



## How can states legalize when the federal government prohibits it?

We can end up with state and federal governments in the US focusing on different things because of our system called Federalism. In the United States, state governments and the federal government share power, and in many ways they can overlap or work in parallel. This differs from a corporation or military system, for instance, in which departments or divisions all ultimately answer to the same authority. In the US, the federal government may want states to make certain things illegal, but it doesn't happen automatically, and the federal government is limited in ways it can make states comply. For instance, the federal government might ban the sale of raw milk and want states to ban it as well, but some states allow sales despite federal law.<sup>1</sup>

In 1996, California voters decided to create an exception to their state marijuana possession law for residents who met certain medical requirements - establishing the United States' first state medical marijuana law.<sup>2</sup> While the federal government still considered possession by those individuals illegal, California wasn't required to keep possession illegal for everyone in all circumstances.

Over the years, other states followed. And they took a more active role - not just creating exceptions for possession for patients, but moving to implement rules for cultivation, licensing systems, and taxes for those who grow and sell marijuana. Multi-billion dollar industries will soon operate in some of these states. Regulatory policies continue to evolve, as more states get added, despite the fact that the federal government has not changed its laws during this time.

Officially, marijuana is still classified as a Schedule I Drug under federal law, meaning that it is treated as one of the most serious and deadly drugs we have. Under most circumstances, states would agree with the federal government's system for rating drugs.<sup>3</sup> But as more states began legalizing not only medicinal use cannabis but also adult-use cannabis, questions arose on how states are able to simply disagree with the federal government.

While state laws only apply to citizens within a particular state, federal law applies to all U.S. citizens. Both medical and recreational marijuana laws "clash" with U.S. federal law as a result, a person can act in compliance with one set of marijuana laws, while being in violation of another.

The area of law that addresses possible conflict between state and federal laws is generally referred to as the Supremacy Clause of the US Constitution, a key provision appearing in article VI.<sup>4</sup> Within the Supremacy Clause is the doctrine of "preemption" which states that in many (but not all) cases of conflicting laws, federal supersedes state law.

So far, it appears the federal government has taken the position that state regulatory activity does not violate the Supremacy Clause. This is likely due to the fact that states do not prevent federal authorities from enforcing their own laws, and at least so far, state workers themselves are not directly involved in cultivation or sales, but rather administering licenses for private companies.

Going a step further, in 2013, the Department of Justice released "the Cole memo," stating that state-legalized marijuana sales remained illegal under federal law, but the US Department of Justice

advised federal prosecutors to not prioritize marijuana enforcement unless states failed to provide “robust” regulation. The memo stated that federal law enforcement would narrowly focus on marijuana revenue that appears to fund gangs, support distribution to minors, and transport across state lines, among other similar priorities.<sup>5</sup> Five years later, Attorney General Jeff Sessions rescinded that memo, leaving federal policy somewhat in question. [For more on the Cole Memo and where things are today, click here.](#)<sup>6</sup>

Neither memos have binding force the way a law does, meaning that federal prosecutors have plenty of discretion when it comes to how they handle marijuana activities. As mentioned, states that have legalized medical and adult-use cannabis do not actually prevent federal authorities from enforcing their own laws against individuals or businesses. Congress itself has put limits on federal law enforcement related to medical cannabis,<sup>7</sup> and personal possession cases at the federal level are rare (but still happen).

Currently, it appears the policies articulated in the Cole memo continue to reflect Department of Justice policy, even if the memo is no longer considered to be in effect. While the federal government can’t require states to keep marijuana illegal, there seems to be a recognition that it is better to have some regulations in place as opposed to none at all. The result is an awkward stalemate, in which the federal government does not do anything in support of cannabis regulations, but stops short of pushing back against them through enforcement or preemption actions.

### **Additional Resources:**

[State Marijuana Laws at Odds with Federal Enforcement](#)

[What happens when a state law contradicts a U.S. federal law?](#)

[State Marijuana Regulation Laws are Not Preempted by Federal Law](#)

---

<sup>1</sup> Abby Wendle, Why Some States Want To Legalize Raw Milk Sales, NPR, February 20, 2015, <https://www.npr.org/sections/thesalt/2015/02/20/387558373/why-some-states-want-to-legalize-raw-milk-sales>

<sup>2</sup> State of California Department of Cannabis Control, California’s cannabis laws, accessed July 9, 2022, <https://cannabis.ca.gov/cannabis-laws/laws-and-regulations/>

<sup>3</sup> Schedule of Controlled Substances, 21 U.S. Code § 812 (1970), <https://www.law.cornell.edu/uscode/text/21/812>

<sup>4</sup> U.S. Const. art. VI, cl. 2

<sup>5</sup> U.S. Department of Justice Office of the Deputy Attorney General, Guidance Regarding Marijuana Enforcement, August 23, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

<sup>6</sup> Office of the Attorney General, Marijuana Enforcement, January 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download>

<sup>7</sup> Congressional Research Service, Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana, LSB10694, (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10694>