

FEDERALISM

If the state can establish medical use of a federally controlled substance, then how can a federal administrative agency interpret “accepted medical use in treatment in the United States” to exclude the accepted use of that substance in a state?

Congress never defined the term “medical use.”

See *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 939 (D.C. Cir. 1991) ("neither the statute nor its legislative history precisely defines the term 'currently accepted medical use'; therefore, we are obliged to defer to the Administrator's interpretation of that phrase if reasonable.")

The Supreme Court says the Attorney General cannot make a rule that makes illegitimate a medical practice authorized by state law.

See *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.")

A U.S. Court of Appeals has held that intrastate medical use of a controlled substance is accepted medical use under the federal drug law that Congress enacted.

See, *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987) ("Congress did not intend 'accepted medical use in treatment in the United States' to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.")

It seems like the state would be negligent if it did not include language in a state law accepting the medical use of marijuana that the federal

classification of marijuana is either invalid on its face, or does not apply to state medical use of marijuana.

After all, the DEA is not initiating the acceptance of the medical use of marijuana. The state is. I think the burden is on the state to make the argument first.

I do agree that a state law cannot pre-empt a federal law.

See ***Gonzales v. Raich***, 545 U.S. 1 (2005). But the federal classification of marijuana is a federal administrative regulation, not a federal statute. ***Id.*** at 28 n. 37 (federal classification of marijuana relies on the “accuracy of the findings that require marijuana to be listed in Schedule 1.”)

I would like to have this defense codified in a state law if I was arrested for participating in a state medical marijuana program.

Some states are brutal about it, like Arizona, for example. This is from the application for the Arizona Medical Marijuana Program:

You must agree to this statement to register:

The sale, manufacture, distribution, use, possession, etc., of marijuana is illegal under federal law. A registry identification card or registration certificate issued by the Arizona Department of Health Services pursuant to Arizona Revised Statutes Title 36, Chapter 28.1 and Arizona Administrative Code Title 9, Chapter 17 does not protect me from legal action by federal authorities, including possible criminal prosecution for violations of federal law.

Unless we challenge this in the actual text of a state law, we'll end up like Colorado, where the Colorado Supreme Court said in ***Coats v. Dish Network***, 350 P.3d 849, 850 (Colo. 2015):

“Therefore, an activity such as medical marijuana use that is unlawful under federal law is not a ‘lawful’ activity under section 24-34-402.5”

States are ceding state authority to a federal administrative agency on the basis of an interpretation of the phrase “accepted medical use in treatment in the United States” which is contrary to the way the federal courts have interpreted that phrase. Both the state and the federal courts have more constitutional authority than a federal administrative agency to interpret the language Congress used in the federal statute. The agency applies an outdated test it developed in 1994 to determine “medical use” and simply ignores the word “accepted” and the phrase “in the United States.” See,

<https://www.dea.gov/resource-center/2016%20NDTA%20Summary.pdf#page=120>
at footnote bb

The recent petitions that have been filed, such as the one filed by the states of Washington and Rhode Island in 2011, have accepted this outdated federal interpretation from 1994 as a valid interpretation today, even though there were no states in the United States that had accepted the medical use of marijuana in 1994 and now we have 44 states in the United States that have accepted either the whole plant or extracts from the cannabis plant.

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