

## Federalism Fights (Part 3)

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Having devoted both of last month’s podcasts to aspects of “Federalism,” I certainly didn’t plan on returning to the subject so soon.

But a podcast committed to how the latest controversies showcase the context behind key constitutional dynamics just can’t pass up the teaching moment afforded by Attorney General Sessions’ recent announcement that the Trump Administration was rescinding a 2013 Obama Administration policy on federal anti-marijuana enforcement. The switch in enforcement policies – and a second federal vs. state square-off involving off-shore oil drilling – provide perfect examples of how constitutional federalism functions (and the ongoing opportunities for mischief it creates).

Even as California and other states have de-criminalized the purchase and possession of medical marijuana or small amounts of so-called “recreational” marijuana, federal law has consistently provided potentially tough penalties for such marijuana users. What kept national and marijuana-tolerant state laws from conflicting was an Obama-Administration memorandum stating that national-government officials would as a matter of prosecutorial discretion decline to enforce federal anti-marijuana laws in states also declining to prosecute.

By allowing individual U.S. Attorneys to again enforce national laws against users now immune from state prosecution, Attorney General Sessions just provided a perfect illustration of how the American constitutional system of “dual legal federalism” – with two separate and independent systems of law – can complicate matters.

On the one hand, the U.S. Congress has constitutional authority to criminalize a vast array of individual acts or omissions. Officials and voters in individual states have no direct ability to countermand federal anti-crime policy.

In turn, however, each of the fifty states has its own separate authority to criminalize – or decline to criminalize – acts or omissions of their residents. And under precedents decided by states-rights supportive Supreme Court majorities in the last two decades, Congress cannot force states to legislate or enforce laws according to Congress’s wishes.

The ability of each level of government, then, to adopt different criminal-justice laws and prosecutorial priorities leads to a messy standoff perfectly illustrated by the plight of marijuana users and dispensaries in California and other states. Users and dispensary owners need not fear interference from their state law-enforcement officials. In fact, many state residents and public officials eagerly anticipate that enhanced economic

activity, increased tax revenue, and reduced incarceration will flow from decriminalizing medical and recreational marijuana.

Yet, the renewed possibility of national law enforcement puts a substantial cloud over all this. Depending upon whether individual U.S. Attorneys decide to spend prosecutorial resources to “make an example” out of medical and recreational marijuana users and dispensaries, the marijuana industry will or will not flourish. And, the mere threat of federal enforcement will likely deter business loans from legitimate banks.

It’s interesting that the ability of national officials to put a practical monkey wrench in the machinery of state marijuana policy is the exact opposite of the dynamics of conflicting off-shore drilling policies – a second federalism controversy much in the news this month. U.S. Interior Department Secretary Zinke has announced an ambitious plan to open deep-water off-shore reserves to oil drilling. Although strongly opposing this perceived threat to its shoreline, California (like other coastal states) has no formal ability to reverse the federal policy – at least as to off-shore reserves at least three miles offshore. Yet, California does have more control over what happens closer to, and on, its shores. So, already there is talk of the State erecting regulatory barriers to make the offshore drilling the Trump Administration wants to green light prohibitively expensive.

So recent news events again illustrate the tangled web woven by the Framers when they committed America to constitutional “federalism” – and the two potentially competing levels of governmental authority federalism inevitably creates.