



# Legally regulated cannabis markets in the US: Implications and possibilities

Emily Crick, Heather J. Haase and Dave Bewley-Taylor

Policy Report 1 | November 2013

# Legally regulated cannabis markets in the US: Implications and possibilities

Emily Crick\*, Heather J. Haase<sup>∞</sup> and Dave Bewley-Taylor<sup>Δ</sup>

Policy Report 1 | November 2013

## Key Points

- In November 2012, voters in Washington and Colorado passed ballot initiatives that establish legally regulated markets for the production, sale, use and taxation of cannabis - the first time anywhere in the world that recreational use of the drug will be legally regulated.
- The construction of legally regulated cannabis markets in these US states must be viewed as part of a long running process of 'softening' the official zero-tolerance approach.
- Support for legalising cannabis has been growing in the US for some time and it is highest in states that have medical marijuana laws, but not decriminalisation. This suggests that voters recognize the benefits of regulation over the relaxation of laws.
- The regulatory regimes being pursued in Washington and Colorado differ in a number of respects. It will be important to see how these differences affect the operation of their respective markets.
- The votes put these US states in contravention of US federal law and, beyond US borders, they generate considerable tension between the federal government and the international drug control system.
- These developments also impact on the ongoing policy shifts within Latin America - including Uruguay - and the emerging tensions around cannabis within the UN system.
- It is vital that the operation of the legally regulated markets in Washington and Colorado is closely monitored and that, where necessary, structures are adjusted in response to any emerging issues.
- Other states in the US and countries across the world will be observing the regulatory frameworks introduced in Washington and Colorado in order to see how effective they are in reducing the harms associated with the illicit cannabis market.

\* Emily Crick - Research Assistant, Global Drug Policy Observatory

<sup>∞</sup> Heather J. Haase - Consultant, International Drug Policy Consortium/Harm Reduction Coalition

<sup>Δ</sup> Dave Bewley-Taylor - Director, Global Drug Policy Observatory

## INTRODUCTION

In November 2012, voters in two US states - Washington and Colorado - approved ballot initiatives to establish legally regulated markets for the production, sale, use and taxation of cannabis (commonly referred to in the US as marijuana). This is the first time anywhere in the world that the recreational use of the drug will be legally regulated - the well-known coffee shop system in the Netherlands is merely tolerated rather than enshrined in law.<sup>1</sup> Needless to say, with implications both within and beyond US borders, the drug policy community is watching Colorado and Washington closely. The votes not only put these US states in contravention of US federal law,<sup>2</sup> but also generate considerable tension between the federal government and the 1961 United Nations Single Convention on Narcotic Drugs, the bedrock of the international drug control regime that the US has so worked so hard to construct and sustain.<sup>3</sup> The federal government was slow to respond to this news. In December 2012, President Obama told ABC News that the government had 'bigger fish to fry' and that 'It would not make sense for us to see a top priority as going after recreational users in states that have determined that it's legal'.<sup>4</sup> In March 2013, US Attorney General, Eric Holder, told the US Senate that the Justice Department would respond 'relatively soon' to the votes. Six months later, no announcement had been made. This was perhaps no surprise. Beyond the Obama administration's calculations concerning the political situation in states where votes for marijuana legalisation exceeded the votes he polled in the presidential election,<sup>5</sup> the Department of Justice had to thoroughly consider the relationship between the states and the federal government, including in relation to the 1970 Controlled Substances Act establishing the federal prohibition of drugs, and Washington D.C.'s commitments under international law. Finally, on August 29, 2013, the Department of Justice issued a memorandum<sup>6</sup> to federal prosecutors and law

enforcement in light of the state initiatives which set out eight enforcement priorities whilst still reiterating the commitment to maintaining federal laws prohibiting marijuana (see Box 3).

While the memorandum sheds much light on the federal government's likely course going forward, the issue is far from resolved. Regardless, these ground-breaking votes have certainly changed the drug policy landscape; most likely irrevocably. At the international level, increasingly intense discussion of and legislative shifts towards drug policy reform in Latin America are taking place with an eye on events to the north, including how they relate to the UN drug control treaties. And within the US itself, a number of other states are looking to alter their legal approaches to cannabis and to adopt their own regulative systems. In 2013, eleven US states proposed legislative bills (as opposed to ballot initiatives) to regulate and tax marijuana. Whilst many of these have stalled in the short term, cannabis legalisation is firmly on the policy agenda.

Beginning with an historical overview within which to locate recent policy shifts in Washington and Colorado, this brief summarises the details of the planned regulative frameworks for recreational cannabis within these states and highlights both similarities and differences in approach. It also outlines the status and details of similar reformist endeavours that have taken place in other US states during 2013. As will be discussed, while many of these appear to have stalled for the time being, they have not only increased the pressure on the US federal government to seek some form of resolution to the state-federal conflict brought about by the implementation of legally regulated cannabis markets, but are also a reflection of a shift in public attitudes towards recreational use of the drug. Additionally, mindful of the implications of the votes beyond US borders, the brief addresses the inter-related impacts upon the increasingly energetic debates and

ongoing policy shifts within Latin America and the emerging tensions around cannabis within the UN based international drug control system.

## THE ROAD TO REGULATED CANNABIS MARKETS: INCREMENTAL AND LAYERED POLICY CHANGE

Recent events in Washington and Colorado have not taken place within a vacuum and should be seen as part of an ongoing, if not always smooth, process dating back over 40 years. Closely resembling the Single Convention, the Controlled Substances Act (CSA), passed under the administration of President Nixon, placed cannabis in the same schedule as heroin and duly prohibited the recreational use of the drug nationwide. This approach, however, was soon challenged by the findings of the so-called Shafer Commission.<sup>7</sup> This was appointed by Nixon to analyse policy in light of increasing levels of cannabis use, a pattern that was increasingly common across a range of western countries at that time. The Commission reported its findings in 1972 and, much to the President's displeasure, recommended an end to marijuana prohibition, arguing that 'the criminal law is too harsh a tool to apply to personal possession even in an effort to discourage use'<sup>8</sup> and that a 'coherent social policy requires a fundamental alteration of social attitudes toward drug use, and a willingness to embark on new courses when previous actions have failed'.<sup>9</sup> Although the Nixon administration ignored them, the Report's findings encouraged a significant number of state governments to review their approach and move away from a zero-tolerance position on recreational cannabis use. In 1972 California was the first state to hold a ballot initiative on marijuana legalisation though it failed by 66-33.<sup>10</sup> Soon after, Oregon became the first state to decriminalise personal possession in 1973, with California following two years later.<sup>11</sup> Also in 1975 the Alaskan Supreme Court went further and ruled that

possession and use of up to one ounce, in one's own home, should be treated neither as a civil nor criminal offence.<sup>12</sup> Indeed, between 1973 and 1978 eleven US states, including Colorado in 1975, shifted towards a more tolerant approach to recreational cannabis use by removing jail time for possession of small amounts of marijuana either through decriminalising<sup>13</sup> or depenalising<sup>14</sup> possession. In 1986, at the peak of the President Reagan's 'war on drugs', Oregon held a ballot initiative to legalise marijuana. Like California's Proposition 215 in 1972, it also failed, this time by 74-26.<sup>15</sup> Although a few states raised their penalties during the Reagan Administration, the trend at state level since then has been to soften the punitive approach towards recreational use (see Fig 1. for map showing the differences in cannabis policy across the US). As recently as March 2013 four states - Hawaii, Maryland, New Hampshire and New Jersey - have voted to make the possession of small amounts of cannabis a non-criminal violation, meaning that there is no threat of arrest or a criminal record.<sup>16</sup>

In the mid-1990s another shift in approach to the drug emerged at the state level with the establishment of medical marijuana programmes. In many ways the result of civil society advocacy,<sup>17</sup> California was the first state to pass a medical marijuana bill in 1996. The state's Compassionate Use Act established an exemption for the medical use of marijuana despite the CSA providing that marijuana had 'no currently accepted medical use'.<sup>18</sup> Over the years other states have followed suit and there are now twenty one jurisdictions, including the District of Columbia, that allow medical marijuana use (MMU) despite its continuing federal prohibition (see Fig. 1).<sup>19</sup> Washington State became an MMU state in 1998 and Colorado in 2000. New Hampshire, Illinois and New York all considered bills regarding medical marijuana in the first half of 2013.<sup>20</sup> The New York bill has currently stalled as the New York Senate adjourned in June without passing the bill.<sup>21</sup> However, on 25<sup>th</sup> July New Hampshire's governor

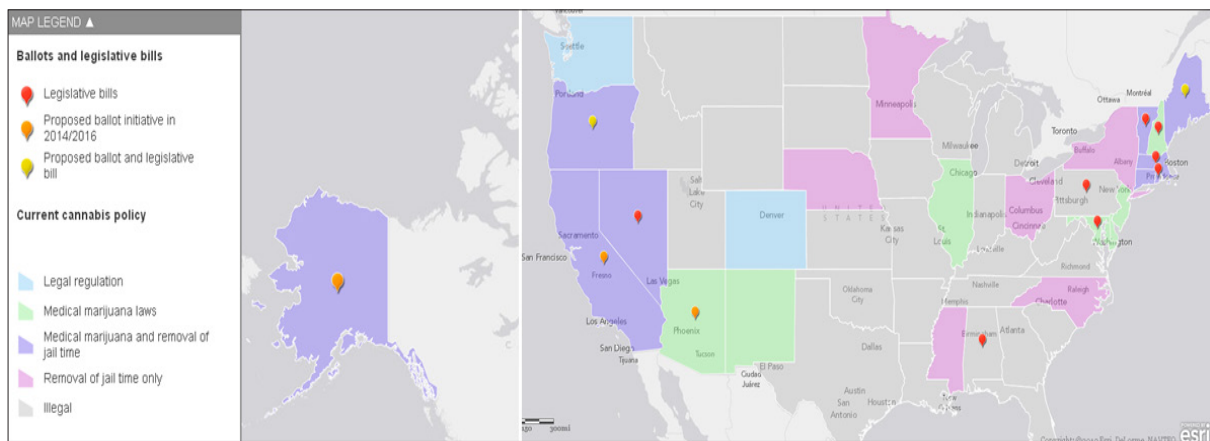


Figure 1: Map of marijuana laws in the United States as of August 2013

approved a medical marijuana bill<sup>22</sup> and on 1<sup>st</sup> August 2013 the governor of Illinois signed a MMU bill into law.<sup>23</sup> While the state medical marijuana laws generate tension with US federal law, the federal government has by and large chosen not to challenge them – a crucial issue that will be discussed in more detail below.

### PREVIOUS ATTEMPTS TO CREATE LEGALLY REGULATED MARKETS

Although the policy shifts in Washington and Colorado must be seen within the context of both a softening in approach towards recreational cannabis use (via decriminalisation and depenalisation) and MMU, it is also important to recognise the significance of recent previous attempts to develop regulated cannabis markets. These have taken the form of both bills within state legislatures and direct democracy through ballot initiatives. While a bill originates in the legislature, an initiative is different in that a new law or constitutional amendment is proposed and voted on by the electorate having been added to the ballot through a petition process.<sup>24</sup> As with other areas of public policy these earlier efforts to create regulated cannabis markets, like their successful successors, emerged from a ‘stakeholder-driven political process’: a process that, as Jonathan Caulkins and colleagues point out, is ‘often adversarial and never pretty’.<sup>25</sup>

In terms of bills within state legislatures, recent efforts date back to 2009 and 2010. Then Californian Assemblyman Tom Ammiano sponsored two bills to regulate cannabis in the state: AB390 and AB2254 respectively.<sup>26</sup> These would have given responsibility for regulation to the Department of Alcoholic Beverage Control (ABC) and imposed a tax of \$50 per ounce excise tax, as well as sales tax, to be paid at point of purchase.<sup>27</sup> Though neither of the bills even got as far as being sent to the floor for a vote, AB390 was the first cannabis legalisation bill to get a committee vote in the state legislature.<sup>28</sup>

Attempts to create regulated markets via ballot initiatives go back further. In 2004 Alaska was the first state to vote on regulating recreational use – the vote was lost 56–44<sup>29</sup> – and a similar policy was rejected by the voters in Nevada (56–44<sup>30</sup> against) in 2006. Colorado also held a vote on cannabis in 2006 – it failed by 58–41 – though it only aimed to make possession of up to one ounce legal rather than addressing production and supply issues.<sup>31</sup>

In the ‘Golden State’, Proposition 19 (also known as the Regulate, Control and Tax Cannabis Act) would have allowed an adult over the age of 21 to possess up to one ounce (28.5g) of marijuana, cultivate limited amounts within a private space and designate cities or counties as the authority in charge of regulating and taxing the commercial market.<sup>32</sup> Considered

to be a far narrower proposal than Ammiano's bills,<sup>33</sup> the 2010 Proposition 19 would have also instituted taxation at the local level rather than at the state level, a situation that some have argued would have meant that the cheapest tax jurisdiction would have become the main market supplier.<sup>34</sup> The local tax regime also became a major point of attack by opponents of the initiative during the campaign<sup>35</sup> and Proposition 19 failed to pass by 53.5–46.5. Interestingly however, despite failing to secure enough votes, a post-election poll revealed that 50% of voters believed marijuana should be legal, but voted 'no' to the Proposition due to issues with the specifics of the regulations.<sup>36</sup> Illustrating the complexities of stakeholder relationships within the state, the three counties that grew the majority of marijuana for MMU in California all voted resoundingly against Proposition 19<sup>37</sup> and it has been argued that the interests of MMU growers in maintaining market privilege did much to generate opposition to the proposals.<sup>38</sup> The fact that Proposition 19 was held during the midterm elections may also have contributed to its failure because the youth vote (traditionally in favour of a shift away from a prohibition-oriented approach to cannabis) tends to be considerably lower than during presidential elections.<sup>39</sup>

To a large extent overshadowed by the successful votes in Washington and Colorado, it should not be forgotten that Oregon also held a ballot initiative to institute a legally regulated marijuana market for recreational use in November 2012. Here 54% of those engaging in the process voted against the policy. The Oregon ballot initiative, Measure 80 (hereafter referred to as M-80) has been criticised for being poorly drafted – the preamble mentioned that George Washington grew hemp as well as referring to 'the "herb-bearing seed" given to humanity in Genesis 1:29'<sup>40</sup> in the King James Bible<sup>41</sup> – and there was scarce detail in the measure itself regarding taxes, personal possession and cultivation limits (see Appendix 3).<sup>42</sup> It has also been argued that the Oregon Cannabis Commission (OCC), the proposed regulatory body, was not sufficiently

independent.<sup>43</sup> It allowed for a seven-member board, five members of which were to be growers and processors. The OCC would have been responsible for issuing licenses and establishing the regulations for the industry, but it would also have been charged with promoting the product in 'all legal national and international markets'.<sup>44</sup> Not only was the messaging regarding its goals and potential consequences problematic, but M-80 also failed to gain as much financial support as the initiatives in Washington and Colorado, with big-name backers holding off with funding so that much of the money came from the measure's sponsor, Paul Stanford.<sup>45</sup> Stanford, a medical marijuana entrepreneur who owns a series of clinics in Oregon, Hawaii and Michigan that puts patients in touch with doctors who are willing to give recommendations<sup>46</sup>, has experienced financial difficulties and pleaded guilty to tax evasion charges – a situation that may have hindered support.<sup>47</sup> Executive Director of the Drug Policy Alliance, Ethan Nadelmann, has suggested that the polling figures, which were not as positive in Oregon as in Washington and Colorado, may also help explain the lack of financial support for the initiative.<sup>48</sup>

Despite the defeat of M-80, and within the context of success elsewhere, there remains enthusiasm within Oregon for cannabis policy reform. As will be discussed below, the Oregon State Legislature has considered a bill to legalise and regulate the marijuana industry. Additionally, Paul Stanford has already proposed two new measures to be put onto the ballot in 2014 in case the legislature does not pass the proposed bill. Stanford's Oregon Marijuana Tax Act Initiative is broadly similar to M-80, although it seems to have taken on board the criticisms of M-80: the new measure proposes that the governor would appoint members of the commission instead of industry insiders.<sup>49</sup> It also includes proposed limits on possession and personal production, 24 ounces or 24 plants – details that were missing in M-80.<sup>50</sup> It is also worth noting here that while California did not hold a ballot initiative on cannabis regulation in 2012, many experts

believe there will be another one at the time of the next presidential election in 2016.<sup>51</sup> This option currently looks promising for supporters of a regulated market for recreational use within the state. Since the California vote in 2010, state-wide polling suggests that there has been a shift in public opinion on cannabis laws with 54% now in support of regulation.<sup>52</sup> Moreover, with successful votes in Washington and Colorado to learn from, it is likely that the regulative framework will be tighter and thus more amenable to the voters. Writing in 2011, Nadelmann and colleagues noted that the ballot initiatives in Washington and Colorado (in draft form at that time) were likely to contain considerably tighter regulations than Proposition 19.<sup>53</sup> And this was indeed the case.

## **BREAKTHROUGHS IN WASHINGTON AND COLORADO: SIMILIARITIES AND DIFFERENCES**

While unsurprisingly similar in many ways, the approaches being pursued in Washington and Colorado differ in a number of respects. As will be shown, specific circumstances within each state ensured that the processes leading to the initiatives were also different.

### **Washington State's I-502**

Washington's initiative 502 (hereafter referred to as I-502) was very much a 'top-down' initiative sponsored by politicians such as Representative Mary Lou Dickerson, academics and legal professionals including Seattle's City Attorney, Peter Holmes, John McKay, former United States Attorney for the Western District of Washington, and Alison Holcomb of the American Civil Liberties Union (ACLU), rather than the medical marijuana industry.<sup>54</sup> As well as having a number of high profile supporters, there was only limited opposition to the policy.<sup>55</sup> The existence of the well-established medical marijuana system in the state since 1998 may help to explain this. As will be seen below (see Fig. 4), states where medical marijuana already exists show higher

levels of support for recreational legalisation. Campaign strategists noted that messaging was extremely important in Washington; they found that voters wanted to know how their tax dollars would be spent and so part of the campaign focussed on where the money would go. In Washington it will be allocated to mental health support and schools.<sup>56</sup> Washington's I-502 passed by 55.7:44.3 giving the 'yes' vote a 10 point lead.

I-502 legalised the possession of up to one ounce of dried marijuana, although the use of this product is not allowed 'in view of the general public'.<sup>57</sup> The initiative also creates a system of taxed production, distribution and supply (see Appendix 3) that will be overseen by the Washington State Liquor Control Board (LCB).<sup>58</sup> It allows for a three-tiered system of production, processing and retail by licensed individuals or organisations.<sup>59</sup> In Washington State vertical integration will be prevented and as such no single entity will be able to both produce and sell marijuana.<sup>60</sup> The LCB has announced that it wants to track cannabis from 'seed to store', a model that is similar to that existing for medical marijuana in Colorado and that aims to reduce leakage into the black market. The 'seed to store' tracking system will mean that growers, processors and retailers must inform the board of all transactions and keep records as to when plants are destroyed or harvested.<sup>61</sup> The draft regulations for the Washington marijuana industry, released in May 2013, state that all cannabis-related industries must have high-level security systems including 24-hour video surveillance.<sup>62</sup>

Personal production is not allowed-for under I-502 except for those residents that already have a medical marijuana recommendation.<sup>63</sup> At present residents with a medical marijuana recommendation are allowed to grow up to 15 plants<sup>64</sup> and no agency currently regulates this production and distribution, although there are proposals that it should come under the authority of the LCB along with the commercial market.<sup>65</sup> Under I-502 there will be an excise tax of 25% at each level of the supply chain from

producer to processor, from processor to retailer and from retailer to consumer.<sup>66</sup> The taxes will be held in a Dedicated Marijuana Fund that will be distributed largely to social and health services.<sup>67</sup> Under the draft regulations, each licence application must be sent to the relevant city, county and potentially tribal government or port authority that will have 20 days in order to respond with an approval or objection to the applicant, location or both.<sup>68</sup>

Unlike Colorado's regulations, so far the LCB has not issued rules on whether non-state residents will be able to purchase the same amounts of marijuana as state residents.<sup>69</sup> The issue of 'marijuana tourism' and how well it is contained in Washington and Colorado may be of concern to the surrounding states and will be watched closely by the federal government as well.<sup>70</sup> With regard to advertising restrictions, and reflecting a stricter approach to earlier versions, the current draft (July 2013) of the regulations states that: 'No licensed marijuana producer, processor, or retailer shall place or maintain, or cause to be placed or maintained, an advertisement of marijuana, usable marijuana, or a marijuana-infused product in any form or through any medium whatsoever'.<sup>71</sup> It also stipulates that each retail store can only have one sign and that advertising must not contain misleading statements or be designed in a manner to appeal to children. It does not, however, contain restrictions on media advertising such as pop-up and banner ads on websites or the print media.<sup>72</sup>

#### **Colorado State's Amendment 64**

In Colorado, the ballot initiative was in the form of a constitutional amendment (explaining why it is known as Amendment 64). This legal mechanism means that no future government can overturn the policy without further amending the state constitution. Amendment 64 (hereafter referred to as A-64) was more of a 'bottom-up' process than that in Washington State. Opposition to the policy was considerably more organised and the Colorado governor publicly opposed the

initiative.<sup>73</sup> However, Colorado has 'the most extensive regulatory apparatus of any of the eighteen [now twenty] medical marijuana states in the country'<sup>74</sup> and it has been argued that the medical marijuana industry in the state has experienced less interference by the federal government than other states because of its strict regulations.<sup>75</sup> These factors may have helped voters make their decisions at the ballot box. Amendment 64 passed by 55.3:44.7, as with the Washington initiative, A-64 passed with almost a 10 point lead. As with Washington State, the messaging was important in Colorado where voters wanted to know how their money would be spent, in this case on a school building project. Campaigners targeted 30-50 year old women because they were a demographic that was more supportive of the initiative at the outset but also more likely to be persuaded by the 'No' vote; they were also seen as the group most likely to respond positively to messages about spending the tax revenue gained from marijuana sales on school building projects.<sup>76</sup>

A-64 is broadly similar to I-502 in that it also creates a system of legal production and supply that is subject to licensing, taxation and regulation (see Appendix 3) as well as imposing age restrictions for purchasing marijuana in line with the legal age for alcohol purchasing which is set at 21 years old.<sup>77</sup> However, it also differs in a number of key ways in that it allows for the personal production of up to six plants in total, only three of which may be mature plants at any one time. Non-commercial transactions of up to one ounce are also allowed.<sup>78</sup> Like I-502, A-64 creates a three-tiered system. Yet the Colorado amendment allows for vertical integration whereby no more than 30% of cannabis produced can be sold to other retailers, a situation similar to its medical marijuana industry.<sup>79</sup> The vertical integration rules for the recreational market will be waived after 30<sup>th</sup> September 2014.<sup>80</sup> Under A-64, Medical marijuana producers and retailers will be given exclusive rights to licenses for the first three months, after



which time the market will be opened up to other operators.<sup>81</sup> Writing in the *Oregon Law Review*, Sam Kamin argues that limiting initial license applications to those who already have experience of the medical marijuana industry is the preferred option for Colorado's Department of Revenue because they want to work with those that have already shown that they can comply with the required regulations.<sup>82</sup>

In Colorado, the commercial market will be regulated by the Marijuana Enforcement Division, operating under the Department of Revenue, and based on the Medical Marijuana Enforcement Division, which already regulates the medical cannabis market.<sup>83</sup> The Marijuana Enforcement Division will be responsible for establishing and monitoring procedures for the issuing, renewal and revocation of licenses as well as labelling, health and safety and advertising restrictions.<sup>84</sup> Unlike I-502 which was more specific in terms of the regulatory and taxation system, A-64 only provided a broad framework for legalisation and regulation, and consequently the Governor of Colorado, John Hickenlooper, established a Task Force to implement A-64 after the vote in November.<sup>85</sup> A-64 called for an excise tax as high as 15%, and the Amendment 64 Implementation Task Force endorsed the full 15% excise tax rate and endorsed a separate sales tax as well.<sup>86</sup> After the Task Force reported back, two bills were drafted and signed into law by the Governor in order to establish the regulatory system required by A-64: House Bill 1317 established the regulations for the retail market; House Bill 1318 (HB 1318) set out the taxes that will be imposed, and is subject to a further voter referendum in November 2013. HB1318 stipulates that from January 2014 there will be a 15% sales tax on purchases of marijuana at the retail level, a 15% excise tax, as well as a 2.9% state sales tax, plus local sales taxes to be decided by the locality.<sup>87</sup>

The Task Force also made recommendations regarding restricting commercial licenses to state residents only and limiting the amount

of marijuana that non-residents can purchase compared to state residents in order to reduce 'marijuana tourism'.<sup>88</sup> HB1317 stipulates that non-residents will only be able to purchase ¼ of an ounce of marijuana in a single transaction; this is in contrast to Washington State which has not set down rules for non-residents.<sup>89</sup> Colorado's HB1317 also stipulates that anyone wishing to apply for a retail marijuana business license must have been a state resident for at least two years, which is in stark contrast to Washington State's draft regulations that licence applicants need only have been a resident for three months.<sup>90</sup> Colorado's regulations, like Washington's regulatory system, require high-level security measures such as video surveillance, security guards and alarms in order to limit leakage into the black market.<sup>91</sup> HB1317 sets out quite detailed restrictions on advertising including limiting branding, restricting internet advertising such as pop-up or banner ads and marketing on mobile phones. It also states that any magazines that focus solely on the marijuana industry must be kept behind the counter in shops where under 21s have access.<sup>92</sup> While Washington State regulations are based on a state-wide model, in Colorado counties and cities will have a far greater control over the industry, being allowed to not only restrict or prohibit marijuana establishments but also to allocate opening hours, density of outlets and location of stores.<sup>93</sup> Indeed, over twenty local governments in Colorado have already voted to ban recreational cannabis shops, including Colorado Springs, the second-biggest city in the state.<sup>94</sup>

### **The financial imperative: A realistic key motivation?**

Drawing on the experiences of California's failed Proposition 19 Caulkins et al identify a number of key motivations for the creation of a regulated cannabis industry. These include eliminating arrests, undercutting black markets and reducing violence, assuring product quality, increasing choices for those seeking intoxication and limiting access by young people.<sup>95</sup> And

despite their different circumstances, many of these were cited as considerations in both the Washington and Colorado initiatives. Significant among them, however, was the expectation that the initiatives would generate much needed income and save the states money on law enforcement.<sup>96</sup> Pro-legalisation activists in Colorado, for example, have argued that the regulated market will raise about \$24.1 million, which will go towards the construction of schools in the state, as well as make \$12 million in savings in law enforcement.<sup>97</sup> Analysis by the Colorado Center on Law and Policy suggests that the state could see \$60 million in total combined savings and additional revenue for Colorado's state budget with a potential for this number to double after 2017".<sup>98</sup>

As the Washington and Colorado campaigners found, it does seem that spelling out how the tax dollars will be spent chimes well with voters, especially those that have not made their minds up.<sup>99</sup> Until the markets have been in existence for some considerable time, however, and the associated costs and benefits have been calculated, many of the figures remain hotly contested estimates. Of course, much of the operational success or failure of both I-502 and A-64 will depend on the implementation of the regulations once they have come into force. Moreover, as Mark Kleiman, Professor of Public Policy at UCLA, Visiting Fellow at the National Institute of Justice and director of BOTEK Analysis (the company hired in March 2013 by Washington

### Box 1. View from the ground: Reality check in Washington State

**Mark Kleiman, Professor of Public Policy, UCLA and CEO, BOTEK Analysis**

The preamble in I-502 argues that a legally regulated market for marijuana would allow law enforcement officials to concentrate on violent and property crime, take the money away from organised criminal groups and generate new revenues through taxation. However, there is no guarantee that these expectations will be met. As with any public policy there are tradeoffs to be made. The taxation system stipulated in I-502 imposes excise taxes of 25% at each level of the supply chain plus sales taxes, which is a relatively heavy tax burden. The risk, therefore, is that the price of cannabis remains such that recreational users will prefer the existing, if restructured, markets. As Kleiman notes, *'The question that's being asked in Washington State is...What if we had pot legalisation and nobody came?... it's not clear that the commercial markets can compete with the medical marijuana market and the illicit market.'* He also points out that there is a fear that the enforcement savings may not be as great as was promised: *'The advocates promised greatly decreased enforcement expenditures as one of the advantages of legalisation. Not so. Not if you want the taxed and regulated market to displace the untaxed and unregulated illegal market.'*

Nonetheless, despite such predictions, Kleiman argues that the legally regulated market will provide some advantages for consumers in comparison to the existing medical marijuana market. In this regard, he highlights that *'The big advantages to consumers of the taxed and regulated market compared with the medical market are the testing and labelling; most of the [other] advantages of legalisation are already there. The other difference is that you don't have to be a liar. You don't have to go to some doctor and say you're anxious or something. Compared to a wide-open medical market, I don't think there are many disadvantages because it's not clear that access is going to be greater after formal legalisation than it was before.'*



State's LCB to consult on the design of the regulative framework) notes, regulation and taxation require enforcement so the net financial benefits may be much less than were originally envisaged (see Box 1).<sup>100</sup>

## MORE REFORM ON THE HORIZON? STATE LEGISLATURE BILLS PROPOSED IN 2013

So far, regulatory frameworks for cannabis have only come about through direct democracy in the form of ballot initiatives. In 2013, however, a number of states have debated legislative bills to regulate marijuana and as such, state legislators have no choice but to confront the issue. As noted above and listed in Box 2, as of September, in 2013 eleven US states debated bills to 'tax and regulate' marijuana.<sup>101</sup> Each bill varies somewhat, but, as can be seen from the tables in Appendices 1 and 2, there are some key commonalities with similar issues being considered in each case. While most of these bills are considered dead in 2013, some have progressed further than many would have believed, for example LD 1229 in Maine.<sup>102</sup> This was sponsored by a group of 35 cross-partisan lawmakers. It was modelled on a previous 2010 bill introduced by Democrat Representative Diane Russell that was rejected by House lawmakers by a vote of 107 to 39.<sup>103</sup> In 2013 the Maine House of Representatives voted LD1229 down by 71-67 and the Maine Senate defeated the proposal by 24-10.<sup>104</sup> However, the House vote was the closest yet on this issue and suggests that support for regulatory measures is growing rapidly in the light of the Washington and Colorado votes. Campaigners are now looking to collect enough signatures to put such an initiative on the ballot in 2016.<sup>105</sup> Moreover, the mere fact that eleven states have discussed bills to regulate the cannabis market shows how fast attitudes have changed since the Washington and Colorado votes. This points to the fact that lawmakers are moving closer to changes in public opinion and that regulation of marijuana is no longer perceived by many politicians to be a vote losing issue.

It is interesting to see the re-emergence of legislative bills as a route to policy reform. There are a number of possible explanations for this. In Maine, for example some supporters of LD1229 explicitly argued that the legislature needed to take control of the issue before it was 'forced' upon them by the voters through a ballot initiative.<sup>106</sup> To be sure, drug law reform groups in the US certainly feel that voter initiatives allow them more influence over the kind of policy that is proposed.<sup>107</sup> Kleiman considers it preferable for state legislators to develop policy themselves, but justifies this on the grounds that legislative bills are open to proper scrutiny and are thus more likely to be better formulated.<sup>108</sup>



Indeed, as pointed out elsewhere, initiatives do not go through the same level of evidence-gathering, negotiation and review as normal government-proposed legislation.<sup>109</sup> In a similar vein, as Caulkins and colleagues point out, another possible explanation for pursuing bills is that in some states ballot initiatives, once passed, are very hard to amend and consequently are difficult to refine as good practice emerges and lessons are learned.<sup>110</sup>

That said, legislators may be wary of voting for reform. In some instances they might be concerned that 'voters are using votes on drug policy bills as measures' of their 'personal moral standing' and as such this may put them off some from supporting bills.<sup>111</sup> Moreover, when legislators take office they swear an oath to uphold the constitution of the United States that places federal law as the supreme law of the land.<sup>112</sup> This could place them in difficult position if they are supporting a bill that is contrary to federal law. Indeed, one of the senators that opposed the Maine bill feared that the bill would merely encourage the Federal government to crack down on the state.<sup>113</sup>

**Box 2. Current state of regulated marijuana bills under consideration**  
(for more details of the bills see Appendices 1 and 2)

**Alabama (HB550)** HB 550 was read for the first time on 4<sup>th</sup> April 2013 and referred to the state House of Representatives committee on Public Safety and Homeland Security. The bill has now been deferred with no further date for discussion set.<sup>114</sup>

**Hawaii (HB699)** The House Judiciary Chairman deferred further discussion on this bill until 2014 after finding that there was not enough support in the House to pass it.<sup>115</sup>

**Maine (LD1229)** The bill was referred to the Committee on Criminal Justice and Public Safety and the initial response from the Committee was somewhat negative; it was thought this could end the bill's passage. However, amendments were proposed which would have meant that had the legislature passed the bill it would have gone to voters in the autumn of 2013.<sup>116</sup> Despite this, in early June both the House of Representatives and the Senate rejected the bill.<sup>117</sup>

**Maryland (HB1453)** There was a public hearing in front of the House Committee on the Judiciary held on 19<sup>th</sup> March. However, no vote was taken by lawmakers. The bill has now been postponed without assigning a future date for further discussion.<sup>118</sup>

**Massachusetts (H1632)** The bill was referred to the Joint Committee on the Judiciary on 22<sup>nd</sup> January 2103. The bill has not progressed any further.<sup>119</sup>

**Nevada (AB402)** AB402 was submitted to the Nevada Assembly in March and was sent to the Assembly Judiciary for examination. On 13<sup>th</sup> April 2013 it was stated that 'no further action' would be allowed on this bill.<sup>120</sup>

**New Hampshire (SB337 & HB492)** SB337 would have removed cannabis from the criminal code. It was defeated in the House 239-112 votes on 13<sup>th</sup> March (voted 'inexpedient to legislate'). HB492 would make marijuana legal for adults 21 and over, allowing individuals to cultivate up to six plants for personal use and setting up a framework for taxing and regulating the production and sale of marijuana. A similar bill, HB 1705, fell one vote short of being approved by the House Criminal Justice and Public Safety Committee in 2012. HB492 has now been retained in Committee.<sup>121</sup>

**Oregon (HB3371)** The House Judiciary Committee voted 6-3 in support of the HB3371 in April 2013<sup>122</sup> and the bill was referred to the Committee on Revenue. The legislation has not passed out of this committee as yet.<sup>123</sup> However, as mentioned above, if it doesn't pass through the legislature then it's likely there will be another initiative in 2014/2016.

**Pennsylvania (SB528)** SB 528 would put the Pennsylvania Liquor Board (PLB) in charge of issuing licenses for retail and production. It would also allow the PLB to purchase marijuana from other states, countries and territories where the production and distribution of cannabis is legal. On 3<sup>rd</sup> April 2013 SB528 was referred to Law and Justice Committee where it still remains.<sup>124</sup>

**Rhode Island (HB5274 & SB334)** House Bill 5274 stalled after the Committee recommended the measure be held for further study on 27<sup>th</sup> February.<sup>125</sup> However, a companion bill SB334 has been referred to the Senate Judiciary Committee. On the 28<sup>th</sup> May 2013 the committee recommended that the bill be held for further study.<sup>126</sup>

**Vermont (HB499)** HB499 was referred to the House Judiciary Committee on 12<sup>th</sup> March and has now been adjourned without a future date set for further discussion.<sup>127</sup>

Although it seems highly unlikely that any of the state legislature bills discussed in Box 2 will pass in 2013, more ballot initiatives are expected in the future. Pro-reform groups within Alaska, Arizona and Oregon are gathering signatures for a 2014 ballot,<sup>128</sup> with those in California (if not elsewhere) working towards 2016. The announcement that more voter initiatives will be held in the near future, as well as the fact that state legislatures have been discussing (if not passing) bills concerning some form of regulation, puts more pressure on the federal government to act.

### **HOLDER'S HEADACHE: FEDERAL VERSUS STATE LAW**

Moves to legalise markets for recreational cannabis use in Washington and Colorado have certainly highlighted state-federal tensions around drugs. Such a dynamic is not new.<sup>129</sup> That said, while state level policy shifts towards recreational cannabis use in the 1970s represented a significant divergence in approach, policies legalising medical marijuana use from 1996 onwards have brought some states into direct conflict with the federal government. In a presidential campaign speech made in 2000 George W. Bush promised not to interfere in states' medical marijuana policy.<sup>130</sup> He failed, however, to keep to this promise once elected, with over 200 raids being carried out during his eight years in office.<sup>131</sup> A similar situation pertains under the current administration. Despite statements made by President Obama early in his first term alluding to a softer position on the issue, the administration later appeared to recommit itself to the punitive approach embodied in the CSA,<sup>132</sup> legislation that provides for strict civil and criminal penalties.<sup>133</sup> Indeed the Obama Administration racked up over 100 raids in states that allow medical marijuana in the first three years in power<sup>134</sup> and is now on course to overtake Bush's record.<sup>135</sup>

Federalism issues relating to the tension between state medical marijuana laws and the CSA have been litigated in state courts in the US for several years, although clear guidance on the issue has yet to emerge.<sup>136</sup> One of the primary issues is whether the CSA 'pre-empts' state medical marijuana laws, so as to render them null and void.

Pre-emption has its roots in the Supremacy Clause of the US Constitution, which dictates that federal laws and treaties generally 'trump' conflicting state laws on the same subject matter.<sup>137</sup> The concept of supremacy is, however, limited by the Tenth Amendment to the Constitution, which reserves to the states and the people powers not granted to the federal government under the Constitution.<sup>138</sup> Pre-emption analysis is therefore complex and involves many different factors, one of which is a determination of whether the legislature intended to occupy the field in which the federal law was passed. The CSA is instructive in that it actually contains a clause that expressly states that no pre-emption is intended unless there is a 'positive conflict' between the state law and the CSA such that 'the two cannot consistently stand together'.<sup>139</sup>

It would seem that, since state medical marijuana laws logically appear to be inconsistent with the CSA, the federal law would pre-empt the state laws. However, whether two laws are logically inconsistent and whether one presents a 'positive conflict' with respect to the other for the purposes of pre-emption analysis are separate issues. Courts have defined the phrase 'positive conflict' narrowly, holding that it is only established where (1) compliance with both laws simultaneously is 'physically impossible', or (2) the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'.<sup>140</sup> In this context, courts have generally held that medical marijuana laws that simply provide exemptions from the state penal codes are not pre-empted under federal law: first, a person could comply with both laws simply by avoiding marijuana,

and second, state medical marijuana laws do not prevent the federal government from enforcing the CSA.<sup>141</sup> Pre-emption power is further limited by a concept known as the ‘anti-commandeering’ principle, which provides that the federal government may not ‘commandeer’ the state legislative process, by forcing states to enact legislation or enforce federal legislation.<sup>142</sup> Since medical marijuana laws in actuality are exemptions from the states’ own penal codes, the federal government can no more force the states to repeal these exemptions than it could have forced the enactment of the statutes to begin with.

The same analysis can be applied to legalisation laws when the issue is the simple

removal of the possession of marijuana from the state penal code. Indeed, many scholars believe that simple legalisation would not be pre-empted under the CSA.<sup>143</sup> Nevertheless, the analysis becomes more complicated under the doctrine of pre-emption when the scheme involves state licensing, regulation and/or tax. Although these laws present a stronger case for pre-emption, whether a state tax and regulate law technically would, as a legal matter, present a ‘positive conflict’ to the CSA such that it would be pre-empted by the federal law is still unsettled in the US.<sup>144</sup> This could help explain why the federal government has decided not to pursue a legal challenge to the Washington and Colorado laws on pre-emption grounds.

### **Box 3. Department of Justice Memorandum for all United States Attorneys, Cole, James M., August 29, 2013**

The guidance was carefully worded and focused on the continuing enforcement of the Controlled Substances Act (CSA). Noting that ‘Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime’, the memorandum reiterated that the Department was ‘committed’ to enforcement of federal laws prohibiting marijuana ‘consistent with those determinations’. It then enumerated a set of enforcement priorities which would guide the enforcement of federal laws against what it called ‘marijuana-related conduct’, and stated that the Memorandum should serve as a guide for Department attorneys and law enforcement to focus their resources on ‘persons or organizations whose conduct interferes with any one or more of these priorities’. The eight areas include:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Recognising that the federal government has traditionally relied on state and local law enforcement agencies for enforcement against marijuana activity, the memorandum stated that, because enactment of these laws ‘affects this traditional joint federal-state approach to narcotics enforcement’, the Department’s guidance rested on its expectation that those states enacting laws authorising marijuana-related conduct ‘will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.’ The memorandum ended with a series of disclaimers, including that the guidance did not ‘alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law’.

Without the support of state law enforcement, however, it could prove difficult if not impossible for the federal government to enforce federal marijuana prohibition. As the Department of Justice also referenced in its recent memorandum (see Box 3),<sup>145</sup> for years the federal government has relied on state law enforcement agents to implement the CSA, using various methods such as investigation cooperation, referrals, and shared forfeiture.<sup>146</sup> This was effective as long as state and federal laws were consistent with one another and enforcement goals overlapped. Yet, as acknowledged in the memorandum, when state laws diverge from this scheme the support of state law enforcement falls away.<sup>147</sup> There is little that the federal government can do about this, as under the ‘anti-commandeering’ principle the federal government may not compel states to enforce federal laws.<sup>148</sup> However, the federal government simply does not have the law enforcement manpower to clamp down by itself: the DEA only employs 4,400 official and federal law enforcement agents only accounted for 1% of cannabis arrests in 2007.<sup>149</sup> This situation leads the federal government to rely on the willingness of state law enforcement officials to enforce the policy, an arrangement that is far from certain in states where the majority of voters support some form of tax and regulation framework for marijuana. This is clearly a concern for those favouring the pre-eminence of the CSA within US states, with, for example,

in March 2013 former Drug Enforcement Administration (DEA) chiefs calling on the federal government to sue Washington and Colorado in the Supreme Court.<sup>150</sup>

Furthermore, the CSA calls on the federal government ‘to enter into contractual agreements... to provide for cooperative enforcement and regulatory activities.’<sup>151</sup> This means that in theory the federal government could come to agreements with the individual states on their cannabis regulation policies, which may be exactly what the Department of Justice is seeking to do in issuing its guidance. Indeed, some have argued that it would be preferable for them to do so rather than let the states merely give up enforcing the federal prohibition on marijuana.<sup>152</sup> It has also been argued that despite the recent Department of Justice guidance there are no guarantees that state attorneys will cease to prosecute those who work in the marijuana industry especially in the light of federal crackdowns on the medical marijuana industry.<sup>153</sup> In a recent hearing held by the Senate Judiciary Committee on the issue, James M. Cole, US Deputy Attorney General (and author of the memorandum) attempted to put many of these concerns to rest.<sup>154</sup> Needless to say, the situation is evolving gradually and it remains to be seen how this guidance is applied in practice. Moreover, these state-federal tensions must be considered in a wider context, and it has been argued that allowing states to determine their own cannabis policy may result in other

states demanding further independence with regards to other aspects of federal policy such as gun control, immigration and health care.<sup>155</sup>

Although there currently seems no chance of them making it onto the statute books, it is also worth noting the emergence of pro-recreational marijuana bills at the federal level. In 2011 the first bill to end federal marijuana prohibition was introduced by Representatives Barney Frank (D-MA) and Ron Paul (R-TX) and 19 co-sponsors.<sup>156</sup> In 2013 Democrat Representatives Earl Blumenauer of Oregon and Jared Polis of Colorado introduced another bill based on the 2011 version.<sup>157</sup> That debate continues both at the state and the federal level has much to do with growing public support for the issue.

## NATIONAL POLLING SHOWS SUPPORT FOR REGULATION IS GROWING

Support for legalising cannabis has been growing in the US for some time. In 2011 a nationwide Gallup poll found that for the first time 50% supported legalising marijuana<sup>158</sup> and in May 2012 a poll carried out by Rasmussen recorded that 56% of respondents were in favour of 'legalizing marijuana and regulating it in the similar manner to the way alcohol and tobacco cigarettes are regulated today'.<sup>159</sup> More polling has been carried out since the Washington and Colorado votes which show similar trends. Although a USA Today/Gallup carried out at the end of November 2012 found only 48% thought it should be legal with 50% against,<sup>160</sup> a Public Policy Polling survey also carried out in late November 2012 found that 58% of respondents supported legalising cannabis (with 33% strongly supporting legalisation and 25% in favour but not strongly supporting the proposition) with 39% against.<sup>161</sup> The most recent national poll carried out on April 4<sup>th</sup> 2013 by the Pew Research Center revealed that a majority (52%) of people supported

legalising cannabis against 45% who thought it should remain illegal. Significantly Pew note that support for legalisation has grown by 11% since 2012 as can be seen in Fig. 2.<sup>162</sup>

### Views of Legalising Marijuana: 1969-2013

% saying marijuana should be ...

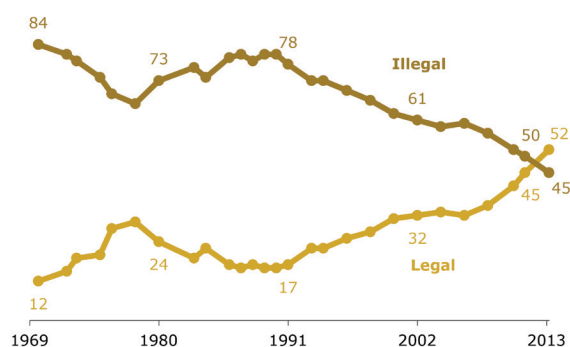


Figure 2: Support for legally regulated markets is growing

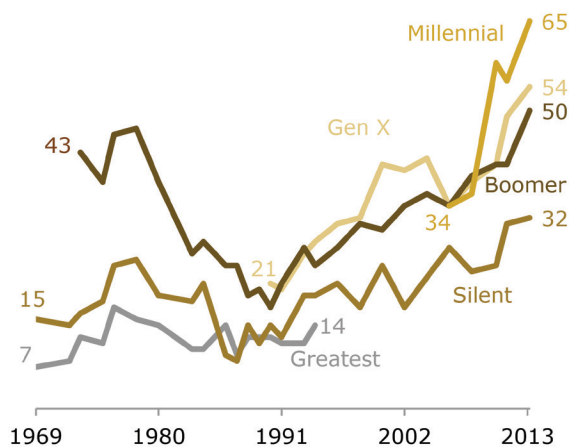
A number of nationwide polls conducted since the votes in Washington and Colorado have asked whether the federal government should allow the states to implement the tax and regulate laws. The first, carried out by USA Today/Gallup found that 64% thought the federal government should not enforce federal laws on marijuana in states that allow it with just 34% disagreeing.<sup>163</sup> A survey by Public Policy Polling between November 30<sup>th</sup> and December 2<sup>nd</sup> 2012 showed that of those polled, 47% believed the Washington and Colorado should be allowed to implement the new laws without federal interference, 33% felt the federal government should prevent the laws being enacted and 20% were unsure.<sup>164</sup> In April 2013 a Pew Research Poll found similar trends to the USA Today/Gallup poll with 60% of respondents believing that the federal government should not enforce federal laws in states that allow marijuana use.<sup>165</sup> The Pew Research Poll also found that 72% of people thought that government efforts to enforce marijuana laws cost more than they are worth.<sup>166</sup> It is also worth noting that the Public Policy Polling survey found that 50% of those interviewed believed marijuana will be legal under federal law within the next 10 years, with 37% in



disagreement and 12% undecided.<sup>167</sup> It seems clear that, as public opinion shifts away from the federal government's oppositional stance on the regulation of cannabis markets, more states may put legalisation measures on their ballots or propose legislative bills.

Additionally, it has been argued that due to the changing demographics in the American population, it is likely that support for legalisation will continue to grow.<sup>168</sup> The only age group who is still staunchly opposed to legalisation of any kind is the over-65s (sometimes referred to as the Silent Generation), and support is strongest amongst Generation X-ers (born between 1965 and 1980) and Millennials (born after 1980) as can be seen in Fig. 3.<sup>169</sup>

### Boomers' Support for Legalisation Rebounds to 1970s Levels



PEW RESEARCH CENTER March 13-17, 2013. 1973-2008 data from General Social Survey; 1969 and 1972 data from Gallup. Generational lines shown when significant sample is available.

**Figure 3: Generational changes in support for legally regulated markets<sup>170</sup>**

Something that stands out in the polling is the changing levels of support amongst the Baby Boomers (born between 1946 and 1964). In 1978, 47% of Baby Boomers supported legalisation, but this dropped sharply during the 1980s and 1990s when only 17% were in favour. Current levels of support amongst this

age range are now up to 50% (see Fig. 3).<sup>171</sup> Kleiman argues that though support from the Baby Boomers has fallen and then risen again, marijuana has always been a part of the Generation-X and the Millennials lives which means they are more likely to maintain their support for alternatives to prohibition.<sup>172</sup>

Another significant result from the Pew Research relates to how the levels of support for legalisation differ depending on the marijuana laws in the state that the interviewee resides (See Fig. 4.)

### Views of Legalisation in States with Different Laws

States where ...	Marijuana should be		
	Legal	Illegal	DK
Medical marijuana is legal; marijuana decriminalized or legal (24 states and D.C.)	55	42	3=100
Just medical is legal (8 states and D.C.)	57	40	3=100
Marijuana is decriminalized; medical marijuana is illegal (6 states)	54	44	2=100
Medical marijuana is legal and marijuana decriminalized (10 states)	55	41	4=100
Not decriminalized or medical (26 states)	50	47	3=100

PEW RESEARCH CENTER March 13-17, 2013. Decriminalization laws reduce the penalties associated with the use or possession of small amounts of marijuana. Figures may not add to 100% because of rounding. See Appendix for list of states.

**Figure 4: Differences in levels of support for legally regulated markets influenced by state marijuana laws**

Whilst support for legalisation is 50% or over in all states, there is some disparity between levels of support. What is particularly interesting is that support is highest (57%) in states that have medical marijuana laws, but not decriminalisation. In states where there are medical marijuana laws and decriminalisation, 55% of people believe marijuana should be legal. Support for legalisation drops slightly to 54% in states that have decriminalisation but not MMU. Only in states where cannabis is not decriminalised and there are no laws

allowing medical access does support drop to 50%. That levels of support for legalisation are highest in states that only have MMU and have no decriminalised recreational use could suggest that voters recognise the benefits of regulation over the relaxation of laws, a view held by Nadelmann who as long ago as 2004 argued that ‘the medical marijuana effort has probably aided the broader anti-prohibitionist campaign’.<sup>173</sup> What is certain, however, is that as the number of states that allow some form of cannabis use increases so the pressure on the federal government to change the CSA or at least allow state experimentation will grow.

## INTERNATIONAL IMPLICATIONS: VIENNA AND LATIN AMERICA

The development of regulatory systems for marijuana in Washington and Colorado are also being watched closely in other parts of the world with the policy implications certainly set to reach far beyond US borders. In the short term, inter-related impacts seem to be most significant within Latin America and Vienna, that city being the institutional home of the UN international drug control framework.

### Encouragement for Latin America?

For many years some countries in Latin America that have suffered greatly from drug related violence, corruption and destabilisation, largely damaging side effects of current prohibition-oriented policies. Concern over these so-called ‘unintended consequences’<sup>174</sup> has increased to the point that, moving beyond earlier calls for drug policy reform from former high level elected officials,<sup>175</sup> a number of serving Latin American presidents have called for a policy review. These have included Jose Mujica of Uruguay, Juan Manuel Santos of Colombia, Laura Chinchilla of Costa Rica and Otto Perez Molina of Guatemala.<sup>176</sup> For Coletta Youngers, Senior Fellow of the Washington Office on Latin America (WOLA) and Associate of the International Drug Policy Consortium (IDPC), the votes in Washington

and Colorado sent ‘a very strong message’, and combine to be ‘one of the key factors driving the tendency in the region to look at drug policy alternatives.’ Furthermore, as Youngers points out, the policy shifts serve to highlight the long-standing but increasingly stark contradictions within the US federal government’s approach to the issue within the hemisphere.<sup>177</sup> As is well documented, in an effort to reduce the size of the US illicit domestic market, Washington D.C. has a long history of urging its southern neighbours to pursue its own supply-oriented favoured approach to drug control – a process operating through both informal and formal diplomatic mechanisms including the certification procedure.<sup>178</sup> However, having engaged with a more tolerant approach to cannabis use, both recreational and medicinal, at the state level for some time, the introduction of legally regulated markets in the two states amplifies the double-standards of the US’s position. It effectively says, ‘We are expecting you to implement policies that are having a huge cost to your own societies, while we let people smoke pot.’<sup>179</sup>



The votes have also influenced recent discussions on drug policy reform within the Organisation of American states (OAS). Triggered by a growing concern for drug related violence within some Latin American states, 2012 saw the OAS engage in significant debate on drugs issue, including the unprecedented high-level discussion of alternatives to the current prohibition-oriented approach. Serious discussions began at the April 2012 OAS Cartagena summit. Here most of the hemisphere’s presidents gathered in a ‘private, closed-door meeting where drug policy was the only topic discussed’, and much of the conversation is said to have focused on policy shifts within the US.<sup>180</sup> Despite reluctance from the US, the Organisation’s dominant member, these discussions resulted in the publication of two major OAS publications in May 2013.

Accompanied by a ‘scenarios’ report, *The Drug Problem in the Americas* was clearly influenced by events in Colorado and Washington. The shift in policy approach is given prominence in both documents, with the ‘Pathways’ chapter within *Scenarios for the Drug Problem in the Americas, 2013-2025*, in particular including noteworthy discussion of events in the two US states.<sup>181</sup> Indeed, it is plausible to suggest that the considerable traction for further discussion generated by the OAS study owed much to the very real events taking place in the US: events that stood out among the other hypothetical discussions concerning a range of possible policy futures.

While driven by the specific nature of the illicit market within the country, the Uruguayan government in particular is also watching very closely what happens in Washington and Colorado as it moves forward with its bill to legalise and regulate marijuana (See Box 4), an unprecedented process that looks set lead to the first nation-state level breach of or withdrawal from the Single Convention. Having overcome considerable difficulties to pass the lower house in late July 2013, Uruguay’s marijuana regulation

bill will now be taken up in the senate, with final passage seen as likely before the end of 2013. As such, as John Walsh, a drug policy expert at WOLA, points out: ‘Uruguay appears poised, in the weeks ahead, to become the first nation in modern times to create a legal, regulated framework for marijuana’. ‘In doing so’, Walsh continues, ‘Uruguay will be bravely taking a leading role in establishing and testing a compelling alternative to the prohibitionist paradigm.’<sup>182</sup> In a similar fashion to the more general discussion regarding drug policy reform in other parts of Latin America, events in Washington and Colorado greatly undermine the US federal government’s legitimacy in opposing what is in many respects a nation-state level version of what is already being rolled out within two US states. Furthermore, the shift towards regulated markets for cannabis within the US is likely to complicate how the international community, particularly those states in favour of the extant shape of the UN drug control treaties, reacts to Uruguay’s efforts to reform its cannabis laws when it meets in Vienna at the Commission on Narcotic Drugs (CND), the central policy making body for the UN drug control system.

#### **Box 4. View from the ground: How Uruguay is learning from Washington and Colorado**

**Coletta Youngers, Senior Fellow, Washington Office on Latin America and Associate of the International Drug Policy Consortium**

On 31<sup>st</sup> July 2013, Uruguay’s House of Representatives voted in favour of a proposal to regulate the production, sale and use of cannabis. This was in response to the increased use within the country of a highly addictive cocaine derivative called ‘paco’ and the fact that the markets for this drug and marijuana are closely connected. The aim of marijuana regulation would be to separate the markets so that marijuana users would not be exposed to ‘paco’ by dealers and to allow law enforcement officials to concentrate on what is deemed to be a more problematic substance. In seeking to ensure successful passage of the Bill, its supporters within the Uruguayan government, and particularly those among civil society groups, have been in communication with their counterparts in Washington and Colorado in order to learn from their experiences. As Youngers notes, *‘The Uruguayan government is certainly following events in Washington and Colorado, but it is really Uruguayan civil society groups that have gotten involved in working with their colleagues and some officials in Washington and Colorado to learn from them in terms of what is the right messaging around this kind of*

*reform initiative.’ Messaging is particularly important within Uruguay since, unlike in much of the US, at present only 40% of the general public support the proposed policy shift. On this point, Youngers observes that: ‘The Uruguayan government is moving forward because they think it is the right thing to do and civil society organisations are working very hard to try and explain to the people why this is a good idea and one of the things they found in Washington and Colorado is that one of the more powerful messages was simply mothers talking about their children...So I think they tried to take those messages that worked in Washington and Colorado and adapt them to the Uruguayan reality and they brought in some experts that worked on the campaign in Washington and Colorado to help them.’ Uruguay will also be in a position to learn from Washington and Colorado on what works and what doesn’t: ‘Now if this initiative goes forward in Uruguay... there will most likely be an exchange between Uruguayan officials and Washington and Colorado officials about the regulatory frameworks. Uruguay is in a very different situation because it’s a federal government, there are much more limitations on Washington and Colorado on what they can do because marijuana remains illegal by [US] federal law, but there is a lot that can be learned comparing the different regulatory frameworks and issues like how do you put appropriate restrictions on advertising, that sort of thing.’*



### **Rumblings in Vienna: Threats to the integrity of the international drug control system**

As we mentioned above, as well as creating state-federal tension, the votes in Washington and Colorado put the US at odds with the international drug control conventions. In this regard, the Vienna based International Narcotics Control Board (INCB or Board), a body that often refers to itself as the ‘guardian’ of the UN drug control treaties,<sup>183</sup> has criticised the votes, stating that allowing systems that regulate the recreational use of cannabis ‘would be a violation of international law, namely the United Nations Single Convention on Narcotic Drugs of 1961, to which the United States is a party’. The Board consequently implored the US federal government to ‘take the necessary measures to ensure full compliance with the international drug control treaties within the entire territory of the United States’.<sup>184</sup> The INCB’s position, both in press releases and its Annual Report for 2012,<sup>185</sup> has sparked some discussion as to whether the state legislation

does in fact place the US in violation of the international treaties and if so, what the US federal government’s obligations are with respect to remedying such a ‘breach’.<sup>186</sup> These questions are open to some, although arguably limited, debate since they raise several competing principles, both internationally and domestically within the US.

It is well-settled under international law that international treaties apply throughout the territories of their signatories. The 1969 Vienna Convention on the Law of Treaties provides that unless a different intention is clear, ‘a treaty is binding upon each party in respect of its entire territory’ and that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.<sup>187</sup> The 1961 Single Convention itself makes it clear that it applies to member countries ‘within their own territories’.<sup>188</sup> Further, as discussed above, within the US the Supremacy Clause of the Constitution dictates that federal law *and* international treaties are the ‘supreme law of the land’ and

that they override conflicting state laws.<sup>189</sup> In this respect, the U.S. Supreme Court has held that “[s]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty.”<sup>190</sup> As such, it would seem that the case is closed and that the US federal government is in breach. This is the view of Martin Jelsma, director of the Drugs and Democracy Programme at the Transnational Institute, who in this case agrees with the INCB’s stance and dismisses arguments that use the US constitutional arrangements discussed below to side-step international obligations.

It may be possible to argue that there are limits to the broad concepts outlined above in terms of both constitutional limitations contained within the texts of the treaties (some articles are prefaced with phrases such as ‘Subject to [each country’s] constitutional limitations’ or ‘having due regard to [each country’s] constitutional, legal and administrative systems’<sup>191</sup>) and with regard to an ‘understanding’ that was lodged by the US upon signing the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>192</sup> Under this argument, if a court were to find that state marijuana laws are not pre-empted by federal law, the drug conventions would be limited in their application to the US by the Tenth Amendment. From another interpretative perspective, it might be also claimed that the Single Convention does not automatically pre-empt state law because it is not a ‘self-executing’ treaty. This means that, as with all the UN drug control treaties, the Convention by itself does not establish binding domestic law; rather it must be implemented through domestic legislation.<sup>193</sup>

Admittedly, these are far from robust legal lines of argumentation and the Constitutional implications have been discussed and debated with no clear authority or guidance emerging so far. These issues aside, since the votes on the Colorado and Washington initiatives took place, US Drug Czar Gil Kerlikowske and others within the Obama administration have consistently emphasised that the CSA, which is the implementing legislation of the Single

Convention, remains in full force and effect throughout the US.<sup>194</sup> None of the international drug treaties specifically requires legislation on multiple levels (i.e., federal, state, municipality levels), nor do they dictate how and to what extent countries must enforce their implementing legislation.<sup>195</sup> In this light, the US might argue that as long as federal laws prohibiting recreational use remain in place, the US is in compliance with its treaty obligations. Paradoxically, this is in contrast to the situation in Uruguay. Here, as Jelsma points out, although similar regulative structures to those in Washington and Colorado will operate should the proposed marijuana bill pass the senate, federal level legislation prohibiting marijuana would not remain in place. This would consequently leave Uruguay in clear breach of the treaties while the US government in Washington D.C. used the federal-state argument to claim that it was operating within the parameters of the treaty framework.<sup>196</sup>

The INCB is, of course, unlikely to agree with the view that since the CSA remains in place across the nation the US is not in breach.<sup>197</sup> And admittedly on this point it is standing on strong legal ground. It is certainly correct when it claims that the situation within the country ‘constitutes a significant challenge to the objective of the international drug control treaties to which the United States is a party’.<sup>198</sup> Furthermore, there is clearly concern that any accommodation by the US federal government of regulative frameworks within Washington and Colorado would further destabilise an increasingly creaky international drug control system.<sup>199</sup> Whether or not the US is technically in ‘breach’ of the treaties, that it was a key player in the establishment of the current treaty framework and continues to play a major role in its implementation certainly adds a degree of irony to the present situation. Moreover, in more practical terms, if the Uruguayan marijuana regulation bill makes it onto the statute books, the US’s awkward domestic predicament will reduce its ability to exert pressure to defend the existing UN treaty

structure within the CND and beyond. ‘The US, which so far has always been the first and quickest to denounce if countries breach the treaties...now cannot really exercise pressure’ says Jelsma. The federal government, he continues, ‘is not in a position to criticise other countries that are basically doing the

same as internally some states in the United States are doing.’ In terms of cannabis policies, ‘this relieves the whole global system of the pressure’ exerted by the US and ‘gives oxygen’ to reform oriented processes – processes that will surely receive significant attention at the next CND meeting in March 2014 (See Box 5).

### **Box 5. View from the ground. Nowhere to hide: The issue of legally regulated cannabis markets at the 2014 UN Commission on Narcotic Drugs**

#### **Interview with Martin Jelsma, director of the Transnational Institute’s Drugs and Democracy Programme**

Before the annual meeting of the Commission on Narcotic Drugs (CND) in March 2013, it appeared as if the votes within Washington and Colorado and Washington would be a key point of debate.<sup>200</sup> The initiatives had passed four months prior to the Vienna event and the INCB had already included well founded critical comments within its *Annual Report*. The issue, however, received remarkably little attention. It was almost as if member states, including crucially the US, wanted to avoid confrontation within an environment that operates on consensus. According to Jelsma, ‘Everybody was sort of expecting a response from the US about the two states’ situation’ but the US clearly decided it was not going to touch the issue and rather preferred to ‘let it play out and wait to see what was going to happen.’ The 2014 CND is likely to be a very different affair, however. By then, he points out ‘the process in Uruguay will be completed and implementation begun and implementation will also have started in the two states. So, it’s really not possible to just not talk about it.’ ‘The INCB will continue to bring out statements, and in their reports they will have, I am expecting, very harsh paragraphs on both the US and Uruguay with the fear...that this could start to affect that integrity of the treaty system’ says Jelsma. Moreover, it must not be forgotten that next year is the mid-term review of the 2009 Political Declaration. This, he believes, will increase the tension around the cannabis issue: ‘There are things’ in the Declaration about cannabis ‘that are difficult now simply to re-state’ and as such national delegations ‘will have to consider some other language on how to deal with cannabis’. On this issue, Jelsma concludes that the international community can no longer simply say that ‘in another ten years time this will have disappeared from the world.’

## CONCLUSIONS

As we have discussed here, while hugely significant in terms of the development of cannabis policies that deviate from a traditional prohibition-oriented approach to the drug, the construction of legally regulated cannabis markets in the US states of Washington and Colorado in 2012 must not be viewed in isolation. Rather they should be seen as part of a long running, if fluctuating, process of ‘softening’ the official zero-tolerance law enforcement approach and reducing negative public attitudes towards cannabis use, both for recreational and medicinal purposes, across the United States of America. In this regard, the sponsors of the ballot initiatives in these states clearly benefitted from and learnt many important lessons via the reformist efforts that went before, particularly the relatively recent failure of Proposition 19 in California in 2010. In this iterative tradition, as the first states to move successfully to restructure their cannabis markets, Washington and Colorado will certainly become exemplars for not only other US states, but also sovereign countries that for a set of specific reasons may decide to emulate Uruguay and seek to adopt a regulated market approach at a national level. Practices deployed within the two states, both in terms of campaigning and policy design, will be studied closely. Indeed, within the US, sponsors of the proposed 2014 ballot initiative in Oregon have already combined the lessons learned from Washington and Colorado with those gleaned from the failure of M-80 to construct a proposal that they hope will be more palatable to the voters. To be sure, other states that may be considering ballot initiatives or legislative bills will be able to observe regulatory systems in action and refine their own proposals as policies in Washington and Colorado undergo the travails of the transition from the theoretical to the hard-nosed realm of applied public policy. And in addition to the welfare of those engaged with the markets within the two states, it is the performance of this laboratory function

that makes close monitoring so crucial to the development of well designed and realistic recreational cannabis policies.

In this regard, while similar in some ways - such as their attempts to prevent leakage into the black market – it will be important to see how the differences in Washington and Colorado’s regulatory regimes impact the operation of their respective regulated markets. For example, allowing home cultivation, as does Colorado but not Washington (except for medical marijuana patients), may add an extra level of difficulty to preventing the growth of a black market as it may be a problem proving the source of the drug.<sup>201</sup> The viability of the ‘grow your own’ system will also depend to some extent on the costs of the commercial market: the cheaper it is to buy, the less people will grow their own. However, the upside to ‘grow your own’ is that it reduces the profit-interest in the trade. Both Colorado and Washington have also restricted the advertising of cannabis. As things stand, Washington’s policy seems to ban all forms of advertising out of store. Colorado on the other hand limits internet and mobile phone advertising, but does not ban advertising outright. This is a significant area of concern since there is wide ranging evidence showing the benefits of advertising restrictions on reducing alcohol and tobacco use among young people.<sup>202</sup> This is clearly then an area that requires close monitoring. As more is learnt about the structures to be implemented within Washington and Colorado, so concerns regarding the public health agenda grow.<sup>203</sup> As discussed above, the fiscal costs and benefits of the two state’s regulatory regimes is another area that should be monitored. Although much has been made of the potential savings of and revenue generated from legally regulated and taxed cannabis markets, it should not be forgotten that they themselves will require enforcement resources. Although criminal justice costs might be reduced, other enforcement officials, such as tax inspectors and licensing officials, will be needed. Furthermore, until there is a

clear idea how much the cannabis will cost to produce and what the levels of sales are like, it is difficult to produce an estimate on the revenues that will be gained under the new regulative frameworks.

What is clear, however, is that as with any area of public policy the frameworks must be open to processes of evaluation, review and, where necessary, adjustment. In this respect, despite the fact that further policy shifts in the near future are likely to come about through ballot initiatives (Alaska, Oregon and California look set to votes on the issue in either 2014 or 2016), it seems as if legislative bills are the preferable route to reform. That said, as the example of Colorado shows, systems emerging from ballots can include review mechanisms. While A-64 amended the state constitution and thus requires a new amendment to allow a significant reversal of policy – such as re-criminalisation – it does include a sunset review clause set for 1<sup>st</sup> July 2016.<sup>204</sup> The intention here is to allow the policy to be amended or developed once the impacts of the system have been analysed. Moreover, it is important to note that beyond carrying what Eric E. Sterling, President of the Criminal Justice Policy Foundation, calls ‘powerful political legitimacy’, the utilisation of direct democracy via ballot initiatives in some instances may be the only way to break policy stalemate within state legislatures and trigger reform.<sup>205</sup>

Regardless of the fact that the federal government has announced that it will allow the development of legally regulated cannabis markets within US states, it is not yet clear how this will play out in the coming months. In all likelihood, tensions will continue to circulate around the issue as these markets grow. However, that eleven states have considered ‘tax and regulate’ bills, even if none of them have so far gone beyond the initial stages, combines with growing public support for cannabis ‘legalisation’ and ballot initiative proposals to ratchet up the need for

some workable compromise between federal and state authority. In the meantime it would seem that the federal government recognises that it does not have enough law enforcement agents to implement federal prohibition, and that permitting Washington and Colorado to institute their new cannabis policies will produce a better outcome than if the states merely give up on enforcing the federal laws. Indeed in the 10<sup>th</sup> September Senate Judiciary Hearing, Deputy Attorney General Cole himself acknowledged that such non-enforcement without state regulation (such as could be the result if the federal government were to challenge the regulations) could give rise to a very unsatisfactory situation for all concerned – de facto legalisation with no controls at all.<sup>206</sup>

That said, the Obama administration finds itself in an unenviable predicament. As well as having to reconcile inter-related state-federal and federal-UN legal commitments, it must consider the domestic political implications of its stance on the cannabis issue, an issue that may be important for elections both in 2014 and 2016. On this, there is much to be said for the view of Ian Millhiser, senior constitutional policy analyst with the left-leaning Center for American Progress. He notes that: ‘If I were Barack Obama, I would look at this and say I would rather have the young voters with me’.<sup>207</sup> In this vein, political considerations within its own borders look likely to take precedence over any obligations the US has to the international drug control conventions. This in turn will very likely help generate policy space within which other countries from Latin America and beyond will be able to develop their own frameworks for legally regulated cannabis markets. While many uncertainties remain, one thing is certain, however. We are currently entering a new era of cannabis policy. And a key challenge is to ensure that regulative frameworks replacing the prohibition-oriented approach are as well designed as possible and succeed in reducing the harms associated with illicit cannabis markets, including those so presciently identified over 40 years ago by the Schafer Commission.



## ACKNOWLEDGEMENTS

With thanks to Will Crick, Christopher Hallam, Martin Jelsma, Mark Kleiman, Giles Pattison, Constanza Sanchez Aviles, John Walsh, Coletta Youngers and the New York City Bar Association Committee on Drugs & the Law, who have helped in various ways with the production of this briefing. Any errors of fact or interpretation remain the responsibility of the authors.

### Appendix 1: Proposed state legislative bills in 2013 (A-M)

States	Alabama (HB550)	Hawaii (HB699)	Maine (LD1229)	Maryland (HB1453)	Massachusetts (H1632)
<b>Taxes Applicable</b>	Tax shall not exceed maximum sales tax placed on alcohol	Excise tax at 15%	Excise tax at \$50 per ounce	Excise tax at \$50 per ounce	Excise tax at \$10 per 1% THC per ounce. Tax stamps on each packet
<b>Proposed Cultivation Laws</b>	12 plants or less for personal use. Commercial cultivation allowed with licence only	5 plants of less for personal use. Cultivation for retail allowed only with licence	6 plants or less for personal use. Commercial cultivation under license only.	3 plants or less allowed for personal use. Commercial cultivation only with license	Commercial cultivation with licence only. Can only sell to processor who must also have licence. Importation allowed as well with valid licence.
<b>Proposed commercial zoning</b>	N/A	N/A	Not within 500 feet of a school. No more than one licensed retail store in locality of less than 2,000 people; 4 stores for 20,001 or more.	Not within 1000 feet of a school. Retail premises cannot also sell alcohol	Schools, churches etc within 500 ft of retail/ cultivation/ processing facility can object to the licence being given and it is up to the licensing authorities to decide whether to allow the licence to go ahead.
<b>Advertising/signage restrictions</b>	Restrictions on advertising and display	Restrictions on advertising and display of marijuana products	Restrictions on advertising, signs and display.	Restrictions to be drawn up on advertising that “do not conflict with the Maryland Constitution and the U.S. Constitution” and allow signage and contact details in telephone directories etc	No advertising in a newspaper, magazine, TV or radio distributed anywhere in the state, or to appeal in any display signs or personal solicitation, or any manner of advertising, any advertisement or notice to promote or encourage the consumption of cannabis.

Appendix 2: Proposed state legislative bills in 2013 (N-Z)

States	Nevada (AB402)	New Hampshire (HB492)	Oregon (HB3371)	Pennsylvania (SB528)	Rhode Island (HB5274)	Vermont (HB499)
<b>Taxes Applicable</b>	Excise tax of 25% at wholesale and retail level plus 25% sales tax at point of retail. General state and local sales taxes also applicable	Excise tax at 15%.	“Privilege” tax at \$35 per oz	Excise tax to be established by the General Assembly	Excise tax at \$50 per oz. Tax stamps not necessary	Excise tax at \$50 per ounce
<b>Proposed Cultivation Laws</b>	Up to 6 plants for personal use. Commercial cultivation with a license only.	6 plants or less for personal use. Cultivation for retail allowed only with license.	Commercial cultivation allowed only with license	6 plants or less for personal use. Commercial cultivation allowed with a licence only	6 plants or less for personal use. Cultivation for sale allowed only under license	3 plants or less for personal cultivation. Commercial cultivation allowed only under license
<b>Proposed commercial zoning</b>	N/A	N/A	Not within 1000 feet of a school	N/A	Not within 1000 feet of a school or place of worship. Retail premises cannot also sell alcohol	N/A
<b>Advertising/signage restrictions</b>	Restrictions on advertising and display	Restrictions on advertising and display of marijuana and marijuana products	Oregon Liquor Control Commission to “regulate or prohibit advertising by marijuana producers, marijuana retailers or marijuana wholesalers”	Restrictions on advertising and display	No product placement in media filmed in Rhode Island. Advertising restrictions to be in compliance with US & Rhode Island constitutions and at least as restrictive as limitations on tobacco products	N/A

### Appendix 3: November 2012 ballot initiatives

States	Colorado A-64 (already passed)	Washington I-502 (already passed)	Oregon M-80 (failed)
<b>Taxes Applicable</b>	Excise tax at 15% plus 15% sales tax on top of normal state and local taxes	Excise taxes at 25% at production, processing and retail levels. Plus general state and local sales taxes	N/A
<b>Proposed Cultivation Laws</b>	Personal cultivation of 6 plants or less allowed. Commercial cultivation allowed with licence only.	Commercial cultivation allowed with licence only.	N/A
<b>Proposed commercial zoning</b>	N/A	Not within a 1000 feet of a school, playground, recreation centre or facility, child care centre, public park, public transit centre, library or any game arcade admission to which is not restricted to persons aged twenty-one years or older	N/A
<b>Advertising/signage restrictions</b>	Restrictions on advertising and display of products	State Liquor Board to develop restrictions on advertising including minimising the exposure to under-21s, no advertising near schools, public buildings and public transport.	N/A

## REFERENCES

- 1 David Bewley-Taylor & Martin Jelsma, *The UN drug control conventions: Limits of Latitude*, Series on Legislative Reform of Drug Policies Nr. 18, March 2012, p.14
- 2 In 1970 the US Congress included cannabis in Schedule I of the Controlled Substances Act stating that it had a “high potential for abuse” and had no “accepted medical use”.
- 3 Under the 1961 UN Single Convention on Narcotic Drugs cannabis production, supply and use should be limited strictly to medical and scientific purposes only – Articles 4(c), 33 and 36. The Single Convention places cannabis in Schedule I (meaning it should be subject to the control measures applied to heroin and cocaine) and Schedule IV (meaning it can be subject to extra control measures due to its liability for misuse and its lack of medicinal benefits – Article 2(b))
- 4 Devin Dwyer, *Marijuana Not High Obama Priority*, ABC Nightline, 14th Dec 2012 – <http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783#.UayCQtI3sqM>
- 5 Timothy Stenovec, *Legal Weed: Marijuana More Popular Than Barack Obama In Colorado*, The Huffington Post, 7<sup>th</sup> November 2012 – [http://www.huffingtonpost.com/2012/11/07/legal-weed-marijuana-more-popular-than-obama-amendment-64\\_n\\_2090109.html](http://www.huffingtonpost.com/2012/11/07/legal-weed-marijuana-more-popular-than-obama-amendment-64_n_2090109.html)
- 6 Memorandum for all United States Attorneys, Cole, James M., August 29, 2013
- 7 The Shafer Commission Report, *Marihuana: A Signal of Misunderstanding*, National Commission on Marihuana and Drug Abuse, 1972.
- 8 As quoted in Tom Blickman, David Bewley-Taylor, Martin Jelsma, ‘The Rise and Decline of Cannabis in the UN Drug Control System’, Draft Version, TNI, p. 28
- 9 Shafer Commission report quoted in Eric, E. Sterling, ‘*Shafer Commission Report on Marijuana and Drugs, Issued 40 Years Ago Today, Was Ahead of its Time*’, Huffington Post, 21<sup>st</sup> March 2013 – [http://www.huffingtonpost.com/eric-e-sterling/shafer-commission-report-\\_b\\_2925777.html](http://www.huffingtonpost.com/eric-e-sterling/shafer-commission-report-_b_2925777.html)
- 10 The official ballot summary for Proposition 19 (1972) states “Removes state penalties for personal use. Proposes a statute which would provide that no person eighteen years or older shall be punished criminally or denied any right or privilege because of his planting, cultivating, harvesting, drying, processing, otherwise preparing, transporting, possessing or using marijuana. Does not repeal existing, or limit future, legislation prohibiting persons under the influence of marijuana from engaging in conduct that endangers others.” – [http://ballotpedia.org/wiki/index.php/California\\_Marijuana\\_Legalization,\\_Proposition\\_19\\_%281972%29](http://ballotpedia.org/wiki/index.php/California_Marijuana_Legalization,_Proposition_19_%281972%29)
- 11 Blickman et al, p. 28
- 12 Marijuana Policy Project briefing ‘*Support for Marijuana Policy Reform*’ p. 2; Paul Armentano, *Legislative Chambers Move Measures To Decriminalize Marijuana In Hawaii, Maryland, New Hampshire, and New Jersey*, NORML blog, 22nd March 2013 – <http://blog.norml.org/2013/03/22/legislative-chambers-move-measures-to-decriminalize-marijuana-in-hawaii-maryland-new-hampshire-and-new-jersey/>
- 13 ‘Decriminalisation’ refers to the removal of a certain act (e.g. possession of cannabis) from the realm of criminal law. Under such a policy, prohibition remains the rule, but the act is considered a civil offence rather than a criminal one. Civil sanctions could include fines, warnings or treatment but the threat of a criminal record is removed. Decriminalisation can either be *de facto* (no official change in legislation but an informal contract is recognised e.g. the Netherlands’ coffee shop system) or *de jure* (the legislation is changed to create civil rather criminal penalties e.g. Portugal since 2001). (For more detail see *EMCDDA thematic papers ‘Illicit drug use in the EU: legislative approaches*’, p. 12). It must be noted that there are debates regarding these terms, for example Espolea argue that decriminalisation occurs when ‘the act or omission in question ceases

- to be relevant to the law and therefore may be equated with the “legalization” of an act.’ (Esploea, *Guidelines for Debate Drug Jargon: Five terms that need to be defined*, 2013 – <http://www.esploea.org/uploads/8/7/2/7/8727772/gped-en-lenguajesobredrogas.pdf>) The states that have decriminalised possession of small amounts of marijuana are Colorado, Connecticut, Maine, Massachusetts, Nebraska, New York, Rhode Island (beginning April 1, 2013), Vermont (beginning 1<sup>st</sup> July 2013)
- 14 ‘Depenalisation’ refers to a situation whereby the penal sanctions are relaxed. Prohibition remains in place and the act is still considered a criminal offence but custodial sentences are generally not applied. Penal sanctions may be used such as fines or a criminal record e.g. in California possession of less than one ounce is an infraction and carries no threat of jail time. (For more detail see *EMCDDA thematic papers ‘Illicit drug use in the EU: legislative approaches’*, p. 12). The states that have depenalised possession of small amounts of marijuana are Minnesota, Mississippi, Nevada, North Carolina, and Ohio
  - 15 [http://ballotpedia.org/wiki/index.php/Oregon\\_Ballot\\_Measure\\_5\\_%281986%29](http://ballotpedia.org/wiki/index.php/Oregon_Ballot_Measure_5_%281986%29)
  - 16 Armentano, NORML blog, 22<sup>nd</sup> March 2013
  - 17 Various drug policy advocacy groups including Drug Policy Alliance (DPA), Marijuana Policy Project (MPP), California National Organization for the Reform of Marijuana Laws (CA-NORML), Common Sense for Drugs Policy supported this initiative along with the American Civil Liberties Union (ACLU). For more details see *Bill Analysis*, 15<sup>th</sup> June, 2010, Assembly Committee on Health – [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0001-0050/sjr\\_14\\_cfa\\_20100611\\_161803\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sjr_14_cfa_20100611_161803_asm_comm.html)
  - 18 Office of National Drug Control Policy (ONDCP) website – <http://www.whitehouse.gov/ondcp/federal-laws-pertaining-to-marijuana>
  - 19 Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois (as of August 2013) Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire (as of July 2013) New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington State and Washington D.C.
  - 20 Jorge G. Castaneda, *Four Marijuana Moments*, Project Syndicate, 18<sup>th</sup> June 2013 – <http://www.project-syndicate.org/commentary/the-coming-end-of-the-americas-war-on-drugs-by-jorge-g-casta-eda>
  - 21 *N.Y. medical marijuana and “decrim fix” bills pass Assembly, but stall in Senate*, Marijuana Policy Project, 26<sup>th</sup> June 2013 – <http://www.mpp.org/states/new-york/>
  - 22 *New Hampshire Becomes 19th State To Legalize Medical Use Of Marijuana*, NORML, 25<sup>th</sup> July 2013 – <http://norml.org/news/2013/07/25/new-hampshire-becomes-19th-state-to-legalize-medical-use-of-marijuana>
  - 23 *Illinois now the 20th medical marijuana state!*, Marijuana Policy Project, 1<sup>st</sup> August 2013 – <http://www.mpp.org/states/illinois/>
  - 24 According to the Initiative and Referendum Institute at the University of Southern California, twenty-four states allow popular ballot measures. These are Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wyoming – [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm)
  - 25 J.P. Caulkins, B. Kilmer, R.J. MacCoun, R.L. Pacula, P. Reuter, ‘Design considerations for legalizing cannabis: lessons inspired by analysis of California’s Proposition 19’, *Addiction*, (107), 2012, 865
  - 26 Ethan Nadelmann, Stephen Gutwillig, Jag Davies, ‘Additional Considerations: commentaries on Caulkins et al’, *Addictions*, (107), 2012, 873
  - 27 Caulkins et al, ‘Design considerations for legalizing cannabis’, 866
  - 28 Nadelmann et al, ‘Additional Considerations’, 874
  - 29 [http://ballotpedia.org/wiki/index.php/Alaska\\_Legalize\\_Marijuana\\_Act,\\_Measure\\_2\\_\(2004\)](http://ballotpedia.org/wiki/index.php/Alaska_Legalize_Marijuana_Act,_Measure_2_(2004))
  - 30 [http://ballotpedia.org/wiki/index.php/Nevada\\_Marijuana\\_Initiative,\\_Question\\_7\\_\(2006\)](http://ballotpedia.org/wiki/index.php/Nevada_Marijuana_Initiative,_Question_7_(2006))
  - 31 [http://ballotpedia.org/wiki/index.php/Colorado\\_Amendment\\_44,\\_Relaxation\\_of\\_Laws\\_on\\_Marijuana\\_Possession\\_%282006%29](http://ballotpedia.org/wiki/index.php/Colorado_Amendment_44,_Relaxation_of_Laws_on_Marijuana_Possession_%282006%29)
  - 32 Caulkins et al, ‘Design considerations for legalizing cannabis’, 866

- 33 Nadelmann et al, 'Additional Considerations', 874
- 34 Author's (EC) interview with Mark Kleiman, UCLA, 6<sup>th</sup> May 2013
- 35 Author's (HH) email exchange with Eric E. Sterling, President of the Criminal Justice Policy Foundation (CJPF), 6<sup>th</sup> August 2013
- 36 Greenberg Quinlan Rosner, '*Marijuana Project: Proposition 19 in Perspective*', Greenberg Quinlan Rosner Research, November 4<sup>th</sup>, 2010, p. 3 – [http://gqrr.com/articles/2538/6127\\_Marijuana%20Project%20-%20Prop.%2019%20-%20Report.pdf](http://gqrr.com/articles/2538/6127_Marijuana%20Project%20-%20Prop.%2019%20-%20Report.pdf)
- 37 Author's (EC) interview with Mark Kleiman; Robert Salladay, *Why pot growers turned against Prop. 19*, California Watch, 8<sup>th</sup> November 2010 – <http://californiawatch.org/dailyreport/why-pot-growers-turned-against-prop-19-6455>
- 38 Russ Belville, *I Gots Mine: Dispensary Owners Against Marijuana Legalization*, *Huffington post*, 14<sup>th</sup> June 2010 – [http://www.huffingtonpost.com/russ-belville/i-gots-mine-dispensary-ow\\_b\\_646438.html](http://www.huffingtonpost.com/russ-belville/i-gots-mine-dispensary-ow_b_646438.html)
- 39 Author's (HH) email correspondence with Eric E. Sterling, 17<sup>th</sup> July 2013
- 40 Text of the proposed ballot initiative, (c) p. 3 – <http://oregonvotes.org/irr/2012/009text.pdf>
- 41 Author's (EC) email correspondence with Eric E. Sterling; author's (EC) interview with Mark Kleiman
- 42 Author's (HH) email correspondence with Eric E. Sterling; Matthew Korfhage, *Mari-Wanna?*, Willamette Week magazine, 29<sup>th</sup> August, 2012 – [http://www.wweek.com/portland/article-19599-mari\\_wanna.html](http://www.wweek.com/portland/article-19599-mari_wanna.html)
- 43 Author interview (EC) with Mark Kleiman; author's (EC) email correspondence with Eric E. Sterling.
- 44 See complete text of the initiative – [http://egov.sos.state.or.us/elec/web\\_irr\\_search\\_record\\_detail?p\\_reference=20120009..LSCYY](http://egov.sos.state.or.us/elec/web_irr_search_record_detail?p_reference=20120009..LSCYY)
- 45 Jeff Mapes, *Big pro-marijuana donors bypassing Oregon legalization measure for more promising initiatives in Washington and Colorado*, Oregon Live, 22<sup>nd</sup> September, 2012, updated 13<sup>th</sup> November, 2012 – [http://www.oregonlive.com/politics/index.ssf/2012/09/big\\_pro-marijuana\\_donors\\_bypas.html](http://www.oregonlive.com/politics/index.ssf/2012/09/big_pro-marijuana_donors_bypas.html)
- 46 Nigel Duara, *Pot grower cultivates murky business*, Associated Press/Star Advertiser, 3<sup>rd</sup> January 2012 – [http://www.staradvertiser.com/news/20120103\\_Pot\\_grower\\_cultivates\\_murky\\_business.html?id=136575548](http://www.staradvertiser.com/news/20120103_Pot_grower_cultivates_murky_business.html?id=136575548)
- 47 Jeff Mapes, 22<sup>nd</sup> September 22, 2012, updated 13<sup>th</sup> November, 2012
- 48 ibid
- 49 Philip Smith, *2014 Marijuana Legalization Initiatives Underway in Three States*, The Daily Chronic, 18<sup>th</sup> June 2013 – <http://www.thedailychronic.net/2013/23889/2014-marijuana-legalization-initiatives-underway-in-three-states/>
- 50 Shannon Finnell, *Pot Heading To Ballot In 2014*, Eugene Weekly magazine, 23<sup>rd</sup> May, 2013 – <http://www.eugeneweekly.com/20130523/news-briefs/pot-heading-ballot-2014>
- 51 From the authors (EC) discussions with Ethan Nadelmann, Bill Piper at DPA, John Walsh at WOLA and Mark Kleiman at UCLA, April-May 2013
- 52 Mark DiCamillo & Mervin Field, '*Support Legalizing the Sale Of Marijuana In California. Strong Backing For State's Existing Medical Marijuana Law. Most Say They'd Allow A Medical Marijuana Dispensary To Operate In Their Community*', Release #2442, Field Research Corporation, 27<sup>th</sup> February 2013, p. 1
- 53 Nadelmann et al, 'Additional Considerations', 874
- 54 See list of sponsors – <http://www.newapproachwa.org/content/sponsors>
- 55 Patrick O'Callahan, *So where's that campaign against legalizing marijuana?*, The News Tribune, 5<sup>th</sup> September 2012 – <http://blog.thenewstribune.com/opinion/2012/09/05/so-where-s-that-campaign-against-legalizing-marijuana/>
- 56 Presentation by Rick Ridder, President, RBI Strategies and Research, 11<sup>th</sup> July 2013, London
- 57 Washington Initiative 502 article 21
- 58 John Walsh, '*Q&A: Legal Marijuana in Colorado and Washington*', Governance Studies at Brookings, Brookings/WOLA, May 2013, p. 3
- 59 Todd Garvey, Brian T. Yeh, '*States Legalization of Recreational Marijuana: Selected Legal Issues*', Congressional Research Service Report for Congress, 5<sup>th</sup> April 2013, p. 2

- 60 Walsh, p. 2
- 61 Gene Johnson, *Washington state releases draft rules for legal pot*, Las Vegas Sun, 16<sup>th</sup> May 2013 – <http://www.lasvegassun.com/news/2013/may/16/washington-state-releases-draft-rules-legal-pot/>
- 62 Washington State Draft Law, ‘*Marijuana Licenses, Application Process, Requirements and Reporting*’, WAC 314-55, section WAC 314-55-083 revised 16<sup>th</sup> May 2013, p. 14
- 63 Walsh, p. 1
- 64 Author’s (EC) interview with Mark Kleiman, 6<sup>th</sup> May 2013
- 65 Walsh, p. 3
- 66 Garvey, Yeh, p. 3
- 67 *ibid*
- 68 Washington State Draft Law, WAC 314-55, section WAC 314-55-020, revised 16<sup>th</sup> May 2013, p. 3
- 69 Washington States draft code for the issuance of licenses does not refer to the issue of non-residents’ purchases. See latest draft of WAC 314-55, 3<sup>rd</sup> July 2013
- 70 Stuart J. Taylor, ‘*Marijuana Policy and Presidential Leadership: How to Avoid a Federal-State Train Wreck*’, Governance Studies at Brookings, April 2013, pg. 15
- 71 Washington State Draft Law, WAC 314-55 section WAC 314-55-155 revised 3<sup>rd</sup> July 2013, p. 31
- 72 *ibid*, p. 31
- 73 Sam Kamin, ‘Lessons Learned from the Governor’s Task Force to Implement Amendment 64’, *Oregon Law Review*, Vol. 91, 2013, 1339
- 74 Kamin, 1347
- 75 Kamin, 1347
- 76 Presentation by Rick Ridder, President, RBI Strategies and Research, 11<sup>th</sup> July 2013, London
- 77 Walsh, p. 1
- 78 Garvey, Yeh, p. 3
- 79 Walsh, p. 2
- 80 Peter Marcus, *Highs and lows with pot bills: Legislators weed through bills amidst speculation about repeal*, Colorado Statesman, 29<sup>th</sup> April, 2013 – <http://www.coloradostatesman.com/content/994123-highs-and-lows-pot-bills>
- 81 Walsh, p. 2
- 82 Kamin, 1351
- 83 Walsh, p. 3
- 84 Garvey, Yeh, p. 4
- 85 *ibid*
- 86 *ibid*
- 87 State of Colorado House Bill 1318, 69<sup>th</sup> General Assembly, 2013, p. 2
- 88 Garvey, Yeh, p. 4
- 89 Colorado’s House Bill 1317 which was signed into law by Governor John Hickenlooper on 28<sup>th</sup> May 2013, State of Colorado HB 1317, 69<sup>th</sup> General Assembly, 2013, p. 3
- 90 State of Colorado HB 1317, p. 2
- 91 *ibid* p. 21
- 92 *ibid* p. 26
- 93 *ibid* p. 29-30
- 94 Jacob Sullum, *Colorado’s Second Biggest City Bans Pot Shops*, reason.com, 25<sup>th</sup> July 2013 – <http://reason.com/blog/2013/07/25/colorados-second-biggest-city-bans-pot-s>
- 95 Caulkins et al, ‘Design considerations for legalizing cannabis’, 866
- 96 In the preamble to A-64 it references the vast law enforcement costs and argues that public health and safety would be improved if marijuana was regulated like alcohol; I-502 argues that regulation will allow law enforcement resources to be focussed on violent and property crime, that it will generate new state revenues and remove organised crime from the industry. See Colorado State Amendment 64 and Washington State Initiative 502 for more details.
- 97 David Knowles, *Colorado becomes world’s first legal, fully regulated, market for recreational marijuana as it anticipates millions in tax revenues*, New York Daily News, 28<sup>th</sup> May 2013
- 98 *ibid*
- 99 Presentation by Rick Ridder, President, RBI Strategies and Research, 11<sup>th</sup> July 2013, London
- 100 Christopher Matthews, *Will High Marijuana Taxes Encourage Black Markets?*, Time, 25<sup>th</sup> February 2013 – <http://business.time.com/2013/02/25/will-high-marijuana-taxes-encourage-black-markets>
- 101 Tax and regulate bill is set to be introduced in at least one additional state (New York) possibly later this year. <http://www.capitalnewyork.com/article/politics/2013/05/8530084/new-non-smoking-champion-marijuana-legalization-new-york>

- 102 Nevada: Assembly Committee Considering Bill to Legalize and Regulate Marijuana, NORML Blog, 6<sup>th</sup> April 2013 – [http://salsa3.salsalabs.com/o/51046/p/dia/action3/common/public/?action\\_KEY=10064](http://salsa3.salsalabs.com/o/51046/p/dia/action3/common/public/?action_KEY=10064); *Lawmaker: Bill to legalize marijuana is about ‘coming to terms with reality*, Las Vegas Sun, 5<sup>th</sup> April – <http://www.lasvegassun.com/news/2013/apr/05/nevada-assembly-considers-ending-marijuana-ban/#ixzz2Pxr2mPV1>
- 103 Erik Altieri, *Marijuana Legalization Measure Formally Introduced in Maine with 35 Co-Sponsors*, NORML blog, 28<sup>th</sup> March 2013 – <http://blog.norml.org/2013/03/28/marijuana-legalization-measure-formally-introduced-in-maine-with-35-co-sponsors/>; *Thirty-Five Maine Lawmakers Co-Sponsor Bill to Regulate Marijuana Like Alcohol*, Marijuana Policy Project Press Release, 27<sup>th</sup> March 2013 – <http://www.mpp.org/media/press-releases/thirty-five-maine-lawmakers.html>
- 104 Christopher Cousins, *Maine Senate defeats legalized marijuana referendum*, Bangor Daily News, 10<sup>th</sup> June, 2013 – <http://www.sunjournal.com/news/0001/11/30/maine-senate-defeats-legalized-marijuana-referendu/1377233>
- 105 ibid
- 106 Christopher Cousins, 10<sup>th</sup> June 2013
- 107 Author’s (EC) interview with Ethan Nadelmann, New York, 21<sup>st</sup> April 2013
- 108 Author’s (EC) interview with Mark Kleiman
- 109 See Jonathan Caulkins, Angela Hawken, Beau Kilmer, Mark Kleiman, *Marijuana Legalization: What Everyone Needs to Know*, Oxford University Press, New York, 2012, pg. 195-196
- 110 Caulkins et al, ‘Design considerations for legalizing cannabis’, 869
- 111 Author’s (EC) interview with Mark Kleiman
- 112 Author’s (EC) interview with Mark Kleiman
- 113 Christopher Cousins, 10<sup>th</sup> June 2013
- 114 <http://legiscan.com/AL/bill/HB550>
- 115 <http://legiscan.com/HI/bill/HB699>
- 116 Erik Altieri, *Maine: Let the People Decide on Marijuana Legalization!*, NORML blog, 21<sup>st</sup> May 2013 – <http://blog.norml.org/2013/05/21/maine-let-the-people-decide-on-marijuana-legalization/>
- 117 Christopher Cousins, 10<sup>th</sup> June 2013
- 118 <http://legiscan.com/MD/bill/HB1453>
- 119 <http://legiscan.com/MA/bill/H1632/2013>
- 120 <http://legiscan.com/NV/bill/AB402>
- 121 <http://legiscan.com/NH/bill/HB492>
- 122 <https://olis.leg.state.or.us/liz/2013R1/Committees/HJUD/2013-04-02-13-00/HB3371/Details>
- 123 <http://legiscan.com/OR/bill/HB3371>
- 124 <http://legiscan.com/PA/bill/SB528>
- 125 <http://legiscan.com/RI/bill/H5274>
- 126 <http://legiscan.com/RI/bill/S0334>
- 127 <http://legiscan.com/VT/bill/H0499>
- 128 Philip Smith, *Marijuana Legalization Initiatives Gear Up in Three States*, Drug War Chronicle, 17<sup>th</sup> June 2013 – [http://stopthedrugwar.org/chronicle/2013/jun/17/marijuana\\_legalization\\_initiativ](http://stopthedrugwar.org/chronicle/2013/jun/17/marijuana_legalization_initiativ)
- 129 See David F. Musto, *The American Disease: Origins of Narcotic Control*, (New York & Oxford: Oxford University Press, 1999, pp. 121-151
- 130 Heidi Lypps, *Bush’s Crackdown on Medical Marijuana*, Counter Punch, 17<sup>th</sup> Sep, 2002 – <http://www.counterpunch.org/2002/09/17/bush-s-crackdown-on-medical-marijuana/>
- 131 *Pres. Obama’s Report Card On Medical Cannabis*, Americans for Safe Access, 21<sup>st</sup> April 2011, p. 1 – [http://AmericansForSafeAccess.org/downloads/Obama\\_Report\\_Card.pdf](http://AmericansForSafeAccess.org/downloads/Obama_Report_Card.pdf)
- 132 Coletta Youngers, *The Obama Administration’s drug control policy on auto-pilot*, IDPC Briefing Paper, April 2011; Taylor, p.5
- 133 21 U.S.C. §§ 841, 844
- 134 Americans for Safe Access, 21<sup>st</sup> April 2011, p.1
- 135 Tom Dickinson, *Obama’s War on Pot*, Rolling Stone magazine, 16<sup>th</sup> Feb, 2012 – <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>
- 136 Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, Policy Analysis, 12<sup>th</sup> December 2012, pp. 8-10
- 137 Art. VI, cl. 2, US Constitution. For a detailed analysis of pre-emption under the CSA, see Garvey, Yeh, pp. 6-18
- 138 Tenth Amendment, US Constitution. Article 1, section 8 sets forth the “enumerated powers” granted to Congress. Art. I, cl. 8, US Constitution
- 139 21 U.S.C. § 903
- 140 Garvey, Yeh, p. 8 (internal citations omitted)



- 141 *ibid*, pp. 9–11. The analysis becomes more complex where states enact more proactive measures seeking to affirmatively authorize and regulate the use of medical marijuana. *ibid*, p. 11; Taylor, p. 10
- 142 Mikos, p. 10 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992))
- 143 See, e.g. Mikos, p. 1; Garvey, Yeh, pp. 10–12
- 144 See Garvey, Yeh, pp. 15–18; Taylor, pp. 10–12. By contrast, almost all agree that a state-run distribution system would be pre-empted under the CSA
- 145 DOJ Memorandum, p. 2
- 146 Michael M. O’Hear, ‘Federalism and Drug Control’, *Vanderbilt Law Review*, (2004) Vol.57, 3, 783, pp. 806–820
- 147 ‘The enactment of laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement’. DOJ Memorandum, p. 2
- 148 See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating a provision of the Brady Handgun Violence Prevention Act requiring state police officers to conduct background checks on prospective handgun purchasers within five days of an attempted purchase)
- 149 Rauch, Jonathan, ‘*Washington Versus Washington (and Colorado): Why the States Should Lead on Marijuana Policy*’, Governance Studies at Brookings, March 2013, p. 3
- 150 Stephen C. Webster, *Former DEA chiefs worry Obama abandoning drug war*, Raw Story, 5<sup>th</sup> March 2013 – <http://www.rawstory.com/rs/2013/03/05/former-dea-chiefs-worry-obama-abandoning-drug-war/>
- 151 US Federal law code USC§ 873(A)(7) as quoted in, Taylor, p. 2
- 152 Rauch, p. 3; Taylor, p. 3
- 153 Jacob Sullum, ‘*U.S. Attorneys Say Marijuana Memo Won’t Affect Their Anti-Pot Work*’, Reason.com, 9<sup>th</sup> Sept 2013
- 154 US Senate Judiciary Committee Hearing, “Conflicts Between State and Federal Marijuana Laws.” 10<sup>th</sup> September 2013
- 155 Rauch, p. 4, and author’s (EC) interviews with Mark Kleiman, Ethan Nadelmann (DPA) and John Walsh (WOLA) Washington DC, 2<sup>nd</sup> May 2013
- 156 Marijuana Policy Project, ‘*Support for Marijuana Policy Reform*’, p. 3
- 157 Gene Johnson, *Marijuana Laws: Bipartisan Reform Efforts In Congress Range From Pot Legalization To Hemp*, Huffington Post, 2<sup>nd</sup> April 2013 – [http://www.huffingtonpost.com/2013/02/04/marijuana-laws-congress\\_n\\_2617223.html](http://www.huffingtonpost.com/2013/02/04/marijuana-laws-congress_n_2617223.html)
- 158 Marijuana Policy Project *Support for Marijuana Policy Reform*, p.2
- 159 Ramussen Reports survey carried out on 12<sup>th</sup> May 2012 – [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/56\\_favor\\_legalizing\\_regulating\\_marijuana](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/56_favor_legalizing_regulating_marijuana)
- 160 USA Today/Gallup poll carried out 26–29<sup>th</sup> November 2012 – <http://www.gallup.com/poll/159152/americans-federal-gov-state-marijuana-laws.aspx>
- 161 Public Policy Polling survey carried out 30<sup>th</sup> November–2<sup>nd</sup> December 2012 – <http://www.mpp.org/assets/pdfs/blog/MPPResults.pdf>
- 162 Pew Research Centre ‘*Majority Now Support Legalization*’, 4<sup>th</sup> April 2103 – <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/>
- 163 USA Today/Gallup poll
- 164 Public Policy Polling
- 165 Pew Research Center
- 166 *ibid*
- 167 Public Policy Polling survey
- 168 William A. Galston, E.J. Dionne Jr., *The New Politics of Marijuana Legalization: Why Opinion is Changing*, Governance Studies at Brookings, Brookings/WOLA, May 2013, p. 1
- 169 Pew Research Center, 4<sup>th</sup> April 2103
- 170 According to Pew Research Center, the ‘Greatest’ generation are those born before 1928. This group does not feature much with the recent survey, although in 1977 76% of them believed in the ‘gateway theory’, i.e. that the use marijuana inevitably leads onto other drugs like heroin and cocaine.
- 171 Pew Research Center
- 172 Authors’ (EC) interview with Mark Kleiman
- 173 Ethan A. Nadelmann, *An End to Marijuana Prohibition: The Drive to Legalize Picks Up*, National Review, 12<sup>th</sup> July 2004, p. 3. Also see Galston, Dionne Jr

- 174 A.M. Costa, *Making drug control 'fit for purpose': Building on the UNGASS Decade*, UNODC, 2008 – <http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS-CRPs/ECN72008CRP17E.pdf>
- 175 The former presidents Fernando Henrique Cardoso of Brazil, Ernesto Zedillo of Mexico, and César Gaviria of Colombia convened the Latin American Commission on Drugs and Democracy and released a statement entitled *Drugs and Democracy: Towards a Paradigm Shift* in February 2009 – [www.drogasedemocracia.org/Arquivos/declaracao\\_ingles\\_site.pdf](http://www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf) The Global Commission on Drug Policy also has a number of high level former officials acting as commissioners including Kofi Annan, former Secretary General of the United Nations, Louise Arbour, former UN High Commissioner for Human Rights and George Shultz, former Secretary of State, United States as well as a number of former presidents and prime ministers – <http://www.globalcommissionondrugs.org/>
- 176 *12 heads of state who support drug policy reform*, Transform Drug Policy Foundation blog, 5<sup>th</sup> June 2013 – <http://transform-drugs.blogspot.co.uk/2013/06/top-heads-of-state-who-support-drug.html>
- 177 Coletta Youngers, *The drug policy reform agenda in the Americas*, IDPC Briefing Paper, May 2013, p. 1
- 178 David R. Bewley-Taylor, *The United States and International Drug Control, 1909-1997* (London & New York: Continuum, 2001) pp. 185-206 and Coletta A. Younger, Eileen Rosin (Eds.), *Drugs and Democracy in Latin America – The Impact of US Policy* (Boulder & London: Lynne Rienner Publishers, 2005)
- 179 Author (DBT) interview with Coletta Youngers, Budapest, 18<sup>th</sup> July 2013
- 180 Coletta Youngers, May 2013, p. 3 and author interview (DBT) with Coletta Youngers
- 181 Organization of American States, *The Drug Problem in the Americas: Studies Legal and Regulatory Alternatives*, May 2013, p. 21 & *Scenarios for the Drug Problem in the Americas, 2013-2025*, May 2013 pp. 39-52 – [http://www.cicad.oas.org/Main/Template.asp?File=/main/policy/default\\_eng.asp](http://www.cicad.oas.org/Main/Template.asp?File=/main/policy/default_eng.asp)
- 182 *Uruguay steps forward with marijuana legalisation vote*, Transnational Institute, Drugs and Democracy Programme, <http://www.tni.org/pressrelease/uruguay-steps-forward-marijuana-legalisation-vote?context=595>
- 183 David R Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge University Press, 2012), pp. 219-278
- 184 United Nations Information Service, *INCB President calls on the United States Government to address initiatives aimed at permitting recreational drug use*, UNIS/NAR/1164, 14<sup>th</sup> March 2013
- 185 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2012* (New York: United Nations, 2013), pp. 11-12
- 186 Damon Barrett, *Marijuana Legalisation: Sometimes Violations of International Law Are Cause for Celebration*, Huffington Post, 7<sup>th</sup> July 2012, [http://www.huffingtonpost.co.uk/damon-barett/marijuana-legalisation\\_b\\_2087887.html?just\\_reloaded=1](http://www.huffingtonpost.co.uk/damon-barett/marijuana-legalisation_b_2087887.html?just_reloaded=1); Ambellas, Shepard, *UN Treaty Supersedes Marijuana Legalization Laws as US In Violation*, Intellihub, 7<sup>th</sup> March 2013, <http://intellihub.com/2013/03/08/un-treaty-supersedes-marijuana-legalization-laws-as-us-in-violation>
- 187 Vienna Convention on the Law of Treaties, Art. 29
- 188 United Nations Single Convention on Narcotic Drugs, 1961, Art. 4.
- 189 Art. VI, Sec. 2, U.S. Constitution. “[A]ll Treaties made .... under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding”.
- 190 *U.S. v. Pink*, 315 U.S. 203 (1942).
- 191 United Nations Single Convention on Narcotic Drugs, 1961, Arts. 35, 36; United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988, Art. 3.
- 192 United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988, Declarations and Reservations (“(1) Nothing in this Treaty requires or authorizes legislation or other action by the United States of America

- prohibited by the Constitution of the United States”). This practice is not unusual for the US, particularly in the context of human rights treaties. See Aust, Anthony, *Modern Treaty Law and Practice*, 2<sup>nd</sup> edition, (Cambridge University Press, 2007), pp. 146-147
- 193 Garvey, Yeh, p. 19-20 (citing *Medellin v. Texas*, 552 U.S. 491 (2008))
- 194 Comments made by Gil Kerlikowske at the XVII Annual CAF Conference, Washington, DC, 5<sup>th</sup> September 2013; “Marijuana is and remains illegal under federal law”, ONDCP email advisory, 29<sup>th</sup> August 2013; “Regardless of any changes in state law ... growing, selling or possessing any amount of marijuana remains illegal under federal law.” As quoted in Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, New York Times, 6<sup>th</sup> December 2012 – <http://www.nytimes.com/2012/12/07/us/marijuana-initiatives-in-2-states-set-federal-officials-scrambling.html>; Mike Riggs, *DEA Responds to Legal Weed in Colorado and Washington: Enforcement of the Controlled Substances Act remains unchanged*, reason.com, 7<sup>th</sup> November 2012 – <http://reason.com/blog/2012/11/07/dea-responds-to-legal-weed-in-colorado-a>; ONDCP Guide, ‘*Marijuana Resource Center: Federal Laws Pertaining to Marijuana*’, ONDCP official website – <http://www.whitehouse.gov/ondcp/federal-laws-pertaining-to-marijuana>
- 195 Famously, in the Netherlands, marijuana possession is technically illegal, but the government, exercising the “expediency principle”, has agreed not to enforce those laws under a set of prosecutorial guidelines known as the “HOJ-G criteria”
- 196 Author’s (DBT) interview with Martin Jelsma, Skype, 12<sup>th</sup> August 2013.
- 197 There seems to be some confusion even within the UN drug control system on this issue; at a press conference held at the last session of the Commission on Narcotic Drugs, when asked about the international consequences of the legislation passed in Colorado and Washington, UNODC Executive President Yuri Fedotov stated that it was his understanding that under international law it is ‘the federal government of the US, rather than the states ... that bears primary responsibility’ for compliance with the conventions. The UN on Drugs: Trends in 2013, The Drug Reporter, HCLU, 27<sup>th</sup> March 2013 <http://youtu.be/pcNL-Xjrinc>, min 6:10
- 198 2012 Report of the International Narcotics Control Board (E/INCB/2012/1), 5<sup>th</sup> March 2013, par. 81
- 199 See IDPC, *The INCB releases its Annual Report for 2012*, 12<sup>th</sup> June 2013 – <http://idpc.net/incb-watch/updates/2013/06/the-incb-releases-its-annual-report-for-2012>
- 200 IDPC, *The 2013 Commission on Narcotic Drugs. Report of Proceedings*, IDPC, 7<sup>th</sup> March 2013 – [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2290788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290788)
- 201 Caulkins et al, ‘Design considerations for legalizing cannabis’, 869
- 202 For example see, Joe B. Tye, Kenneth E. Warner, Stanton A. Glantz, ‘Tobacco Advertising and Consumption: Evidence of a Causal Relationship’, *Journal of Public Health Policy*, Vol. 8, No. 4 (Winter, 1987), pp. 492-508; Lesley A. Smith, David R. Foxcroft, ‘The effect of alcohol advertising, marketing and portrayal on drinking behaviour in young people: systematic review of prospective cohort studies’, *BMC Public Health*, (2009), Vol. 9, 51
- 203 See for example, Robin Room, ‘Legalising a market of cannabis for pleasure: Colorado, Washington, Uruguay and beyond’, *Addiction*, forthcoming
- 204 State of Colorado HB 1317, p. 66
- 205 For example California’s Compassionate Use Act only came into law through a the 1996 voter initiative after three attempts by the Democrat-controlled legislature to enact medical marijuana bills had been vetoed by the Republican governor. Author’s (EC) email correspondence with Eric E. Sterling, 6<sup>th</sup> August 2013
- 206 Comments by Cole, Senate Judiciary Hearing, 10<sup>th</sup> September 2013
- 207 Alex Dobuzinskis, *Marijuana Legalization Victories Could Be Short-Lived*, Huffington Post, 11<sup>th</sup> July 2013.

supported by



**OPEN SOCIETY**  
FOUNDATIONS

## About the Global Drug Policy Observatory

The Global Drug Policy Observatory aims to promote evidence and human rights based drug policy through the comprehensive and rigorous reporting, monitoring and analysis of policy developments at national and international levels. Acting as a platform from which to reach out to and engage with broad and diverse audiences, the initiative aims to help improve the sophistication and horizons of the current policy debate among the media and elite opinion formers as well as within law enforcement and policy making communities. The Observatory engages in a range of research activities that explore not only the dynamics and implications of existing and emerging policy issues, but also the processes behind policy shifts at various levels of governance.

### Global Drug Policy Observatory

Research Institute for Arts and Humanities

Room 201 James Callaghan Building

Swansea University

Singleton Park, Swansea SA2 8PP

Tel: +44 (0)1792 604293

[www.swansea.ac.uk/gdpo](http://www.swansea.ac.uk/gdpo)



@gdpo\_swan