

Marijuana Regulation and the State-Federal Balance

By Sam Kamin

As of early 2014, 20 states plus the District of Columbia have passed measures permitting the use of marijuana for medical purposes, and two states—Washington and Colorado—have legalized the use, cultivation and distribution of small amounts of marijuana for all adult users. While the federal prohibition of marijuana remains in effect, a growing number of states are considering and implementing other regulatory models for marijuana. This article discusses these trends and looks to the future of federal-state relations in this area.

Like heroin and LSD, marijuana is classified by the federal government as a Schedule I narcotic under the Controlled Substances Act. Its manufacture, sale and use are all felonies under federal law. Violations of the Controlled Substances Act are punishable by significant prison terms and any property used in a violation of the act is subject to civil forfeiture proceedings. What is more, a doctor cannot prescribe the drug for his or her patients lest they risk losing their federal prescription license. Federal courts consistently have upheld the authority of Congress to regulate marijuana—even marijuana grown on private property for consumption on that property—under the Interstate Commerce Clause.

Until recently, marijuana also was prohibited under the laws of every state. In 1996, however, California—frustrated with the cost and disparate impact of its own marijuana prohibition and believing marijuana to have substantial medical benefits—became the first state to soften its marijuana prohibition and permit its medical use for certain conditions. Since then, 20 states and the District of Columbia have passed similar medical marijuana provisions. These laws generally create an exception to state criminal laws for those who can demonstrate a medical need for the drug and permit doctors to recommend, rather than prescribe, marijuana for patients they believe would benefit. Some medical marijuana laws, like those in Colorado, also set up a state regulatory regime to keep track of both those registering as medical patients and those licensed to produce and sell marijuana in conformance with state law.

In 2012, Washington and Colorado took an additional step away from prohibition, passing measures explicitly designed to tax and regulate marijuana like alcohol. In those states, possession and sale of less than an ounce of marijuana immediately were legalized and both states' legislatures were charged

with developing a regulatory regime to tax and license the production and retail distribution of marijuana to all adult users—not just medical patients. Colorado's tax and regulatory scheme went into effect Jan. 1, 2014, with Washington state's expected to roll out in spring 2014.

Given the continuing federal prohibition of any production, distribution or sale of marijuana, marijuana use in states adopting law reform existed in a tenuous state. This is because all marijuana conduct in those states legalizing the drug, whether for medical patients or all adult users, remains illegal under federal law. It is clear the states are free to remove their own marijuana prohibitions; the federal government cannot force states to either criminalize marijuana or keep their existing prohibitions in place. Likewise, states are under no obligation to help the federal government enforce the Controlled Substances Act. The states cannot be made the enforcement arm of the federal government. Federal law, however, continues to apply in those states, and courts have held that, in a federal prosecution under the Controlled Substances Act, it is irrelevant the alleged conduct complied with state law. State legalization, in other words, cannot protect the residents of that state from prosecution under federal law.

The regulatory regimes being created to tax and regulate marijuana also remain in a legal limbo. Although such laws are obviously contrary to the purposes of the Controlled Substances Act—which bans marijuana outright—it is not at all clear that the state marijuana laws are necessarily invalidated by the contrary federal law. Because the Supreme Court has determined that Congress is authorized in the area of marijuana regulation, it necessarily has the power to limit state legislation in that area. Congress could invalidate any inconsistent state laws or even prevent the states from passing any legislation whatsoever in this area. Congress,

MARIJUANA REGULATION

however, has demonstrably not done so. The Controlled Substances Act explicitly declares an intent to exclude the states from marijuana regulation. Rather, inconsistent state laws are pre-empted by the act only where there is a conflict between state and federal laws such that the two laws cannot be read together.

For months after the passage of legalization in Colorado and Washington, it remained unclear whether the federal government would argue in court that state regulatory regimes posed such an obstacle to the enforcement of the Controlled Substances Act. Many feared a suit—similar to the one the federal government brought against Arizona to enjoin enforcement of that state’s immigration laws—seeking to quash the enactment of state marijuana regulatory regimes as pre-empted by federal law. States also feared that the federal government might, as is clearly its right, simply continue to enforce the federal act in those states enacting marijuana law reform, rendering moot any attempt by the state to regulate and tax that conduct.

In the face of this uncertainty, and facing a daunting, first-of-its-kind regulatory task, state policy makers in Colorado and Washington state looked to the nation’s capital for guidance: Would the federal government allow the states to experiment or would it crack down? After months of silence, the federal government eventually arrived at a wait-and-see policy with regard to state legalization efforts. While announcing that the Controlled Substances Act remained the law of the land and the federal government reserved the right to enforce it as needed, the U.S. Department of Justice issued a memorandum setting forth federal enforcement priorities with regard to marijuana. As long as those states seeking to legalize marijuana were able to address these priorities—limiting access to children, keeping gangs and organized crime out of the industry and minimizing the externalities on other states—then the federal government would exercise its prosecutorial discretion to permit those state-level experiments to proceed.

While this official pronouncement might seem to give stability and predictability to those in Colorado, Washington and the many other states considering a tax and regulate approach, in reality, it does not. A promise of nonenforcement is far from legalization. For one thing, a statement of federal enforcement priorities is neither binding nor permanent. It can be withdrawn given a change in administration or even just a change in policy

in Washington. Furthermore, the federal memo makes the federal government the sole arbiter of whether the states are regulating marijuana with sufficient robustness to satisfy federal concerns.

But the principal problem with the federal government’s assertions regarding the enforcement of the Controlled Substances Act is that, even if the federal government stays the course and never seeks to enforce its laws against those in states, it does not change the basic dynamic of state-federal regulation. Even in states that have “legalized” marijuana, it is far from legal. Those acting in compliance with state law, whether it allows medical or recreational use, remain subject to arrest and their assets remain subject to forfeiture. Marijuana has become a multimillion dollar industry employing thousands and bringing a substantial amount of revenue into state and local coffers. But this entire industry is currently built on an unstable foundation. As long as marijuana remains illegal at the federal level, state experiments with marijuana law reform will necessarily be hampered.

To see how the continuing illegality of marijuana negatively impacts both marijuana practitioners and the states that would regulate them, consider the question of banking. Since the passage of marijuana legalization in Colorado and Washington in 2012, it has been obvious that the unavailability of basic banking services for the marijuana industry would be a major obstacle to the regulation and taxation of marijuana. Banks have been wary of opening accounts for marijuana businesses, daunted by the prospect of federal money laundering charges if they knowingly engage in financial transactions involving the proceeds of what remains, in the eyes of the federal government, drug trafficking. Without the participation of banks, marijuana remains a cash business. This is bad for marijuana businesses because it puts them at risk for victimization and predatory business practices. It is at least as bad for states, though. If marijuana is a cash business, it is difficult to track and tax. This difficulty, caused by the federal prohibition, ultimately could be used by the federal government to determine that the states are unable to regulate marijuana sufficiently on their own. While there has been some movement at the federal level toward permitting banks to treat marijuana businesses the way they do others, until marijuana ceases to be illegal, these problems are sure to persist.

It is not just marijuana businesses that are affected by the continuing federal prohibition. While marijuana remains illegal at the federal level, those

who use it—even in compliance with state law—continue to place themselves at risk. Recent cases from Colorado indicate that employees can be fired for testing positive for marijuana, notwithstanding a state statute barring termination for engaging in lawful off-duty conduct because marijuana use is not legal. It is prohibited by federal law and both state and federal courts have held that it can remain the basis of termination. Similarly, probationers and parolees may be subject to incarceration if they test positive for the drug. Parents who use marijuana are at risk of having their rights diminished because of their choice to consume marijuana. Those receiving federal benefits, such as housing or student loans, put those benefits at risk if they choose to take advantage of state laws permitting them to use marijuana. In each case, marijuana's continuing criminal status defeats the state policy of decriminalizing marijuana use and does so even in the absence of any federal enforcement of the Controlled Substances Act.

Conclusion

We are at an inflection point with regard to marijuana policy nationally. While the federal government's decision not to enforce the Controlled Substances Act against those operating in conformance with robust state regulatory regimes is a comfort to reformers, it merely postpones a crisis; it does not avoid one. Only through change in policy at the federal level will the states truly be empowered to experiment with novel approaches to marijuana policy.

About the Author

Sam Kamin is professor and director of the Constitutional Rights and Remedies program at the University of Denver Sturm College of Law and also a member of Gov. John Hickenlooper's pot Task Force which issued 58 recommendations to state lawmakers regarding what regulation should look like in Colorado. Professor Kamin is active in the Law and Society Association and in the field of law and social science generally. Professor Kamin's research interests include criminal procedure, death penalty jurisprudence, federal courts, and constitutional remedies. He is the co-author of two books analyzing California's Three Strikes and You're Out Law and has published scholarly articles in the *Virginia Law Review*, the *Indiana Law Journal*, the *Boston College Law Journal* and *Law and Contemporary Problems*, among others.

