Section 2
THE IMPACTS AND IMPLICATIONS OF MARIJUANA LEGALIZATION

Section 2 discusses the impacts and implications of marijuana legalization.
Legalization would truly be unprecedented. All the 2012 marijuana initiatives legalize taxation, wholesale distribution, commercial cultivation, and commercial processing of marijuana; this is wholly uncharted territory. Some might point to the Netherlands as an example of a place where marijuana is legal, but as we can see here, “back door” operations are still officially illegal.

This is also important to keep in mind moving forward; accurate predictions are virtually impossible to make because there is no precedent on which to base forecasts.

Note that decriminalization here is defined as either removing all penalties or reducing penalties to a fine/infraction (depenalization).
Even the *New York Times* is not accurately reporting what is at stake

- On January 26, described Colorado’s Regulate Marijuana Like Alcohol Act as:
  “a ballot proposal to *legalize possession of marijuana in small amounts* in Colorado...”

- On February 27, reported that:
  “[a] voter initiative that *would legalize the possession of marijuana* by adults for recreational use qualified for [Colorado’s] November ballot...moves to *decriminalize* marijuana face opposition from the federal government...”

It’s not just the public that isn’t fully understanding the totally unprecedented nature of these 2012 proposals. Even well-reputed news sources like the New York *Times* aren’t getting it right. These statements are not inaccurate, per se, but they completely ignore the other sections of the CO initiative. The initiative take several big steps past decriminalization.
Legalization of any one initiative would have significant and far-reaching effects. We’ll discuss these effects in detail in the slides that follow.
Only about 3% of arrests for marijuana sale and possession are federal. Thus, removing local enforcement from the current picture would radically change the current state of affairs.
Initiatives also vary in the potential conflict they could create between the state and the federal government. A state may legalize marijuana, but the drug remains illegal on the federal level. Still, not all initiatives conflict with the federal government as brazenly as others.

Various policies adopted within the ‘Nullify and Delegate’ and ‘Nullify and Regulate’ laws put state officials at odds with the Controlled Substances Act (CSA). All states in the ‘nullify and regulate’ category and many in the other categories collect taxes – meaning the state is deriving revenue from the sale of a federally controlled substance. They also all license and inspect facilities, putting state employees into production and cultivation facilities and processing the paperwork for the pursuit of these activities. More controversially, MA and OR proposals have employees testing the quality and packaging the products. California, Oregon, and Colorado have included provisions precluding state law enforcement from assisting in federal investigations. The most stark conflict is in Oregon, where state stores would sell marijuana.
Federal response can take several distinct forms

- U.S. Attorneys can write letters to landlords and businesses threatening seizure of property

- Judges can preempt regulations that conflict with the CSA

- The DEA’s efforts can be...
  - reduced
  - maintained at the status quo
  - somewhat stepped up
  - increased to completely fill in for missing state enforcement

There are three primary ways in which the federal government could respond to state legalization of marijuana.
U.S. Attorneys’ threats have helped to restrain medical marijuana sales

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<thead>
<tr>
<th>Consequences to Landlords</th>
<th>Consequences to Businesses</th>
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<tr>
<td>• CO U.S. Attorney John Walsh wrote to 23 medical marijuana dispensary landlords requiring shutdown</td>
<td>• WA U.S. Attorneys Jenny Durkan and Michael Orsnby: “[DOJ] priority includes prosecution of business enterprises that unlawfully market and sell marijuana”</td>
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<tr>
<td>• CA U.S. Attorney Melinda Haag wrote to landlords that the property “is subject to seizure by and forfeiture to the United States”</td>
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Letters and threats from U.S. attorneys have been successfully employed to hinder medical marijuana. These same tactics could be used against legalized recreational marijuana.

For the full news release about Attorney John Walsh, see: http://www.justice.gov/dea/pubs/states/newsrel/2012/den011212.html
The second main option for federal response is preemption. When courts preempt laws, they are ruling that the federal law supersedes the state law, and thus, that the state law is null and void. State law would ‘positively conflict’ with the objective of the CSA, making “simultaneous compliance with both state and federal directives...impossible”

- State courts have consistently held that medical marijuana regulation is not preempted by the CSA

- Federal courts could find that regulations creating a state monopoly for marijuana sales and criminalizing cooperation with federal drug laws are preempted by the CSA

The federal government could take legalization to the courts

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The second main option for federal response is preemption. When courts preempt laws, they are ruling that the federal law supersedes the state law, and thus, that the state law is null and void. State law would ‘positively conflict’ with the CSA only if complying with both state and federal law is impossible. For example, in the extreme cases where initiatives make it a crime for state employees to abide by federal law (i.e. cases where it is a misdemeanor to impinge the enjoyment of marijuana consumption, as in the Missouri initiative or the California Hemp and Health Initiative), it would be impossible for state employees to comply with both state and federal law. It seems likely that such a provision might be preempted. The same is true for state-owned stores (which we see in the OR Cannabis Tax Act, for example).

But any initiative that involves state employees in marijuana activity (for example, monitoring the quality or dealing with paperwork related to marijuana sales) could potentially be preempted. Still, as discussed, there is a spectrum; it seems that criminalizing cooperation with federal drug laws and creating state monopolies for medical marijuana sales would likely be at the top of the list. Given that state courts have not preempted medical marijuana, those that are lower down on the spectrum may or may not be preempted. But because this situation is so unprecedented, it is difficult to know how the courts will rule.

On the other hand, “repeal only” initiatives do not necessarily positively conflict with the CSA. By taking a hands off approach, state employees are not enforcing the federal law, but they are also not explicitly going against it.

It should also be noted here that all the 2012 marijuana legalization initiatives include severability clauses, stating that if certain provisions are preempted or otherwise turned down, the rest of the law would remain intact.
Taxes are a special case. On the one hand, taxation of marijuana could be preempted—that is, it could be ruled that if a state collects taxes from marijuana, then state employees are positively conflicting with the Controlled Substances Act. In this scenario, state courts would rule that states are not allowed to collect any taxes from marijuana sales.

But even if taxes are not preempted, per se, the federal government could still seize state tax revenues under federal money-laundering statutes.

We should note that the federal government has not yet stepped in and seized any revenues from medical marijuana to date. Oakland, California actually lists medical marijuana revenue as a line item in its accounting books, and still the federal government has not taken action. However, the story might change if the numbers involved are much greater (which we would generally expect them to be).

At the same time, the federal government will be less likely to seize revenues if specific earmarks—such as education or drug treatment services—render it politically painful to do so.

A reminder: we can speculate and hypothesize as to how the federal government will respond, but we cannot know for certain.
The answer: very doubtful, unless the DEA significantly amps up its resources. This graph shows the total number of marijuana-related arrests by state. Note that the number of state-level arrests in CA greatly exceeds the total number of DEA marijuana-related arrests nationwide.

In cases like MT or even CO or OR, where the current number of marijuana arrests is comparatively small, we could imagine the DEA might be able to step in and make up for a greater proportion of local marijuana arrests.
This graph shows the total number of field personnel per category as well as the total budget. We can see that the total number of law enforcement officers in CO, WA and CA each far exceed the number of total DEA personnel, and the total budget for the DEA is dwarfed by that of CA. Note that this total budget is for all activity, not just that which is marijuana-related.

Basically, there isn’t a whole lot more the DEA can do with current resources.
Federal law enforcement cannot take the place of state and local enforcement without seriously amping up its resources. State courts could preempt state sales, and letters from U.S. attorneys could restrain sales from state stores, dispensaries, and other businesses marketing and selling marijuana.

Currently, the DEA steps in in cases involving 100 pounds or more of marijuana. The DEA (or the Bureau of Alcohol, Tobacco, Firearms, and Explosives) could step in where marijuana production is highly visible at farms and any other operations (i.e. greenhouses) producing 1,000 lbs. at a time.

But the DEA would likely not be able to touch grow houses. By “grow houses” we mean houses that appear like regular residences from the outside, but are chock-full of marijuana plants on the inside. According to the RAND Altered State? analysis, these grow houses could still lead to price collapses of up to 80%, and could conceivably meet marijuana consumption demand.

Thus, only if the federal government could very substantially increase its current resources could it squelch the market effects of state marijuana legalization.

<table>
<thead>
<tr>
<th>Consequence of State Legalization</th>
<th>Judges (State and Federal)</th>
<th>U.S. Attorney Letters</th>
<th>DEA, ATF, etc., as currently constituted</th>
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<tbody>
<tr>
<td>State Stores</td>
<td>✓</td>
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<tr>
<td>Private Landlords Renting to Dispensaries</td>
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<tr>
<td>Business Enterprises marketing and selling marijuana</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Farming</td>
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<td>Production up to 1000 lbs. at a time “underground”</td>
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<td>✓</td>
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<tr>
<td>“Grow Houses”</td>
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The federal response choice is a complicated one.

State courts could take a hard stance against marijuana legalization by increasing enforcement and preempting regulations that positively conflict with the CSA, such as state-owned stores or criminalizing cooperation with federal law. But doing so would only repeal those regulatory provisions of the laws; the repeal of marijuana prohibition would not positively conflict with the CSA, and thus would remain.

Under “repeal only” laws, there would still be market effects on prices and consumption; perhaps not as great if enforcement is stricter, but still quite significant.
Consumption will increase due to lower prices

- Exact consumption increase unknowable
- Advocates point to potential tax revenue as benefit of legalization
- Impossible to predict tax revenues because we don’t know post-legalization price or consumption

We know consumption will increase if a state legalizes marijuana. By how much? This, we don’t know, in large part because this situation is so unprecedented.

One should be wary of any figures concerning expected tax revenues under state legalization, for there is no way to make such forecasts; we have no accurate predictions of what post-legalization prices will be. We can make some reasonable estimates, but because there is no precedent to learn from, any estimates are more like “what if?” scenarios, at best, not accurate estimations.
Before we go forward, we stress this caveat.

A caveat:

Our projections are based on the most recent and meaningful information we have available at this time.

However, parameters for marijuana prevalence, consumer sensitivity to price and non-price effects, tax evasion, user consumption amounts, and State spillover effects should in no way be viewed as precise or definitive. They are intended to give a sense of scale and to structure the issues.
Currently, most marijuana comes from Mexico, and includes high risk premiums because of the illicit status of the drug. RAND’s Altered State? analysis found that regardless of the production method used, prices under state legalization would be far below current wholesale marijuana costs.

Note that these production costs refer to sinsemilla production and thus are higher estimates than lower-grade, commercial marijuana prices. Prices could feasibly drop even more if efficiency and scale are maximized beyond what is known possible today.
This graph shows current retail prices of marijuana (again, estimates are made for sinsemilla, and come from RAND’s *Altered State*? analysis).

WA and CO prices differ because of the differences in taxation structures between WA I-502 and CO Regulate Marijuana Like Alcohol. WA I-502 stipulates a 25% excise tax at 3 levels (production, distribution, and retail sale), while CO RMLA only stipulates a 15% excise tax at the retail sale level.

The calculations are as follows:

WA = 250 lb. production + 25% producer markup + 25% excise tax + 15% distributor markup + 25% excise tax + 33% retailer markup + 25% excise tax + sales tax

CO = 260 lb. production + 25% producer markup + 33% retailer markup + 15% excise tax + sales tax
If one state legalizes, it will be much cheaper for drug dealers in states where marijuana remains illegal to purchase legal marijuana from a U.S. state than to purchase from Mexico. As a result, we expect prices to drop precipitously nationwide.
Even if marijuana legalization passes in both CO and WA this year, because CO’s taxation structure will result in lower marijuana prices, CO will become the primary producer of marijuana for the entire U.S. As a result, CO could stand to reap some very substantial tax revenues from (illegal) users in other states. Note that even if marijuana became legal in WA, users in WA would still probably get their marijuana from CO.

We could thus imagine a domino effect; if one state legalizes marijuana and earns serious tax revenues as a result, other states will be more likely to jump on the marijuana legalization bandwagon.