criminalizing and prosecuting drug crimes must be decided at the state level, absent a properly ratified constitutional amendment. If the commerce clause could be interpreted so broadly, there is virtually nothing the federal government could not regulate or control under the guise of 'commerce.'" That is what consistent constitutionalists, as opposed to faux federalists like Pruitt and Bruning, sound like.