

Continued from page 1282

States forge ahead with medical marijuana despite federal ruling

The California Senate approved a bill on June 6 that would implement a statewide registry of patients using marijuana for medical purposes, bar state prosecution of physicians who recommend marijuana to their patients, and legalize medical marijuana cooperatives.

Five years earlier, Californians passed Proposition 215, also known as the Compassionate Use Act, an initiative that permits the medical use of marijuana. California was the first state to approve medical marijuana. New York passed a medical marijuana law in 1980, but it was never fully carried out.

Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington have laws that allow the seriously ill to receive, possess, grow, or smoke marijuana for medical purposes without fear of state prosecution.

But are states on a collision course with the federal government for enacting such laws?

"Yes," said law professor Jesse C. Vivian.

Vivian teaches health care policy, pharmacy ethics, and law courses at Wayne State University in Detroit.

"The real question in this case is states' versus federal rights," he said. "Federal law is supreme. The stricter law applies when the federal government says you can't do something."

The Supreme Court of the United States ruled in May that there is no medical necessity exception to the Controlled Substances Act's prohibitions on manufacturing and distributing marijuana.

The case involved the Oakland Cannabis Buyers' Cooperative, a Northern California cannabis club that distributes marijuana to patients whose physicians provide notes recommending the use of marijuana to help relieve the symptoms of cancer, AIDS, anorexia, and other illnesses.

The 8-0 decision upheld a 1998 injunction against the cooperative issued by federal District Judge Charles Breyer. Judge Breyer is the brother of Justice Stephen G. Breyer of the Supreme Court, who recused himself from the case.

Judge Breyer granted a preliminary injunction in 1998 after the federal government sued the cooperative. The cooperative appealed on the grounds that its distributions were medically necessary. The U.S. Court of Appeals for the 9th Circuit reversed Judge Breyer's decision. The Clinton administration appealed to the Supreme Court.

Writing for the court, Justice Clarence Thomas said the circuit court erred when it ruled that the cooperative could raise a medical necessity defense.

But Justice John Paul Stevens, joined by Justices David H. Souter and Ruth Bader Ginsburg, did not sign Thomas's opinion. In a concurring opinion, Stevens said the court was correct to reverse the lower court's decision. And, Stevens said, "the Controlled Substances Act cannot bear a medical necessity defense to distributions of marijuana."

But Stevens said Thomas's opinion "reaches beyond its holding."

"Because necessity was raised in this case as a defense to distribution, the Court need not venture an opinion on whether the defense is available to anyone other than distributors," Stevens said. "Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not present here."

Stevens said Thomas's "overbroad language" is "especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union."

Stevens said federal courts, whenever possible, should avoid or minimize conflict between federal and state laws.

"By passing Proposition 215, California voters have decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state laws for cultivating and possessing marijuana if the patient's physician recommends using the drug for treatment," he said. "This case does not call upon the necessity defense to federal prosecution, when the case itself does not involve any such patients."

California filed a brief in support of the Oakland cooperative, asserting that the federal law "unduly intrudes into California's traditional right to regulate for the health and welfare of their citizens."

Vivian said the Justice Department sought an injunction in the case to send a message to states that they can't flout their laws in the face of federal authority.

"The law is clear," he said. "There is no room for argument. The Controlled Substances Act leaves no doubt. This was a clear victory for federalism and an utter defeat for states' rights."

Vivian said the only legal way marijuana can ever be used or distributed, other than through approved research by the federal government, is if the federal government changes the laws.

"Until and unless the states can convince the DEA that the medical benefit of marijuana outweighs any social harm, the law is clear: marijuana is a controlled substance," he said. "The remedy isn't for states to make more laws."

Vivian said the Justice Department is sending a signal to states that the proper way to change the law is to get the federal government to change marijuana's classification.

"The FDA looks at a drug as scientists to see if the drug is safe and effective," he said. "The DEA looks at the drug like