Legislating Marijuana: The growth of marijuana policy from medical to recreational

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Today’s Presentation
- Progression of recent marijuana laws
- Practical issues of regulating marijuana due to federal law
- State responses to medical marijuana regulation
- Issues for regulatory legislation
- Taxation to fund regulatory activities
- Looking forward: medical and recreational marijuana
The Progression of Marijuana Laws: Federal Controlled Substances Act

- Controlled Substances Act (1970)
  - Part of the Comprehensive Drug Abuse and Prevention Act.
  - Congressional findings related to the regulation of controlled substances as a matter of interstate commerce.
  - Requires any person who manufactures, distributes, or dispenses controlled substances to register with the US Attorney General.

The Progression of Marijuana Laws: Federal Controlled Substances Act

- Establishes five schedules for controlled substances with differing levels of regulation for each. Strictest regulations for Schedule I.
- Characteristics of Schedule I drugs
  - High potential for abuse;
  - No currently accepted medical use in treatment;
  - Lack of accepted safety for use of the drug under medical supervision.
The Progression of Marijuana Laws: Federal Controlled Substances Act

- Unlawful for a registered person to distribute or dispense a controlled substance in violation of prescribing authority which applies to schedules II-V.
- Schedule I controlled substances may only be used in approved research projects.
- Enforced by the Attorney General with the cooperation of local, state, tribal, and federal agencies.

The Progression of Marijuana Laws

Adoption of State Medical Marijuana

- 2005 Supreme Court issues
- 2009 DOJ Ogden Memo
- 2009
- 2010
- 2011
- 2012
- 2013

States and Medical Marijuana

CA, AK, OR, WA
ME, CO, HI, NV
MT, VT
RI
NM
MI
AZ, NJ
DE, CT, MA
IL, NH
The Progression of Marijuana Laws: States and Medical Marijuana

In 1996, California voters passed Prop 215
- Physician immunity
  - “no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes”
- Patient/primary caregiver immunity
  - Immunity from marijuana cultivation laws for a patients or primary caregiver “who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”
- Establishment of conditions
- Does not apply to activity that endangers others or for nonmedical purposes.

The Progression of Marijuana Laws: States and Medical Marijuana

First post-California wave of states.
- In 1998 voters approved measures in Alaska, Oregon, and Washington.
- In 1999-2000, four more states (Colorado, Hawaii, Maine, and Nevada)
  - Hawaii becomes the first state to adopt through the legislative, not voter, process.
  - Colorado adopted its law as a constitutional amendment.
The Progression of Marijuana Laws: States and Medical Marijuana

First wave started adding operational structure to what California started.
- Written documentation (not prescriptions)
- Immunity from criminal prosecution and professional discipline for physicians and patients.
- Registry identification card
- Limited medical conditions w/petition
- Maximum amounts
- Restrictions

The Progression of Marijuana Laws: States and Medical Marijuana

Second wave: since 2000, twelve more states and D.C.
- New Mexico passed SB 523 in 2007: notable as the first attempt to set up active regulation of the production and distribution. December 2010 issued regulations.
- Trend toward the legislative process rather than initiative.
  - Seven of first eight medical marijuana laws adopted measure through voter process.
  - Eight of the following twelve adopted through legislative process.
- Significant in that the legislative process allows for broader input (from patients through law enforcement) and for a legislative institutional history to develop.
The Progression of Marijuana Laws: States and Recreational Marijuana

- In November 2012, voters in Colorado and Washington became the first states to pass initiatives to allow for the limited use of marijuana for recreational purposes.
- Establishment of a retail system for selling marijuana with government regulation over production and distribution of cannabis through the issuance of licenses and collection of taxes.
- Security, tracking, and testing requirements.
- Authorizes the sale of no more than one ounce* of marijuana.
- Restrictions for age, advertising, and location.
- Colorado released final rules to implement Amendment 64 and its modifying bills in September 2013.
- Washington expects final rules to implement Initiative 502 to be adopted by mid-October.

The Progression of Marijuana Laws: Federal Response to State Proposals

Several federal cases reviewed the role of the federal government in state medical marijuana regulations.

- Oakland Cannabis Buyer’s Coop (532 US 438 (2001))
  - A patient cooperative sought a medical necessity defense to Controlled Substances Act violations.
  - Court held medical necessity is not a defense to manufacturing and distribution under the Controlled Substances Act.
- Walters v. Conant (309 F.3d 629 (2002))
  - Patients/providers sought to enjoin government enforcement of a policy against the DEA prescriptive authority of providers that issue written statements to allow patients to obtain marijuana.
  - Ninth Circuit affirmed the injunction citing the policy’s punishment of physicians based on the content of doctor-patient communications.
The Progression of Marijuana Laws: Federal Response to State Proposals

- **Gonzalez v. Raich** (545 US 1 (2005))
  - California medical marijuana patients who cultivate marijuana themselves or through a caregiver sought to enjoin the federal government from enforcing the Controlled Substances Act as applied to them.
  - Court considered the issues of whether Congress’ power to regulate interstate markets for medicine includes parts of the market that only use locally produced and consumed drugs.
  - Citing **Wickard v. Filburn**, Court concludes that Congress had a rational basis for concluding that purely intrastate production of marijuana has a substantial effect on interstate commerce.

The Progression of Marijuana Laws: Federal Response to State Proposals

Department of Justice began clarifying its position through three memoranda to attorneys.

- **Ogden Memo** (October 2009):
  - Prosecuting patients or their caregivers who are in compliance with state medical marijuana laws is not an efficient use of federal resources.
  - Seven factors showing noncompliance: unlawful firearms; violence; sales to minors; suspicious financial/marketing activity; large quantities; illegal activities with other controlled substances; ties to criminal enterprises.
The Progression of Marijuana Laws: Federal Response to State Proposals

- Cole Memo I (June 2011):
  - Reiterates the patient and caregiver protection, but does not extend that to "commercial operations cultivating, selling, or distributing marijuana."
- Cole Memo II (August 2013):
  - Identified eight enforcement priorities: Avoiding sales to minors; funding to criminal enterprises; diversion to other states, cover for trafficking other illegal drugs; violence and firearms; drugged driving and other public health risks; growing on public lands; possession on federal property.
  - "A strong and effective state regulatory system and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests."

Practical Issues In Marijuana Businesses

Marijuana the "next great American industry," investor group says

- Denver Post, September 25, 2013
Practical Issues In Marijuana Businesses

It is Still Illegal Under Federal Law

- So what?
- What will the next administration do?
- Cash Business
- No credit cards
- No checking accounts
- Security issues

Practical Issues In Marijuana Businesses

It is still illegal under federal law

- So what?
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Practical Issues In Marijuana Businesses

Section 280E
"No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any state in which such trade or business is conducted."

Practical Issues In Marijuana Businesses

Rule 8.4 (b) of the Colorado Rules of Professional Conduct:
It is professional misconduct for a lawyer to:
(b) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other aspects;
Practical Issues In Marijuana Businesses

Rule 1.2 (d) of the Colorado Rules of Professional Conduct:
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

State Responses:
Washington State

- Medical Use of Marijuana Act:
  Initiative 692 (1998)
- Looked like other initiatives from that year, except:
  - No quantified limit – “sixty day supply”
  - No patient registry
- Tensions between initiative’s low-regulation concept and the uptake in the social acceptance of medical marijuana.
State Responses: Washington State

2007 ESSB 6032 passed the Legislature:
- Added Crohn’s disease and hepatitis C to list of medical conditions.
- Directed Department of Health to define a sixty-day supply of medical marijuana.
- Directed the Department of Health to make recommendations on options for an “adequate, safe, consistent, and secure source” of medical marijuana for patients.
- Changed authority for “primary caregivers” to “designated providers.”

The change from “primary caregivers” to “designated providers” established a loophole leading to a state dispensary system.
- **Primary caregiver:** 18 or older; responsible for housing, health, or care of the patient; designated by patient to perform those duties.
- **Designated provider:** 18 or older; designated by patient in writing; designated provider to one patient at a time.
- Shift from actual hands-on caregivers to a generic, unattached individual led to a dispensary industry that cycled through patients one after another.
State Responses: Washington State

In 2011, SB 5073 was introduced. [Link](http://app.leg.wa.gov/billsummary/default.aspx?year=2011&bill=5073)

- Proposed a comprehensive approach to production, processing, and distribution of medical marijuana with Department of Health and Department of Agriculture regulations and inspections.
- Allowed for “collective gardens” for multiple patients and designated providers to grow independently.
- Voluntary registry that afforded registrants full arrest protection for those who opted-in.
- Specific limits on quantity.
State Responses: Washington State

During debate of SB 5073:
- Tension between advocates and law enforcement over registry and criminal immunity.
- Tension between existing dispensary industry and those interested in entering the industry.
- In the last week of session, US Attorneys for Washington State issued a joint letter to Governor Gregoire.
  - States that SB 5073’s licensing scheme for cultivation and distribution “undermines the federal government’s efforts to regulate the possession, manufacturing, and trafficking of controlled substances.”
  - DOJ could take legal action against growing operations and dispensaries, those who assist growing operations and dispensaries (property owners, landlords, financiers), and state employees conducting regulatory activities.
State Responses: Washington State

Result: Partial veto to eliminate any state involvement or risk to state employees.
- No regulation of production, processing, distribution of operations.
- Unregulated collective gardens remained and became the new dispensary model.
- No registry for patients, health care providers, producers, processors, or dispensaries.
- Inconsistent definitions.

State Responses: Washington State

- Allows individuals 21 years old or older to possess up to one ounce of cannabis (or for marijuana-infused products: 16 oz of solid form or 72 oz. of liquid form) regardless of medical need.
- Creates a fully-regulated system of producing, processing, and distributing cannabis for recreational purposes.
- Assesses 25 percent excise tax from producer to processor, processor to retailer, and retailer to consumer.
State Responses: Washington State

<table>
<thead>
<tr>
<th></th>
<th>Recreational</th>
<th>Medical</th>
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</thead>
<tbody>
<tr>
<td>Amount</td>
<td>1 ounce</td>
<td>24 ounces</td>
</tr>
<tr>
<td>Tax</td>
<td>Excise tax, sales tax</td>
<td>Sales tax</td>
</tr>
<tr>
<td>Source</td>
<td>Retailer</td>
<td>Personal, collective garden (dispensary)</td>
</tr>
<tr>
<td>Age</td>
<td>21 years old or more</td>
<td>No age limit</td>
</tr>
<tr>
<td>Regulation</td>
<td>Liquor Control Board</td>
<td>Private sector self-regulates or law enforcement</td>
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- The dual systems create an incentive to become a patient: higher amounts and no excise tax.
- Concerns that:
  - More patients will draw taxes from the recreational market.
  - Medical market will not meet federal guidelines.

State Responses: Washington State

Legislative options for tightening medical marijuana system:
- Establish a registry for patients and health care providers.
- Limit amount of cannabis for patients.
- Limit duration of authorizations.
- Impose similar taxes on medical as recreational.
- Eliminate collective gardens and allow patients access to regulated marijuana products through retailers or separate dispensaries.
- Tighten up medical provisions for minors.
State Responses: Colorado 2000 Initiative

- Article XVIII, Section 14. Medical use of marijuana for persons suffering from debilitating medical conditions.
- Initiated measure effective on proclamation of the governor on December 28, 2000.

State Responses: Colorado 2000 Initiative

- Debilitating medical condition
- Recommendation from a doctor of medicine
- Apply for a registry identification card
- No more than two ounces of a usable form of marijuana and no more than six marijuana plants no more than three of which are mature flowering plants; or
- Greater amounts where medically necessary.
State Responses: Colorado 2001 Legislation

House Bill 01-1371 - Concerning restrictions on the medical use of marijuana
http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2001/sl_149.htm

- Authorized Department of Public Health and Environment to establish registry and registry identification cards
- Established class 1 misdemeanors for fraudulent uses of registry identification cards
- Specified that a registry identification card was not a defense to a charge of driving while under the influence.
- No other changes to criminal laws

State Responses: Colorado 2010 Legislation

House Bill 10-1284 – Concerning regulation of medical marijuana
http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2010a/sl_355.htm

- Established medical marijuana enforcement division in the Department of Revenue
- Authorized local jurisdictions to ban medical marijuana establishments or establish their own licensing requirements
- Required a state license after any local license was issued
- Licensing fees only source of revenue
State Responses: Colorado 2010 Legislation

State licenses:
- Medical marijuana Centers (Dispensaries/stores)
- Optional medical marijuana cultivation facilities (Grow houses)
- Medical marijuana-infused products manufacturing facilities
- Personnel

State Responses: Colorado 2012 Initiative

Article XVIII, Section 16 Personal use and regulation of marijuana
- Initiated measure effective on proclamation of the governor on December 10, 2012.
State Responses: Colorado 2012 Initiative

- Legalized possession by persons 21 and older of up to one ounce and up to six plants no more than three of which may be mature flowering
- Legalized consumption of marijuana “provided that nothing shall permit consumption that is conducted openly and publically or that endangers others.”
- Legalized establishments as of January 1, 2014;
- Authorized local jurisdictions to ban or regulate
- Department of revenue to adopt regulations by October 1, 2013
- Directed the General Assembly to enact an excise tax of up to 15%
  - First $40 million to school construction

State Responses: Colorado 2013 Legislation

Senate Bill 13-283 Implementation of Amendment 64 (Consensus recommendations)
http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_332.htm
- Medical marijuana and retail marijuana contracts are not void as against public policy
- Income tax deductions disallowed under section 280E may be deducted for state income tax purposes
- Adds smoking marijuana to the indoor smoking ban
- Commission to make recommendations on changes to criminal laws
- Department of public safety to study the effects of the amendments.
State Responses: Colorado 2013 Legislation

House Bill 13-1317 Concerning recommendations made in public process for the purpose of implementing retail marijuana legalized by section 16 of article XVIII of the Colorado constitution

http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_329.htm

- Designated the marijuana enforcement division in the department of revenue to enforce both medical marijuana and retail marijuana
- Enacted the Colorado retail marijuana code

State Responses: Colorado 2013 Legislation

Colorado retail marijuana code
- Same licenses as medical marijuana but adds retail marijuana testing facilities
- All licensees must be Colorado residents, but owners must be Colorado residents for two years
- Local jurisdictions may ban or regulate retail marijuana establishments
- The state licensing authority has broad rule making authority
State Responses: Colorado 2013 Legislation

Required rules:
- Requirements to prevent sale or diversion to persons under 21
- Labeling, including potency
- Signage
- Advertising, including banning popup adds and marketing to mobile devices
- Requiring magazines focused on marijuana to be only sold in licensed stores and kept behind the counter

State Responses: Colorado 2013 Legislation

House Bill 13-1325, Concerning penalties for persons who drive under the influence of alcohol or drugs
http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_331.htm
- A blood content of five nanograms or more of delta 9-tetrahydrocannabinol creates a permissible inference of driving under the influence
Regulatory issues to avoid federal intervention

- Preventing distribution to minors
- Requiring ID
- Preventing diversion to other states
- Seed-to-sale tracking
- Preventing revenue going to criminals
- Background checks
- Preventing trafficking in other illegal drugs
- Preventing violence and use of firearms
  - Security issues
- Preventing drugged driving
  - Five nanogram limit
- Preventing growing, use, or possession on federal property

How well is it working?

Audit of registry

http://www.leg.state.co.us/OSA/coauditor1.nsf/All/C9112BFFDE1559CE87257BA5007AE40F/$FILE/2194B%20MedMarijPart2%20June%202013.pdf

Audit of medical marijuana enforcement division

http://www.leg.state.co.us/OSA/coauditor1.nsf/All/1BB1CBF38E313A1587257B320079E543/$FILE/2194A%20MedicalMarijuanaRegSys%20031813.pdf
How to pay for regulation?
Colorado’s experience

Article XVIII, Section 16
- The General Assembly shall enact an excise tax
- At a rate not to exceed 15% prior to January 1, 2017
- The General Assembly shall direct the Department of Revenue to establish procedures for all taxes levied
- The first $40 million from excise tax annually shall be used for public school capital construction

Governor’s task force findings
- Excise tax and application fees are significantly restricted by Article XVIII, Section 16
- Limitations on potential revenue could leave the marijuana enforcement division under-funded
- Other approaches to raising revenue are not prohibited
- A special tax would be consistent with the treatment of similar commodities and activities, such as alcohol, fuel, and gaming
How to pay for regulation? Colorado’s experience

What combined tax rate would Goldilocks choose?
- A combined rate that is high enough to generate the revenue necessary to regulate the industry; but not so high that it drives consumers to the black market
- A combined rate that is low enough to pass on election day; but not so low that it does not generate the revenue needed to regulate the industry
- House Bill 13-1318: 15% excise tax and 10% retail marijuana tax – Just right (we hope)

House Bill 13-1318
http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_330.htm
- Contains the framework for the Colorado department of revenue’s administration of the excise tax and the retail marijuana sales tax
- Includes the ballot question
- Directs the secretary of state to submit the ballot questions to the registered electors at the election in November 2013
How to pay for regulation?
Colorado’s experience

Excise tax
- On the sale or transfer of unprocessed retail marijuana by a retail marijuana cultivation facility to a retail marijuana store, a retail marijuana product manufacturing facility, or another retail marijuana cultivation facility
- 15% of the average market rate of unprocessed retail marijuana
- Imposed only on the first sale or transfer of unprocessed retail marijuana
- The General Assembly may change the rate by bill, but cannot exceed 15%
- First $40 million for public school capital construction

Retail marijuana Sales Tax
- 10% tax is imposed on the sale of retail marijuana or retail marijuana products to a consumer by a retail marijuana store
- 10% tax is in addition to the 2.9% state sales tax and any local government tax
- The General Assembly may change the tax rate by bill, but cannot exceed 15%
- Retail marijuana stores are required to collect and remit the tax
- 15% share back with local governments
How to pay for regulation? Colorado’s experience

Ballot Question – Ask the voters
- Shall state taxes be increased by $70,000,000 annually in the first full fiscal year
- By imposing an excise tax of 15% and an additional sales tax of 10%
- With the tax revenues being used to fund the enforcement and regulations on the retail marijuana industry
- With the rate of either or both taxes being allowed to be decreased or increased without further voter approval so long as the rate of either tax does not exceed 15%

Looking Forward

- How to comply with such general federal guidance?
  - Large enough system to meet reasonable consumer demands without sending people to the illegal market, but not so large that the market invites influence from the illegal market.
  - A single regulatory structure appropriate for the recreational market, but flexible enough for the medical market.
  - System of public protections to guard against drugged driving and other adverse public health consequences.
- Will a new federal administration have the same priorities toward patients and suppliers?
- Can revenue expectations be met without pricing the product into the illegal market?
Appendix