

University of New Hampshire

## University of New Hampshire Scholars' Repository

---

Law Faculty Scholarship

University of New Hampshire – Franklin Pierce  
School of Law

---

3-12-2017

### Marijuana Regulation and Federalism

John M. Greabe

*University of New Hampshire School of Law*, [john.greabe@law.unh.edu](mailto:john.greabe@law.unh.edu)

Follow this and additional works at: [https://scholars.unh.edu/law\\_facpub](https://scholars.unh.edu/law_facpub)



Part of the [Alternative and Complementary Medicine Commons](#), [Chemicals and Drugs Commons](#), [Commercial Law Commons](#), [Criminal Law Commons](#), [Health Law and Policy Commons](#), and the [State and Local Government Law Commons](#)

#### Comments

This article is part of the series *Constitutional Connections* by John M. Greabe and was originally published by the Concord Monitor.

---

#### Recommended Citation

John M. Greabe, *Marijuana Regulation and Federalism*, Concord Monitor, Mar. 12 2017 at D1, D4.

This Editorial is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of University of New Hampshire Scholars' Repository. For more information, please contact [sue.zago@law.unh.edu](mailto:sue.zago@law.unh.edu).

# Marijuana regulation and federalism



**JOHN GREABE**

Constitutional Connections

Federal law makes the cultivation and use of marijuana illegal for all purposes. Yet, over the past two decades, 28 states plus the District of Columbia have legalized marijuana for medicinal purposes, and eight states plus the District of Columbia have legalized it for recreational purposes. Marijuana regulation thus provides a useful and timely example for exploring the ways in which the distribution of power between the federal government and

the states can facilitate policy change.

Let's start with the basics. The Constitution performs three principal functions.

First, it creates a federal government of three branches – the legislative branch (Congress), the executive branch (the president) and the judicial branch – and provides them with separate but somewhat overlapping powers. We refer to this arrangement as our “separation of powers.”

Second, it specifies the powers that the federal government may exercise. Most of these powers are held concurrently by both the federal government and the states, but a few (for example, the power to coin money) are given exclusively to the federal government. If the Constitution does not explicitly confer a power on the federal government, that power is understood to reside solely with the states. But federal law is supreme; it

SEE CONSTITUTION D4

# Marijuana legalization proves system sometimes works as founders intended

## CONSTITUTION FROM D1

preempts any conflicting state laws. We refer to this general distribution of power between the federal government and the states as our “federalism.”

Third, it recognizes certain zones of liberty surrounding the individual. Some of these zones belong only to citizens, but most are held by all persons within the jurisdiction of the United States. Some limit only the federal government, but most constrain both the federal government and the states. We refer to these

zones of liberty as our “individual constitutional rights.”

Back to marijuana. The Constitution does not explicitly give the federal government the power to regulate marijuana. But it does grant a number of relevant powers. It empowers Congress to regulate interstate commerce and

to adopt additional measures that are necessary and proper for putting this power into operation. It also vests the president with general law enforcement powers while directing him to take care that federal laws be faithfully executed.

In 1970, Congress used its commerce clause powers to pass the federal Controlled Substances Act. The goal of the CSA was to combat drug abuse and control the trafficking of drugs such as marijuana. The CSA makes it a federal felony to manufacture, distribute, dispense or possess marijuana.

In 2002, not long after California had legalized marijuana for certain medical uses, a dispute arose over whether federal authorities could constitutionally enforce the CSA against a disabled California resident who was lawfully growing and using marijuana under state law.

The resident sued, claiming that the CSA could not constitutionally be applied to her. She claimed that her conduct had no bearing on interstate commerce and thus was beyond Congress’s power to outlaw.

In 2005, the Supreme Court disagreed and held that federal authorities could constitutionally enforce the CSA against her. The court acknowledged that she was not engaged in conduct that affected interstate commerce. Nonetheless, the court said, the Constitution’s Interstate Commerce Clause gives Congress the power to regulate entirely local activity that, if replicated by others elsewhere, could in the aggregate affect interstate commerce. And a majority of the court said that growing marijuana for personal medicinal use was just such an activity.

The upshot of this decision

is that there are no real limits on the federal government’s power to outlaw marijuana. Congress has passed a law that completely bans its cultivation and use, and the Supreme Court has upheld the constitutionality of that law’s enforcement in very extreme circumstances.

So why do states continue to enact laws legalizing marijuana? Aren’t such efforts a waste of time?

They are not. Our constitutional system of checks and balances presumes that the states will resist federal regulation with which they disagree. As more and more states use their lawmaking processes to register disagreement with federal marijuana policy, the pressure will mount to modify or abandon that policy.

Moreover, law enforcement is conducted mostly by state and local officials who cannot

be conscripted into federal service. Police officers in states that have legalized marijuana are unlikely to spend their limited resources addressing conduct that, although technically illegal under federal law, is permitted under state law. And federal law enforcement agents are unlikely to spend their limited resources combating the small-time marijuana use that has been legalized at the state level.

Finally, there is the matter of federal executive law enforcement discretion under the Constitution. In 2013, notwithstanding the CSA, the Obama administration adopted a policy of non-interference with state marijuana legalization efforts so long as such efforts are accompanied by strict rules regulating the cultivation and sale of the drug.

The Trump administration has signaled that it may re-

consider the Obama administration’s hands-off policy with respect to state laws legalizing recreational marijuana use, but not medicinal marijuana use. So the recent changes we have seen are unlikely to be entirely rolled back.

One of the principal reasons that the founders adopted a federalist system was to enable local resistance to unpopular federal policies. The recent success of the marijuana legalization movement suggests that, at least sometimes, the system continues to work as the founders intended.

*(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)*