

Why the Future of Marijuana Legalization is Still Uncertain

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Abstract

The purpose of this paper is to examine the future of the marijuana legalization movement and the prospects of recreational marijuana legalization at the national level. While the marijuana movement has made tremendous strides at the state level over a very short period of time, there remains a debate over whether or not this progress will translate into success federally. First, this paper reviews the literature from the field, the majority of which focuses on whether marijuana ought to be legalized for recreational use in the first place. Despite extensive research, the evidence from the field is far from definitive. It remains unclear whether recreational legalization of marijuana raises teenage usage, whether the harmful side effects of marijuana are offset by its medical benefits, and whether the social costs of marijuana prohibition outweigh the social costs associated with its increased use. This paper also details political obstacles obstructing federal legalization of marijuana. Even if state-based evidence for recreational legalization was overwhelmingly favorable, there would still be significant obstacles to federal legalization of marijuana. These obstacles include a backward drug classification system, an anti-marijuana Attorney General, and key constituencies that oppose marijuana legalization. This paper concludes that despite the liberalization of marijuana policies at the state level, the future of federal legalization is still hazy at best.

Introduction: The Marijuana Legalization Movement is Making Strides

2016 has undoubtedly been a significant year for the marijuana legalization movement. On November 8th, 4 states (California, Maine, Massachusetts and Nevada) voted to legalize marijuana for adult recreational use, and an additional 3 states (Arkansas, Florida, and North Dakota) voted to legalize it for medical use (Ingraham 2016 A). 8 states in total (plus D.C.) now allow adult use of marijuana for recreational purposes, and 28 (plus D.C.) have legalized it for medical use (Wallace 2016). Nearly 25% of Americans live in states where the drug is legal recreationally for adults, and a whopping 61% of Americans live in states that allow medical use (Tate 2016).

What is more, support for marijuana legalization amongst American adults has never been higher. According to a Gallup poll released in October, approximately 60% of Americans older than 18 are now in favor of making the drug legal (Swift 2016). A Pew Research Center poll also released in October supports this data, finding that only 37% of U.S. adults think that marijuana should be illegal (Geiger 2016).

When these trends are put into perspective, it becomes clear that the marijuana legalization movement has made incredible progress in a very short amount of time. Just 4 years ago, the recreational use of marijuana was not legal anywhere in the U.S., and as recently as 20 years ago, medical marijuana had not been legalized in a single state. Likewise, when Gallup conducted a similar poll in 2009, they found that just 44% of Americans supported legalization (Swift 2016).

It makes sense that many marijuana advocates are optimistic about federal legalization in the near future, particularly because of their success in California. For example, Tom Angell, founder of the pro-legalization group Marijuana Majority, suggested that “Passing legalization in California will greatly accelerate our ability to end the federal prohibition” (Berman 2016). Similarly, Lynne Lyman, California director at the Drug Policy Alliance, argued that “With California and some other, smaller states legalizing it in 2016, the federal government will be forced to reckon with this. We’re hoping that this leads to the end of marijuana prohibition nationally” (Vekshin 2015). Perhaps the most enthusiastic, however, was Rob Kambia, the executive director of the influential nonprofit Marijuana Policy Project. In a statement released the morning after the election, Kambia declared that “This is the most momentous Election Day in history for the movement to end marijuana prohibition” and confidently predicted that “The end of prohibition is near, and it would be a mistake for the federal government to continue waging a war on its own nonviolent citizens” (Ferner 2016).

There has been some pushback against these sentiments. For instance, Kevin Sabet, president of the anti-marijuana legalization group Smart Approaches to Marijuana (SAM), has argued that “[Marijuana legalization] is a very long game. This is not going to be determined once and for all either this November or in November of 2018” (Berman 2016). Likewise, Sarah Trumble, the Deputy Director of Social Policy at the D.C.-based think tank Third Way has expressed similar skepticism, stating that she has heard the saying “If California goes, then it is inevitable that all states will go”, but that “[It’s] not necessarily true” (Borchardt 2016). Even prominent constitutional law scholar and proponent of marijuana legalization, Erwin Chemerinsky, published an op-ed in the Washington Post contending that federal legalization will not be as swift or simple as some people think (Chemerinsky 2016).

There is an ongoing discussion within the marijuana policy community about the viability of federal legalization of marijuana for recreational purposes. This paper seeks to add to the discussion by examining how likely this is to occur. This process will demonstrate that while the marijuana legalization movement may continue to make significant strides at the state level, substantial obstacles to federal legalization remain.

Literature Review: A Field Divided

Unsurprisingly, the majority of literature in the field of marijuana policy focuses not on the viability of federal legalization, but rather on the central question of whether or not marijuana ought to be federally legalized for recreational use in the first place. While this question is rather straightforward, the evidence to adequately answer it is not. The fact of the matter is that because state-based marijuana markets are a recent phenomenon (as of 2014), relatively little data has been gathered from them. Also, because the marijuana markets in these states have not fully matured yet, it is difficult to say if similar results would occur on the national level. Even if an adequate amount of data from the states was available, the question of whether marijuana should be legalized nationally would still be a subjective one. Marijuana legalization, like all public policy decisions, has its benefits and its drawbacks. The extent to which people value different outcomes would certainly affect their willingness to support such a proposal. Thus, in reviewing the literature from the field, the best that can be done is to present arguments and counterarguments from both

sides of the debate. Doing so will capture the essence of the discussion surrounding federal marijuana legalization and paint an accurate picture of the obstacles that such an initiative faces.

Perhaps the biggest question surrounding federally legalizing marijuana is whether or not doing so would increase usage rates, particularly amongst teenagers. A number of different sources have commented on this question, indicating the evidence is mixed. According to a comprehensive report released by the state of Colorado in April, the legalization of marijuana for recreational use in 2012 likely led to an increased use amongst adults, but not teenagers. According to this Colorado survey, nearly a third of Coloradans age 18 to 25 in 2014 had used marijuana in the last 30 days, a rise of about 5% from the year before recreational marijuana was legalized. Similarly, the survey showed that for adults over 26, past 30-day marijuana use went from 7.6% in 2012 to 12.4% in 2014. The survey also showed, nevertheless, that among high school students, marijuana use decreased from about 23% in 2005 to about 20% in 2014, nor was there was a significant change in use by children younger than 13 in recent years (Gurman & Wyatt 2016). However, a 2015 report from the Rocky Mountain High Intensity Drug Trafficking Area shows that while marijuana use amongst minors has declined nationwide in recent years, states like Colorado have seen an increase. The report claims that in Colorado, young people are 20% more likely to have used marijuana regularly since it became legal for adults 2 years ago (Sullum 2016). When it comes to the correlation between recreational marijuana legalization and increased use, the literature indicates that this correlation exists with adults. The literature is less conclusive on if this correlation exists with teenagers.

Another important question in the debate surrounding federal marijuana legalization concerns the health effects of marijuana use. Here, the literature is less divided. Marijuana health researchers generally agree that while marijuana can be useful in treating a number of afflictions, such as epilepsy, Crohn's disease and chronic pain, there is also a long list of well documented health defects associated with frequent usage. For example, an overwhelming amount of evidence suggests that regular marijuana use significantly hinders the cognitive development of children. A 2014 study by Harvard and Northwestern found that "Young adults who used marijuana only recreationally showed significant abnormalities in two key brain regions that are important in emotion and motivation" (Nemko 2014). Likewise, a 2013 study from the University of Maryland School of Medicine found that "Regular marijuana use during adolescence, but not adulthood, may permanently impair cognition and increase the risk for psychiatric diseases, such as schizophrenia" (Nemko 2014). A longitudinal Duke study even found that "People who began smoking marijuana heavily in their teens lost an average of 8 points in IQ between age 13 and age 38. Importantly, the lost cognitive abilities were not fully restored in those who quit smoking marijuana as adults" (Nemko 2014).

Marijuana has been shown to pose risks that are not just cognitive, but also physical. For instance, a 2014 study published in the *Journal of the American Heart Association* found that young and middle-aged adults who use marijuana might have an increased risk for heart-related complications. Some evidence suggests that a person's risk of heart attack during the first hour after smoking marijuana is nearly five times his or her usual risk (Nemko 2014). Additionally, another 2014 study found that marijuana use during pregnancy could impede the development of the baby's brain. Smoking marijuana

during pregnancy has been linked to low birth weights in babies and premature birth as well (Nemko 2014). Some marijuana smokers even show signs of damage and precancerous changes in their lungs. A 2013 study in *Cancer Causes & Control* found that heavy marijuana smoking might raise the risk of lung cancer (Nemko 2014). Overall, there seems to be little doubt within the medical community that there are a significant number of health problems associated with frequent marijuana use.

Last but not least, a third point of contention between legalization advocates and prohibitionists concerns the societal costs and benefits of each policy. Those who support recreational legalization often point out that prohibition has enormous economic and social costs. For example, they note that every year, American police officers devote thousands of hours to arresting, booking and imprisoning marijuana users, many of whom are otherwise law-abiding citizens. According to F.B.I. statistics, there were 658,000 arrests for marijuana possession in 2012, compared with 256,000 for cocaine, heroin and their derivatives (The New York Times 2014). Harvard economist Jeffery Miron even estimates that \$8.7 billion a year is spent on enforcing laws against marijuana in the U.S. (Evans 2013). Furthermore, these arrests can have serious consequences for the arrested. According to the American Civil Liberties Union, suspects arrested on marijuana charges will often spend a night or more in local jail, and be forced to go into court multiple times to resolve the case. Even if an individual does not go to jail as a result of their arrest, they can still suffer. Their arrest will likely stay on their record for years, crippling their prospects for jobs, loans, and housing. A single marijuana arrest can have devastating consequences (Wegman 2014). On the flip side, legalization advocates also like to draw attention to the fact that the sale of marijuana, like the sale of other goods, can be taxed to generate government revenue. For instance, between July 1, 2014 and June 30, 2015, the state of Colorado collected nearly \$70 million in marijuana taxes. What is more, the Tax Foundation recently estimated that a mature marijuana industry could generate up to \$28 billion in tax revenues for federal, state, and local governments, including \$7 billion in federal revenue (Henchman & Scarboro 2016). When earmarked, these fees and taxes can go to good use. In Colorado, for example, the bulk of marijuana tax revenues has been spent on preventing broader addiction issues through educational programs, substance abuse treatments, and law enforcement training (Cuen 2016).

Of course, marijuana prohibitionists have their own series of counterpoints. They contend that while marijuana legalization would reduce unneeded police expenditures and perhaps limit unnecessary arrests, these benefits are far outweighed by the societal costs that legalization (and thus increased marijuana usage) would entail. For example, marijuana prohibitionists argue that the use of marijuana by employees in a work environment often lowers productivity, increases the frequency of workplace accidents and injuries, increases absenteeism, and leads to lower morale. According to the U.S. Department of Justice, 50% of all on-the-job accidents and up to 40% of employee theft is due to drug abuse. Drug-abusing employees are also absent from work ten times more frequently than their non-using peers, and their turnover rate is 30% higher than for those employees who do not engage in drug use. Workers who report drug use are also significantly more likely to have worked for 3 or more employers in the past year, and to have higher rates of unexcused absences and voluntary turnover in the past year (Institute for a Drug-Free Workplace 2014). Moreover, a 2015 article in the *Journal of Occupational and Environment Medicine*

concluded that there is a likely statistical association between illicit drug use, including marijuana, and workplace accidents (Goldsmith 2015). One study published in the *Journal of the American Medical Association* found that marijuana users had 85% more injuries at work than non-users. The same study found that employees who tested positive for marijuana had 55% more industrial accidents than those who did not (Evans 2013).

What is more, marijuana prohibitionists also suggest that more frequent marijuana use leads to an increase in vehicle accidents. They cite a study by the National Highway Traffic Safety Administration that found that 18% of drivers in fatal accidents tested positive for non-alcoholic mind-altering drugs, mainly marijuana. This study also found that almost twice as many drivers in fatal accidents tested positive for drug use compared to a control group (Nemko 2014). In Washington, the percentage of vehicle accidents in which the driver tested positive for marijuana rose significantly after the State legalized the drug in late 2012. From 2010-11, there was a 0.7% increase, and in 2011-12, there was a 0.7% increase again. In 2013, however, the percentage of vehicle accidents in which the driver tested positive for marijuana rose a whopping 40% (Nemko 2014).

Marijuana prohibitionists even push back against the argument that legalization increases government revenue. They assert that while recreational marijuana could be taxed to raise government revenue, these revenues would be insignificant. They point out that the revenue Colorado raises from taxing marijuana represents significantly less than 1% of the state budget. As such, although this tax revenue is earmarked to go toward fixing schools, it has done little to offset large cuts in K-12 funding in the State (Stiffler 2016).

If this literature review illustrates anything, it is that the approach the government takes toward regulating marijuana is not simple. This is because when it comes to the central questions surrounding the federal legalization debate, the evidence is mixed; it is unclear if recreational legalization would increase usage by teenagers, it is unclear if the medical benefits of marijuana are offset by its potentially harmful side effects, and it is unclear if the social costs of prohibition outweigh the social costs associated with increased marijuana usage. Thus, while a review of today's literature surrounding marijuana policy is fascinating, it is far from conclusive.

Question: The Other Marijuana Debate: How Realistic is Federal Legalization?

The central question remains: "How likely is it that marijuana will be legalized for recreational use at the federal level?"

Methodology: Context is Important

To address the question of the viability of federal marijuana legalization, this paper considers the literature and political context surrounding the issue. This is important because both the inherent advantages and drawbacks of legalization, as well as the political climate in which such an effort is taking place, factor into its likelihood of success. Today's literature often sheds light on the first consideration, but rarely the latter. Thus, to get a better understanding of if the end of federal prohibition is near, this paper takes the question of legalization out of a vacuum and analyzes the prospects of such a change given the history of marijuana regulation in the United States alongside everything else that is happening around marijuana policy today. In doing so, this paper examines studies, journal articles,

reports, newspaper articles, and polls to determine what marijuana legalization advocates are actually saying.

Findings: Legalization? Not so Fast

As mentioned earlier, the marijuana legalization movement has made tremendous progress in the past 20 years. In 1996, California became the first state to legalize marijuana for medical purposes. Today, 28 states (and D.C.) have similar laws. In 2012, Colorado and Washington became the first 2 states to allow marijuana for recreational use, and since then, an additional 6 states (plus D.C.) have followed (Wallace 2016). Even the idea of legalizing marijuana for recreational use has never been more popular amongst the American people. Considering these facts alone, it would seem that federal legalization is just on the horizon, and to be fair, this is a widespread belief amongst marijuana advocates and prohibitionists alike. There is certainly a strong sense that 2016 has been a tipping point for the marijuana legalization movement.

The fact of the matter is, however, that this trend tells only half of the story. While it cannot be debated that significant progress will likely continue to be made on the state level, federal legalization is a different game altogether. Part of the problem, of course, is that progress at the state level is no substitute for the conclusions that can be drawn from those states, and as detailed in the literature review, the evidence from states that have established recreational marijuana markets is mixed. There are certainly pieces of evidence that suggest legalization can be beneficial, but there is also evidence to suggest that prohibition may be a better approach. On the whole, the evidence is not overwhelmingly favorable in either direction, and therefore, because federal prohibition is the status quo, it is not clear that state-based evidence alone is strong enough to overturn that. Thus, contrary to what many legalization advocates claim, the laboratory of democracy experiments currently being conducted in Colorado and Washington do not “prove” that federal legalization would be the right approach.

Even if state-based evidence for recreational legalization was overwhelmingly favorable, there would still be obstacles for the federal legalization movement to overcome. The biggest obstacle, perhaps, is the fact that under the Controlled Substances Act of 1970, marijuana is still categorized as a “Schedule 1 substance”, the most severe of the five schedules. This means that in the eyes of the US Drug Enforcement Administration (DEA), marijuana, like heroin, LSD and ecstasy, has a high potential for abuse and no medical value (Joseph 2016). While this scheduling is largely believed to be unjustified, it is significant nonetheless. This is because categorizing a drug as a “Schedule 1 substance” makes it more difficult to research. For example, to conduct research on Schedule I drugs, scientists have to gain DEA approval and often upgrade the security protocols in their labs, expensive and time-consuming hurdles. They must also meet with federal and state agents, and conduct additional reviews of study proposals (Joseph 2016). Additionally, because marijuana is a “Schedule 1 substance”, the DEA severely restricts the quantity that it makes available for researchers (Joseph 2016). Combined, these factors have prevented significant medical research from being done on marijuana. The lack of research on marijuana is important because for marijuana to become federally legalized for recreational use, it would need to be removed as a “Schedule 1 substance.” Yet, when explaining why the DEA rejected a petition to reclassify marijuana this summer, its acting administrator, Chuck Rosenberg, cited the

fact that scientists do not understand the drug's chemistry and haven't conducted adequate safety and efficiency studies (Joseph 2016). Hence, the effort to reclassify marijuana is caught in a catch-22: because marijuana is a "Schedule 1 substance" it is difficult to research, but it is this lack of research that directly prevents it from being moved to a higher schedule. As long as marijuana remains caught in this paradox, it will not be reclassified, and therefore cannot be legalized for recreational use at the federal level.

Another major obstacle to federal legalization of marijuana is U.S. Attorney General and former Senator, Jeff Sessions. Sessions will likely be the marijuana legalization movement's worst nightmare. While Sessions has at times been ambiguous on certain law-enforcement matters, marijuana regulation is not one of them. Throughout his political career, he has consistently taken a hardline stance against marijuana legalization. At a hearing of the Senate Caucus on International Narcotics Control in April, he said "We need grownups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought to be minimized, that it is in fact a very real danger" (Ingraham 2016 B). He then added that "[Marijuana] is dangerous, you cannot play with it, it is not funny, it is not something to laugh about...good people don't smoke marijuana" (Ingraham 2016 B).

Even if Sessions had no authority to directly dictate marijuana policy in this country, his stance on how to regulate it would still be important. Sessions, in addition to being U.S. Attorney General, will be a powerful voice within the Trump cabinet. Therefore, on any policy issue, not just marijuana, his opinion will be influential. As it happens, Sessions will be able to dictate marijuana policy. The reason that state-based recreational marijuana markets exist even though the drug is still federally illegal is because of the approach that the Obama Justice Department took toward enforcing federal marijuana policy. In 2013, James Cole, a deputy attorney general for the Justice Department, wrote a memo to all federal prosecutors setting marijuana enforcement priorities. The Cole Memo encouraged federal prosecutors to focus their efforts on preventing revenue from the sale of marijuana from going to cartels, and preventing violence in the drug's distribution (Higdon 2013). These priorities did not include prosecuting marijuana businesses operating in regulated state markets, which has given these companies room to grow (Higdon 2013). Of course, Sessions could remove these protections simply by withdrawing the Cole Memo, giving federal prosecutors the power to prosecute marijuana business even if they are legal under state law.

In fact, if Sessions does not want to wait for federal prosecutors to go after the marijuana industry on their own, he can do it himself. It would certainly be within the power of the Attorney General to order targeted prosecutions of large recreational marijuana farms and shops, even if they are operating within the confines of state law (Miller 2016). Not only would this shut down major marijuana suppliers, it would also send a clear message. Also, pursuing some high-level prosecutions and sending threatening letters out to marijuana business owners would likely have a chilling effect, deterring entrepreneurs from the marijuana industry (Miller 2016).

While it is true that Sessions alone cannot prevent federal legalization, he can easily dismantle the industry to such a degree that legalization would be practically impossible. As such, his confirmation as Attorney General represents a huge setback for the recreational marijuana movement, and another massive obstacle standing in the way of federal legalization.

Finally, although the DEA rescheduling paradox and Attorney General Sessions certainly represent the two biggest roadblocks preventing federal legalization, public opinion dynamics cannot be discounted. Ultimately, only Congress can federally legalize marijuana for recreational use. Therefore, for federal legalization to occur, such an initiative must be supported by Congress. However, amongst key congressional constituencies, marijuana legalization is actually unpopular. For example, according to a Pew Research Center poll done in October, only 41% of Republicans believe that marijuana should be legal, and this number drops to 33% amongst conservative Republicans (Geiger 2016). This is damaging to the legalization movement because Republicans currently control both chambers of Congress, so, what Republican voters think is actually very important. Likewise, according to the same Pew Research Center poll, only 33% of those from the “Silent Generation” (born between 1925 and 1945) support legalization (Geiger 2016). This matters as well because seniors tend to be the most actively involved constituents. They are the most likely to vote, they are the most likely to call their representative, and because of this, legislators want to make sure that the seniors in their districts remain happy. Thus, although support for marijuana legalization has never been higher within the American populace, public opinion amongst disproportionately influential constituency groups represents a third significant obstacle to the federal legalization of marijuana.

This is Just the Beginning

The findings of this paper suggest that despite the spread of marijuana liberalization policies at the state level in 2016, there remain perhaps insurmountable obstacles to federal legalization. Despite the tremendous optimism of the legalization movement, there are still numerous obstacles in its way. Evidence from state-based recreational markets is mixed at best. The DEA’s system of classifying drugs stymies research. Jeff Sessions is the most anti-marijuana Attorney General in history. Key constituency groups, with vastly disproportionate influence over Congress, still oppose marijuana legalization. For these reasons, it is highly unlikely that marijuana will be federally legalized for recreational use any time soon.

That said, the goal of this paper is not to end of the debate over the viability of federal marijuana legalization. Rather, this paper seeks to get the conversation started. The biggest problem with the literature surrounding marijuana policy today is that there is a great amount of discussion about the effects of recreational legalization, but not nearly enough discussion about how marijuana policy is expected to evolve over time. Fortunately, this gaping hole provides great opportunities for additional research. There has been little research done on how changing demographics in the U.S. will likely affect public opinion on marijuana legalization in the future. Similarly, few scholars in the field are discussing how an increase in the lawful supply of marijuana to scientists would change the regulation landscape. These are but a few of the many questions that deserve further investigation. Hopefully, as the debate over federal marijuana legalization gains prominence, these questions will get the answers they deserve.

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