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# What California Can Learn from Colorado's Marijuana Regulations

Sam Kamin

*University of Denver, College of Law*

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# What California Can Learn from Colorado's Marijuana Regulations\*

Sam Kamin\*\*

California occupies a unique place in marijuana law reform in the United States: Over the last twenty years, it has been both leader and laggard. California was the first state in the Union to legalize marijuana for medical patients when its voters approved Proposition 215 in 1996.<sup>1</sup> However, it would be twenty more years before the state adopted robust, state-wide regulations for the production and sale of medical marijuana.<sup>2</sup> In the interim, regulation was largely left to local governments, which adopted regulations varying from the robust to the permissive. During this time, 28 other states followed California's example and authorized medical marijuana, with nearly all of them adopting rigorous, state-wide regulations soon after.<sup>3</sup> California, once a trendsetter, has fallen badly behind.

With California voting in 2016 to legalize marijuana for all adults,<sup>4</sup> the regulatory task facing the state became significantly more complicated. California must now implement both medical and adult use regulations at the same time, and do so within a very short time frame. If there is good news for California in the task ahead, it is that it is not regulating on a blank slate; being leapfrogged by many other states has given California a number of regulatory examples from which it can learn. In this essay, I discuss what California can learn from the experience of Colorado and other states that have already implemented both medical and recreational regulations over the last twenty years. In addition to pointing out particular regulatory issues that are likely to trouble regulators, I argue that successful regulation in the Golden State will require both patience and nimbleness on the part of lawmakers. Events on the

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\* This essay builds on a lecture I gave at the McGeorge Law School in April 2017. I am grateful to the organizers of that conference for the opportunity to speak and to publish this essay in the law review.

\*\* Vicente Sederberg Professor of Marijuana Law and Policy, University of Denver College of Law.

1. See Nat'l Conf. of S. Leg., *State Medical Marijuana Laws*, available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (on file with *The University of the Pacific Law Review*) ("In 1996, California voters passed Proposition 215, making the Golden State the first in the union to allow for the medical use of marijuana. Since then, 28 more states, the District of Columbia, Guam and Puerto Rico have enacted similar laws.").

2. Patrick McGreevy, *California Lawmakers Approve Medical Pot Regulations Plan*, L.A. TIMES, Sept. 11, 2015, available at <http://www.latimes.com/local/political/la-me-pc-california-lawmakers-approve-medical-pot-regulations-plan-20150911-story.html> (on file with *The University of the Pacific Law Review*) ("This unprecedented collaborative effort will finally, after 19 years, regulate the medical marijuana industry," said Assemblyman Reginald Jones Sawyer (D-Los Angeles)).

3. Nat'l Conf. of S. Leg., *supra* note 1.

4. See Kory Grow, *California Passes Recreational Marijuana Bill Proposition 64*, ROLLING STONE, Nov. 8, 2016.

ground change quickly in this area and regulation will need to be seen as a process rather than an endpoint.

## I. STATE-FEDERAL MARIJUANA LAW

The federal Controlled Substances Act (“CSA”), passed by Congress in 1970, has, since its inception, classified marijuana as a Schedule I drug, a substance whose production, distribution, and possession are criminal in every instance.<sup>5</sup> Doctors are forbidden from prescribing Schedule I drugs, and long prison sentences are set out for anyone who possesses, produces, or distributes such drugs.<sup>6</sup> This remains true despite the fact that California and the 28 other states have enacted medical marijuana provisions that permit some of their citizens to grow, sell, and use marijuana based on a doctor’s recommendation.

Given the continuing federal prohibition, laws authorizing medical marijuana in the states had to be drafted with care. These laws generally do not legalize marijuana, even under state law, but instead create an exception to state prohibitions for those who use marijuana for medical purposes and for those who assist medical patients in obtaining marijuana for medical purposes.<sup>7</sup>

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5. 21 U.S.C. § 812(b) (defining Schedule I drugs as having “a high potential for abuse,” “no currently accepted medical use in treatment in the United states,” and for which “there is a lack of accepted safety for use of the drug . . . under medical supervision.”).

6. 21 U.S.C. § 841(b)(2)(B)(vii) (stating that anyone in possession of 1,000 or more marijuana plants: shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both).

7. *See, e.g.*, COLO. CONST. AMEND. XX, § 14(2)(a):

Except as otherwise provided . . . a patient or primary care-giver charged with a violation of the state’s criminal laws related to the patient’s medical use of marijuana will be deemed to have established an affirmative defense to such allegation where:

(I) The patient was previously diagnosed by a physician as having a debilitating medical condition;  
(II) The patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section. This affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient’s medical use of marijuana.

*Id.*

*See also* Cal. Prop. 215 § 11362.5:

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Furthermore, the drug must generally be recommended<sup>8</sup> by a physician for a specific condition listed by statute.<sup>9</sup> Thus, most marijuana conduct remains illegal in these states for most adults, with only narrow carve-outs for medical treatment. Furthermore, the continuing federal marijuana prohibition means that everyone who uses marijuana engages in serious criminal conduct, even if their actions conform to state law.<sup>10</sup> While a state can choose to weaken or under-enforce its own prohibitions, it can do little to protect its citizens from a decision by the federal government to enforce the CSA.

Although they have similar overall structures, the laws of the various medical marijuana states differ significantly from one another in terms of how they limit who may produce marijuana for medical patients, how that marijuana can be distributed, and so forth. For example, in some states like New York and New Jersey, the process is tightly regulated from beginning to end. New York State licensed only five companies to produce and sell marijuana under the auspices of state law.<sup>11</sup> Physicians in New York wishing to recommend cannabis under this system are required to complete a course and to register with the state before they

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*Id.*

8. Because marijuana is a Schedule I drug, a doctor would risk losing her license were she to attempt to prescribe it for her patient; the term recommendation creates an important loophole. See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado*, 8 HARV. L. & POL'Y REV. 359, 364 n.28 (2014). Appellate courts have held that a doctor cannot, consistent with the First Amendment, be enjoined from discussing treatment options with her patient. Thus, a recommendation or suggestion of marijuana therapy is constitutionally protected speech. See *Conant v. Walters*, 309 F.3d 629 (2002).

9. See, e.g., N.Y. Pub. Health L. 3360 defining a serious condition qualifying under the measure as:

- (i) . . . one of the following severe debilitating or life-threatening conditions: cancer, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, amyotrophic lateral sclerosis, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, or as added by the commissioner; and
- (ii) any of the following conditions where it is clinically associated with, or a complication of, a condition under this paragraph or its treatment: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures; severe or persistent muscle spasms; or such conditions as are added by the commissioner.

10. As I have written elsewhere, this federal prohibition can have significant negative consequences for marijuana users, even if they never face federal prosecution for their conduct. Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 90-91 (2014) ("Even if the promise of federal nonenforcement were made permanent—which cannot be done by executive action alone because enforcement decisions made by one presidential administration could easily be overturned by the next—federal prohibition operates to present substantial obstacles to businesses and adults seeking to implement and avail themselves of new state laws authorizing marijuana distribution and use.").

11. N.Y. St. Dep't of Health, *Medical Use of Marijuana Under the Compassionate Care Act: Two Year Report* at 2 (2016), [https://www.health.ny.gov/regulations/medical\\_marijuana/docs/two\\_year\\_report.pdf](https://www.health.ny.gov/regulations/medical_marijuana/docs/two_year_report.pdf) (on file with *The University of the Pacific Law Review*)

(NYSDOH received 43 applications from entities interested in becoming registered organizations to manufacture and dispense medical marijuana under the Compassionate Care Act. NYSDOH evaluated all completed applications received on or before the deadline in accordance with the criteria set forth in PHL § 3365 and Title 10 of the New York Code of Rules and Regulations (NYCRR) §§ 1004.5 and 1004.6. On July 31, 2015, NYSDOH selected five applicants to become registered organizations.)

can issue such recommendations;<sup>12</sup> marijuana can be dispensed in oil or capsule form, but cannot be smoked or infused into edibles.<sup>13</sup> As a result of these restrictions, the system has remained far smaller than in other states: Two years into regulation in New York State, only 5,500 patients were taking part.<sup>14</sup>

By contrast in Colorado, regulations were largely market-based; few limits were placed on the products that were available to consumers, the amount of marijuana that could be produced, or the number of growers or dispensaries that would be licensed by the state. But this is not to say that Colorado adopted an entirely laissez-faire attitude to medical marijuana—quite the contrary. As will be discussed more fully below, Colorado developed an elaborate set of rules to regulate every aspect of the production and sale of marijuana by licensed businesses.

Compared to these systems, California's regulations of medical marijuana have proven to be particularly lax. Proposition 215 itself contained almost no details regarding how a medical marijuana system would operate and the legislature was slow to fill in the gaps.<sup>15</sup> The passage of the amusingly-named SB 420 was a first step toward statewide regulation, but it was a weak one. It left much of regulation to the county level, and California's 482 localities and 58 counties applied this discretion with varying degrees of robustness.<sup>16</sup> Local

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12. 10 NYCRR § 1004.1(a) requires physicians seeking to certify patients to receive medical marijuana to be qualified to treat patients with one or more of the qualifying conditions set forth by statute, be licensed and in good standing in New York state, have completed a four-hour course on the topic, and register with the NYS Department of Health as a qualified practitioner. *See* 10 NYCRR § 1004.1(a).

13. *Medical Use of Marijuana*, *supra* note 11, at 2. "Registered organizations are permitted to manufacture medical marijuana products in the following dosage forms: liquid or oil preparations for metered oromucosal or sublingual administration or administration per tube; metered liquid or oil preparations for vaporization; capsules for oral administration; any additional form and route of administration approved by the commissioner. Smoking and edible products are not permitted."

14. *Id.* at 2.

15. California's Senior Senator, Diane Feinstein, famously described Proposition's ambiguous language as containing enough loopholes to drive a truck through. *See Medical Marijuana in California: A History*, L.A. TIMES, Mar. 6, 2009 ("About four weeks before the 1996 general election, Sen. Diane Feinstein said what would become the mantra of anti-medical marijuana forces. She said Proposition 215 was so poorly written that 'you'll be able to drive a truckload of marijuana through the holes in it. While its seems simple, the devil is in the details or, in this particular bill, the lack of details.'").

16. The measure was hardly a model of clarity. *See* Dennis Romero, *Op-Ed: Why This Time Will Be Different for Marijuana Legalization*, L.A. TIMES, Aug. 20, 2016.

When medical marijuana was legalized here by ballot initiative in 1996, it was groundbreaking—but the law itself left many unanswered questions: How would pot be sold to patients? How would the state regulate those sales? State legislation, SB 420, tried to sort that out, but it left sellers even more confused. Were dispensaries allowed to profit? The guy who wrote the law, late state Sen. John Vasconcellos, said sure. Others, including former L.A. City Attorney Carmen Trutanich, said medical weed had to be a nonprofit enterprise. The rules and enforcement issues weren't fully worked out until last year, when Gov. Jerry Brown signed the Medical Marijuana Regulation and Safety Act.

*Id.*

regulations under SB 420 have ranged from outright bans on production and sale in many areas to local ordinances that encouraged commercial activity. As a result of this lack of statewide regulation and uniformity, federal enforcement actions against marijuana businesses—a rarity in places like Colorado and unheard of in jurisdictions like New York—continued in California throughout the 2000s.<sup>17</sup> Although compliance with robust medical cannabis regulations was never a safe harbor in other medical marijuana states,<sup>18</sup> it became clear that the absence of such regulations left the nascent marijuana industry in California particularly vulnerable to federal enforcement actions.

Notwithstanding criticisms of its lax approach to marijuana regulation, California continued down the path of marijuana law reform. Proposition 19, a measure to legalize cannabis for all adults in California, was introduced in 2010 but was narrowly defeated at the polls.<sup>19</sup> Prop. 19 would have gone far beyond Prop. 215's narrow medical use exception—it would have legalized the possession of small amounts of marijuana for all adults, removing such conduct from the state's criminal laws entirely.<sup>20</sup> Although Prop 19 was leading in polls taken prior to the election, the ballot measure faltered in the final days, due at least in part to strong, public opposition from the Obama Justice Department.<sup>21</sup> While the Department had mostly allowed state law experimentations with medical marijuana to play out, it drew the line at what California contemplated—the legalization, taxation, and regulation of marijuana for all adults.

Other medical marijuana states noted the close failure of Prop. 19 in California and developed better, more robust proposals to legalize marijuana for adult users. While Prop. 19 had *permitted* local governments to write rules to tax and regulate adult-use marijuana while remaining silent on the question of statewide regulation,<sup>22</sup> the new proposals *mandated* the issuance of statewide

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17. See, e.g., Peter Hecht, *Feds Move to Rein in Medical Marijuana Shops in California*, SAC.BEE, Oct. 7, 2011, available at <http://www.sacbee.com/news/state/california/california-weed/article2573426.html>.

18. See, e.g., James Cole, *Memorandum for United States Attorneys*, June 29, 2011 (“[A prior memorandum] was never intended to shield [marijuana] activity from federal enforcement action and prosecution, even where those activities purport to comply with state law . . . State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA.”).

19. Merrit Kennedy, *California To Vote On Legalizing Recreational Marijuana*, NPR.ORG (June 29, 2016 11:49 AM), available at <http://www.npr.org/sections/thetwo-way/2016/06/29/483999326/california-to-vote-on-legalizing-recreational-marijuana> (on file with *The University of the Pacific Law Review*).

20. The Regulate, Control and Tax Cannabis Act of 2010 § 11300 (2010), available at <http://cdn.sos.ca.gov/vig2010/general/pdf/english/text-proposed-laws.pdf>.

21. See, e.g., John Hoefel, *Holder Vows Fight over Proposition 19*, L.A. TIMES, Oct. 16, 2010 (“Stepping up the Obama administration’s opposition to Proposition 19, the nation’s top law enforcement official promised to ‘vigorously enforce’ federal drug laws against Californians who grow or sell marijuana for recreational use even if voters pass the legalization measure.”).

22. See, e.g., Proposition 19 § 11301: (“Notwithstanding any other provision of state or local law, a local government may adopt ordinances, regulations, or other acts having the force of law to control, license, regulate, permit, or otherwise authorize, with conditions . . . the . . . cultivation, processing, distribution, and

regulations upon passage. Washington State and Colorado passed adult use initiatives in 2012<sup>23</sup> (without federal objection) and the states of Oregon and Alaska along with the District of Columbia followed suit in 2014.<sup>24</sup> All four states promptly implemented regulations for the licensing and, for the first time, taxing of marijuana production and sale.<sup>25</sup>

After much hemming and hawing, the federal government explicitly decided to let these experiments with regulated adult-use marijuana proceed without challenge.<sup>26</sup> Although marijuana remained illegal in these states under federal law, the states are under no obligation to prohibit it themselves. The government acknowledged that the states generally take the lead on matters of drug enforcement and that, if they wished to treat marijuana as a regulatory rather than a criminal matter, they would be permitted to do so<sup>27</sup> as long as their regulations were sufficient to meet eight federal priorities.<sup>28</sup>

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safe and secure transportation, sale, and possession for sale of cannabis, but only by persons and in amounts lawfully authorized.”).

23. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, available at <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> (on file with *The University of the Pacific Law Review*).

24. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES, Nov. 3, 2014, available at <https://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html> (on file with *The University of the Pacific Law Review*).

25. The District of Columbia, which also approved marijuana legalization in 2014, was forbidden by federal law from implementing a regulatory regime. D.C. remains the only adult-use jurisdiction without regulations for the production and distribution of marijuana. See FY 2015 Omnibus Spending Bill (forbidding the District from spending any funds allocated to it to implement laws legalizing marijuana).

26. Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFPOST, Aug. 29, 2013, available at [http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034.html](http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html) (on file with *The University of the Pacific Law Review*).

27. See MEMORANDUM FROM JAMES M. COLE, DEPUTY ATT'Y GEN., U.S. DEP'T OF JUSTICE, TO ALL U.S. ATTORNEYS (Aug. 29, 2013):

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.

28. The eight priorities include:

- 1) Preventing the distribution of marijuana to minors;
- 2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- 3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- 4) Preventing stat-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- 5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- 6) Preventing drugged driving and the exacerbation of other adverse public health consequences

It was in this context that California considered Proposition 64, an adult-use voter initiative in 2016. An important part of the process was the passage the year before of the Medical Cannabis Regulation and Safety Act (MCRSA)—the first robust, statewide medical regulations in California.<sup>29</sup> Although MCRSA left much of the detail to regulators to hash out, it was an indication—both to the federal government and to voters—that the state was finally getting serious about regulating the marijuana industry that it enabled twenty years earlier.<sup>30</sup> On November 8, 2016, California joined Nevada, Massachusetts, and Maine in authorizing marijuana for adult users, bringing the total number of recreational marijuana jurisdictions to nine.

But for California, making the leap to authorizing recreational marijuana was only the first step. California now faces the daunting task of drafting regulations to implement both the MCRSA and Proposition 64, regulating medical and recreational cannabis at the same time.<sup>31</sup> Together, these acts invoke an alphabet

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associated with marijuana use;

7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

8) Preventing marijuana possession or use on federal property.

*Id.* at 1–2.

29. In June of 2016, the name of the act was changed from the Medical Marijuana Regulation and Safety Act to the Medical Cannabis Regulation and Safety Act. See CA SB 837, available at [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0801-0850/sb\\_837\\_bill\\_20160627\\_chaptered.htm](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0801-0850/sb_837_bill_20160627_chaptered.htm) (on file with *The University of the Pacific Law Review*). This appears to reflect a growing view that the word marijuana has negative racial connotations. See, e.g., Tobias Coughlin-Bogue, *The Word “Marijuana” Versus the Word “Cannabis,”* THE STRANGER, Apr. 13, 2016 (“No matter how you slice it, the rise of the term marijuana is suspiciously contemporaneous with its popularity in racist screeds. To that end, I’m going to stop using the word ‘marijuana’ in this column, except in proper names, quotations, or where it is part of the seemingly inseparable alliterative pairing ‘medical marijuana’ (after all, ‘medical marijuana’ has specific regulatory policy attached to it).”). Although I am sensitive to this concern, I continue to use marijuana because I believe it is more specific than cannabis. Cannabis can refer to the entire cannabis sativa plant—producer of both psychoactive marijuana and industrial hemp. Because I generally concern myself only with the former, I generally use the term “marijuana.”

30. Victoria Colliver & Rachel Swan, *Governor Brown Signs Bills Regulating Medical Marijuana Industry*, S.F. CHRON., Oct. 9, 2015

The stringent and comprehensive regulations create an enforceable framework for governing virtually every aspect of the business in California — from licensing and taxation to quality control, shipping, packaging and pesticide standards. The lack of regulations for the booming medical pot business has been frustrating to growers, dispensary operators, local governments, law enforcement and patient groups since 1996 when California voters approved Proposition 215, the law that made it legal for doctors to recommend pot to their patients. In the void, what has emerged is a hazy, semi-legitimate industry with no uniformity between jurisdictions. The regulations seek to change that.

*Id.*; see also, Hillary Bricken, *California Set to Harmonize Recreational and Medical Marijuana Laws*, Above the Law, Apr. 24, 2017, available at <http://abovethelaw.com/2017/04/california-set-to-harmonize-recreational-and-medical-marijuana-laws/> (on file with *The University of the Pacific Law Review*) (“With passage of the Medical Cannabis Regulation and Safety Act (‘MCRSA’) in 2015, California took a huge step towards comprehensively regulating its medical cannabis industry after more than 20 years of little to no such state government oversight under Proposition 215.”).

31. Rosalie Murphy, *A Massive Undertaking as California Races to Regulate Marijuana So Legal Sales*



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soup of regulatory agencies with authority over various parts of marijuana production and sale<sup>32</sup> and describe no fewer than nineteen different kinds of licenses to be issued.<sup>33</sup>

This task would be complicated enough, but several factors unique to California conspire to make this process even more fraught. First, California is simply far larger than the other states that have taken on the task of regulating marijuana for adult users;<sup>34</sup> were it a separate country, it would have the world's

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*Can Begin Jan. 1*, THE DESERT SUN, Apr. 3, 2017, available at <http://www.desertsun.com/story/money/business/2017/04/03/marijuana-california-regulation-legalization/98970628/> (on file with *The University of Pacific Law Review*) (reporting that the Bureau of Medical Cannabis Regulation "was still working on drawing up [medical] regulations when voters approved Proposition 64, legalizing adult recreational use of marijuana.").

32. AUMA, § 2 I. The Adult Use of Marijuana Act creates a comprehensive regulatory structure in which every marijuana business is overseen by a specialized agency with relevant expertise. The Bureau of Marijuana Control, housed in the Department of Consumer Affairs, will oversee the whole system and ensure a smooth transition to the legal market, with licenses issued beginning in 2018. The Department of Consumer Affairs will also license and oversee marijuana retailers, distributors, and microbusinesses. The Department of Food and Agriculture will license and oversee marijuana cultivation, ensuring it is environmentally safe. The Department of Public Health will license and oversee manufacturing and testing, ensuring consumers receive a safe product. The State Board of Equalization will collect the special marijuana taxes, and the Controller will allocate the revenue to administer the new law and provide the funds to critical investments. *Id.* Other tasks are given to the Department of Pesticide Control (§ 26060(b)); the Department of Fish and Wildlife (§ 26060 (c)); the State Water Resources Control Board (*Id.*); the Department of Health Care (§ 26211(b)(2)(B)); the Department of Finance (§ 34019); the Department of 26211(B).

33. AUMA § 26050:

The license classification pursuant to this division shall, at a minimum, be as follows:

- (1) Type 1 = Cultivation; Specialty outdoor; Small.
- (2) Type 1A = Cultivation; Specialty indoor; Small.
- (3) Type 1B = Cultivation; Specialty mixed-light; Small.
- (4) Type 2 = Cultivation; Outdoor; Small.
- (5) Type 2A = Cultivation; Indoor; Small.
- (6) Type 2B = Cultivation; Mixed-light; Small.
- (7) Type 3 = Cultivation; Outdoor; Medium.
- (8) Type 3A = Cultivation; Indoor; Medium.
- (9) Type 3B = Cultivation; Mixed-light; Medium.
- (10) Type 4 = Cultivation; Nursery.
- (11) Type 5 = Cultivation; Outdoor; Large.
- (12) Type 5A = Cultivation; Indoor; Large.
- (13) Type 5B = Cultivation; Mixed-light; Large.
- (14) Type 6 = Manufacturer 1.
- (15) Type 7 = Manufacturer 2.
- (16) Type 8 = Testing.
- (17) Type 10 = Retailer.
- (18) Type 11 = Distributor.
- (19) Type 12 = Microbusiness.

*Id.*

34. Throughout this essay I endeavor to use the terms "adult use" and "recreational use" interchangeably. Both refer to a legal system that makes marijuana available for all adults without a doctor's recommendation.

sixth largest economy.<sup>35</sup> Thus, the stakes are higher, the amount of money involved is greater, and the number of potential stakeholders in the process far exceeds those of any state that has yet legalized marijuana for adult users. Perhaps more important, though, California has for years been the largest domestic producer of marijuana in the country;<sup>36</sup> the hills of its north coast are dotted with small farmers who have been growing the drug on the black and grey markets for generations.<sup>37</sup> California's capacity to sensibly regulate marijuana necessarily depends on bringing these legacy producers into a taxed and regulated market—without their participation, any regulatory regime is doomed for failure. Finally, the federal landscape against which California regulates is more foreboding than at any time in recent memory. After a few short years of a predictable policy of forbearance from the federal government under the Obama administration, the election of Donald Trump and his appointment of Jeff Sessions as attorney general have cast a pall over marijuana law reform.<sup>38</sup> California thus finds itself jumping into the marijuana regulatory arena at a time when federal law enforcement policy is as unpredictable as it has been in a decade.

If there is any good news for California, it is that the state does not regulate on a blank slate. As we have seen, the twenty years since California first enacted marijuana law reform have been a busy time in the regulation of marijuana in the states. Both medical and adult-use states have implemented varied systems to regulate marijuana. In the next section I draw upon the experience of Colorado and other states to anticipate what California can expect in the months ahead.

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35. See Alison Vekshin, *California Overtakes France to Become Sixth-Largest Economy*, BLOOMBERG POLITICS, June 24, 2016, available at <https://www.bloomberg.com/politics/articles/2016-06-14/california-overtakes-france-to-become-sixth-largest-economy>.

36. Madison Margolin, *How Will Marijuana Legalization Affect California's Black-Market Exports*, L.A. WEEKLY, Dec. 5, 2016, available at <http://www.laweekly.com/news/how-will-marijuana-legalization-affect-californias-black-market-exports-7660623> (“About 60 to 80 percent of the black-market cannabis consumed nationally is from California”).

37. See, e.g., Joel Warner, *High Times at Rusty Shovel Ranch*, INT'L BUS. TIMES, Dec. 1, 2015, available at <http://www.ibtimes.com/high-times-rusty-shovel-ranch-2190309> (on file with *The University of the Pacific Law Review*) (quoting Hezekiah Allen, executive director of a Northern California marijuana as saying “half of my board is third-generation farmers, people who grew up in the drug war, lying about what their parents did and wishing they were normal. And we are in charge now.”).

38. Eli Watkins, *Pot Activists Have Been Holding Their Breath for Months on Jeff Sessions*, CNN, June 17, 2017, available at <http://www.cnn.com/2017/06/17/politics/jeff-sessions-marijuana/index.html> (on file with *The University of the Pacific Law Review*).

## II. MARIJUANA REGULATION IN COLORADO

Like California,<sup>39</sup> Colorado had just over a year to implement regulations and begin issuing licenses after the passage of its voter initiative legalizing marijuana for adult users. Perhaps because it already had a statewide regime in place for the regulation of medical marijuana at the time it passed recreational legalization, Colorado was able to move nimbly to implement rules for the regulation of adult-use marijuana. This is a luxury that California will not have. In this part, I describe Colorado's regulations, their successes and failures, and the lessons they may hold for California's upcoming regulatory enterprise.

### A. The Rules

Unlike California, Colorado fully implemented statewide medical marijuana regulations before approving marijuana use by all adults.<sup>40</sup> In 2010, when attempts by the Colorado Department of Public Health and the Environment to shut down the burgeoning medical marijuana industry failed,<sup>41</sup> an unregulated medical marijuana market boomed in the state and caused the following:

Entrepreneurs came out of the shadows and rented strip mall storefronts throughout Colorado to meet the demand. Persons considered “drug dealers” the night before became “small business owners” by morning; some who never used marijuana saw the opportunity to start a business with seemingly unlimited growth potential. Soon, there were more marijuana shops in Denver than there were Starbucks coffee shops. There was no turning back. An entirely unregulated network had taken root.<sup>42</sup>

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39. See, e.g., Murphy, *supra* note 31, “The passage of California’s Adult Use of Marijuana Act in November left a 14-month gap before businesses could begin selling marijuana to recreational users. For residents eager to purchase and use cannabis, that may have seemed like a long time. But that period is almost half over—and for the state, which has been tasked with regulating the sprawling cannabis industry, there’s a lot more to do.”

40. *Shift in some teens' use and perceptions of marijuana after recreational marijuana is legalized*, U.C. DAVIS HEALTH, Dec. 27, 2016, available at <https://www.ucdmc.ucdavis.edu/publish/news/newsroom/11707> (on file with *The University of the Pacific Law Review*).

41. See, e.g., *Judge Suspends Pot-Patient Policy*, DENVER POST, July 3, 2007, available at <http://www.denverpost.com/2007/07/03/judge-suspends-pot-patient-policy/> (on file with *The University of the Pacific Law Review*). (“A Denver judge suspended a state rule Tuesday limiting the number of medical-marijuana patients a caregiver can see, saying the policy jeopardizes the lives of the patients.”); John Ingold, *Judge Tosses out Health Board Decision on Medical Pot*, DENVER POST, Nov. 10, 2009 (“A Denver District Court judge rebuked the state board of health today for changing rules about medical marijuana without providing adequate notice to patients.”).

42. David Blake and Jack Finlaw, *Marijuana Legalization in Colorado*, 8 HARV. L. & POL’Y REV. 359, 364 (2014).

Unable to stop what was occurring on the ground, the state was left with no alternative but to regulate the medical marijuana production and sale that was already under way and operating unchecked by state, local, or federal law. In doing so, Colorado became the first jurisdiction anywhere in the country, if not the world, to implement comprehensive regulations for the production and sale of cannabis.<sup>43</sup> Its regulations rightly stood as a model for the 28 medical marijuana states that would follow Colorado's lead.

What it developed was a compulsory licensing scheme—those who could meet the stated qualifications were entitled to a license to either produce or sell marijuana.<sup>44</sup> While other states would develop either lottery<sup>45</sup> or competitive<sup>46</sup> systems for the awarding of a limited number of licenses, Colorado took the position that the market should largely determine how much marijuana is produced and by how many players. In addition to avoiding equity concerns about the distribution of a scarce resource,<sup>47</sup> the compulsory licensing scheme had the advantage of letting supply and demand determine how much marijuana should be produced rather than attempting to set an artificial cap.<sup>48</sup> As California

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43. *Id.* at 365 (“For the first time, a state legislature directed a state government agency to issue licenses to private entities to grow, manufacture, and sell illicit drugs in blatant disregard of federal law.”).

44. AUMA § 26050 (showing licensing scheme).

45. *See, e.g.*, Wash. State Liquor & Cannabis Bd., *Liquor Control Board Approves Lottery Process for Retail Marijuana Stores* (last visited Oct. 9, 2017), available at <http://lcb.wa.gov/pressreleases/liquor-control-board-approves-lottery-process-retail-marijuana-stores> (on file with *The University of the Pacific Law Review*).

The Washington State Liquor Control Board (WSLCB) today approved staff's recommendation for a lottery that will select the apparent successful applicants for marijuana retail licenses. The independent, double-blind process will take place April 21-25, 2014, and will produce an ordered list of applicants that the agency will use to continue its retail licensing process. The agency expects to begin issuing retail licenses no later than the first week of July.

In Washington, winning a lottery was just the first step:

Being identified as the apparent successful applicant is not a guarantee that the selected applicant will receive a license. There are multiple requirements for licensure such as the applicant must pass a criminal history and financial investigation as well as have a location that is not within 1,000 feet of a school, park or other area specified by Initiative 502 as places where children congregate.

*Id.*

46. *See* ILL. ADMIN. CODE tit. 68, § 1290.60 (“The Division will conduct a comprehensive, fair and impartial evaluation of the applications timely received. It will award dispensing organization authorizations on a competitive basis.”); *See also id.* at § 1290.70 (setting forth the criteria for assigning points in the competitive application process: “Suitability of the Proposed Dispensary”; “Security and Recordkeeping”; “Applicant’s Business Plan, Financials and Operating Plan”; Knowledge and Experience.”)

47. *See, e.g.*, Rebecca Beitsch, *Licensing Medical Marijuana Stirs Up Trouble for States*, Pew Charitable Trusts, Dec. 22, 2016, available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/22/licensing-medical-marijuana-stirs-up-trouble-for-states> (on file with *The University of the Pacific Law Review*) (“States that grant [marijuana licenses] based on applicants’ business proposals produce intense competition and often bring cries of cronyism. Lawsuits pending in Maryland contend the system there unfairly factored in geography as part of its qualifications.”).

48. Contrast with Washington State, where a demand study was conducted and then a limited number of licenses were distributed throughout the state in order to meet the existing demand for marijuana. *See, e.g.*, Wash. State Liquor & Cannabis Bd., *Board to Increase Number of Retail Marijuana Stores Following Analysis*

will discover, the amount of cannabis produced within the regulated system is crucially important. If not enough is produced, the price will be too high and the regulated market will be unable to displace the existing black market; too much marijuana and the risk of diversion ramps up. Overproduction means that producers, unable to recoup their investment in a saturated market may look elsewhere to unload their crops. The combination of high supply and low price can also negatively impact youth usage rates—because young users are particularly price-sensitive<sup>49</sup>—and tax revenue—because marijuana is often taxed based on price.<sup>50</sup>

One means of mitigating the risks of overproduction in Colorado was the requirement that licensed cannabis businesses be vertically integrated: A business operating under state law was required to demonstrate that it was cultivating at least 70% of the marijuana it was planning to sell.<sup>51</sup> Such a restriction is necessarily a restraint on consumer choice; imagine a liquor store in which the owner had to verify that she had distilled in-house 70% of the spirits she was planning to sell and all other brands could constitute only 30% of her stock. The reason for imposing this awkward requirement—which led to “shotgun marriages” whereby previously unaffiliated growers and retailers had to join forces to comply with the law<sup>52</sup>—was security and oversight. A vertically

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of Marketplace, available at <http://lcb.wa.gov/pressreleases/lcb-to-increase-number-of-retail-mj-stores> (on file with *The University of the Pacific Law Review*) (describing the decision to raise the number of retail marijuana stores from 334 to 556 in order to meet demand.).

49. Johns Hopkins Bloomberg School of Pub. Health, *Keeping Legalized Marijuana out of Hands of Kids*, SCIENCE DAILY, May 4, 2015, available at <https://www.sciencedaily.com/releases/2015/05/150504082143.htm> (on file with *The University of the Pacific Law Review*).

50. Carl Davis & Richard Phillips, *Tax Policy Issues Associated with Legalized Retail Marijuana: Testimony Before the Vermont Senate Committee on Finance*, INST. ON TAX'N & ECON. POL'Y, Jan. 19, 2016, available at [https://itep.org/wp-content/uploads/vt\\_marijuanatestimony\\_0116.pdf](https://itep.org/wp-content/uploads/vt_marijuanatestimony_0116.pdf).

51. John Ingold, *New Medical Marijuana Regs Now the Law in Colorado*, DENVER POST, June 7, 2010, available at <http://www.denverpost.com/2010/06/07/new-medical-marijuana-regs-now-law-in-colorado/> (on file with *The University of the Pacific Law Review*) (“The new law will place other requirements on dispensaries, as well. People convicted recently of a felony—or at all of a drug-related felony—will be barred from operating a dispensary. People who have lived in Colorado for fewer than two years cannot open a new dispensary. And all dispensaries must grow at least 70 percent of the marijuana they sell, meaning people currently operating as wholesale growers either have to partner with a dispensary or shut down.”). By contrast, Washington state forbade vertical integration. See Josh Voorhees, *Higher Learning: What the Next Wave of Pot Legalizing States Can Learn from Colorado and Washington*, SLATE.COM, Oct. 8, 2014, available at [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/10/marijuana\\_legalization\\_what\\_the\\_next\\_wave\\_of\\_pot\\_legalizing\\_states\\_can\\_learn.html](http://www.slate.com/articles/news_and_politics/politics/2014/10/marijuana_legalization_what_the_next_wave_of_pot_legalizing_states_can_learn.html) (on file with *The University of the Pacific Law Review*) (“While Colorado allows for—and in part requires—vertical integration between growers, processors, and sellers, Washington forbids it.”).

52. See Sam Kamin & Joel Warner, “Need Room to Grow?”: *Marijuana-Friendly Real Estate Agents and Other Enterprising Businesspeople Looking to Make a Bundle from Colorado's Weed Industry*, SLATE.COM (Jan. 22, 2014), available at [http://www.slate.com/articles/news\\_and\\_politics/alterd\\_state/2014/01/colorado\\_marijuana\\_legalization\\_how\\_it\\_is\\_remaking\\_the\\_state\\_s\\_economy\\_in.html](http://www.slate.com/articles/news_and_politics/alterd_state/2014/01/colorado_marijuana_legalization_how_it_is_remaking_the_state_s_economy_in.html) (on file with *The University of the Pacific Law Review*) (“When Colorado first required medical marijuana businesses to vertically integrate in 2010, the industry was full of shotgun marriages—growers and retailers suddenly had to combine forces into a single entity to comply with the law. Now, as many of those businesses transition to

integrated market was seen as easier to police for diversion than one in which production and distribution are uncoupled.<sup>53</sup> Producers have an incentive under this system not to produce more than they will be able to retail in their own shops.

Other regulations were enacted with the specific goal of limiting the flow of cannabis from licensed businesses into the black market. For example, owners of licensed businesses had to be Colorado residents for at least two years<sup>54</sup> and have criminal backgrounds free of drug convictions;<sup>55</sup> RFID tags were required inside licensed businesses to track cannabis plants throughout the growing, curing, and production process;<sup>56</sup> and cameras watched every significant step along the way.<sup>57</sup> That these regulations drew heavily from the state's regulation of the gaming industry is no surprise; marijuana regulation was assigned to the Department of Revenue, the agency also charged with regulating the state's casinos. The systems that had been developed to keep organized crime out of the

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recreational marijuana, some of the growers and retailers involved are going through divorces and shacking up (i.e., consolidating) with other operations.”).

53. Zac Anderson, *Medical Marijuana Market Taking Shape*, HERALD TRIBUNE, June 3, 2017, available at <http://www.heraldtribune.com/news/20170603/medical-marijuana-market-taking-shape> (on file with *The University of the Pacific Law Review*).

54. COLO. REV. STAT. § 12-43.3-307 (XIII) (prohibiting the issuance of a license to “a person who has not been a resident of Colorado for at least two years prior to the date of the person’s application.”).

55. *Id.* at § 12-43.3-307 (VIII) (prohibiting the issuance of a license to “a person who has discharged a sentence in the five years immediately preceding the application date for a conviction of a felony or a person who at any time has been convicted of a felony pursuant to any state or federal law regarding the possession, distribution, or use of a controlled substance.”).

56. Colo. Dep’t of Rev., Basis and Purpose - Rule M 309

The State Licensing Authority finds it essential to regulate, monitor, and track all Medical Marijuana and Medical Marijuana-Infused Product to eliminate diversion, inside and outside of the state, and to ensure that all marijuana grown, processed, sold and disposed of in the Medical Marijuana market is transparently accounted for. An existing Medical Marijuana Business must have an active and functional Inventory Tracking System account on or before December 31, 2013 or it may not exercise the privileges of its license.

*Id.* This requirement has proven highly controversial. See, e.g., Amanda Chicago Lewis, *How Black People Are Being Shut Out of America’s Weed Boom*, BUZZFEED, Mar. 16, 2016, available at [https://www.buzzfeed.com/amandachicagolewis/americas-white-only-weed-boom?utm\\_term=.eugAa1W2n#.juevKMYwj](https://www.buzzfeed.com/amandachicagolewis/americas-white-only-weed-boom?utm_term=.eugAa1W2n#.juevKMYwj) (on file with *The University of the Pacific Law Review*).

Even though research shows people of all races are about equally likely to have broken the law by growing, smoking, or selling marijuana, black people are much more likely to have been arrested for it. Black people are much more likely to have ended up with a criminal record because of it. And every state that has legalized medical or recreational marijuana bans people with drug felonies from working at, owning, investing in, or sitting on the board of a cannabis business. After having borne the brunt of the “war on drugs,” black Americans are now largely missing out on the economic opportunities created by legalization.

*Id.*

57. Colo. Dep. Of Rev. Rule M 306 C.1 (“Camera coverage is required for all Limited Access Areas, point-of-sale areas, security rooms, all points of ingress and egress to Limited Access Areas, all areas where Medical Marijuana or Medical Marijuana-Infused Product is displayed for sale, and all points of ingress/egress to the exterior of the Licensed Premises.”).

gaming industry and to ensure that cash did not disappear from the system without being taxed seemed a perfect fit for the regulation of another historically criminal enterprise now becoming taxed and regulated for the first time.

These medical marijuana regulations in turn formed the basis for the adult use regulations that went into place after Colorado voters approved Amendment 64 in 2012.<sup>58</sup> The seed-to-sale surveillance and background checks were incorporated directly into the new rules as (at first) was the vertical integration requirement.<sup>59</sup> What is more, for the first nine months of the recreational market's operation, applications for recreational licenses were only accepted from those who had previously held a license to produce medical marijuana.<sup>60</sup> This again hurt customer choice—giving a monopoly to existing license-holders was a barrier to entry that necessarily suppressed competition. But this limit—which, like the requirement that all equity owners of marijuana businesses be residents of the state, was relaxed over time—was deemed necessary to allow the Department of Revenue to scrupulously vet all license applicants. Because Colorado was the only game in town—its regulated adult use market became operational months before Washington State's—it could expect to be inundated with applications from would-be entrepreneurs around the country seeking to cash in on the nation's first recreational marijuana market. Limiting licenses not just to those who were already in the state but to those who had already demonstrated a willingness and ability to conform their marijuana production and distribution to rules set by the Department of Revenue was perceived as an invaluable check on organized crime and other disreputable operators seeking to obtain licenses.

One of the most important policy decisions facing Colorado was how to tax marijuana. Although the overall marijuana tax rate is obviously important, there are other, crucial questions to be considered when implementing marijuana tax policy. Deciding at what level—production, wholesale, retail—and by what metric—weight, price, potency—to tax influences not just the total amount of revenue, but other important policy outcomes as well. Colorado ultimately

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58. The process was quite different elsewhere. “Medical outlets in Colorado were state-licensed, somewhat regulated, and required by law to produce most of what they sold; by contrast, the medical marijuana business in Washington consisted of unlicensed retailers, some of which grew their own product while others were supplied by unlicensed growers. Thus, Colorado was able to create a commercial-supply system simply by issuing new licenses to some existing licensees, while Washington had to start more or less from scratch.” Kleiman, et al., *Legal Commercial Cannabis Sales in Colorado and Washington: What Can We Learn?*, BROOKINGS INST. (2016).

59. See, e.g., T.N., *The Economist Explains: How Does Colorado's Marijuana Market Work?*, THE ECONOMIST, Jan. 6, 2015, available at <https://www.economist.com/blogs/economist-explains/2014/01/economist-explains-1> (on file with *The University of the Pacific Law Review*) (“Colorado's system of “vertical integration”, under which retailers must cultivate most of the stuff they sell themselves, will . . . remain in place until October; this makes monitoring easier for the state, even if one irritated observer likens it to a supermarket owning apple orchards.”).

60. *Id.*

imposed an excise tax on the transfer from cultivator to retailer and a special sales tax on the sale to the consumer, yielding an effective tax rate of approximately 29%.<sup>61</sup>

Finally, Colorado's Amendment 64 allowed localities to exert significant power over how marijuana businesses would be regulated within their borders. While recriminalizing the possession and use of marijuana was beyond the reach of cities and localities,<sup>62</sup> local policy makers were given wide latitude regarding whether and to what extent marijuana businesses would be permitted to operate; localities could impose time, place, and manner restrictions on the operation of marijuana businesses or else ban them entirely. Some municipalities such as Denver used this authority to impose moratoria<sup>63</sup> on the licensing of new businesses while others, such as Colorado Springs, imposed a permanent ban on all recreational businesses. The promise of such local control was an important carrot to communities concerned that the commercial exploitation of marijuana was not consistent with their local values.

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61. See Joseph Henschman and Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, TAX FOUND., May 12, 2016, available at <https://taxfoundation.org/marijuana-taxes-lessons-colorado-washington/> (on file with *The University of the Pacific Law Review*) ("When these taxes are added up, a \$30 eighth of pot (1/8 oz.) will have about \$8.59 in taxes tacked onto it, or about a 29 percent overall effective tax rate."). See also Pat Oglesby, the nation's leading authority on marijuana taxation, has strongly advocated for marijuana taxes that start low (when demand and prices are both low) and build over time (as production ramps up to meet demand and prices drop. See Pat Oglesby, *Marijuana Taxes on the 2016 Ballot*, HUFFPOST, Oct. 18, 2016, available at [http://www.huffingtonpost.com/pat-oglesby/marijuana-taxes-on-2016-b\\_b\\_12487528.html](http://www.huffingtonpost.com/pat-oglesby/marijuana-taxes-on-2016-b_b_12487528.html) (on file with *The University of the Pacific Law Review*) ("This year, only California has a weight tax—\$9.25 per ounce of typically smoked "flowers." That's 33 cents a gram, lower than Colorado's current 60-cent per gram rate, and much lower than Alaska's enacted \$1.76 per gram rate. But it makes sense to start low and go slow").

62. This did not stop some jurisdictions from trying to criminalize marijuana possession, however. The City of Greenwood Village, a suburb of Denver, sought to prohibit marijuana possession on streets and roads in the town, on the theory that it was the owner and operator of that property and that property owners can ban marijuana from property that they own or administer. See Jacob Sullum, *Can Colorado Cities Re-Ban Marijuana Possession Because They Own the Streets*, REASON.COM, Jan. 23, 2013, available at <http://reason.com/blog/2013/01/23/can-colorado-cities-re-ban-marijuana-pos> (on file with *The University of the Pacific Law Review*).

Greenwood Village, a Denver suburb that already had pre-emptively banned the marijuana stores that Colorado is supposed to start licensing and regulating next year, recently adopted an ordinance that severely restricts what people can do with marijuana they grow for their own use, as permitted by a provision of Amendment 64 that took effect in December. The ordinance, introduced by Greenwood Village City Council Member Leslie Schluter, prohibits possession of marijuana on city property, including public streets and sidewalks.

*Id.*

63. See, e.g., Jon Murray, *Denver Seeks to Bar New Players in Medical and Retail Marijuana*, DENVER POST, Oct. 2, 2016, available at <http://www.denverpost.com/2015/11/10/denver-seeks-to-bar-new-players-in-medical-and-retail-marijuana/> (on file with *The University of the Pacific Law Review*) ("For two years, a city moratorium aimed at controlling industry growth has allowed only existing medical marijuana businesses to open recreational dispensaries, grow houses or edible manufacturers. That's set to expire Jan. 1, a prospect that has had eager entrepreneurs and investors lining up.").



Taken together, these rules created a comprehensive regulatory regime that put in place rules governing each step of the production, processing, distribution, and consumption of cannabis in the state. The central animating principle was a tightly regulated, market-based approach in which the market largely determined what products would be offered,<sup>64</sup> by whom, in what amounts, and at what prices. In the next section, I discuss how successful this regime has proven to be in meeting its goals of permitting, but tightly regulating, marijuana production and sale.

### B. Measuring Overall Success

Assessing the effectiveness of Colorado's regulatory regime is not an easy endeavor. Statistics are often pushed by groups with a strong stake in the outcome of national law reform, making any attempt at objective evaluation difficult. For example, a January 2016 report by the Rocky Mountain High Intensity Drug Trafficking Area (HIDTA), a task force of state and federal law enforcement officers opposed to marijuana legalization,<sup>65</sup> reported a 20% increase in youth marijuana use after legalization.<sup>66</sup> However, a report in *Scientific American* around the same time indicated that marijuana use among teens had actually dropped in the first two years following legalization.<sup>67</sup> Part of

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64. See, e.g., 1 CCR 212-2, SERIES R 100 THROUGH SERIES R 1400, RETAIL MARIJUANA RULES, Sep. 9, 2013, available at [https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf) (last visited Aug. 2, 2017) (on file with The University of the Pacific Law Review). Although there were calls to ban certain products—principally concentrates and edibles—Colorado regulators decided that it made more sense to regulate products for which there was clearly demand than to have those products available solely on the black market.

65. See, e.g., Jacob Sullum, *Supposedly Neutral Federal Report Stacks the Deck Against Marijuana Legalization*, FORBES, Sept. 17, 2015.

The RMHIDTA, a federally supported task force dedicated to suppressing marijuana and other illegal drugs, claims only 50 percent of Colorado voters supported legalization in that Quinnipiac survey—eight points lower than the actual result. It also understates the 2012 vote for Amendment 64 by a point, but the comparison still supports the story that the task force wants to tell: The consequences of legalization in Colorado have been so bad that public support for the policy already has fallen.

*Id.*

66. Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact* at 2, Jan. 2016, available at <http://www.rmhidta.org/html/FINAL%20NSDUH%20Results-%20Jan%202016%20Release.pdf>.

67. *Colorado's Teen Marijuana Usage Dips after Legalization*, REUTERS, available at <https://www.scientificamerican.com/article/colorado-s-teen-marijuana-usage-dips-after-legalization/> (on file with The University of the Pacific Law Review).

The biannual poll by the Colorado Department of Public Health and Environment also showed the percentage of high school students indulging in marijuana in Colorado was smaller than the national average among teens. According to the department, 21.2 percent of Colorado high school students surveyed in 2015 had used marijuana during the preceding 30 days, down from 22 percent in 2011, the year before voters statewide approved recreational cannabis use by adults 21 and older. The first

the reason that measurement is so difficult is that recreational stores went into operation on January 1, 2014; thus we have at most two year-over-year data points to use to assess changes in everything from tax revenue, to marijuana arrests, to youth usage rates.<sup>68</sup> What is more, in some important areas such as marijuana-impaired driving there are often no pre-enforcement data to compare to data following legalization.<sup>69</sup> That is, there were no measures of marijuana-impaired driving prior to the opening of regulated marijuana businesses in January 2014; thus, while we can trace post-legalization trends in this area, we cannot compare post-legalization rates to pre-legalization rates. It is not surprising, therefore, that wildly differing estimates of marijuana legalization's impact on impaired driving circulated in the press.<sup>70</sup>

But the problem is more complicated still; changes in training and enforcement can impact data collection. For example, since 2014 Colorado has trained its law enforcement officers regarding "the legal and regulatory issues surrounding the legalization of marijuana."<sup>71</sup> As a result, law enforcement is now much more likely to look for and detect evidence of marijuana-impaired driving when making a traffic stop *whether any additional impairment is occurring or not*. Given the unusual pharmacology of cannabis in the bloodstream, the situation is even more complicated.

[Impaired driving] figures are affected not only by the prevalence of stoned driving but by enforcement priorities and police awareness, which has been heightened by legalization. Furthermore, even when a DUI suspicion is substantiated by tests showing THC in a driver's blood, that does not necessarily mean he was impaired while he was driving. As the report notes, "the detection of any THC in blood is not an indicator of impairment but only indicates presence in the system." When marijuana

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state-licensed retail outlets for legalized pot actually opened in 2014. Nationwide, the rate of pot use by teens is slightly higher at 21.7 percent, the study found.

*Id.*

68. *Id.*

69. Noelle Phillips & Elizabeth Hernandez, *Colorado Still Not Sure Whether Legal Marijuana Made Roads Less Safe*, DENVER POST, Aug. 13, 2015, ("The Colorado State Patrol started measuring marijuana-related traffic citations in 2014, said Sgt. Rob Madden, a spokesman. That year will serve as the baseline for years to come. 'Statistically speaking, you need more than two years of data, and we don't even have two years yet,' Madden said.").

70. Compare Radley Balko, *Since Marijuana Legalization, Highway Fatalities in Colorado Are at Near-Historic Lows*, WASH. POST, Aug. 5, 2014, available at [https://www.washingtonpost.com/news/the-watch/wp/2014/08/05/since-marijuana-legalization-highway-fatalities-in-colorado-are-at-near-historic-lows/?utm\\_term=.d701aaf7a416](https://www.washingtonpost.com/news/the-watch/wp/2014/08/05/since-marijuana-legalization-highway-fatalities-in-colorado-are-at-near-historic-lows/?utm_term=.d701aaf7a416) (on file with *The University of the Pacific Law Review*) with Bill Briggs, *Pot Fuels Surge in Drunk Driving Deaths*, NBC NEWS, Feb. 15, 2014, available at <http://www.nbcnews.com/health/health-news/pot-fuels-surge-drugged-driving-deaths-n22991> (on file with *The University of the Pacific Law Review*).

71. *Marijuana Training for Law Enforcement*, COLO. PEACE OFFICER STANDARDS & TRAINING, (last visited Aug. 2, 2017), available at <https://www.coloradopost.gov/training/marijuana-training-law-enforcement> (on file with *The University of the Pacific Law Review*).

consumption rises in the general population, the percentage of drivers who test positive for THC will rise too, even if they are not actually stoned behind the wheel.<sup>72</sup>

Given all of this uncertainty regarding measurement, the inability of researchers to disprove the null hypothesis regarding marijuana regulation—the assertion that legalization has had no impact on important metrics—is actually an important result. And a number of researchers have come to exactly this conclusion. For example, the libertarian Cato Institute conducted an elaborate study, measuring a number of metrics in marijuana law reform states both before and after legalization,<sup>73</sup> concluding that, while it was early to make sweeping conclusions, the worst risks of legalization had not come to pass:

Our conclusion is that state marijuana legalizations have had minimal effect on marijuana use and related outcomes. We cannot rule out small effects of legalization, and insufficient time has elapsed since the four initial legalizations to allow strong inference. On the basis of available data, however, we find little support for the stronger claims made by either opponents or advocates of legalization. The absence of significant adverse consequences is especially striking given the sometimes dire predictions made by legalization opponents.<sup>74</sup>

Writing at the dawn of recreational regulation, Professor Mark Kleiman, who initially ran Washington State's marijuana regulations, described the worst-case fears of marijuana opponents as the dog that did not bark in the night.

While it is far too early to judge the effects of adding legal cannabis to widely available medical marijuana, we do have some information on the effects of virtual legalization under the medical guise in Colorado and Washington. Crime did not dramatically increase or decrease. Auto

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72. Jacob Sullum, *Early Lessons from Marijuana Legalization in Colorado*, Reason.com, (Apr. 25, 2016), available at <http://reason.com/archives/2016/04/25/early-lessons-from-marijuana-legalizatio> (on file with *The University of the Pacific Law Review*).

73. Angela Dills, Sietse Goffard & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalization*, Cato Inst., Sept. 16, 2016, available at <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations> (on file with *The University of the Pacific Law Review*). The Cato Institute looked not just at traditional markers—youth usage rates, public health outcomes, etc.—but at economic ones—the Case-Schiller Home Price Index, unemployment rates, etc.—as well.

74. Angela Dills, Sietse Goffard & Jeffrey Miron, *Dose of Reality: The Effect of State Marijuana Legalization*, CATO INST., Sept. 16, 2016, available at <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations> (on file with *The University of the Pacific Law Review*).

accidents did not dramatically increase or decrease. Alcohol sales did not dramatically increase or decrease.<sup>75</sup>

Fiscally, marijuana law reform has mostly fulfilled its modest goals. In 2016, the last year for which there are complete data, marijuana sales in the state exceeded \$1.3 billion and tax revenue exceeded \$200 million.<sup>76</sup> While this might seem like a lot of money, it's also important to see the number in context.<sup>77</sup> For fiscal 2017, Colorado has a nearly \$27 billion budget.<sup>78</sup> Marijuana revenues thus make up less than one percent of the state budget. While these funds are definitely welcome in difficult budget times, the idea that marijuana revenues are going to close significant revenue gaps in the states is fanciful. Furthermore, much of this revenue was earned at a time when Colorado had a near monopoly on recreational marijuana; if you weren't a medical patient and you wanted to purchase marijuana from a store rather than a drug dealer, you had to travel to either Colorado or Washington State to do so.<sup>79</sup> As more and more states, particularly the behemoth of California, begin offering marijuana for sale to all adults, revenue can be expected to fall. As production ramps up and price declines, revenues may flatten out or drop.

None of the foregoing is to say that marijuana legalization has proceeded without problems in Colorado. It has not, as I describe more fully in the next section. Rather, the conclusion that not much changed when marijuana became legally available is merely one data point that states (and other nations)<sup>80</sup> should consider in determining whether to implement marijuana law reform themselves. There are good reasons to tax and regulate marijuana like alcohol rather than prohibiting it—reallocating law enforcement resources from non-violent crimes

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75. Mark A.R. Kleiman, *Legal Commercial Cannabis Sales in Colorado and Washington: What Can We Learn?*, BROOKINGS INST., July 2016, available at <https://www.brookings.edu/wp-content/uploads/2016/07/Kleiman-Wash-and-Co-final.pdf>.

76. Kate McKee Simmons, *Colorado Reports \$1.3 Billion in Marijuana Sales in 2016*, WESTWORD, Feb. 13, 2017, available at <http://www.westword.com/marijuana/colorado-reports-13-billion-in-marijuana-sales-in-2016-8785295> (on file with *The University of the Pacific Law Review*).

77. Jacob Sullum, *What the World Can Learn from Colorado's Marijuana Experience*, FORBES, Apr. 21, 2016, available at <https://www.forbes.com/sites/jacobsullum/2016/04/21/what-the-world-can-learn-from-colorados-marijuana-experience/#6ff8e1505b94> (on file with *The University of the Pacific Law Review*).

78. See, e.g., John Frank, *Colorado Legislators Send Budget Bill to Governor with Reservations*, DENVER POST, May 3, 2017, available at <http://www.denverpost.com/2017/05/03/colorado-budget-bill-approved/> (on file with *The University of the Pacific Law Review*).

79. Sam Kamin & Joel Warner, *How Lucrative is it to be One of Colorado's Legal Marijuana Dealers? (Not as Lucrative as Being an Illegal One.)* SLATE Jan. 16, 2014, available at [http://www.slate.com/articles/news\\_and\\_politics/altered\\_state/2014/01/colorado\\_marijuana\\_legalization\\_how\\_lucrative\\_is\\_it\\_to\\_be\\_a\\_legal\\_weed\\_dealer.html](http://www.slate.com/articles/news_and_politics/altered_state/2014/01/colorado_marijuana_legalization_how_lucrative_is_it_to_be_a_legal_weed_dealer.html) (on file with *The University of the Pacific Law Review*).

80. See Cannabis Act, a bill that would “create a strict legal framework for controlling the production, distribution, sale and possession of cannabis across Canada,” available at <https://www.canada.ca/en/services/health/campaigns/legalizing-strictly-regulating-cannabis-facts.html> (on file with *The University of the Pacific Law Review*).

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to more serious ones; acknowledging the disproportionate impact that marijuana criminalization has on communities of color; minimizing the violence and environmental degradation associated with the illegal production of marijuana—but all of that is not to say that marijuana legalization is a panacea. Concerns about the rise of Big Marijuana to rival Big Tobacco, Big Pharma, and Big Alcohol are real and troubling.<sup>81</sup> The profit motive and the habit-forming nature of marijuana for some users<sup>82</sup> are genuine concerns that smart regulation needs to address. But these concerns are properly the argument for intelligent regulation rather than reasons to keep marijuana illegal. Currently marijuana is being marketed to children, sold to problem users, and pushed by those with a profit motive. At bottom the argument for marijuana legalization and regulation is that these risks can be minimized if the person selling the marijuana is a licensed and regulated businessperson rather than a drug lord.<sup>83</sup>

### C. *Stumbling Blocks*

While Colorado's regulations have largely been acknowledged as successful, even by many who originally opposed legalization in the state,<sup>84</sup> they were

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81. See, e.g., *Big Pot: The Commercial Takeover of Marijuana*, CBS News, Nov. 6, 2016.

Dan Riffe, once one of the nation's most influential lobbyists for legalization, now opposes what he sees as a commercial takeover of the movement—the creation of an industry dependent on heavy users and kids.

“Legalization is happening, you know, for the first and only time,” he said. “And it seems like instead we're just going to do alcohol again. We're just going to do tobacco again. We're just going to create this big, commercial model.” Mark Kleiman, a professor of public policy at New York University and a decades-long supporter of softer marijuana laws, shares Riffe's concerns. “We're lurching from prohibition to the most wide-open kind of legalization,” he said. “Probably a bad idea.”

*Id.* But see, John Hudak & Johnathan Rauch, *Worry About Bad Marijuana, Not Big Marijuana*, BROOKINGS INST., June 2016.

In our view, any conversation about marijuana policy should not begin with a debate over firm size or corporate structure. Instead, the discussion should focus on the types of behaviors, outcomes, situations, and costs that should be encouraged or avoided, and how best to generate the incentives that achieve each. Deterring marketing to minors or to problem users, preventing price and market manipulation, assuring appropriate taxation, guarding against regulatory capture and caprice, and assuring reasonable competition: such are the goals that make for effective public policy. Worrying about corporate size or clout per se addresses none of those issues.

*Id.*

82. *Is Marijuana Addictive?*, NAT'L INST. OF DRUG ABUSE (last updated April 2017), available at <https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-addictive> (on file with *The University of the Pacific Law Review*).

83. Ethan Nadelmann, *The Case for Legalization*, 92 PUB. INT. 3 (1988) (“It is important to stress what legalization is not. It is not a capitulation to the drug dealers—but rather a means to put them out of business.”).

84. See, e.g., David Kelly, *Governor Who Called Legalization “Reckless” Now Says Colorado's Pot Industry Is Working*, L.A. TIMES, May 17, 2016, available at <http://www.latimes.com/nation/la-na-hickenlooper-marijuana-20160516-20160516-snap-story.html> (on file with *The University of the Pacific Law Review*) (quoting Colorado Governor John Hickenlooper, an early opponent of legalization within his state, as

certainly not without their challenges. In this section I discuss some of the regulatory stumbles that Colorado took along the way and the implications of these missteps for the task facing California in implementing recreational and medical regulations in the year ahead.

One of the biggest problems in Colorado—and one California will certainly have to grapple with—is how to reconcile medical and recreational laws. Under the current regulations in Colorado, genetically identical marijuana plants growing side-by-side in the same warehouse are governed by very different sets of rules depending on whether they are a part of the recreational market or the medical market.<sup>85</sup> The problem with this arrangement is more than needless regulatory complexity and duplication of effort. First, recreational marijuana is heavily taxed while medical marijuana purchasers generally pay only standard sales tax on their purchases.<sup>86</sup> Thus, medical marijuana can be a cheaper, more attractive alternative to recreational marijuana for non-medical patients.<sup>87</sup> The numbers in Colorado seem to bear this out. In October of 2012, when medical marijuana was the only legal alternative to the black market, 108,481 patients were currently registered with the state department of public health to participate in the medical marijuana program.<sup>88</sup> That number had decreased less than 13% to 94,577 by December 31, 2016,<sup>89</sup> nearly four years after marijuana possession and home-grow became legal for all adults and three years into the taxed and regulated recreational market. That is, although they could buy their marijuana on the recreational market, most medical patients chose to keep their medical cards.

More telling, the number of new medical marijuana patient applications between October 31, 2012 and December 31, 2016 was 144,138.<sup>90</sup> In other

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saying that legalization was “not as vexing as we thought it was going to be.”).

85. Abby Hutmacher, *A Practical Guide to Help You Compare Med & Rec Marijuana*, POTGUIDE.COM (Jan 5, 2016), available at <https://www.coloradopotguide.com/colorado-marijuana-blog/2016/january/05/a-practical-guide-to-help-you-compare-med-rec-marijuana/> (on file with *The University of the Pacific Law Review*).

86. Christopher Ingraham, *Colorado Marijuana Tax Revenues Surge as Recreational Sales Surpass Medical*, WASH. POST, Sept. 11, 2014, available at [https://www.washingtonpost.com/news/wonk/wp/2014/09/11/colorado-marijuana-tax-revenues-surge-as-recreational-sales-surpass-medical-for-the-first-time/?utm\\_term=.267421185597](https://www.washingtonpost.com/news/wonk/wp/2014/09/11/colorado-marijuana-tax-revenues-surge-as-recreational-sales-surpass-medical-for-the-first-time/?utm_term=.267421185597) (on file with *The University of the Pacific Law Review*).

87. See Hutmacher, *supra* note 86 (Purchasing medical marijuana rather than recreational marijuana has other advantages. Medical patients are able to purchase up to two ounces at a time, compared with the single ounce that recreational purchasers can acquire.)

88. Colo. Dep’t of Pub. Health & the Env’t, Medical Marijuana Registry Program Update (as of Oct. 31, 2012), (last visited Aug. 2, 2017), available at [https://www.colorado.gov/pacific/sites/default/files/CHED\\_MMR\\_10\\_2012\\_MMR\\_report.pdf](https://www.colorado.gov/pacific/sites/default/files/CHED_MMR_10_2012_MMR_report.pdf).

89. Colo. Dep’t of Pub. Health & the Env’t, Medical Marijuana Registry Program Update (as of December 31, 2016) (last visited Aug. 2, 2017), available at [https://www.colorado.gov/pacific/sites/default/files/CHED\\_MMR\\_Report\\_December\\_2016.pdf](https://www.colorado.gov/pacific/sites/default/files/CHED_MMR_Report_December_2016.pdf).

90. *Id.* At the end of October, 2012, the total number of new patient applications received since June 2010 was 198,838; by the end of 2016, that number had swelled to 342,976. The difference between these totals

words, more than 144,000 Coloradans who had access to the recreational marketplace to purchase marijuana chose to apply for patient cards so that they could purchase medical marijuana instead. While some of those 144,138 individuals were no doubt sincere medical patients, it strains credulity to believe that all of them required medical marijuana for a chronic condition as required by statute. In 2016, medical marijuana sales constituted approximately one-third of all marijuana sales in Colorado.<sup>91</sup> That is, the 95,000 medical patients in the state in 2016 consumed half as much marijuana as the rest of the state's adults and all of the state's visitors, combined.<sup>92</sup> The state collected no marijuana taxes on any of those purchases.

Another concern is that medical caregivers are not regulated by the state in the same way that commercial medical and recreational establishments are overseen by the Department of Revenue.<sup>93</sup> Recall that Colorado's Amendment 20 exempted medical patients *and their caregivers* from the state's marijuana possession and cultivation provisions. However, while commercial marijuana producers—both medical and recreational—are subject to extensive and expensive regulation, caregivers have been almost entirely unregulated in the state.<sup>94</sup> This led to concern that large amounts of unregulated cannabis were being produced under the guise of medical caregiving.<sup>95</sup> For example, because

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indicates that 144,138 new patients registered with the state in the four years between counts. The number of new applicants exceeds the number of current patients because a number of patients failed to renew their cards during this time and left the medical marijuana rolls.

91. See Alicia Wallace, *Colorado Cannabis: \$1.3 Billion Worth of Marijuana Sold in 2016*, THE CANNABIST, Feb. 9, 2017, available at <http://www.thecannabist.co/2017/02/09/colorado-marijuana-sales-2016/73415/> (reporting that recreational sales accounted for over \$875 million in 2016 while medical sales topped \$437 million). Interestingly, medical sales grew less than ten percent over the previous year while recreational sales increased nearly 50%.

92. See *The Legalities of Medical Marijuana State by State*, MARIJUANA.COM (Aug. 24, 2016), available at <http://www.marijuana.com/community/threads/the-legalities-of-medical-marijuana-state-by-state.171665/> (on file with *The University of the Pacific Law Review*). Colorado does not offer reciprocity to those visiting from another medical marijuana state; anyone purchasing medical cannabis in a Colorado dispensary must show a valid Colorado registry card.

93. See, e.g., Colorado Governor's Office, *Marijuana Grey Market: Challenges*, Aug. 16, 2016, available at <https://www.colorado.gov/pacific/sites/default/files/16Marijuana0817Marijuana%20Grey%20Market.pdf> (on file with *The University of the Pacific Law Review*).

Amendment 20 to the Colorado Constitution and subsequent enacting and implementing legislation allow medical marijuana patients and caregivers to grow up to 99 plants in a residential setting. Beyond a statutory patient/caregiver registry system coming online in January 2017, state agencies do not have the authority to regulate these grows. While local, state, and federal law enforcement do have enforcement powers in this area, the laws governing such operations are murky. There are, in short, few ways to prevent grey marketeers from operating under the guise of a residential caregiver grow in order to unlawfully ship marijuana out of state.

*Id.*

94. *OpEd: Shut Down Colorado's Gray Marijuana Market*, DENVER POST, Mar. 7, 2017, available at <http://www.denverpost.com/2017/03/07/shut-down-colorados-gray-marijuana-market/> (on file with *The University of Pacific Law Review*).

95. See, e.g., *id.* ("While licensed, commercial marijuana dispensaries are the most visible and highly

caregivers were not originally required to register with the state, there was simply no way for law enforcement officials, discovering a large grow facility that was not registered with the Department of Revenue, to determine whether that grow was a legitimate production facility for medical patients, an entirely unauthorized outlaw facility, or, perhaps most likely, somewhere in between. New regulations now require medical caregivers to register with the state<sup>96</sup> and the number of plants that can be grown on a single unlicensed property has dropped from 495 to 99 to 12 in the last year.<sup>97</sup> Given that these regulations impose restrictions on the constitutional amendment that created medical marijuana in Colorado, these restrictions were controversial and are likely to lead to litigation.<sup>98</sup>

Another thorny regulatory issue has been the public consumption of marijuana. Amendment 64 in Colorado explicitly stated that it did not authorize the open and public consumption of marijuana.<sup>99</sup> Although often misunderstood, this provision did not operate to *prohibit* the open and public consumption of marijuana; it simply indicated that the passage of the initiative did not, without more, repeal the preexisting prohibition on open and public use. Yet nearly five years after the passage of Amendment 64, public use remains prohibited in

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reported aspect of marijuana legalization, Colorado voters have also provided the right to responsible and limited home-growing, both as caregivers and for personal use. However, in some cases the home grow provisions have been exploited by criminals, seemingly organized, to create black and grey markets that threaten the safety of Coloradans and undermine our regulatory system. These markets have emerged from Constitutional loopholes and exist outside the intent of the law.”); and *OpEd: Shut Down Colorado’s Gray Marijuana Market*, DENVER POST, Mar. 7, 2017, available at <http://www.denverpost.com/2017/03/07/shut-down-colorados-gray-marijuana-market/> (on file with *The University of the Pacific Law Review*) (“A gray area of the law allows individuals to combine their plant counts for massive unregulated co-op home grows, and medical marijuana patients can ask a caregiver to grow their plants for them in a money-saving co-op with other patients. Both situations mean mega-grows. It’s difficult for law-enforcement agents to distinguish which of these huge grows are legitimate personal or medical use operations and which are out-of-state cartels.”).

96. See Colorado Department of Revenue, *Caregiver Cultivation Registration* (last visited Jun. 1, 2017), available at <https://www.colorado.gov/pacific/enforcement/caregiver-cultivation-registration> (on file with *The University of the Pacific Law Review*) (stating that as of January 1, 2017, cultivating caregivers must register the location of each grow, the registration number of each patient for whom the grower is acting as a caregiver, and “any extended plant count numbers and their corresponding.”).

97. Jakob Rodgers, *New Year Rings in Huge Drop in Number of Marijuana Plants Colorado Caregivers Can Grow*, COLORADO SPRINGS GAZETTE, (Dec.28, 2016), (“Beginning Jan. 1, [2017] the maximum number of plants marijuana caregivers can grow will drop from 495 to 99 - one of the most sweeping changes to the caregivers program since Colorado voters approved medical marijuana in 2000.”); Brian Heuberger, *Colorado Reduces Marijuana Growing Limits on Residential Properties*, COLORADO POLITICS, (Apr. 5, 2017) (“In a rare show of bipartisanship, both the Colorado House and the Colorado Senate unanimously approved a bill that reduces the residential medical marijuana growing limit from 99 plants per household to 12 plants per household.”)

98. COLO. CONST. AMEND. 64 (7)(a). In this regard, it is important to note that it was the intent of the drafters to “limit any privileges or rights of a medical marijuana patient [or] primary caregiver.”

99. COLO. CONST. AMEND. 64 (3)(d) (“... [N]othing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.”).



Colorado and defining open and public use has been one of the trickiest regulatory concerns the state has confronted.<sup>100</sup>

The continued absence of any place to lawfully consume marijuana publicly stands in stark contrast to the stated purpose of Amendment 64: to regulate marijuana like alcohol. While alcohol can be enjoyed at bars, restaurants, sporting events, and cookouts, marijuana is essentially barred from all of these spaces. More than that, however, the unavailability of a location for public consumption is inconsistent with the notion that cannabis should be taken out of the shadows and into a safer, more regulated environment. While the regulation of cannabis elsewhere often turns a blind eye to gaps or omissions in regulations—in Holland, for example, marijuana may lawfully be sold out the front door of a coffee shop while there is no lawful way for it to enter the coffee shop through the back door<sup>101</sup>—regulations in Colorado were designed to create a fully legal way to produce, sell, and consume cannabis. Unfortunately, for many consumers, their capacity to comply with the law stops once they are in possession of marijuana; without a place to legally consume, they are forced to resort to smoking in alleyways and parked cars for want of a lawful place to consume.

Nonetheless, the opposition to changing the law regarding public consumption has been strong. A bill to license the equivalent of marijuana brewpubs (where marijuana may be purchased and consumed on the premises) failed during the 2017 legislative session,<sup>102</sup> as did a bill to permit in private clubs the consumption of marijuana bought elsewhere.<sup>103</sup> The City of Denver passed an initiative authorizing such clubs, but its implementation has been slowed by conflicts with state-level initiatives<sup>104</sup> and by concerns about the need to avoid provoking federal law enforcement officials. As of June 1, 2017 there

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100. See John Frank, *Colorado Lawmakers Remain Divided on Whether You Can Smoke Marijuana on Your Front Porch*, DENVER POST, (May 3, 2017), (“The sticking point is whether you can smoke marijuana on a front porch in public view—one of the most enduring debates since legalization in 2012. ‘Welcome to the jungle,’ quipped Rep. Dan Pabon, a Denver Democrat and one of the negotiators. ‘This has been an issue that we have discussed and debated since the inception of Amendment 64.’”).

101. See, e.g., Michael Scott Moore, *Where Does Amsterdam's Marijuana Come From?*, PACIFIC STANDARD, Apr. 20, 2011, available at <https://psmag.com/news/where-does-amsterdams-dope-come-from-30408> (on file with *The University of Pacific Law Review*).

102. SB17-063, Marijuana Club License, available at <https://leg.colorado.gov/bills/sb17-063>.

103. SB17-184, Private Marijuana Clubs Open and Public Use, available at <https://leg.colorado.gov/bills/sb17-184>.

104. For example, shortly after passage of Initiative 300, the Department of Revenue – which regulates alcohol as well as marijuana – announced that no alcohol-licensed business could allow marijuana to be consumed on the premises, thus nixing the idea that bars and restaurants would be able to serve as marijuana consumption sites. See John Murray, *Bars Can't Seek New Denver Social Marijuana Use Permits Allowed by Initiative 300*, State Says, DENVER POST, Nov. 18, 2016, available at <http://www.denverpost.com/2016/11/18/bars-cant-seek-new-denver-social-marijuana-use-permits-allowed-by-initiative-300/> (on file with *The University of Pacific Law Review*).

remains nowhere in Colorado where marijuana can be lawfully consumed outside the home.<sup>105</sup>

Finally, other problems have arisen having to do with particular products or means of consuming cannabis. Edible products in particular have proven to be a particularly problematic regulatory issue.<sup>106</sup> At the time that the first recreational marijuana regulations were written in Colorado, the focus was mainly on the smoking of dried marijuana flowers (buds). It quickly became clear however, that many consumers were choosing to consume edible or other infused products rather than smokable flowers.<sup>107</sup> The reasons for this are several. First, as we have seen, there was nowhere for most people to lawfully smoke marijuana. The ban on smoking of marijuana both in public and in all the same places—bars, restaurants, etc.—in which tobacco smoking is prohibited drove consumers toward more discrete products such as candies and baked goods infused with cannabis oils. But this created its own regulatory challenges. Such products have a long latency period between consumption and the onset of psychoactive effect.<sup>108</sup> This long delay before the full effects of consumption are felt can cause neophytes to overconsume as they wait for the effect of the product to kick in.<sup>109</sup> While edible products may be a very effective delivery device for a cancer patient struggling with lost appetite, they proved dangerous for inexperienced

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105. John Frank, *Why it's so hard to define where you can legally smoke pot in Colorado*, DENVER POST (May 18, 2017), available at <http://www.denverpost.com/2017/05/18/legally-smoking-pot-colorado/> (on file with The University of the Pacific Law Review).

106. See, e.g., Ricardo Baca, *Report: More than 15 Months In, Pot-Infused Edibles Still Confound*, DENVER POST, Apr. 11, 2015, available at <http://www.denverpost.com/2015/04/11/report-more-than-15-months-in-pot-infused-edibles-still-confound/> (on file with *The University of Pacific Law Review*).

107. Barbara Brohl, Ron Kammerzell, and W. Lewis Koski, *Colo. Dep't. of Rev., Marijuana Enforcement Division, Annual Update* (Feb. 27, 2015), at 24. According to the first annual report of the Marijuana Enforcement Division, 5.59 million units of infused marijuana products were sold in 2014, the first year of retail sales in the state.

108. Elise McDonough, *10 Commandments of Marijuana Edible Safety*, HIGH TIMES (Jun. 5, 2014), available at <http://hightimes.com/edibles/10-commandments-of-marijuana-edible-safety/> (on file with *The University of Pacific Law Review*).

109. See, e.g., Maureen Dowd, *Don't Harsh Our Mellow, Dude*, NEW YORK TIMES, June 3, 2014.

The caramel-chocolate flavored candy bar looked so innocent, like the Sky Bars I used to love as a child. Sitting in my hotel room in Denver, I nibbled off the end and then, when nothing happened, nibbled some more. I figured if I was reporting on the social revolution rocking Colorado in January, the giddy culmination of pot Prohibition, I should try a taste of legal, edible pot from a local shop. What could go wrong with a bite or two? Everything, as it turned out. Not at first. For an hour, I felt nothing. I figured I'd order dinner from room service and return to my more mundane drugs of choice, chardonnay and mediocre-movies-on-demand. But then I felt a scary shudder go through my body and brain. I barely made it from the desk to the bed, where I lay curled up in a hallucinatory state for the next eight hours. I was thirsty but couldn't move to get water. Or even turn off the lights. I was panting and paranoid, sure that when the room-service waiter knocked and I didn't answer, he'd call the police and have me arrested for being unable to handle my candy.

*Id.*

consumers.<sup>110</sup> New regulations were drafted dealing with a number of issues regarding edibles: new regulations placed limits on the total amount of THC a single edible package could contain; required that individual dosages be clearly marked; banned shapes and colors that appeal to small children; and imposed a requirement marijuana edibles be identifiable as such even once they left their original packaging.

That all of these new regulations were needed to respond to initial gaps or omissions in regulation is not (necessarily) an indictment of the original rules that were put in place. Rather, they were an acknowledgment that even a thoughtful process entered into in good faith by a representative group of stakeholders could nonetheless fail to anticipate conditions on the ground. Colorado regulators had essentially no experience with the operation of a legal marijuana market and there were bound to be unintended consequences of their actions. In fact, one of the takeaways for California from the Colorado experience is that exactly this kind of nimbleness and flexibility are necessary to any functioning regulatory system.

### III. CONCLUSION: WHAT THIS ALL MEANS FOR CALIFORNIA

Despite the fact that marijuana regulation has proceeded relatively smoothly in Colorado—as well as the other states where regulations are in place – there is no doubting that the task facing California is a daunting one. Fortunately, California does not write upon a blank slate. The experience of Colorado, in particular, has already informed California many ways. The Blue Ribbon Commission that Lieutenant Governor Gavin Newsom established to formulate best practices for the regulation of marijuana drew heavily on the experience of Colorado's own Task force to implement Amendment 64.<sup>111</sup> Furthermore, Proposition 64 borrowed more than just its number and its name from Colorado's Amendment 64, An Initiative to Tax and Regulate Marijuana Like Alcohol. Many of the provisions of the Proposition 64—the limits on possession and cultivation, the permitting of vertical integration (prohibited under the MCRSA), the granting of priority to existing medical producers, and criminal background checks for licensees—can be found as well in Amendment 64 but not in California's previous attempt at recreational legalization, Proposition 19.

I close by highlighting a few of the other lessons that California can draw from the way implementation has proceeded in Colorado. The first has to do with the interplay between medical and recreational regulations. On April 2, 2017, California Governor Jerry Brown released a 79-page report, setting forth a

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110. Robert Glatter, *The Hidden Danger of Marijuana Edibles*, FORBES (Jul. 27, 2015), available at <https://www.forbes.com/sites/robertglatter/2015/07/27/the-hidden-danger-of-marijuana-edibles/#67427fd77f72> (on file with *The University of the Pacific Law Review*).

111. I served as a member of both bodies.

number of proposals to harmonize ambiguous or inconsistent terms of the MCRSA and AUMA.<sup>112</sup> The document suggests the establishment of a dual regulatory system, whereby separate rules are set forth for the medical and recreational markets: “While many components of the regulatory structure are proposed to be harmonized, the administration proposes to preserve the integrity and separation of the medicinal and adult use industry by maintaining these as two separate categories of license types with the same regulatory requirements for each.”<sup>113</sup> As discussed above, there are legitimate concerns about the operation of parallel systems for the regulation of recreational and medical marijuana. In particular, to the extent the medical system is more porous (and lower taxed) than the recreational system, it will undercut many of the policy goals of recreational regulation.

This is likely unavoidable, however, at least for now. Proposition 64 did not repeal most previously existing medical marijuana provisions. It was clearly not the intent of the voters to repeal the medical system and replace it with a recreational one; the two were meant to exist side-by-side. Nonetheless, a better long-term solution would probably entail a single-stream regulatory system with accommodation made for sincere medical patients. So, for example, a single tax and regulate regime could be produced to govern all marijuana grown and sold in California, with medical patients exempted from taxes imposed in the recreational marketplace and perhaps granted other accommodations such as more concentrated products or higher purchase limits.<sup>114</sup> This solution, however, would likely anger medical patients who were already worried about the changes that recreational marijuana will bring to the existing medical market.<sup>115</sup> There is concern that the recreational market will have little incentive to create the kinds of products—particularly those high in non-psychoactive CBD—that medical patients require and may generate a backlash against all marijuana law reform. So long as there are separate systems for medical and recreational marijuana, moreover, and so long as the tax rates for those two markets differ, there will always be an incentive for regular users to avoid the recreational system and seek

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112. Department of Consumer Affairs, *Bureau of Cannabis Control Proposed Trailer Bill Legislation* (Apr. 2, 2017), available at [http://www.dof.ca.gov/Budget/Trailer\\_Bill\\_Language/documents/200CannabisRegulationDraft.pdf](http://www.dof.ca.gov/Budget/Trailer_Bill_Language/documents/200CannabisRegulationDraft.pdf).

113. *Id.* at 2.

114. Proposition 64 accomplishes this in part by exempting medical patients from a 7.5% sales tax on marijuana, but not the 15% excise tax or \$9.25/ounce cultivation tax.

115. See, e.g., Patrick McGreevy, *The Push to Legalize Pot for All Has Deeply Divided the Medical Marijuana Community*, L.A. TIMES, Oct. 4, 2016, available at <http://www.latimes.com/politics/la-pol-ca-proposition-64-recreational-pot-opponents-20161004-snap-story.html> (on file with *The University of Pacific Law Review*). (“Proposition 64 has split the medical cannabis community, with some seeing new opportunity and others fearing it will wreck a system that is working for nearly 800,000 medical pot card holders.” A pool of medical marijuana producers showed that 31% supported Proposition 64, 31% opposed it, and 38% were undecided).

refuge in the medical marketplace. With an estimated one and a half million Californians already holding marijuana cards, this could significantly cut into tax revenue.<sup>116</sup> In the interim, then, California will have to engage in the same delicate balance that Colorado has engaged in, attempting to close the medical loophole without running afoul of rights and expectations that have been created by the state's medical marijuana laws.

Vertical integration is another issue that is already proving contentious in California. Marijuana states vary widely in their approach to the question: While Colorado initially required that marijuana businesses be vertically integrated, Washington State adopted a three-tier distribution model based on the system of alcohol distribution that explicitly *prohibited* vertical integration.<sup>117</sup> California law already reflects this schizophrenia: Proposition 64 permits vertical integration while MCRSA largely prohibited it. Something, obviously, must give. In his April 2<sup>nd</sup> proposal, Governor Brown proposed adopting AUMA's provisions over those of MCRSA, allowing license holders to combine all types of licenses except testing.<sup>118</sup> This recommendation has drawn immediate fire from many in the state.<sup>119</sup> The concern is that vertical integration increases the market power of the few entities able to acquire multiple licenses. For this reason, even some medical marijuana growers' associations have expressed concern about vertical integration.<sup>120</sup> One protection against the acquisition of such monopolistic power is the phased rollout of production licenses, with the

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116. Of course, because registration with the state is optional, no one knows exactly how many Californians have medical marijuana cards. Nonetheless, the Marijuana Policy Project estimates 1.125 million cardholders based on registry rates in other states. See Marijuana Policy Project, *Medical Marijuana Patient Numbers* (last visited June 1, 2017), available at <https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/> (on file with *The University of the Pacific Law Review*)

117. For a discussion of the pros and cons of each method, see, e.g., Jonathan Caulkins, et al., *Considering Marijuana Legalization: Insights for Vermont and Other Jurisdictions*, RAND, 2015 at 111-12 ("Vertical integration is ordinarily banned in the alcohol business in the United States. One argument against vertical integration is that concentrated economic power will lead to political power and effective lobbying to the benefit of the industry and to the detriment of public health. Proponents of a vertical integration argue that banning it is likely to result in inefficient and costly operations. However, some people who focus on protecting public health see inflating retail prices via this inefficiency as a feature, not a bug, for the long run.").

118. See *Trailer Bill* at 3. Obviously, testing licensees cannot compete with those cultivators, manufacturers, and retailers whose products they test.

119. See, e.g., Taryn Luna, *Jerry Brown Wades Into Pot Battle with Plan to Merge Medical, Recreational Marijuana*, SACRAMENTO BEE, Apr. 5, 2017, (reporting opposition from the Teamsters union to the governor's decision to allow vertical integration.); Michael R. Blood and Paul Elias, *California Police Not Down with Gov. Brown's Marijuana Plan*, THE CANNABIST, Apr. 6, 2017, ("Proposition 64 has split the medical cannabis community, with some seeing new opportunity and others fearing it will wreck a system that is working for nearly 800,000 medical pot card holders." A pool of medical marijuana producers showed that 31% supported Proposition 64, 31% opposed it, and 38% were undecided).

120. See *id.* ("Hezekiah Allen, head of the California Growers Association, also said his organization has concerns with the elimination of the multiple licenses prohibition. 'It could lead to mega-manufactures and mega-chain stores,' Allen said.").

largest production facilities not coming online until 2023.<sup>121</sup> The fact that economies of scale will not be fully realized for several years, and that Proposition 64 makes provision for small, “microbusiness” licenses creates the possibility of a more diverse market and helps temper fears of a Big Marijuana industry springing up overnight.<sup>122</sup> In this regard, California’s wine industry—which abuts the marijuana growing regions of the state—provides some hope. Although there are a few large producers who create cheap, mass-consumed wines, there are also successful artisanal producers who are able to make a living (and charge a premium) for a more hand-crafted product.

Finally, and perhaps most importantly, is the importance of enforcement. The regulation of marijuana is expensive and time-consuming. It asks a lot of both regulators and the regulated. If California implements a robust regulatory regime, it will be crucial to the functioning of that regime that it covers as much marijuana produced in the state as possible. If the state’s currently existing marijuana growers do not switch from the black and grey markets where they currently ply their trade to the regulated market, the entire regulatory apparatus in California will likely fail. The problem of regulatory compliance can only be solved if law-abiding growers are confident that their neighbors are also subject to the costs and complications of regulation. The collective action problem that is created will create incentives for complying producers to report those who are not in compliance; a grower paying licensing fees, taxes, and regulatory costs simply cannot compete with a neighbor who is not. In Colorado, a hotline the Department of Revenue instituted a hotline for regulated businesses to call in order to report noncompliant ones.<sup>123</sup>

There is no doubt that this norm will be difficult to instill in the hills of Northern California. The anti-authoritarian spirit runs deep there. There is antipathy toward the regulation of marijuana as a business and a distrust of government and its agents. These concerns are not paranoia. Many of the growers in these hills have been to prison or seen their family and friends sent there. But the dirty secret of marijuana law reform is that it is not the end of government’s interest in marijuana production and sale; it only signals a shift from a criminal model to a regulatory one. While marijuana growers are unlikely to report their neighbors if doing so would lead to their arrest and conviction, they might be willing to do so if the consequence were that they no longer had to compete with others not bearing the burden of regulatory compliance. A regulatory regime will have to be constructed that enables that to happen.

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121. So-called Type 5 licenses—outdoor farms of more than an acre—will not be available until the year 2023. See Proposition 64§ 26061(d).

122. See Proposition 64§ 26070(a)(3).

123. See *Contact Us—Marijuana Enforcement*, Colo. Dep’t. of Rev., Marijuana Enforcement Division, available at <https://www.colorado.gov/pacific/enforcement/contact-us-marijuana-enforcement> (on file with *The University of Pacific Law Review*).

*2017 / What California Can Learn from Colorado's Marijuana Regulations*

In the time and space I have, it would be impossible to catalog the challenges facing California. They are monumental. Rather, I have hoped to flag a few examples and to offer a few insights from what Colorado has experienced. Even with this experience, it would be unrealistic to expect California regulators and lawmakers to get this task right the first time. Rather, the final takeaway is that it makes more sense to see regulation as a process rather than a one-time endeavor. With patience and determination, however, California has the opportunity once again to become a leader in the area of marijuana law reform.