

Washington Versus Washington (and Colorado): Why the States Should Lead on Marijuana Policy

Jonathan Rauch

**INTRODUCTION:
A NEW DAY FOR MARIJUANA POLICY**



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When Colorado and Washington legalized marijuana by decisive margins in initiatives last November, they set up not just one but two conflicts. The first, of course, is about drug policy. No less important, albeit less widely noticed, is a conflict about power. To what extent can and should the states act independently of the federal government on an issue with national ramifications? The choices that Colorado and both Washingtons make over the coming months are likely to affect the course not only of drug policy but of state-federal relations for years to come.

The American public is closely divided on whether marijuana should be legal. But it has a clear preference on the question of how to decide. In three recent polls that asked whether the federal government or the states should decide—or, in a different wording, whether the federal government should let Colorado and Washington implement their legalizations—respondents favored state leadership by margins ranging from 14 to 25 percentage points. Significantly, CBS News, in November, found that even among those who *oppose* legalizing marijuana (47 percent—the same percentage as favored legalizing), 49 percent thought the states should be allowed to decide.¹

This paper argues that the public's preference is well grounded. Specifically, it makes three points. First, the clash over marijuana, far from

1. CBS News Poll, Nov. 16-19, 2011. Published November 29, 2012

being anomalous, is the latest and greatest in an escalating series of state-federal confrontations on hot-button issues. If not handled with care, it could lead to legal confusion, policy incoherence, and political resentment. Law by itself cannot decide how to proceed; there is no avoiding making *political* choices which determine whether and how the federal government and states will cooperate or collide.

Second, in making those choices, a good place to look for insight is to same-sex marriage. Though the two issues are substantively and legally very different, from a political point of view their similarities are quite striking. With same-sex marriage, a state-led approach has been a remarkable success, particularly at containing social conflict and adapting deliberately to social change. Most of the reasons for that success also apply to marijuana legalization.

Third, letting states lead on marijuana decision-making is legally more difficult than letting them lead on marriage, and it is politically less natural. State leadership was the default option with marriage; for marijuana it will take hard work and a willingness to stretch. That said, the work is worth doing. Trying to impose and sustain a one-size-fits all, top-down resolution from Washington, D.C., is likely to be too unsustainable and inflexible to succeed.

II. What Happened? And What Next?

Far from being an eternal fact of life, federal control of marijuana policy is a relatively recent phenomenon. For most of the country's history, the legal status of marijuana was left to the states, 29 of which had banned it by 1931.² That changed in 1937, when Congress began the first of a series of escalating restrictions, culminating in the 1970 Controlled Substances Act (CSA), which not only prohibits cannabis but places it in the same category as heroin. By that point, the federal government became the dominant actor, with states generally following the federal template. Still, some states found ways to push back. Beginning with Oregon in the early 1970s, 16 states have decriminalized possession of small amounts of marijuana for personal use. Then, beginning with California in 1996, 18 states and the District of Columbia legalized medical marijuana—a somewhat oblique but still pointed challenge to federal policy, which has been met, by the Obama Administration most recently, with an ambivalent and inconsistent federal response.³

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There is nothing oblique or ambivalent, however, about the latest challenges from Colorado and Washington. Last November's legalization initiatives passed by decisive margins: 55-45 percent in Colorado, 56-44 percent in Washington. No one could doubt that the public had spoken. The two initiatives differed, inasmuch as Washington set up a

2. Rep. Earl Blumenauer and Rep. Jared Polis, *The Path Forward: Rethinking Federal Marijuana Policy*, February 5, 2013 (issued jointly by their congressional offices).

3. <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>

more rigorous regulatory regime; but they are similar in making the possession and personal use of marijuana legal under state law, and in making production and distribution legal under certain conditions regarding licensure, promotion, and taxation.

Despite the spread of medical marijuana liberalization, it is undisputed among legal authorities that federal drug law reigns supreme, and states cannot defy or nullify it. For that reason, one school of thought holds that the answer to today's marijuana conundrum is straightforward: just enforce the CSA. On this view, the federal government has no legal alternative but to prevent the production, sale, and use of marijuana to the very best of its ability, and to block any state policies to the contrary. End of story.⁴

While that answer is indeed straightforward, simple it is not. Although states cannot break or overrule federal law, state law and policy can differ from federal law and policy—and very frequently does. Moreover, Washington, D.C., cannot conscript states to pass laws consonant with federal law and it cannot commandeer state resources to enforce federal law. If states want to tell the federal government, “It’s your law, you enforce it,” they can do so, provided they do not break federal law themselves.

In the United States, the federal government employs only a tiny fraction of the officers who enforce drug laws. Federal law enforcement accounted for less than 1 percent of all marijuana arrests in 2007.⁵ The Drug Enforcement Administration employs only about 4,400 law enforcement agents, in a country where, in 2008, more than 40 percent of the population aged 12 and over had used marijuana, and 6 percent were current users.⁶

Legally speaking, then, the federal government cannot prevent the states from removing their troops from the battlefield; practically speaking, it cannot enforce the CSA by itself. The implication is that it might be impractical, counterproductive, or both for the federal government to attempt to impose a “zero tolerance” model on Colorado and Washington, which legalize but regulate marijuana, because they or other states might respond by simply legalizing marijuana *without* regulating it—almost certainly a worse outcome from a federal point of view. Instead, the federal government might better serve the policy goals of the CSA by working with Colorado and Washington to focus federal and state enforcement on high federal priorities, such as preventing legalized marijuana from spilling across state borders, rather than on trying to shut down the states’ experiments.

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4. A further complication, beyond the scope of this paper but certain to affect the federal government's thinking, is that the United States is a party to several international treaties which require their signatories to prohibit marijuana.

5. Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*. Cato Institute, December 12, 2012.

6. U.S. Substance Abuse and Mental Health Services Administration, National Survey on Drug Use and Health, 2008.

How the courts might view such cooperative efforts, and where they might draw the line between states' violating federal law and their refusing to support it, and how much (if any) congressional action might be needed to sort it all out—all of those are complicated questions on which legal opinions differ, and on which courts undoubtedly will differ as well. The statute books can shape the outcome, but they cannot dictate it. Nor, for that matter, can drug policy preferences decide the matter, though they will certainly bear upon it. Even if the country were united in, say, a desire to liberalize drug policy, the question would remain of who should lead the change, frame the policy, and set the tempo.

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In short, there is no alternative to the exercise of *political* judgment. Mature people will have to make conscious choices about how to manage social change and conflict with a minimum of unnecessary pain and disruption.

The stakes transcend drug policy proper: marijuana legalization, far from standing alone, is an installment in a series. In the past several years, state-federal conflict has become a running theme of the national debate, on multiple hot-button issues and in multiple permutations:

- *On immigration, the federal government demanded that the states follow federal policy.* Arizona claimed a right to independently enforce federal law, even if its enforcement priorities differed from those of the federal government. It also asserted a right to supplement federal policies with its own more stringent ones. The federal government objected, and the Supreme Court delivered a mixed ruling which mostly favored the federal government.
- *On Obamacare (the 2010 Affordable Care Act), states demanded the right not to follow federal policy.* They challenged the law's expansion of Medicaid and its mandate to buy health insurance. The Supreme Court again delivered a mixed ruling, this time leaning toward the states.
- *On gay marriage, states demanded that the federal government follow state policy.* In suing to overturn the U.S. Defense of Marriage Act, they claimed that Washington, D.C., had to follow states' definitions of marriage rather than establish a separate definition of its own. The Supreme Court, at this writing, has yet to rule.

Unlike the cases of immigration and Obamacare and the Defense of Marriage Act, marijuana involves not merely friction between state and federal policy but something closer to outright defiance. Even in a context of growing agitation in federal-state relations, this was putting a cat among the pigeons. Avoiding conflict or even chaos is not going to be easy, and the outcome will affect not only drug policy but the way in which the country handles other federal-state conflicts sure to emerge.

In short, there is no escaping, or delegating to lawyers and drug-policy experts, the inherently political question the country now confronts: How should we handle the cannabis conflict? The

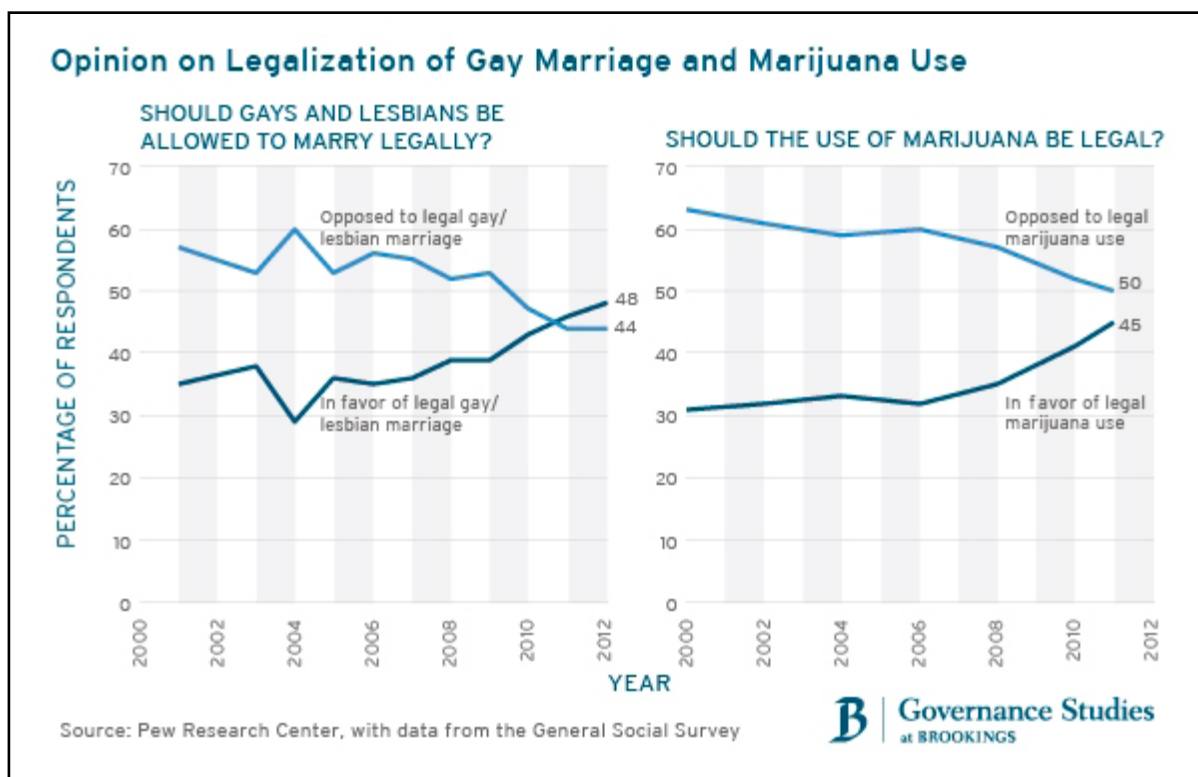
question is not primarily, “What is the lawful approach?” It is, “What is the wise approach?” To answer that question, it is helpful to look at a recent success story.

III. The Example of Same-Sex Marriage

Gay marriage came on the scene in American public debate in the early 1990s. In at least two very important respects, it is different from the marijuana issue: it involves civil rather than criminal law and it is a policy area which has traditionally been left to the states. Moreover, nothing in the following discussion implies any close *substantive* tie between gay marriage and marijuana legalization. Where their *political* structures are concerned, however, gay marriage and marijuana legalization bear a number of important, indeed striking, similarities.

First, both are controversial social issues, on which, for many people, fundamental questions about morality and rights trump policy tradeoffs and cost-benefit balancing. Over time, attitudes toward gay marriage closely track attitudes toward the morality of homosexuality. Similarly, the views on the legalization of marijuana are closely bound up with views of the morality of using drugs. In both cases, compromise is difficult among those who believe that fundamental values are at stake.

Second, both are areas where a formerly strong national consensus has broken down, leaving public opinion closely divided but possibly at the point where the lines cross and the former minority becomes the majority. The almost eerie parallel between the two speaks for itself.



Third, both issues are marked by pronounced regional, partisan, and religious differences. Conservatives and Republicans are less supportive of both marijuana legalization and gay marriage

than are liberals and Democrats, with moderates and independents leaning more toward Democrats. Southerners are less supportive than easterners. In other words, the country is not homogeneous on either issue. Although the country as a whole is closely divided, many states and regions remain firmly opposed to legalization of both same-sex marriage and marijuana.

Fourth, and of potentially great significance: levels of support for both marijuana legalization and gay marriage are closely tied to age cohort. The younger you are, the more likely you are to favor liberalization; the youngest and oldest cohorts stand firmly on opposite sides of the issue, separated by a 20- to 30-point gap, with intermediate cohorts arrayed in between.



Although some young people grow more conservative with age and parenthood, it seems a very safe bet that overall support for both legal marijuana and same-sex marriage will grow over time as older cohorts die off. We can assume, then, that public opinion will continue to change. Whatever the country's final destination on both issues, it has not yet arrived there.

Fifth, both were, at time of first enactment, untested policies. No modern country allowed same-sex marriage until 2000, when the Netherlands legalized it—only four years before Massachusetts legalized it. No modern jurisdiction legalized marijuana production, distribution, possession, and recreational use until Colorado and Washington did it last year. The result, among electorates and politicians, is caution—an especially appropriate attitude toward marijuana liberalization, which can be implemented in all kinds of ways. (There are not a whole lot of ways to legalize gay marriage.)

In short: here we have two social issues where a prior consensus has broken down, where a new consensus has not yet emerged, where different regions and demographic groups take quite

different views, where public opinion is likely to shift toward legalization, and where much remains to be learned about the effects of reform and how best to implement it.

The country's handling of another divisive social issue offers a cautionary tale. In 1973, as states began to deregulate abortion, the Supreme Court stepped in and declared abortion to be a constitutional right. The result was to impose upon the whole country a policy on which nothing like a consensus had emerged, generating backlash and polarization which remain politically vexing to this day.

The country handled gay marriage very differently, by leaving it to the states. This was, in some ways, a striking departure from the general trend in recent years to push social policy issues and disputes up to the federal level (as with, for example, abortion, education, immigration, crime)—a trend which contributed to the state rebelliousness we see today. Congress twice considered and rejected a constitutional amendment banning gay marriage nationally, instead settling for the Defense of Marriage Act, which affirmed that states and the federal government could all go their separate ways. The implicit principle was that neither the federal government nor any one state (by exporting its policy to the rest of the country) would be allowed to set a single policy for the entire nation. Diversity would be the rule, at least while the country was making up its mind.

Two groups disliked the decentralized, incremental approach to same-sex marriage. The first were social conservatives who want gay marriage banned on every square inch of U.S. soil. The second were gay-rights advocates who want marriage equality recognized immediately everywhere. Both sides argued, albeit from opposite perspectives, that a decentralized approach would be incoherent and confusing. As, indeed, to some extent it has turned out to be: many gay couples are now in the demeaning and inconvenient position of being married in some states but not others.⁷ Nonetheless, I think tomorrow's historians will join today's political moderates in judging the state-by-state marriage strategy to have been a success. Despite its imperfections, it has done a remarkable job of containing conflict and smoothing a difficult social transition. In particular, delegating marriage to the states has had five important advantages:

First: It has *educated information*. Over the course of the last nine years, since Massachusetts legalized same-sex marriage in 2004, states provided a testing ground. The country has gone from having zero knowledge about the possible effects of gay marriage, and believing that the results might be catastrophic, to having some sense of what actually happens: not very much. The absence of visible harm does not prove that bad things (or good things) will not happen in the future, but it allows much more peace of mind than if the country had jumped into the policy change wholesale.

Second, relatedly: it has *managed risk*. No policy change is without risk. But that is not an argument for never changing policies, because standing pat in a changing world entails risks of its

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7. My husband I are in this position ourselves.

own. The state-by-state strategy obviated any need to bet the entire country on one policy or the other, immensely reducing the cost of mistakes—very important in a world where trial-and-error is indispensable for learning what works and what doesn't.

Third: it has *facilitated adaptation*. Locking the whole country into a fixed policy, as with a national constitutional ban on gay marriage, is particularly hazardous when public opinion is in flux. Even if the policy is workable or acceptable today, it may be obsolete and reviled tomorrow. By letting each state set its own tempo, the decentralized approach allowed gradual policy adaptation at a rate that neither lagged nor led public opinion.

Fourth: it has *contained conflict*. Moving the gay marriage debate to the national stage, with policy for the entire country at stake, would have created a conflict of nearly apocalyptic importance to the stakeholders. Instead, the state-by-state approach left room for regional variation and agreement to disagree. The result is that, although the gay marriage debate has certainly had its hysterical episodes, the national debate as a whole has been remarkably calm and deliberate.

Fifth: it has *fostered public deliberation*. This may be the most important advantage of all. By stepping in and nationalizing abortion policy, the Supreme Court truncated a process in which the states, acting through their legislatures, were debating the morality of abortion, adapting to changing public opinion, and discovering and developing consensus. The Supreme Court settled the argument before it could properly begin. As both sides subsequently dug in—pro-choicers to defend *Roe v. Wade* at any cost, pro-lifers to undermine it in every way possible—the country lost an opportunity to have an orderly public debate about the morality of abortion and the status of unborn children. That debate might have built a clearer moral consensus one way or the other. With gay marriage, by contrast, the consensus-building process has gone ahead unimpeded, to impressive persuasive effect.

IV. Lessons for Marijuana Legalization

What, then, does the example of gay marriage suggest about marijuana legalization? It argues for distinguishing between *what the policy should be* and *how the policy should be decided*—two very different questions. It suggests that the body politic will be healthier if the argument is pushed down toward the state level, and if the country moves away from the one-size-fits-all approach that has dominated drug policy until now. It implies that the legalization experiments in Colorado and Washington may be bad ideas or good ideas, but that the federal government would be wise to view them and other state experiments not as threats but as opportunities—opportunities, specifically, to:

- *Avoid a premature national decision.* As with gay marriage, a trend toward legalization is plainly under way, but the country is far from a consensus. Allowing some states, when they feel ready and able, to attempt orderly change is a good way to adapt policy to changing public opinion without betting the whole country on a single policy prematurely. The result is likely to be better risk management and a less bumpy ride.

- *Educe knowledge about drug regimes.* Because legalizing marijuana is a very complicated policy change, understanding the consequences and costs of different regulatory approaches is especially important. What happens to consumption? To crime? To prices? How high should taxes be, and structured in what way? Can states prevent leakage of marijuana across state lines? Cliché though it may be, the phrase “laboratories of democracy” nicely describes the function states can perform in finding out what works and what doesn’t.
- *Launch an overdue public deliberation.* Public opinion on marijuana has been changing since 1995, almost 20 years, but the federal government’s rigid drug laws and ostensible (if often unenforceable) zero-tolerance policies have left little room for political deliberation on other options. A result is that the drug war and public opinion have drifted apart. That disconnect cannot be sustainable, at least not in a democracy as responsive to public opinion as ours. State-level deliberation provides a comparatively safe, incremental way to bring policy and opinion into closer alignment.
- *Contain conflict and reduce hysteria.* The attempt to impose a one-size-fits-all policy from Washington, D.C., even if it were sustainable, would come at the cost of setting up a bitterly polarizing winner-takes-all political dynamic. Pushing the question to states allows advocates to win in some places despite losing in others, reducing the fear of a catastrophic or permanent defeat. It forces them to adapt their arguments to local tastes and conditions, reducing the fear that one area’s preferences will be foisted on the whole country. It keeps minds open longer and prevents premature commitment, allowing politicians and voters to hang back and see how state skirmishes and experiments work out before choosing sides and taking entrenched positions.

Now, the two caveats mentioned above deserve another moment in the sun. Both suggest that for the federal government to cede leadership to the states on drug policy will be harder—probably much harder—than for it to cede leadership on marriage.

First, gay couples didn’t go to jail for trying to marry; they just couldn’t get married. The matter was civil in nature, and no sprawling structure of criminal law and law enforcement entered the picture. By contrast, when one level of government is issuing licenses to the same people whom another wants to arrest, the two sides are very far apart indeed.

Second, marriage and family policy have been within states’ purview ever since colonial times. Federal interventions were rare, indeed extraordinary. To let states lead on gay marriage, the federal government needed to do little more than hang back (or deadlock) and let nature take its course. In vivid contrast, drug policy has been an area where federal law has been active, often dominant, since the passage of the Harrison Narcotics Act in 1914. Tolerating state leadership on marijuana policy will require creative and proactive legal and political thinking from all concerned, especially the federal government.

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That said, the payoffs for accommodation are substantial, and are not limited to drug policy per se. Marijuana legalization is not the first state-federal conflict to have bubbled up, but it certainly won't be the last. How the Obama Administration, the states, Congress, the courts, and the public choose to cope with it will influence the handling of other conflicts yet to emerge. The path around confrontation on marijuana is a trail which others can follow in the future. The opportunity to blaze it, if foreclosed, may be hard to recover.

V. The Madisonian Way

James Madison understood exactly what he was doing when he designed the U.S. Constitution as a mechanism to force compromise. He and his colleagues in Philadelphia faced a seemingly intractable dilemma, one which no prior form of government had ever solved. They were writing a constitution for a regime they hoped would be durable for generations, even centuries. Yet they could not begin to foresee the kinds of problems and conflicts which would arise 50, 100, 200 years in the future. How could they design a system that would be both adaptive and stable?

Madison's solution was as counterintuitive as it was brilliant. Force competing factions, branches of government, and—not least—*levels* of government into continuous but orderly conflict, requiring them, in order to meet their own goals, to accommodate the goals of others. "Ambition must be made to counteract ambition," he famously wrote in *Federalist 51*. Not only would factions restrain each other and thereby constrain each other's depredations (the cure for political excess is even more politics), their competitive jostling would force the system to adjust dynamically to real-world change. The result, if it worked, would be a continuously recalibrated equilibrium.

Building a political regime not on authority but on conflict, and betting that the result would be not chaos but adaptation, was the most visionary political gamble ever taken—especially at a time when Adam Smith was a contemporary figure and Charles Darwin was decades in the future. Today, though the resulting system isn't pretty to watch, even Madison might be surprised by how well it has worked—when it is allowed to.

Where illegal drugs and especially marijuana are concerned, however, Madison's mechanism has been largely disabled for decades by the federal government's effective near-monopoly on policy. The result, I would argue, has been a shining example of counter-productivity and excess—but that is a topic for another day. The point for today is that marijuana legalization in Colorado and Washington offers an opportunity not just to improve policy; it also offers an opportunity to give the constitutional order a tune-up, putting play back in the joints of drug policy and channeling conflict toward constructive change—and thereby, if you will, bringing James Madison back into the game.

Although no particular outcome is inevitable, the question before the country, given the change in public opinion, is not *whether* to adjust marijuana policy but *how*. Allowing for state leadership and regional diversity would leave many people unhappy, and it is certain to be messy and imperfect. It also, however, offers the best prospect of containing conflict, preventing disruptive change, avoiding policy mistakes, and correcting the mistakes that do happen before there is no turning back.

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