

## Lessons Learned from the Governor’s Task Force to Implement Amendment 64

Introduction .....	1337
I. The Challenges Facing the Task Force .....	1340
II. The Work of the Task Force and the Working Groups .....	1343
A. Balancing State and Federal Concerns .....	1343
B. Taxation.....	1345
C. Regulatory Framework.....	1346
1. Borrowing from Colorado’s Medical Marijuana Framework.....	1347
2. Vertical Integration Requirement .....	1348
3. Limiting New Licenses to Existing Licensees .....	1351
III. The Road Ahead .....	1352

### INTRODUCTION

In November 2012, more than fifty-five percent of Colorado voters passed Amendment 64, a voter initiative titled, “An Act to Regulate Marijuana Like Alcohol.”<sup>1</sup> The measure removed Colorado’s criminal penalties for possession of less than one ounce of marijuana and

---

\* Professor and Director, Constitutional Rights and Remedies Program, University of Denver, Sturm College of Law. I thank the editors of the *Oregon Law Review* for allowing me to participate in this discussion. The views expressed herein are my own and do not represent the opinions of the University of Denver, the Office of the Governor, or the Amendment 64 Task Force.

<sup>1</sup> E.g., *Ballot Measure: Colorado (Colorado Amendment 64)*, CNN POLITICS (Dec. 10, 2012, 10:22 AM), <http://www.cnn.com/election/2012/results/state/CO/ballot/01; Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012>, CAMPAIGN TO REGULATE MARIJUANA LIKE ALCOHOL, <http://www.regulatemarijuana.org/s/regulate-marijuana-alcohol-act-2012> (last visited May 28, 2013).

permitted individuals to cultivate up to six marijuana plants and to give away without remuneration amounts up to one ounce.<sup>2</sup> More significantly, Amendment 64 called on the legislature to enact appropriate legislation to authorize and regulate the retail sale of marijuana by January 1, 2014.<sup>3</sup> A similar measure was passed by nearly the same margin simultaneously in the state of Washington.<sup>4</sup>

While eighteen states plus the District of Columbia had previously enacted measures permitting marijuana to be used for medical purposes,<sup>5</sup> the measures in Colorado and Washington were the first to embrace full legalization of small amounts of the drug and to call for the regulation of a for-profit recreational marijuana industry. Their passage made national headlines in large part because marijuana remains a Schedule I narcotic—a drug whose manufacture, possession, and sale remain serious felonies under federal law.<sup>6</sup> The Obama Justice Department had strongly opposed an earlier, unsuccessful legalization effort in California,<sup>7</sup> and the passage of Amendment 64 and Proposition 502 in Washington State only sharpened the conflict between the states' experimentation with marijuana decriminalization and the federal government's continuing prohibition of the drug.

In part because of concerns about a showdown with the federal government over marijuana policy, Colorado Governor John

---

<sup>2</sup> COLO. CONST. art. 18, § 16(3).

<sup>3</sup> *Id.* § 16(5)(h)–(i).

<sup>4</sup> *E.g.*, *Ballot Measure: Washington (Washington Initiative 502)*, CNN POLITICS (Dec. 10, 2012, 11:19 AM), [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://www.cnn.com/election/2012/results/state/WA/ballot/02; Initiative Measure No. 502, SECRETARY OF ST., <a href=) (last visited May 28, 2013).

<sup>5</sup> ALASKA STAT. ANN. § 17.37.010 (West, Westlaw through 2012 2d Reg. & 3d Special Legis. Sess.); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2012); COLO CONST. art. 18, § 14; HAW. REV. STAT. §§ 329-121 to -128 (West, Westlaw through 2012 Reg. Legis. Sess.); ME. REV. STAT. ANN. tit. 22, § 2383-B (West, Westlaw through 2011 2d Reg. Legis. Sess.); MICH. COMP. LAWS ANN. §§ 333.26421–.26430 (West, Westlaw through 2012 Reg. Legis. Sess.); MONT. CODE ANN. §§ 50-46-101 to -344 (West, Westlaw through 2011 legislation); NEV. REV. STAT. ANN. §§ 453A.010–.810 (West, Westlaw through 2011 Reg. Legis. Sess.); N.J. STAT. ANN. § 24:6I-1 (West, Westlaw through 2012 legislation); N.M. STAT. ANN. §§ 26-2B-1 to -7 (West, Westlaw through 2012 2d Reg. Legis. Sess.); OR. REV. STAT. §§ 475.300–.375 (2011); R.I. GEN. LAWS ANN. §§ 21-28.6-1 to -13 (West, Westlaw through 2012 Reg. Legis. Sess.); VT. STAT. ANN. tit. 18, §§ 4472–41 (West, Westlaw through 2011-2012 Legis. Sess.); WASH. REV. CODE ANN. §§ 69.51A.005–.903 (West, Westlaw through 2012 legislation).

<sup>6</sup> Controlled Substances Act, 21 U.S.C. §§ 801–889 (2006).

<sup>7</sup> *See, e.g.*, John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES (Oct. 16, 2010), <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.

Hickenlooper publicly opposed passage of Amendment 64.<sup>8</sup> After the election, however, he moved quickly to implement the bill's provisions.<sup>9</sup> Given the very short timeline set forth in the Amendment for the implementation of a regulatory regime,<sup>10</sup> time was clearly of the essence. On December 10, 2012, the Governor appointed a twenty-four-member Task Force to make recommendations to the General Assembly regarding the implementation of the Amendment.<sup>11</sup> The makeup of the Task Force was designed to include the many diverse stakeholders in the marijuana legalization process.<sup>12</sup> It included state elected officials, regulators from the Colorado Department of Revenue, representatives of the medical marijuana industry, marijuana consumers, organized labor, employers, local government, law enforcement, public health, prosecutors, and defense attorneys, among others.<sup>13</sup> I was asked to serve on the Task Force because of my interest and expertise in the federalism implications of state marijuana regulation.<sup>14</sup>

The Task Force was quickly broken up into a number of Working Groups, each containing both members of the Task Force and other stakeholders with expertise in the various specific topics assigned to the Working Groups—criminal law, regulatory framework, consumer safety and social issues, local authority and control, and tax and

---

<sup>8</sup> *Gov. Hickenlooper Opposes Amendment 64*, COLO. (Sept. 12, 2012), <http://www.colorado.gov/cs/Satellite?c=Page&childpagename=GovHickenlooper%2FCBONLayout&cid=1251630730489&pagename=CBONWrapper>.

<sup>9</sup> *Gov. Hickenlooper Signs Amendment 64 Proclamation, Creates Task Force to Recommend Needed Legislative Actions*, COLO. (Dec. 10, 2012), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251842728832&ssbinary=true> [hereinafter *Amendment 64 Proclamation*].

<sup>10</sup> *See, e.g.*, COLO. CONST. art. 18, § 16(5)(a) (“Not later than July 1, 2013, the Department shall adopt regulations necessary for the implementation of this section.”); *id.* § 16(5)(g)(I) (“Each application for an annual license to operate a marijuana establishment shall be submitted to the department. The Department shall begin accepting and processing applications on October 1, 2013.”).

<sup>11</sup> *Amendment 64 Proclamation*, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> I have been writing and researching in this area for several years. *See, e.g.*, Sam Kamin and Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013); Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012); Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 87 DENV. U. L. REV. 977 (2012); Sam Kamin, *The Challenges of Marijuana Law Reform*, in THE IMPACT OF THE DECRIMINALIZATION AND LEGALIZATION OF MARIJUANA (2011).

finance.<sup>15</sup> The Working Groups were asked to propose recommendations to the full Task Force for consideration. I was assigned to serve on the Regulatory Framework Working Group, which was charged with creating an overall structure for the regulation of recreational marijuana and with coordinating the recommendations coming from the other Working Groups.<sup>16</sup>

## I

### THE CHALLENGES FACING THE TASK FORCE

Our task was a difficult one. Beyond the obvious problems with trying to develop consensus among a twenty-four-member body—many of whom had been on opposing sides at the ballot box just months earlier—Colorado is attempting to do what has not previously been attempted anywhere in the United States and possibly in the world.<sup>17</sup> While many states and even some national governments have experimented with drug decriminalization, Colorado is the first jurisdiction attempting not merely to legalize possession of small amounts of marijuana but to construct a regulatory and tax regime for its manufacture and sale.

Furthermore, a lot of money is at stake. Medical marijuana sales in Colorado amounted to nearly \$200 million in 2012, generating \$5.5 million in sales tax.<sup>18</sup> Moreover, sales were made only to the roughly 100,000 registered medical marijuana patients in the state.<sup>19</sup> When sales to Colorado's several million adults (none of whom will be required to register with the state as marijuana users) become lawful in early 2014, it is logical to expect the size of the industry to grow by at least an order of magnitude.

---

<sup>15</sup> See JACK FINLAW & BARBARA BROHL, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64, 12 (2013) [hereinafter TASK FORCE REPORT], available at <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf>.

<sup>16</sup> *Id.* at 12, 124.

<sup>17</sup> While a number of American and foreign jurisdictions have experimented with the decriminalization, medicalization, or partial legalization of marijuana, I have been unable to come up with another example of any government choosing to legalize, regulate, and tax marijuana as Colorado and Washington have.

<sup>18</sup> *Colorado Medical Marijuana Dispensary Retail Sales and State Sales Tax by County FY2012*, COLO., <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251832728888&ssbinary=true> (last visited May 28, 2013).

<sup>19</sup> *Medical Marijuana Statistics*, COLO., <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (last visited May 28, 2013).

But Colorado's task is complicated by much more than novelty and the promise of untold riches. A more serious concern is the fact that marijuana remains a prohibited substance under federal law. Although the federal government's enforcement of the marijuana prohibition has been uneven at best,<sup>20</sup> it remains an ongoing threat. In fact, federal law provides for significant criminal penalties for those who knowingly facilitate a violation of the Controlled Substances Act.<sup>21</sup> As I stated somewhat facetiously at the first meeting of the Task Force, a colorable argument could be made that the entire work of the Task Force was to facilitate violations of federal law and that all of us participating in this endeavor were subject to arrest and prosecution.

There are several ways that federal disapproval of state legalization could manifest. The federal government could simply begin arresting Colorado residents engaged in violations of the CSA and/or subjecting their assets to forfeiture;<sup>22</sup> it could file suit to enjoin the

---

<sup>20</sup> Compare Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys on Investigations and Prosecutions in States Authorizing the Med. Use of Marijuana 2 (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf> ("As a general matter, pursuit of [Departmental] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources."), with Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use 2 (June 29, 2011) [hereinafter Cole Memo], available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> ("The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA], regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil . . . enforcement of federal law with respect to such conduct, including enforcement of the CSA.").

<sup>21</sup> See, e.g., Cole Memo, *supra* note 20, at 2 ("Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law." (emphasis added)).

<sup>22</sup> The federal government cannot commandeer state and local law enforcement officials to enforce federal laws. *Printz v. United States*, 521 U.S. 898, 935 (1997). However, the federal government remains free to enforce federal marijuana law throughout the land, regardless of state and local laws to the contrary. See, e.g., *Gonzales*

development and implementation of the regulatory apparatus;<sup>23</sup> it could threaten to withhold certain funds from Colorado and Washington State until such time as they put aside their plans to tax and regulate marijuana.<sup>24</sup> Upon the passage of Amendment 64, Governor Hickenlooper appealed to the federal government to provide guidance regarding its enforcement intentions if Colorado were to implement Amendment 64; no answer was forthcoming.<sup>25</sup> Without such guidance, the Task Force was essentially flying blind, unable to tailor its recommendations in light of federal enforcement intentions. While word trickled out of closed-door meetings that the federal government was concerned primarily about the diversion of adult-use marijuana,<sup>26</sup> we were reduced to little more than reading tea leaves.

Thus, our task became to balance two competing interests, only one of which we could fully understand. On one hand, the governor charged us to make recommendations to the General Assembly that would give effect to the will of the people as expressed through their passage of Amendment 64. On the other, we sought to forestall possible federal enforcement action that would destroy the possibility

---

v. Raich, 545 U.S. 1, 9 (2005) (upholding under the commerce power Congress's ability to prohibit marijuana in the states); *United States v. Oakland Cannabis Buyers' Collective*, 532 U.S. 483, 494–95 (2001) (rejecting the argument that a defendant acting pursuant to a state medical marijuana provision has a defense to the federal marijuana prohibition).

<sup>23</sup> For example, the government could bring a suit similar to the largely successful suit brought against the state of Arizona to enjoin the enforcement of SB 1070, the controversial Arizona immigration provision. *See Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012). However, it is also worth noting that nothing can be done to overturn Colorado's repeal of its criminal prohibition on possession of small amounts of marijuana. The federal government cannot commandeer the state legislature any more than it can the state law enforcement apparatus. *See, e.g., New York v. United States*, 505 U.S. 144, 161 (1992) (finding that Congress lacks the power under the Commerce Clause to compel the states to pass particular legislation).

<sup>24</sup> Of course, the power of the federal government to achieve through the spending power that which it cannot through other provisions of the constitution remains in doubt after the Affordable Care Act litigation. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012) (invalidating as impermissibly coercive Congress's attempt to expand Medicaid through the use of the Spending Power).

<sup>25</sup> *See, e.g., John Ingold et al., Hickenlooper Reaching Out to Feds on Colorado Marijuana Legalization*, DENVERPOST.COM (Nov. 7, 2012, 11:13 PM), [http://www.denverpost.com/breakingnews/ci\\_21949542/hickenlooper-reaching-out-feds-colorado-marijuana-legalization](http://www.denverpost.com/breakingnews/ci_21949542/hickenlooper-reaching-out-feds-colorado-marijuana-legalization).

<sup>26</sup> *See, e.g., Bob Young, Inslee Encouraged by Marijuana Talk with Attorney General Holder*, SEATTLE TIMES, Jan. 22, 2013, [http://seattletimes.com/html/localnews/2020190301\\_inseeholderpot.xml.html](http://seattletimes.com/html/localnews/2020190301_inseeholderpot.xml.html); Jim Camden, *Pot Leaving Washington Is Federal Concern*, THE SPOKESMAN-REV., Jan. 25, 2013, <http://www.spokesman.com/stories/2013/jan/25/pot-leaving-washington-is-federal-concern/>.

of Amendment 64 being implemented at all. These two often competing goals drove nearly every decision we made.

## II

### THE WORK OF THE TASK FORCE AND THE WORKING GROUPS

One thing that became clear very early in the process was that the task before us was massive. Our charge covered everything from advertising to product labeling, from product testing to local zoning, from taxation to education and public health. Our recommendations covered most of these topics,<sup>27</sup> hopefully creating a framework from which the Legislature and the Department of Revenue can develop a complete set of regulations. My goal here, however, is not to survey these recommendations in their entirety but rather to highlight a few illustrative examples that demonstrate the challenges faced by the Task Force. I hope that others can learn from our endeavors.

#### *A. Balancing State and Federal Concerns*

The two competing factors I describe above manifested, for example, in our consideration of the so-called “marijuana tourism” issue. Some argued that the language of Amendment 64 clearly implied, though it did not require, that in-state and out-of-state residents be treated identically with regard to retail sales. Amendment 64 repealed the ban on possession of small amounts of marijuana for everyone, whether resident or not; if out-of-staters were allowed to possess marijuana within the state, then surely they ought to be allowed to purchase it.<sup>28</sup> Yet others argued that permitting sales to out of state residents was exactly the sort of red flag that would awake the sleeping giant of federal law enforcement.

Cutting the baby in half, we developed widespread consensus for a compromise position allowing sales to be made to out-of-state

---

<sup>27</sup> Sometimes, though, we found a problem to be intractable. For example, we were unable to suggest a solution to the banking problem facing the marijuana industry. *See* TASK FORCE REPORT, *supra* note 15, at 98 (Recommendation 15.1). With regard to the unwillingness of banks to deal in the proceeds of marijuana transactions for fear of federal money-laundering charges, we were able to do little more than recommend “that the General Assembly consider all lawful alternatives to assist marijuana businesses to access the banking system.” *Id.* at 163.

<sup>28</sup> Many, myself included, argued that if out-of-staters were not allowed to purchase the marijuana which they were lawfully entitled to possess from a retail store, a black market would quickly develop to serve them. Amendment 64 was clearly designed to move marijuana out of the black market and into a regulated, and taxed, legal market.

residents, but encouraging the State Assembly to enact limits on the *amount* of marijuana that could be sold to those from out-of-state.<sup>29</sup> It was the belief both of the Working Group and the Task Force that reasonable limits on the amount an out-of-stater could buy at one time—we toyed with one-eighth of an ounce but ultimately decided against recommending a particular amount—would make prohibitively difficult the accumulation of an amount of marijuana worth smuggling out of state.

Our intent to balance state and federal concerns made us more cautious on the question of out-of-state investment in Colorado marijuana businesses, however. Under the medical marijuana regulations already in place in our state when Amendment 64 was passed in 2012, only those who have been Colorado residents for at least two years are entitled to apply for a medical-marijuana license.<sup>30</sup> We determined that concerns about federal objections were sufficient to recommend carrying that ban over into the adult-use marijuana realm.<sup>31</sup> In many ways, this decision demonstrated the “through the looking glass” nature of regulating marijuana in the face of the continuing federal prohibition. Normally, it would be constitutionally suspect to treat residents and non-residents differently with regard to the provision of a public benefit; there is concern that such laws violate the Privileges and Immunities Clause of the 14<sup>th</sup> Amendment by discriminating against out-of-state residents.<sup>32</sup> However, when that government “benefit” is a license to violate federal law, the situation is quite different. It is hard to imagine a federal court being sympathetic to an out-of-state plaintiff’s claims that Colorado was denying her the same opportunity to engage in serious felonious conduct that it affords its own citizens. In fact, we believed that permitting capital to flow into the marijuana industry from out of state—and permitting marijuana proceeds to flow out—would be seen by the federal government as more problematic than prohibiting out-of-state residents to own a licensed marijuana facility in our state.

---

<sup>29</sup> See TASK FORCE REPORT, *supra* note 15, at 49 (Recommendation 7.1).

<sup>30</sup> COLO. REV. ST. ANN. 12-43.3-307(1)(m) (West, Westlaw through 2011 legislation).

<sup>31</sup> TASK FORCE REPORT, *supra* note 15, at 33 (Recommendation 4.1).

<sup>32</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 506–07 (1999) (invalidating, under the Privileges and Immunities Clause of the Fourteenth Amendment, California’s attempt to limit newly arrived residents to the AFDC benefits they would have been entitled to in their last place of residence.).



### B. Taxation

Other issues touched on federalism only peripherally. For example, establishing an appropriate level of taxation proved particularly vexing for reasons having much more to do with public policy and the arcana of Colorado law than any questions of the appropriate division of power between state and federal governments. By its terms, Amendment 64 required the legislature to enact an excise tax of at most fifteen percent with the money earmarked to pay for school construction.<sup>33</sup> While this promise of tax revenue was certainly one of the more attractive aspects of the amendment for some voters, that promise may prove more illusory than it appeared on the ballot. Simply put, the people cannot, even through the initiative process, force their elected representatives to do anything. While the Amendment says that the legislature *shall* enact an excise tax, that is a command without an enforcement mechanism. Furthermore, under Colorado law, any new tax increase must be approved by the voters.<sup>34</sup> Thus, by approving Amendment 64, the public truly did little more than ask the legislature to ask the voters to approve a particular tax.<sup>35</sup>

The Task Force also considered the imposition of a separate statewide sales tax on marijuana. Although the Amendment mentions only the excise tax, we took it as a given that this express provision did not preclude the imposition of other taxes. Given that the cost of regulation is sure to be high, many argued that these costs should be offset by heavy sales taxes. The counterweight to this argument was twofold. Proponents of the Amendment argued that high taxes would contravene the underlying premise of Amendment 64—to treat marijuana more like alcohol than like an illicit substance.<sup>36</sup> Second, there was significant concern that a high tax on regulated marijuana would create a black market. While the public is probably willing to pay a premium for legal marijuana, this argument went, there are

---

<sup>33</sup> COLO CONST. art. 18, § 16(5)(d).

<sup>34</sup> COLO CONST. art. 10, § 20.

<sup>35</sup> See TASK FORCE REPORT, *supra* note 15, at 28 (discussing Recommendation 3.1, which includes the Task Force's finding that the passage of Amendment 64 was not the approval by the voters of a tax increase and that an additional public vote would be needed to comply with the requirements of the Taxpayer Bill of Rights (Tabor)).

<sup>36</sup> The excise tax rates on alcohol in Colorado are quite low. For example, in 2010, the tax per gallon of spirits, wine, and beer were \$2.28, \$0.28, and \$0.08, respectively. TAX FOUND., STATE SALES, GASOLINE, CIGARETTE, AND ALCOHOL TAXES (2010), available at [http://taxfoundation.org/sites/taxfoundation.org/files/docs/state\\_various\\_sales\\_rates\\_2000-2010.pdf](http://taxfoundation.org/sites/taxfoundation.org/files/docs/state_various_sales_rates_2000-2010.pdf).

limits to how high that premium can go. At a certain point, the price of regulated and taxed marijuana would become high enough to lure buyers into purchasing on the black market. In the end, we were unable to arrive at consensus on this point, encouraging the legislature to take testimony regarding the appropriate level, if any, of a statewide sales tax on marijuana.<sup>37</sup> Hopefully, though, our discussion of the issues and the input we got from members of the public were enough to give the State Assembly a good start on its consideration of this issue.<sup>38</sup>

### *C. Regulatory Framework*

One of the most important and telling decisions for the regulatory working group was determining the overall shape of the regulatory framework for the manufacture and sale of recreational—or adult use—marijuana.<sup>39</sup> Although the Amendment’s title, “Regulate Marijuana Like Alcohol,” might seem like a fairly clear exhortation on this point, we in fact chose a very different model for the regulatory regime for the new industry. Rather than regulating marijuana like alcohol, we chose to borrow heavily from the already extant medical marijuana regulations present in Colorado prior to the passage of Amendment 64.<sup>40</sup>

---

<sup>37</sup> It should be noted that Washington’s Initiative 502 called for a twenty-five percent excise tax on every level of marijuana transfer—from producer to processor, from processor to retailer, and from retailer to consumer. *See Initiative Measure No. 502*, SECRETARY OF ST., 40 (July 8, 2011), [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf).

<sup>38</sup> In this regard, it is worth noting that the co-chairs of the joint committee empanelled by the General Assembly to take on the Task Force’s recommendations—Representative Dan Pabon and Senator Cheri Jahn—were both members of the Task Force. *See Dennis Huspeni, Marijuana Joint Committee Created in Colorado Legislature*, DENV. BUS. J. (Mar. 8, 2013, 1:47 PM), <http://www.bizjournals.com/denver/news/2013/03/08/marijuana-joint-committee-created-in.html?page=all>.

<sup>39</sup> As I noted in a previous Article, advocates for marijuana law reform prefer the phrase “adult use” to “recreational use.” I have tried to use “adult use” throughout. *See Sam Kamin and Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 878 n.35 (2013).

<sup>40</sup> *See generally* Colo. Med. Marijuana Enforcement Div. Rules 1.001-19.100 (2011) [hereinafter MMED Rules], *available* at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Current+Set+of+Rules%2C+Effective+July+1%2C+2011.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251781468397&ssbinary=true>.

### 1. Borrowing from Colorado's Medical Marijuana Framework

In this regard, we were fortunate that Colorado had more than two years' experience running a regime for the manufacture, sale, etc. of marijuana for medical patients.<sup>41</sup> I have detailed these regulations elsewhere,<sup>42</sup> but stated briefly, Colorado has the most extensive regulatory apparatus of any of the eighteen medical marijuana states in the country. Under Colorado law, a patient with a doctor's recommendation is entitled to possess up to two ounces of marijuana and may purchase that medicine from a business licensed by the state to sell it.<sup>43</sup> To obtain a license from the Department of Revenue to grow marijuana, make marijuana-infused products, or sell either marijuana or infused products, an applicant is subject to a criminal background check and must demonstrate proof of Colorado residency.<sup>44</sup>

Perhaps more crucially, our system calls for a closed-loop production and distribution apparatus under which the provenance of each plant must be carefully documented and all marijuana produced must be carefully measured and accounted for.<sup>45</sup> Often referred to as seed-to-sale surveillance, the tracking of product in Colorado closely parallels the way pharmaceuticals are tracked—only authorized employees are allowed into certain areas of licensed facilities,<sup>46</sup> video surveillance is mandated throughout licensed premises,<sup>47</sup> and extensive records and shipment manifests are required to be kept and presented to officials of the Department of Revenue.<sup>48</sup>

Together, these various regulations were effective in keeping the federal government from cracking down against Colorado's marijuana patients and providers despite their clear violation of the CSA. Unlike other states where tensions between federal law and state medical marijuana provisions led to arrests, threatening letters

---

<sup>41</sup> See John Ingold, *New Med-Marijuana Regs Now Law in Colorado*, DENVERPOST.COM (June 7, 2010, 1:21 PM), [http://www.denverpost.com/news/marijuana/ci\\_15244688](http://www.denverpost.com/news/marijuana/ci_15244688).

<sup>42</sup> See, e.g., Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 47 MCGEORGE L. REV. 147 (2012); Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 DENV. U. L. REV. 977 (2012).

<sup>43</sup> COLO. CONST. art. 18, § 14.

<sup>44</sup> COLO. REV. ST. ANN. § 12-43.3-307 (West, Westlaw through 2011 legislation).

<sup>45</sup> See MMED Rules, *supra* note 40, Rules 10.100-11.200.

<sup>46</sup> *Id.* Rule 10.100.

<sup>47</sup> *Id.* Rule 10.400.

<sup>48</sup> *Id.* Rule 11.200.

from the DEA and the shutdown of large parts of the industry,<sup>49</sup> Colorado's experiment with medical marijuana was left largely undisturbed by federal law enforcement officials.<sup>50</sup> Thus, the Colorado provisions have stood as something of a model for other states considering implementing medical marijuana regulations. We quite sensibly chose them as a model for our own adult-use marijuana regulations.

We began by recommending to the legislature that the Medical Marijuana Enforcement Division be converted to the Marijuana Enforcement Division with authority over both medical and adult use marijuana,<sup>51</sup> that anyone seeking an ownership interest in a licensed adult use marijuana business demonstrate two years residency in Colorado,<sup>52</sup> and that prospective owners meet eligibility criteria—including a criminal background check—similar to those required for medical marijuana licensees.<sup>53</sup>

## 2. Vertical Integration Requirement

But deciding that we would be regulating marijuana like medical marijuana—rather than like alcohol—was merely the first, rather than the last, regulatory decision before us. A crucial question was exactly how much of the medical marijuana regulatory regime we would take with us into the regulation of adult use marijuana. In particular, we considered whether the vertical integration requirement put in place for the regulation of medical marijuana should be applied to adult use as well.

---

<sup>49</sup> See Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES, Oct. 7, 2011, <http://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html>; Jamie Kelly, *Former Grizzly Pleads Not Guilty to Federal Drug Charges*, MISSOULIAN (Jan. 19, 2012, 8:00 PM), [http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article\\_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdFT4](http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdFT4).

<sup>50</sup> The principal exception to the immunization of Colorado medical marijuana practitioners to crackdowns taking place elsewhere was the issuance of letters to Colorado dispensaries operating within 1000 feet of a school zone. See, e.g., John Ingold, *Colorado Medical-Pot Dispensaries to Get Letters from Feds Saying They're Too Close to Schools*, DENVERPOST.COM (Jan. 13, 2012, 6:40 AM), [http://www.denverpost.com/news/marijuana/ci\\_19733017](http://www.denverpost.com/news/marijuana/ci_19733017). Yet even these letters demonstrate federal acquiescence to the Colorado medical marijuana regulatory system. Those receiving letters were in clear violation of federal law, but the DEA asked them to move their business to different locations rather than seeking to make arrests or forfeit property.

<sup>51</sup> TASK FORCE REPORT, *supra* note 15, at 22 (Recommendation 1.4).

<sup>52</sup> *Id.* at 33 (Recommendation 4.1).

<sup>53</sup> *Id.* at 34 (Recommendation 4.2).

One of the more esoteric but important aspects of medical marijuana regulation is the so-called seventy-thirty rule, which requires producers of marijuana to retail seventy percent of what they produce themselves.<sup>54</sup> This partial vertical integration requirement was designed to limit the size and growth of the industry and to prevent diversion of marijuana to the illicit market; the coupling of production and retail was designed to make inventory easier to track and to prevent the excess production of marijuana. However, the requirement clearly operates as a restraint on consumer choice. To see why, imagine a similar requirement in the context of beer or liquor. With vertical integration, seventy percent of the beer sold in any particular liquor store would have to be brewed by the owner of the liquor store; only thirty percent of the beer could be brewed by others. Such a system is cumbersome, difficult to comply with, and limits consumer choice.

Yet there was much support, both at the Working Group and Task Force stages, for retaining the vertical integration requirement in the adult-use regulations. This support came not just from those benefiting from the vertical integration requirement—those, in other words, already operating a vertically-integrated marijuana business. Rather, support for vertical integration was publicly voiced by members of law enforcement, prosecutors, regulators, and members of the public health community.

Part of the reason for this widespread support was an inherent conservatism; Colorado's extensive regulatory regime has been remarkably successful at keeping federal enforcement to a minimum and no one wanted to do anything that might be perceived as risking that tenuous relationship. Although many, myself included, argued that the seed-to-sale surveillance, criminal background checks, and other factors contributed far more than vertical integration to Colorado's insulation from federal enforcement, the majority of those, both on the Working Group and the Task Force, decided that it was more prudent to import the regulatory system as is.<sup>55</sup>

---

<sup>54</sup> See COLO. REV. ST. ANN. 12-43.3-103(b) (West, Westlaw through 2011 legislation) (“On or before September 1, 2010, a [retail] business or operation shall certify that it is cultivating at least seventy percent of the medical marijuana necessary for its operation.”).

<sup>55</sup> We proposed sun-setting this recommendation after three years of operation. That is, we suggested that the legislature return to the vertical integration requirement after three years to see if it was serving the goals that we had set for it. TASK FORCE REPORT, *supra* note 15, at 16 (Recommendation 1.1).

It should be noted as well that there is nothing inherent in the regulation of vice that requires vertical integration. For example, Colorado, like most states, has imposed a three-tier system for alcohol regulation that *forbids* vertical integration<sup>56</sup>:

After Prohibition was repealed, most states instituted the three-tier system for the regulation of alcohol and, seventy-five years later, it remains the most popular regulatory model. Tier One consists of alcohol producers—wineries, distilleries, and breweries. Tier Two is the wholesaler level: after receiving alcohol from the producer, the wholesaler pays excise taxes to the state, and then distributes the alcohol to instate retailers. Tier Three is made up of retail outlets licensed by the state. Unless otherwise provided by the state, Tier Three is the only level permitted to sell directly to a consumer. Vertical integration of the tiers (common ownership of businesses in multiple tiers) is prohibited.<sup>57</sup>

Furthermore, the State of Washington, in adopting Initiative 502, explicitly rejected the vertical integration requirement in favor of a model much more closely resembling the alcohol model. Its statute explicitly prohibits exactly what ours requires; namely, the joint ownership of production and retail licenses.<sup>58</sup> Still other regulatory possibilities exist. For example, many states, rather than adopting a three-tiered system for alcohol, use a model under which the state takes a more active role in the distribution of alcohol.<sup>59</sup> The Task Force considered but ultimately rejected such a state-run model for marijuana distribution<sup>60</sup> as well as a more flexible model that would

---

<sup>56</sup> COLO. REV. ST. ANN. § 12-47-101 et seq. (West, Westlaw through 2011 legislation).

<sup>57</sup> Kevin C. Quigley, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1882 (2011) (footnotes omitted).

<sup>58</sup> WASH. REV. CODE ANN. § 69.50.328 (West, Westlaw through 2013 legislation) (“Neither a licensed marijuana producer nor a licensed marijuana processor shall have a direct or indirect financial interest in a licensed marijuana retailer.”).

<sup>59</sup> See, e.g., *The Control States*, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, <http://www.nabca.org/States/States.aspx> (last visited May 28, 2013) (listing the 18 states that take an active role in the distribution of alcohol).

<sup>60</sup> TASK FORCE REPORT, *supra* note 15, at 19 (Recommendation 1.2). Although the Task Force and Working Group were presented with testimony indicating that state-run alcohol stores were associated with fewer negative externalities than privately-run stores, we rejected the adoption of a state-run marijuana model for two reasons. First, it appeared clear to us that such a model was inconsistent with the text of Amendment 64, which clearly envisioned the state as a regulator rather than a market participant. Second, there was concern that the state taking an active role in the distribution of marijuana—a federal offense—would increase rather than allay federal concern. It is one thing for the state to permit and even to benefit through taxation from the production of a Schedule I narcotic. It is quite another for a state to direct its officials to violate federal law in their official capacities.

have neither permitted nor forbidden vertical integration. Instead, we adopted in whole the regulatory regime that had been in place in Colorado to regulate medical marijuana.

### 3. *Limiting New Licenses to Existing Licensees*

Yet we did not stop at conveying the medical marijuana *model* and its vertical integration requirement into the adult-use realm. We went a step further and suggested to the General Assembly that the same *actors* be transferred from the adult-use regime as well. That is, part of our recommendation was that for the first year of adult-use regulation, only those currently holding medical marijuana licenses should be permitted to apply for adult-use licenses.<sup>61</sup> Not only did we carry over a system that would be of significant benefit to those already in the medical marijuana market—because they had both retail space and growing facilities already in operation—we essentially closed the market to new participants; only those already in the market as of December 31, 2012, would be able to enter the adult use market in the first year. We essentially guaranteed a windfall to those who were daring, smart, or lucky enough to have entered the market early.

This happened for a number of reasons, but the primary one was a surprise. The impetus for providing this benefit to existing licensees came not, as one might expect, from the license-holders themselves, but from the regulators charged with implementing adult-use marijuana regulation. The Department of Revenue's Marijuana Enforcement Division was anxious to see a regulatory regime put in place that it knew it could execute. Working with those already known to the Department—and who had demonstrated their willingness and capacity to comply with the Department's rules—was clearly an important concern of the regulators.

These concerns were certainly well founded. The Marijuana Enforcement Division had suffered layoffs and budget shortfalls

---

<sup>61</sup> TASK FORCE REPORT, *supra* note 15, at 16 (recommending that the General Assembly “[p]rovide for a grace period of one (1) year that would limit new applications for adult-use marijuana licenses to medical marijuana license holders in good standing, or applicants that had an application pending with the Medical Marijuana Enforcement Division prior to December 10, 2012” (Recommendation 1.1)). We also suggested that an existing medical marijuana licensee be permitted to designate some part of their inventory from their medical license to their new recreational license. *See id.* at 36–45.

during its two years of operation<sup>62</sup> and a report critical of its management and oversight was released shortly after the Task Force completed its work.<sup>63</sup> The division was hamstrung by delays in criminal background checks carried out by the Colorado Bureau of Investigations—which sometimes required more than six months to complete the checks—and was clearly concerned that if it had to evaluate scores of applications from new potential licensees it would be unable to meet the requirements of the new law.

Thus, though it is tempting to see this episode as an example of regulatory capture,<sup>64</sup> that explanation is too simple. The grandfathering in of existing licensees is better thought of as the alignment of interest between the regulator and the regulated rather than the classic case of capture, in which the regulator simply serves the regulated rather than the public interest.

### III

#### THE ROAD AHEAD

A poll released by the Pew Research Center on April 4, 2013 showed that public support for marijuana legalization in the United States had reached an all-time high of fifty-two percent.<sup>65</sup> More striking, views on the subject varied significantly with age. Sixty-five percent of Millennials—those born since 1980—supported legalization, compared with only fifty percent of Baby Boomers and thirty-two percent of the so-called Greatest Generation.<sup>66</sup> The parallel to support for gay marriage is hard to avoid. Both issues now enjoy unprecedented support, particularly among younger respondents.<sup>67</sup>

---

<sup>62</sup> Kristen Wyatt, *Pot Regulators Slashed in Colorado*, ASSOCIATED PRESS, Apr. 3, 2012, available at [http://www.denverpost.com/henderson/ci\\_20316774](http://www.denverpost.com/henderson/ci_20316774).

<sup>63</sup> Keith Coffman, *Colorado Medical Marijuana System Lacks Oversight, Plagued by Money Woes: Report*, REUTERS, Mar. 26, 2013, available at [http://www.huffingtonpost.com/2013/03/27/refile-colorado-medical-p\\_n\\_2959862.html](http://www.huffingtonpost.com/2013/03/27/refile-colorado-medical-p_n_2959862.html).

<sup>64</sup> See, e.g., Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 541 (2012) (defining capture as “the heavily disproportionate influence by one of the interest groups covered by a regulatory framework to the improper disadvantage, or exclusion, of other groups also intended to be embraced, restricted or protected by the regulatory regime” (internal quotation marks omitted)).

<sup>65</sup> *Majority Now Supports Legalizing Marijuana*, PEW CENTER FOR THE PEOPLE AND THE PRESS (Apr. 4, 2013), <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/>.

<sup>66</sup> *Id.*

<sup>67</sup> *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW CENTER FOR THE PEOPLE AND THE PRESS (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage/>.



Gay marriage is supported forty-nine percent compared to forty-four percent opposed, with support among Millennials at seventy percent.<sup>68</sup>

Epochal change on both issues is beginning to seem inevitable. In the context of medical marijuana, this will mean that the federal government and the states will need to formulate a system for the taxing and regulation of a substance that federal law has treated as an unalloyed evil since the 1930s. The continuing federal prohibition can be criticized at multiple levels—it seems inconsistent with the medical potential of marijuana, it disproportionately impacts communities of color, it expends large amounts of law enforcement, judicial, and correctional resources on non-violent offenders—but perhaps one of the least-voiced criticisms is the extent to which federal prohibition hampers state-level law reform. If marijuana were not prohibited federally, states might experiment with different models. Some states might ban it outright. Others might regulate its production and sale while taking tax revenue. Still others might encourage its production the way Nevada has encouraged the gaming industry.

This laboratory of ideas would allow us to determine how best to deal with marijuana. Currently, however, only two states—Washington and Colorado—have taken on the federal prohibition and decided to tax and regulate marijuana the way other products—alcohol, cigarettes, etc.—are regulated. We know there will be significant differences in the regulatory approaches these two states will take with regard to taxation, vertical integration, and so on. Hopefully, the work being done in these two states will be an early contribution to this process.

---

-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/.

<sup>68</sup> *Id.*

