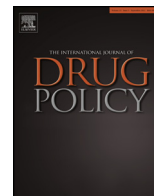




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A practical framework for regulating for-profit recreational marijuana in US States: Lessons from Colorado and Washington

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ABSTRACT

Despite the federal prohibition against marijuana, state-level recreational use appears to be moving forward. Public opinion is shifting. Following well-publicized state-legalization in Washington and Colorado, states across the US have begun considering similar measures. Since the 2016 election, over 21% of Americans now live in places where recreational marijuana is state-legal, and over 63% of the country permits medical or recreational use at the state level. This paper does not consider whether states should legalize marijuana nor does it weigh all regulatory options available to states. Instead, it considers how states can create a *practical* framework to regulate recreational marijuana, particularly in a climate of federal uncertainty where marijuana remains illegal. We draw lessons from Colorado and Washington—assuming that other states will adopt similar models and employ commercial, for-profit systems. Considering both the variety of goals that states could adopt and how they interact, we offer recommendations in five areas: cultivation, production, and processing; sale, consumption, and possession; taxes and finance; public health and safety; and governance. We recommend that states implement a relatively restrictive regulatory approach, with a single market for recreational and medical marijuana, if appropriate. This should make marijuana laws easier to enforce, help reduce diversion, and satisfy federal guidance. Moreover, drawing from Colorado and Washington's experience, we suggest a flexible system with robust data collection and performance monitoring that supports a thorough evaluation. This should allow states to “learn as they go”—a must, given the uncertainty surrounding such policy shifts. Of course, a tightly regulated approach will have drawbacks—including a significant illegal market. But political experience teaches that states will be better off loosening a tight market than attempting to tighten a loose one. We also consider a potential role for the federal government under the status quo.

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Introduction

States across the US have relaxed and, in some cases, effectively eliminated legal restrictions against marijuana use. Twenty-nine states and the District of Columbia have legalized medical marijuana, and over 63% of the nation's population lives in a state that permits medical marijuana.¹ In addition, many states have increasingly moved towards decriminalizing the

possession of small amounts of marijuana for personal use.² Accounting for over 21% of the US population, Washington, Colorado, Oregon, Alaska, California, Maine, Massachusetts, Nevada, and the District of Columbia have gone one step further—legalizing recreational marijuana under state law. These changes have occurred while marijuana remains illegal under federal law, categorized as Schedule I under the US Controlled Substances Act of 1970 (CSA).

The public's attitude towards legalization is also changing. Today, 58% of Americans believe that marijuana should be legal, compared with about 20% two decades ago (Jones, 2015). The initial moves by Colorado and Washington to permit recreational

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¹ Medical marijuana laws vary considerably by state. Analyses of those laws benefit greatly from finer distinctions than we make here. Medical marijuana laws in some states (e.g., California) functionally allow any adult resident to obtain a medical recommendation. Others (e.g., New York) impose much more stringent restrictions, allowing many fewer users.

² Counting states that have “decriminalized” possession depends significantly on how one operationalizes “decriminalization”. We do not attempt those characterizations here.

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Table 1
States with state-legal medical marijuana use.

States with legalized medical use	Population
Alaska (1999)	738,432
Arkansas (2016)	2,978,204
Arizona (2010)	6,828,065
California (1996)	39,144,818
Colorado (2000)	5,456,574
Connecticut (2012)	3,590,886
Delaware (2011)	945,934
Florida (2016)	20,271,272
Hawaii (2000)	1,431,603
Illinois (2014)	12,859,995
Louisiana (2015)	4,670,724
Maine (1999)	1,329,328
Maryland (2014)	6,006,401
Massachusetts (2013)	6,794,422
Michigan (2008)	9,922,576
Minnesota (2014)	5,489,594
Montana (2004)	1,032,949
Nevada (2001)	2,890,845
New Hampshire (2013)	1,330,608
New Jersey (2010)	8,958,013
New Mexico (2007)	2,085,109
New York (2014)	19,795,791
North Dakota (2016)	756,927
Ohio (2016)	11,613,423
Oregon (1999)	4,028,977
Pennsylvania (2016)	12,802,503
Rhode Island (2006)	1,056,298
Vermont (2004)	626,042
Washington (1998)	7,170,351
District of Columbia (2010)	672,228
Total population	203,278,892
Percent of US population	63.2%

Notes: The National Alliance for Model State Drug Laws helped develop some of the data in Tables 1, 2, and 3. Population figures were obtained from the US Census Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015.

Dates show the year medical use laws took effect, not the year they were initially approved.

Of the 29 states and DC with legalized medical use, 8 states (AK, CA, CO, MA, ME, NV, OR, WA) and DC have legalized recreational use.

use may have been viewed as “experiments” that authorities could learn from (Caulkins, Hawken, Kilmer, & Kleiman, 2012).³ However, those early adopters appear to have been supplanted by a national movement for legalization.

In 2016, organized efforts successfully put measures to legalize recreational marijuana use on the ballot in five states. Voters in four of those states approved the measures. Only Arizona voters narrowly rejected state-level legalization. Thus, despite remaining illegal under federal law, most Americans now reside in jurisdictions where—under state law—marijuana may be used medically, recreationally, or both (Tables 1 and 2).

Even if legal recreational use is still considered an “experiment” by some, no one can deny its scale. This moves the task of regulating the new industry to the forefront of the policy agenda. And it raises the issue of whether the federal government should combat the movement or respect the wishes of states and their constituents. Moreover, it raises unique challenges for states that may seek to create legal regulatory frameworks for a drug that remains illegal under federal law. It is this the last question that will concern us most in this paper.

³ We disagree with the characterization of state legalization efforts as an “experiment.” However, because this characterization is quite common in the public marijuana discourse, we have acknowledged it here.

Table 2
States with state-legal recreational marijuana.

States with legalized recreational marijuana	Population
Alaska (2015)	738,432
California (2016)	39,144,818
Colorado (2012)	5,456,574
Maine (2016)	1,329,328
Massachusetts (2016)	6,794,422
Nevada (2016)	2,890,845
Oregon (2015)	4,028,977
Washington (2012)	7,170,351
District of Columbia (2015)	672,228
Total population	68,225,975
Percent of US population	21.2%

Notes: All states that successfully legalized recreational use had previously legalized medical use.

Other than states that approved use in 2016, dates show the year that recreational marijuana laws were enacted.

Purpose and scope: selecting the for-profit model

This paper does not address the wisdom of marijuana legalization. Instead we ask, if states continue to legalize marijuana, how should it be regulated? And what are the tradeoffs inherent in different approaches to legalization? In many ways, these questions have been asked (and answered) eloquently before. But, unlike most prior works, this paper does not ask these questions in an academic vacuum. We allow considerations of practicality and “facts on the ground” to guide us in several ways.

To that end, this paper does not address the full spectrum of regulatory options. We explicitly limit ourselves to what we believe are the practically viable legalization regimes likely to occur in US states under current circumstances and law. We draw from the experiences of states that permit recreational use. All states that have legalized so far have used a commercial, competitive, but regulated market structure, which allows cultivation, production, and sale in the private for-profit sector—modeled after the alcohol industry.⁴ Given US culture, the parties at work in the legalization movement, existing federal law and federal guidance (discussed later), and the experience of states that have legalized up to now, we believe that for-profit but limited commercial legalization at the state level represents the short-term (and possibly the longer-term) reality of US marijuana laws. Because this paper seeks to focus on a *practical* regulatory framework for US states, we begin with the approach that we judge most likely to be implemented. Our decision is not an endorsement of the commercialized for-profit market. Instead, we explore optimization within that system.

This is, perhaps, the largest distinction between this paper and other (admirable) efforts to explicate the full range of theoretical options available under the umbrella of “marijuana legalization.” In theory, a variety of alternative market structures might be considered, such as government monopolies, nonprofit corporations, and for-benefit organizations—to name but a few (Caulkins et al., 2015; Rolles and Murkin, 2016). The theoretical benefits and costs of these alternative structures deserve the careful consideration that they receive elsewhere, notably excellent works by Rolles and Murkin (2016) and Caulkins et al. (2015) to which we owe a great debt.

Before outlining our own policy goals, this paper reviews the tension between state and federal law, which is crucial to understanding the practical “facts on the ground” approach that

⁴ Though not a state, the District of Columbia’s recreational market is an exception. But the circumstances leading to the development of the District’s market appear to stem much more from circumstance (i.e., Congressional intervention) than from the intentions of District voters or the DC Council.

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