

The Marijuana Insurgency: Federalism and Social Reframing in Policy Reform

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ABSTRACT

After fifty years of federal prohibition, marijuana reform efforts have won political and legal success. These victories hold lessons for anyone seeking to resist federal law without being able to directly affect it.

Victory can come from reframing an issue. For marijuana reform, social reframing—not formal legal analysis or material factors—provides the best explanation for how advocates achieved change. Their unconventional political tactics, akin to those used by insurgents in wartime, undercut federal prohibition by winning hearts and minds.

This is an analysis of the sociology of legal change. It is also the story of how ordinary Americans retook personal liberty from the centralized state. Despite what anti-liberal critics have argued, local self-governance and individual freedom can sometimes go hand-in-hand.

The Revolution was in the minds and hearts of the people; . . . This radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution.

—John Adams, 1818¹

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1. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160 (enlarged ed., 1992) (emphasis removed).

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INTRODUCTION: A SOCIOLOGICAL ANALYSIS AND A NORMATIVE ARGUMENT

This is a story with three related themes: (1) federalism, (2) the power of people over black-letter law, and (3) the normative value of local and personal self-governance. The first two notes sound throughout this article. American law is pluralist, in terms of both jurisdictions and the people who govern themselves in them. An overly formalistic approach to law may overlook how popular mobilization and values can drive it. To explore their roles, I use insurgency as a lens. I see parallels between insurgency and marijuana reform advocates' successful resistance to the federal government.

A third theme, one that is an undercurrent in the discussion that follows, is not sociological but normative. We live in a transformative time for thinking about the proper scope of government—especially the federal government. American law has long reflected contradictory values. Many understand this country's core credo to be "live and let live," especially when the alternative to individualism is government regulation.² However, Americans are also heirs to the rich and highly regulative "reformed-Protestant communalism of [the] late 18th-century."³ That cultural background has inspired unique American approaches to the moral condemnation and punishment of drug use.⁴

The more civil-libertarian attitude has taken a beating from intellectuals on the right. Patrick Deneen has accused liberalism (in both its classical and social varieties) of leading only to a state that "expands to control nearly every aspect of life while citizens regard government as a distant and uncontrollable power."⁵ He says liberalism does so "by invitation to the easy liberties, diversions, and attractions of freedom, pleasure, and wealth," at the expense of local self-governance.⁶ Adrian Vermeule, meanwhile, has characterized "individualist, autonomy-based, and libertarian" personal rights as deviations from classical understandings of law.⁷

This article tells a different story about liberty and power, one more in keeping with traditional understandings of limited government. In

2. See, e.g., Claude S. Fischer, *Paradoxes of American Individualism*, 23 SOCIO. F. 363, 363–64 (2008).

3. BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM* 3 (1994); see also MARK STEIN, *VICE CAPADES: SEX, DRUGS, AND BOWLING FROM THE PURITANS TO THE PRESENT* 1 (2017) ("Americans have a love-hate relationship with vice.").

4. Katherine Van Wormer, *Harm Induction vs. Harm Reduction: Comparing American and British Approaches to Drug Use*, 29 J. OFFENDER REHAB. 35, 37 (1999).

5. PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 3 (2018).

6. *Id.* at 5.

7. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION* 4 (2022).

prohibiting marijuana, the federal Leviathan *took away* the power of neighborly citizens to claim recreational freedom. For all of prohibition's alignment with certain forms of moral regulation—albeit on a scale far larger than the intimate localism of Puritan New England—it also represents unprecedented regulatory zeal. Prohibition contradicts the traditional principle that “[n]ot every sin is a crime and not every sin can or should be punished by the civil law.”⁸ All the way back in the late Classical Era, Saint Augustine thought utopian schemes were unrealizable because “we could reach higher than a den of robbers but perhaps not that much higher most of the time.”⁹ Surprisingly for the “many who see the Middle Ages as an authoritarian time,” Saint Thomas Aquinas taught that human laws “chiefly” ban those vices “that are to the hurt of others,” warning that too much coercion would “break out into yet greater evils.”¹⁰ Then, during the Protestant Reformation, Martin Luther defined Christian freedom as “taking risks and embracing the capacity of people to seek salvation, through grace, in a manner free from incessant tutelage.”¹¹ One titan of Enlightenment-era Anglo-American law wrote: “Let a man . . . be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws.”¹² This was not the liberal champion John Stuart Mill, but that scion of respectable English tradition, William Blackstone. For all the (many) anachronisms in modern liberal ideology, armed government agents kicking in people's front doors to stop them from getting high and raiding the backyard grow sites of cancer patients are historical innovations.

To Deneen's credit, he recognizes that liberalism's “efforts to secure liberty and human dignity” have “continuities with the deepest commitments of the Western political tradition.”¹³ He writes that he does not want to “discard” these but rejects only an “ideological remaking of the world in the image of a false anthropology.”¹⁴ I agree with Deneen's philosophical stance. However, not all of the evils he describes are the result of technocrats liberalizing communities from above. Some are due to extraordinary overreaches of government control. And, pace Deneen, some liberal

8. Jean Bethke Elshtain, “*There Oughta Be a Law*”—*Not Necessarily*, 58 EMORY L.J. 71, 72 (2008).

9. *Id.* at 73.

10. *Id.*; THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, Q. 96, art. 2, resp. & ad. 2 (Fathers of the English Dominican Province trans., 2d. ed. 1920), <https://www.newadvent.org/summa/> [<https://perma.cc/67WC-4XBN>]; see also Matthew P. Cavedon, *Early Stirrings of Modern Liberty in the Thought of St. Thomas Aquinas*, 16 POL. & RELIG. 567, 571 (2023).

11. Jean Bethke Elshtain, *The Perils of Legal Moralism*, 20 J.L. & POL. 549, 552 (2004).

12. 1 WILLIAM BLACKSTONE, COMMENTARIES *120.

13. DENEEN, *supra* note 5, at 19.

14. *Id.*

measures—like reforming marijuana laws—are not just “tantamount to throwing gas on a raging fire.”¹⁵ People can resist centralization by asserting basic personal liberties that harm no one, except perhaps themselves, when exercised responsibly.

Such resisters can be thought of as insurgents. My analogy goes beyond morals and back into sociology. This article compares advocates’ strategies to insurgent warfare as described in the U.S. military’s *Counterinsurgency Field Manual*.¹⁶ “War is merely the continuation of policy by other means,” according to Carl von Clausewitz, and in a parallel, politics often mirrors the strategies of war.¹⁷ The *Manual* itself defines “an insurgency” as “an organized, protracted politico-military struggle designed to weaken government control and legitimacy while increasing insurgent control.”¹⁸ Insurgents triumph by “undermining and outlasting public support” for government policies.¹⁹ Marijuana advocates have done this well. Like other insurgents, they have used “all available tools—political . . . , informational . . . , and economic” to contest the federal regime.²⁰ This is the story of why and how.

I. MARIJUANA REFORM DEFIES FEDERAL PROHIBITION

The federal government prohibited marijuana as a Schedule I narcotic beginning in 1970.²¹ This classification grew out of its alleged

15. *Id.* at 4.

16. U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL (2007).

17. CARL VON CLAUSEWITZ, ON WAR 87 (trans. Michael Howard & Peter Paret, 1984) (Google Books ed.) (1832).

18. U.S. ARMY & MARINE CORPS, *supra* note 16, § 4-1.

19. See *Introduction to id.* at *li*.

20. *Id.* at § 1-3.

21. See 21 U.S.C. § 812 (Schedule I (c) (10)); David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 15–18 (2020) (identifying President Nixon’s use of racial and class politics as a major contributing factor); Y. Lu, *Medical Marijuana Policy in the United States*, HOPES (May 15, 2012), <https://www.stanford.edu/group/hopes/cgi-bin/wordpress/2012/05/medical-marijuana-policy-in-the-united-states> [<https://perma.cc/7L2B-FHB6>]. For the history of marijuana before this, see GEORGE FISHER, BEWARE EUPHORIA: THE MORAL ROOTS AND RACIAL MYTHS OF AMERICA’S WAR ON DRUGS 337–423 (2024) (chronicling American criminalization of marijuana between 1911 and 1937); David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1 (2020); CLAYTON JAMES MOSHER & SCOTT AKINS, IN THE WEEDS: DEMONIZATION, LEGALIZATION, AND THE EVOLUTION OF U.S. MARIJUANA POLICY 23–69 (2019); JOHN HUDAK, MARIJUANA: A SHORT HISTORY 43–48 (2016).

potential for abuse and lack of benefits,²² supposed antisocial effects,²³ and use by politically unpopular Latino and Black people.²⁴

This part explains how all three branches of the federal government prohibit marijuana. It then identifies the seeds of resistance that grew into a field of advocates willing to challenge that policy.

A. All Three Branches of the Federal Government Maintain Prohibition

1. Legislative

Each branch of the federal government supports marijuana criminalization. Congress placed the drug in Schedule I of the Controlled Substances Act.²⁵ Under that Act, it is illegal “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense” marijuana.²⁶ It is also illegal to knowingly or intentionally possess it.²⁷

Early on, Congress also lent other support to marijuana prohibition. A 1974 report by a committee chaired by prominent senator James O. Eastland found that marijuana “caused severe and irreversible brain damage, damage to the reproductive system,” a clinical lack of motivation, and paranoia, and that its users were exploitable by extremist political groups.²⁸

Federal legislative prospects for reform were bleak a decade ago when referenda in Colorado and Washington State legalized recreational

22. See Jane E. Brody, *Tapping Medical Marijuana's Potential*, N.Y. TIMES WELL BLOG (Nov. 4, 2013), http://well.blogs.nytimes.com/2013/11/04/tapping-medical-marijuanas-potential/?_php=true&_type=blogs&_r=0 [https://perma.cc/EKZ3-3T4A].

23. See Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL'Y 691, 731–32 (2010).

24. See *id.* at 713 (discussing how the drug was considered “Mexican opium,” capable of making Latino field hands violent, when states began prohibiting it); David Schlusell, Note, “*The Mellow Pot-Smoker*”: *White Individualism in Marijuana Legalization Campaigns*, 105 CALIF. L. REV. 885, 897 (2017). Schlusell recounts:

In congressional hearings for the proposed Marihuana Tax Act of 1937, [Federal Bureau of Narcotics Commissioner Henry] Anslinger was the advocate for prohibition. His testimony essentially consisted of racist anecdotes focused on sex and violence. He stated that “most marijuana smokers are Negroes, Hispanics, Filipinos and entertainers. Their satanic music, jazz and swing result from marijuana usage. This marijuana causes white women to seek sexual relations with Negroes.” He told a fictional story about pot-crazed black college men impregnating white coeds

Id. (footnotes omitted).

25. See 21 U.S.C. § 812 (Schedule I (c) (10)). The statute anticipates the possibility of rescheduling. See *id.* § 812 (Schedule I (c)).

26. *Id.* §§ 812 (Schedule I (c) (10)), 841 (a).

27. *Id.* § 844 (a).

28. MOSHER & AKINS, *supra* note 21, at 51–52.

marijuana.²⁹ Although activists back then said they were “willing to fight for reform at all levels,” they also had no “hope . . . of passing any federal legislation.”³⁰ Congress was “a notoriously hard place to get anything done, much less a controversial reform” like legalizing marijuana.³¹ Though the House of Representatives passed a bill to decriminalize and deschedule marijuana in 2022, the Senate did not enact it, and the bill died. None of the marijuana legalization bills introduced in 2023 have made it out of committee; Congress has not eased prohibition.³²

2. Executive

The executive branch has enforced marijuana prohibition ever since President Nixon helped usher it into law. Nixon detested the youthful counterculture and peace movements that prized the drug.³³ He “associated marijuana use with all the changes in society” he opposed.³⁴ Nixon saw marijuana prohibition as a way of targeting his perceived enemies—hippy, Black, and Jewish communities—while garnering support from southern voters.³⁵ He signed the Controlled Substances Act outlawing marijuana nationwide.³⁶ Nixon later blocked rescheduling the drug, even though a commission he established recommended doing so.³⁷ He pressured

29. See Lisa Marshall, *A Decade After Legalizing Cannabis in Colorado, Here's What We've Learned*, CU BOULDER TODAY (Nov. 4, 2022), <https://www.colorado.edu/today/2022/11/04/decade-after-legalizing-cannabis-colorado-heres-what-weve-learned> [<https://perma.cc/4XN7-N6QW>]; Jonathan Martin & Seattle Times Staff, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Feb. 23, 2017), <https://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/> [<https://perma.cc/756Z-DYLD>]. For an overview of failed congressional efforts to reform marijuana laws, see HUDAK, *supra* note 21, at 123–30.

30. Email from Allen St. Pierre, Exec. Dir., NORML, to Author (Mar. 10, 2014) (on file with author).

31. Email from Morgan Fox, Commc’n Manager, Marijuana Pol’y Project, to Author (Mar. 14, 2014) (on file with author).

32. See Jean E. Smith-Gonnell & Cole White, *Where Things Stand: A Summary of Pending Federal Cannabis Legislation*, REUTERS (Feb. 7, 2024), <https://www.reuters.com/legal/litigation/where-things-stand-summary-pending-federal-cannabis-legislation-2024-02-07/>; Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Congress (2022); *H.R. 3617 (117th): Marijuana Opportunity Reinvestment and Expungement Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/117/hr3617> [<https://perma.cc/2WDZ-782G>] (last visited Apr. 1, 2024); Ben Adlin, *As Marijuana Banking Bill Stagnates in Congress, Maryland Regulators Share Tips to Reduce Burglaries Targeting ATMs*, MARIJUANA MOMENT (Oct. 19, 2023), <https://www.marijuanamoment.net/as-marijuana-banking-bill-stagnates-in-congress-maryland-regulators-share-tips-to-reduce-burglaries-targeting-atms/> [<https://perma.cc/WFH6-NRL6>]; *but see* Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215, 136 Stat. 2257 (2022) (codified as amended in scattered sections of 21 U.S.C., 42 U.S.C.) (authorizing expanded medical research regarding cannabis).

33. ANNE L. FOSTER, *THE LONG WAR ON DRUGS* 156 (2023).

34. *Id.*

35. MOSHER & AKINS, *supra* note 21, at 44; HUDAK, *supra* note 21, at 50.

36. FOSTER, *supra* note 33, at 156.

37. *Id.* at 117–19.

legislators to halt federal reform efforts, and states hesitated to undertake their own measures for fear of losing federal funding.³⁸ Nixon declared a federal war on drugs.³⁹

Virtually every president since then has contributed to that policy.⁴⁰ However, there have been some steps towards a more moderate approach under recent Democratic presidents. The Obama Administration stopped prosecuting ordinary users in states where marijuana had been legalized.⁴¹ A year and a half into President Biden's administration, he pardoned federal marijuana-possession offenders.⁴² As this Article was going to press, the administration also proposed relocating marijuana to Schedule III of the Controlled Substances Act, which would have limited effects:

[A]lthough rescheduling likely provides tax relief, it does not impact criminal justice and immigration issues related to cannabis criminalization. Rescheduling would not be a panacea for the challenges faced by state legal marijuana businesses and would not necessarily make marijuana easier to research.

Schedule 3 drugs must be approved by the [FDA,] prescribed by a doctor, and distributed by a pharmacy. Thus, none of the existing state-regulated marijuana dispensaries would be able to comply without extreme cost or further regulation or legislation.⁴³

3. Judicial

The judiciary, meanwhile, has held that prohibition is both constitutional and legally authorized. An important early challenge came in the

38. *Id.* at 158.

39. See HUDAK, *supra* note 21, at 49–65.

40. See Paul-Emile, *supra* note 23, at 731; Vince Sliwoski & Molly Nelson, *Grading the Presidential Candidates on Cannabis Policy*, LAW360 (Oct. 15, 2019), <https://www.law360.com/articles/1209381/grading-the-presidential-candidates-on-cannabis-policy> [<https://perma.cc/5VTS-Y9AF>] (“Though Trump has supported the STATES Act [allowing states to decide whether to legalize marijuana], he has not advocated for legalizing marijuana. . . . Unfortunately, he has not said he would reschedule marijuana.”). President Carter did endorse decriminalization at one point, but “did little to change the institutional apparatus of the drug war.” HUDAK, *supra* note 21, at 67. For a survey of the many federal executive agencies involved in marijuana “demonization,” see MOSHER & AKINS, *supra* note 21, at 124–51.

41. See Memorandum of James M. Cole, Deputy Att’y Gen., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/9WGR-GL64>].

42. See Statement on Marijuana Reform, 2022 DAILY COMP. PRES. DOC. 883 (Oct. 6, 2022); see also Deepa Shivaram, *Biden Expands Pardons for Marijuana Possession and Grants Clemency to 11*, NPR (Dec. 22, 2023), <https://www.npr.org/2023/12/22/1221230390/biden-pardons-clemency-marijuana-drug-offenses> [<https://perma.cc/G8BX-CRG9>].

43. Victoria Litman, *What You Need to Know About Marijuana Rescheduling*, BILL OF HEALTH (May 28, 2024), <https://blog.petrieflom.law.harvard.edu/2024/05/28/what-you-need-to-know-about-marijuana-rescheduling/> [<https://perma.cc/W7VJ-K44W>].

1980's *National Organization for the Reform of Marijuana Laws (NORML) v. Bell*.⁴⁴ In *NORML*, marijuana advocates challenged prohibition under the right to privacy, equal protection, and the Eighth Amendment.⁴⁵ The district court rejected the privacy claim on the ground that "[s]moking marijuana does not qualify as a fundamental right" because it does not concern family affairs and is recreational.⁴⁶ Next, advocates argued that prohibition violated equal protection because alcohol and nicotine were not classified in Schedule I despite posing similar risks.⁴⁷ The court dismissed this claim because of medical disagreement about marijuana's effects and Congress's separate regulatory schemes for the other two substances.⁴⁸ Lastly, advocates argued that \$5,000 fines and one-year jail sentences for possession were cruel and unusual punishment.⁴⁹ But the court found that these penalties were comparable to other drug crimes and noted that judges retained broad sentencing discretion.⁵⁰

NORML brought other federal lawsuits for another fourteen years.⁵¹ In 1994, it challenged the DEA's refusal to let marijuana be prescribed medically.⁵² The D.C. Circuit held legally sufficient the DEA's rationales for this policy.⁵³ NORML did not petition the Supreme Court for certiorari "in fear of making 'bad law' and forever imped[ing] cannabis reform efforts."⁵⁴

Other groups did bring medical marijuana before the Supreme Court. In *United States v. Oakland Cannabis Buyers' Co-operative*, a medical marijuana clinic in California—which had authorized the clinic's operation—argued that the Controlled Substances Act contained a medical-necessity defense.⁵⁵ Writing for the Court, Justice Thomas disagreed that the courts could imply such a defense.⁵⁶

The greatest federal judicial challenge to marijuana prohibition came four years later in *Gonzales v. Raich*.⁵⁷ This challenge was from California-based medical marijuana users.⁵⁸ They contested the federal

44. 488 F. Supp. 123 (D.D.C. 1980).

45. *See id.* at 125.

46. *Id.* at 132–33.

47. *See id.* at 134.

48. *See id.* at 134, 136, 138. Regarding other failed rescheduling efforts, see HUDAK, *supra* note 21, at 135–36.

49. *See NORML*, 488 F. Supp. at 142.

50. *Id.* at 142–43.

51. *See, e.g., All. for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994).

52. *Id.* at 1132–33.

53. *Id.* at 1137.

54. Email from Allen St. Pierre, *supra* note 30.

55. *See* 532 U.S. 483, 486–87, 489 (2001).

56. *See id.* at 493–94.

57. 545 U.S. 1 (2005).

58. *See id.* at 5–6.

prohibition of “intrastate manufacture and possession of marijuana for medical purposes” where this was authorized by state law.⁵⁹ This time, Justice Thomas took their side: “If Congress can regulate [such activity] under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.”⁶⁰ If the defendants could be prosecuted, he wrote, then “the Federal Government [might] now regulate quilting bees, clothes drives, and pot-luck suppers throughout the 50 States.”⁶¹ Unfortunately for the defendants, though, the majority sided with the government.⁶² “Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels,” the majority held that Congress could prohibit marijuana possession.⁶³

Federal courts have refused to block prohibition on constitutional, statutory, or administrative grounds, regardless of state decriminalization measures. That has not changed, despite the many changes at the state level detailed below. This reticence may seem somewhat surprising. (Or perhaps not, given that judges have, “in all times, as a general rule, displayed remarkable conservatism.”⁶⁴) After all, Judge Jeffrey Sutton has recently detailed cases in other areas of law where federal jurisprudence—including around personal liberty—was swayed by state courts because “interpretations of the original state constitutional guarantees illuminate the meaning of the later federal provision.”⁶⁵ But state marijuana reforms have not affected federal constitutional precedent, perhaps because few of these have been won through litigation.⁶⁶ Judge Sutton notes as well that federal courts can be influenced because “States’ experiences in recognizing [a] right warrant nationalizing it.”⁶⁷ This has had a major effect, as I discuss below, but more with the public and other branches of government than with the federal judiciary.

From the statute books, through presidential policy, to the chambers of federal courts, marijuana prohibition remains firmly established in

59. *Id.* at 15.

60. *Id.* at 57–58 (Thomas, J., dissenting).

61. *Id.* at 69.

62. *Id.* at 33 (majority opinion).

63. *Id.* at 22; cf. Mona Zhang, *Massachusetts Cannabis Businesses Challenge Constitutionality of Federal Drug Laws*, POLITICO (Oct. 26, 2023), <https://www.politico.com/news/2023/10/26/massachusetts-cannabis-businesses-courts-00123768> (noting a new lawsuit questioning *Gonzales*).

64. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 77 (Ga. 1905).

65. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2 (2018).

66. See *infra* Part II.B.2; but see *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (interpreting the state constitution as protecting the possession of small amounts of marijuana for personal use).

67. SUTTON, *supra* note 65, at 2.

federal law's formal provisions. In most contexts, this would doom reform efforts.

B. Insurgents Fight Prohibition

However, from the mid-1990s to 2010, thirteen states and the District of Columbia legalized medical marijuana.⁶⁸ Then, in 2012, voters in Colorado and Washington State legalized recreational use of the drug.⁶⁹ Advocates have since won similar battles in twenty-one more states and the District of Columbia, while medical marijuana is legal throughout nearly the entire United States.⁷⁰

Who are the insurgents who resist federal prohibition, and why have they decided to fight? There are three main groups: (1) medical marijuana patients, their loved ones, and their doctors; (2) libertarians and fiscal conservatives; and, perhaps most obviously, (3) recreational marijuana users and entrepreneurs. All of them, as Deneen said of Americans in general, have “felt loss of power over the trajectory of their lives” and fought back.⁷¹

The first group has had the most policy success, as 37 states now allow access to medical marijuana, while another twelve allow access to medical products low in THC, cannabis's active compound.⁷² Against a federal regime that long branded marijuana use as highly dangerous and antisocial, medical marijuana users came across as highly sympathetic people with great and genuine need for access to the drug.⁷³ The first American to legally use medical marijuana was Robert Randall, a taxi driver with glaucoma, in 1976.⁷⁴ He successfully raised a justification defense to a criminal prosecution and “even received a monthly supply” from the only farm that grew the drug legally for medical research.⁷⁵ In the two decades that followed, California—an epicenter for the HIV/AIDS

68. See Leslie Shapiro & Katie Mettler, *U.S. Marijuana Laws: A History*, WASH. POST, <https://www.washingtonpost.com/graphics/health/marijuana-laws-timeline/> [<https://perma.cc/9KWA-SAXQ>] (last visited Oct. 22, 2023). Ten states decriminalized marijuana possession without legalizing it in the 1970s, but then early reform efforts halted. See HUDAK, *supra* note 21, at 120.

69. See Shapiro & Mettler, *supra* note 68.

70. See Claire Hansen, Horus Alas, & Elliott Davis Jr., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD RPT. (Sept. 27, 2023), <https://www.us-news.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [<https://perma.cc/VY8R-3U8V>]; *Medical Marijuana Laws*, NORML, <https://norml.org/laws/medical-laws/> [<https://perma.cc/6TRS-SWEJ>] (last visited Oct. 22, 2023).

71. DENEEN, *supra* note 5, at 7.

72. See *Medical Marijuana Laws*, *supra* note 70.

73. See Paul-Emile, *supra* note 23; Patton, *supra* note 21, at 6–10, 15–18.

74. FOSTER, *supra* note 33, at 159–60.

75. *Id.* at 160.

epidemic—saw activists win public sympathy for distributing marijuana to desperately ill people.⁷⁶

Patients remain an important part of marijuana reform efforts. Take Charlotte “Charlie” Figi.⁷⁷ A severe form of epilepsy left Charlie suffering 300 grand mal seizures every week by the age of five.⁷⁸ She had multiple heart attacks and could not walk, talk, or eat.⁷⁹ Charlie’s parents had “already signed a do-not-resuscitate order . . . [and] said their goodbyes” to her when she began using medical oil derived from marijuana.⁸⁰ Charlie did not have a single seizure in her first week on the new medication.⁸¹ A year later, she was riding a bicycle, suffering only a few seizures a month, and “thriving.”⁸²

Her mother once strongly opposed legalizing medical marijuana.⁸³ Now, the strand of marijuana that brought Charlie health is named “Charlotte’s Web” in her honor.⁸⁴ Every patient like Charlie spun another kind of web, too: a network of sympathetic family members, friends, and doctors. Just as insurgencies gain recruits “by appealing to local grievances” and then “lur[ing] followers into the broader movement,”⁸⁵ medical marijuana advocates have won public support by translating sympathy into pressure for reform.

The next division in marijuana’s army is staffed by libertarians and fiscal conservatives. This group’s motives are less emotional than the first group, but its support is important. On principle, libertarians believe that individuals should weigh health risks for themselves.⁸⁶ They want a world in which “gay people [are] able to protect their marijuana plants with guns.”⁸⁷

76. *Id.*

77. See Sandra Young, *Marijuana Stops Child’s Severe Seizures*, CNN HEALTH (Aug. 7, 2013), <http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/> [https://perma.cc/VV4M-7253].

78. *See id.*

79. *See id.*

80. *Id.*

81. *See id.*

82. *Id.* Charlie lived to age 13. Mallory Simon & Melissa Dunst Lipman, *Charlotte Figi, the Girl Who Inspired a CBD Movement, Has Died at Age 13*, CNN HEALTH (Apr. 9, 2020), <https://www.cnn.com/2020/04/08/health/charlotte-figi-cbd-marijuana-dies/index.html> [https://perma.cc/F5MK-8VJ9].

83. *See* Young, *supra* note 77.

84. *Id.*

85. U.S. ARMY & MARINE CORPS, *supra* note 16, § I-49, at 17–18.

86. *See, e.g.*, David Gordon, *Ruins of the Drug War*, 8 MISES REV., Winter 2002 (book review), <https://mises.org/library/legalize-case-decriminalizing-drugs-douglas-n-husak> [https://perma.cc/XW59-F2N2].

87. Nick Gillespie, “I Want Gay People to Be Able to Protect their Marijuana Plants with Guns.”, REASON HIT & RUN BLOG (Mar. 5, 2014), <http://reason.com/blog/2014/03/05/i-want-gay-people-to-be-able-to-protect> [https://perma.cc/N3N7-APE5] (quoting Tim Moen).

Additionally, as I explain below, marijuana legalization could have a large impact on public budgets. This helps bring fiscal conservatives to support reform, too, especially against expensive alternatives like incarceration. Over 500 economists—led by free-market champion and Nobel laureate Milton Friedman—endorsed marijuana legalization in 2005.⁸⁸

Drawing from both libertarian and fiscal-conservative rationales, *National Review* founder William F. Buckley (known to have “experimented” with marijuana at least once⁸⁹) condemned federal prohibition of drugs as a waste of public resources, as well as a needless crusade against the many users who are the “equivalent of those Americans who drink liquor but do not become alcoholics, or those Americans who smoke cigarettes but do not suffer a shortened lifespan.”⁹⁰ Although clear partisan divides remain,⁹¹ a significant group of people on the right side of the political spectrum have accepted the fiscal and liberty arguments, becoming supporters of marijuana reform.⁹²

Marijuana reform’s third company of troops is the most obvious: recreational users and related businesses. Most marijuana users oppose policies that could put them behind bars.⁹³ And, as explained below, marijuana is highly lucrative. Recreational users and their allies were the first to challenge prohibition.⁹⁴ Bolstered with profits after the Colorado and

88. See Quentin Hardy, *Milton Friedman: Legalize It!*, FORBES (June 2, 2005), https://www.forbes.com/2005/06/02/cz_qh_0602pot.html?sh=1f8c8f2ddd90 [<https://perma.cc/2SDS-AGUS>] (“Ending prohibition enforcement would save \$7.7 billion in combined state and federal spending, the report says, while taxation would yield up to \$6.2 billion a year.”).

89. See Evan Thomas, *Bill Buckley: Mr. Right, RIP*, NEWSWEEK (Mar. 13, 2010), <http://www.newsweek.com/bill-buckley-mr-right-rip-83951> [<https://perma.cc/S2VE-95DD>] (saying Buckley “sailed his yacht into international waters to experiment with marijuana”).

90. William F. Buckley, *The War on Drugs is Lost*, NAT’L REV. 35–36 (Feb. 12, 1996), <https://www.nationalreview.com/2014/07/war-drugs-lost-nro-staff/> [<https://perma.cc/C3GA-Y3TE>].

91. See Rachele Gordon, *Where Do the 2024 Republican Presidential Candidates Stand on Marijuana?*, GREENSTATE (Aug. 23, 2023), <https://www.greenstate.com/news/where-do-the-2024-republican-presidential-candidates-stand-on-marijuana/> [<https://perma.cc/6PEP-GFXX>].

92. See Natalie Fertig & Mona Zhang, *New GOP Weed Approach: Feds Must ‘Get Out of the Way’*, POLITICO (Nov. 22, 2021), <https://www.politico.com/news/2021/11/21/cannabis-democrats-republicans-523119>.

93. But see Elliott C. McLaughlin, *California Marijuana Vote Draws Unlikely Foes, Allies into Ring*, CNN POLITICS (Sept. 15, 2010), <http://www.cnn.com/2010/POLITICS/09/13/california.marijuana.legalization/index.html> [<https://perma.cc/HJX3-ULLZ>] (interviewing two recreational marijuana growers opposed to legalization in California, one of whom candidly said: “Morally, I know [legalization is] the right thing. I might pass judgment on people who put themselves first financially, but here I am doing it.”).

94. See, e.g., Nat’l Org. for Reform of Marijuana L. v. Bell, 488 F. Supp. 123 (D.D.C. 1980) (rejecting constitutional and statutory challenges to federal prohibition of recreational marijuana); cf. *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (holding that Alaska’s state constitutional right to privacy protects home possession of small amounts of marijuana for personal use).

Washington State referenda, entrepreneurs hired their first federal lobbyist in 2014.⁹⁵ The world of recreational marijuana is full of activists.

As is often the case in politics, these three strands of supporters do not always form a coherent coalition. Like other insurgents, reform advocates “may form loose coalitions when it serves their interests; however, these same movements may fight among themselves.”⁹⁶ Indeed, there are many states where medical marijuana is legal, but recreational marijuana is banned. For that matter, legalization causes new battles: should marijuana be sold by non-profit cooperatives, state monopolies, or private businesses, and should Black entrepreneurs be given priorities?⁹⁷ How should marijuana be taxed, and should there be limits on grow sizes or potency?⁹⁸ Marijuana’s partisans disagree on these questions for reasons of principle and of self-interest.⁹⁹ Sometimes, these disagreements defeat unity altogether, like when some California growers and distributors opposed the legalization of recreational marijuana “as a regulatory threat.”¹⁰⁰

95. See Kelly Vlahos, *Cannabis Goes Corporate*, AM. CONSERVATIVE (Apr. 15, 2014), <http://www.theamericanconservative.com/articles/fear-the-rise-of-big-pot/> [https://perma.cc/6FJR-ZV3U]; Ben Terris, *Big Pot Rising: The Marijuana Industry’s First Full-Time Lobbyist Makes Rounds on Capitol Hill*, WASH. POST (Mar. 24, 2014), https://www.washingtonpost.com/lifestyle/style/big-pot-rising-on-capitol-hill-nations-first-full-time-marijuana-lobbyist-makes-his-rounds/2014/03/24/dbc8c0c0-b07b-11e3-95e8-39bef8e9a48b_story.html [https://perma.cc/NFE7-PQNR].

96. U.S. ARMY & MARINE CORPS, *supra* note 16, § I-39, at 15.

97. See Y. Tony Yang, Carla J. Berg, & Scott Burris, *Cannabis Equity Initiatives: Progress, Problems, and Potentials*, 113 AM. J. PUB. HEALTH 487 (2023); Nick Evans, *Marijuana Business Owners Line Up Against Ohio Senate’s Proposed Medical Cannabis Overhaul*, OHIO CAPITAL J. (Mar. 7, 2023), <https://ohiocapitaljournal.com/2023/03/07/marijuana-business-owners-line-up-against-ohio-senates-proposed-medical-cannabis-overhaul/> [https://perma.cc/N9AP-TLSM]; Kelsi Anderson, *What You Need to Know About Recreational Marijuana on Missouri’s Ballot*, KSDK-TV (Oct. 27, 2022), <https://www.ksdk.com/article/news/politics/elections/missouri-marijuana-legalization-initiative-what-to-know-amendment-3-missouri-pot-weed/63-dcbe46af-c99a-4992-9449-2944cb505fad> [https://perma.cc/YVG3-YQUY] (“[S]ome argue the Amendment would disproportionately benefit the already established medical marijuana industry, which has been criticized for shutting out Black entrepreneurs and deprioritizing the communities that have been most negatively impacted by the war on drugs.”); Vlahos, *supra* note 95.

98. See Elliott C. McLaughlin, *Experts: Maine, Michigan Votes Another ‘Green Light’ for Marijuana Legalization*, CNN (Nov. 9, 2013), <http://www.cnn.com/2013/11/09/us/marijuana-public-opinion/> [https://perma.cc/3TFG-7VCY].

99. *Cf.* U.S. ARMY & MARINE CORPS, *supra* note 16, § I-47, at 17 (noting that some join insurgencies for money and will act accordingly).

100. Morgan Fox, *Public Opinion, Political Disconnect, and the Marijuana Market*, CATO UNBOUND (Nov. 14, 2011), <http://www.cato-unbound.org/2011/11/14/morgan-fox/public-opinion-political-disconnect-marijuana-market> [https://perma.cc/X955-CPGB]. These trends have persisted: due partly to a 70% effective tax rate and widespread municipal bans, 80–90% of California’s recreational market “remains underground.” Amanda Chicago Lewis, *California Legalized Weed Five Years Ago. Why Is the Illicit Market Still Thriving?*, GUARDIAN (Nov. 2, 2021), <https://www.theguardian.com/us-news/2021/nov/02/california-legal-weed-cannabis-industry-economy> [https://perma.cc/PR3A-T7ZS]; see also Michael Corkery, *Oakland Cannabis Sellers, Once Full of*

Political action often requires a wide coalition. However, many successful coalitions are so broad that they meet only at a single tangent point. As McNollgast noted, law is “a compromise among numerous political actors” with differing goals.¹⁰¹ Be that as it may, the insurgent army behind marijuana reform has won many battles despite not always seeing eye-to-eye.

II. INSURGENT SUCCESS IS BEST ATTRIBUTED TO ISSUE-FRAMING

What explains the current state of marijuana law? There are three common answers.

(1) Perhaps the most obvious, at least for lawyers, is legal formalism. Here, though, where there is such a radical disconnect between what the law is according to the U.S. Code and what marijuana policy actually looks like, “our practice is richer than our theorizing.”¹⁰² Professor William Buzbee’s theory of the regulatory commons, detailed below, helps explain why.

(2) The next step toward understanding actual marijuana policy is to consider what I call material factors—votes, demographics, public budgets, and other observable “hard facts.” Each has something to do with why marijuana reform has been successful. However, material conditions are often caused *by* popular support for policy change, and to the extent they have had an impact on the marijuana debate, it is by changing people’s minds. All the money in the world means nothing without altered perceptions and opinions.

(3) The best answer to the riddle of marijuana policy reform is framing. As people tire of the drug war, they become open to alternatives. Local legal permissiveness makes it possible for the public to see legalization as a real possibility. Combined with rising public familiarity with marijuana, a new mindset takes hold.

Hope, Face a Harsh Reality, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/business/cannabis-dispensaries-oakland.html> (blaming crime and unresponsive policing).

I have an ongoing contract to write amicus briefs for the Cato Institute, but have not consulted with anyone there regarding this article and do not remember if I asked for feedback from anyone there on the 2014 version of it. I also cite some Institute for Justice resources; although I am a former employee and still an occasional contractor for that group, I likewise have not consulted with anyone there regarding this article and do not remember whether I did so back in 2014.

101. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretations*, 80 GEO. L.J. 705, 707 (1992). McNollgast is an academic trio composed of Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast. See *Barry R. Weingast*, STANFORD, BARRY R. WEINGAST, <https://weingast2023.sites.stanford.edu/> [<https://perma.cc/28RV-YL9C>] (last visited May 5, 2024).

102. Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN’S L. REV. 407, 413 (2011).

I discuss each of these three analytical approaches in turn, highlighting their limits and contributions in explaining marijuana policy.

A. Legal Formalism Does not Explain Marijuana Policy

“[T]he *Controlled Substance Act* is in name only,” according to Allen St. Pierre, then-executive director of NORML.¹⁰³ He is right, but the surprising thing is that, at face value, federal law really does strictly support marijuana prohibition. As I explained above, all three branches of the federal government have maintained that policy. Formal legal analysis could lead one to imagine that absolute marijuana prohibition is real.

Formalism is such a weak explanation here in part because of the political pathologies identified by Buzbee’s theory of the regulatory commons.¹⁰⁴ This theory says there are cases where “social ills match no particular political-legal regime or jurisdiction, but instead encounter fragmented political-legal structures.”¹⁰⁵ When this happens, there may be “political underinvestment” caused by opponents taking advantage of government confusion, regulators passing responsibility on to others, and governments left uncertain about who to blame for enforcement failures.¹⁰⁶

Regulatory commons arise in the United States regularly because of federalism.¹⁰⁷ Where federal, state, and local governments all “share regulatory turf in uncertain sorts of ways,” policy coordination can be hard.¹⁰⁸ If no one has sole responsibility for enforcing a policy, decision-makers will often prioritize whatever falls neatly within their domain.¹⁰⁹ This may make regulations harder to implement, but this complexity was intended by the Founders because “divisions of authority are an institutional mechanism for safeguarding individual liberty.”¹¹⁰ Overcoming a regulatory commons often requires crises that create public demand for political change until a “tipping point” forcing simplification is reached.¹¹¹ If there are no crises, a regulatory commons tends to persist.

Marijuana policy has long sat in a regulatory commons. Federal and state authority overlap in unclear ways.¹¹² The federal government

103. Email from Allen St. Pierre, *supra* note 30.

104. See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003).

105. *Id.* at 6.

106. *Id.*

107. See *id.* at 24.

108. *Id.*

109. See *id.* at 29–30.

110. *Id.* at 51.

111. *Id.* at 55.

112. See *id.* at 24; see also Victoria Litman, *Limiting Federal Regulation of Cannabis*, REGUL., Fall 2023, at 2–4, <https://www.cato.org/regulation/fall-2023/limiting-federal-regulation-cannabis>

prohibits marijuana.¹¹³ However, states have legalized varying uses of marijuana for decades.¹¹⁴ The federal government has agents who can directly enforce prohibition,¹¹⁵ but it is constitutionally prohibited from conscripting state officials into doing so.¹¹⁶ However, the federal government also used to pour “large amounts of money into local law enforcement agencies, giving them an incentive to ignore state law and help federal law enforcement.”¹¹⁷ “[E]ven though the states [did] all the heavy lifting,” much of the funding came from “huge federal coffers.”¹¹⁸

This mishmash of laws, personnel, and money makes marijuana regulation a crowded field. While that situation did not directly cause regulatory inaction, it did lead to arbitrary enforcement decisions and federal laxity in pursuing marijuana arrests in jurisdictions where the drug was legal—even before such abstention became official policy.¹¹⁹ It also encouraged some state legislators to overcome their “fear that they [would] simply be overruled by federal law.”¹²⁰

The regulatory commons also means there has been a lack of crises that could inspire more vigorous prohibition.¹²¹ The public did not grow increasingly concerned as more states legalized medical marijuana—they saw that “the sky hadn’t fallen.”¹²² Public support for legalizing recreational marijuana has reached record highs.¹²³ The regulatory commons is not going to be reorganized into effective federal prohibition any time

[<https://perma.cc/D7LK-W6A5>]; Lisa N. Sacco, Joanna R. Lampe, & Hassan Z. Sheikh, CONG. RSCH. SERV., THE FEDERAL STATUS OF MARIJUANA AND THE POLICY GAP WITH STATES (2024), <https://crs-reports.congress.gov/product/pdf/IF/IF12270> [<https://perma.cc/33RM-JMYN>]; Amy Kellogg, Caitlin Anderson & Meg Michiels, *A Cannabis Conflict of Law: Federal vs. State Law*, BUS. L. TODAY (Mar. 21, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-april/a-cannabis-conflict-of-law-federal-vs-state-law/ [<https://perma.cc/4SCX-79FZ>].

113. See 21 U.S.C. § 812.

114. See *Medical Marijuana Laws*, *supra* note 70.

115. See Drug Enf’t Admin., *Domestic Cannabis Suppression/Eradication Program*, <https://www.dea.gov/operations/eradication-program> [<https://perma.cc/QHW7-P7RB>] (last visited Oct. 22, 2023).

116. See *Murphy v. NCAA*, 584 U.S. 453, 469–72 (2018); *Printz v. United States*, 521 U.S. 898 (1997).

117. Email from Morgan Fox, *supra* note 31.

118. Email from Allen St. Pierre, *supra* note 30.

119. See Memorandum of James M. Cole, *supra* note 41; Slates C. Veazey, *Attorney General Garland Reconfirms the DOJ’s Hands-Off Approach Toward Federal Marijuana Prosecution*, NAT’L L. REV. (May 2, 2022), <https://www.natlawreview.com/article/attorney-general-garland-reconfirms-doj-s-hands-approach-toward-federal-marijuana> [<https://perma.cc/9JNF-7MN3>] (noting inconsistent federal policies regarding states where marijuana has been legalized).

120. Email from Morgan Fox, *supra* note 31.

121. Buzbee, *supra* note 104, at 46.

122. Email from Morgan Fox, *supra* note 31.

123. See Gallup, *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx> [<https://perma.cc/2R3J-YV6W>].

soon. Morgan Fox, then-Communications Manager at the Marijuana Policy Project and now Political Director of NORML, predicted the current state of affairs in 2014:

We predict that within the next three years, at least ten states will have made marijuana legal for adults and regulated sales in a manner similar to alcohol. At that point, Congress will have to address the issue, but it is anyone's guess how long it will take them to take action. I think it is fair to say that in fifteen years, marijuana will no longer be illegal at the federal level With states being free to determine their own marijuana policies, I think it is safe to say that about half of all states will have regulated legal marijuana markets in place, and nearly all will allow marijuana for medical use in some form.¹²⁴

Of course, Fox and other activists wanted to see federal prohibition end. However, they also realized that the federal government could maintain its policies while reform grew in the regulatory commons' gaps. Formal legal analysis does not explain the actual lay of the law regarding marijuana. The regulatory commons hold too much sway.

B. Material Factors Somewhat Explain Marijuana Policy

Other factors undermining prohibition are material, though their effects are mixed. This subpart will consider five material factors impacting marijuana policy: demographics, political momentum, public budgets, profit incentives, and access to accurate scientific information. Although each does shape marijuana policy, they do so in different ways. Several are caused by behavioral factors, while others change policy only by altering behavior, and several in fact partly support prohibition.

1. Demographic Changes Affect Marijuana Policy Only Indirectly

The most obvious demographic factor affecting marijuana policy is age.¹²⁵ As St. Pierre noted over a decade ago, "Baby Boomers are now largely in control of most of the country's major institutions . . . and they have a decidedly different perception and/or relationship with cannabis than the World War II generation."¹²⁶ Different generations have had very different opinions about marijuana for the last century. A hundred years ago, marijuana was used commonly as an "appetite stimulant, muscle

124. Email from Morgan Fox, *supra* note 31.

125. See HUDAK, *supra* note 21, at 88–94 (discussing several of the generational dimensions noted here).

126. Allen St. Pierre, *Ending Cannabis Prohibition in America*, CATO UNBOUND (Nov. 11, 2011) (emphasis removed), <http://www.cato-unbound.org/2011/11/11/allen-st-pierre/ending-cannabis-prohibition-america> [<https://perma.cc/P7ZH-3DTB>].

relaxant, analgesic, hypnotic, and anticonvulsant.”¹²⁷ However, southwestern prohibitionists branded it “‘Mexican opium,’ a drug that turned Mexican field hands violent and high school students insane.”¹²⁸ By 1937, nearly every state had prohibited marijuana, with federal backing.¹²⁹

A later generation’s encounter with marijuana was very different. During the 1960s and 1970s, marijuana was seen as part of peaceful resistance to the cultural norms of an unresponsive majority.¹³⁰ Young people of that era had a very positive opinion of the drug, and they led Oregon to decriminalize it and President Carter to back federal reform.¹³¹ However, intergenerational conflict set in not long after, as a “concerned parents” movement blamed marijuana for a decline in public morals and educational priorities, as well as a rise in sexual libertinism.¹³² President Reagan ran on a campaign of tough prohibition.¹³³

Generational change is now driving another round of reconsideration. Americans who grew up later came to see marijuana primarily as a medical herb or harmless pastime rather than a dangerous opiate or cultural corrosive.¹³⁴ St. Pierre’s observation that society is now led by people who saw marijuana as having good cultural effects forty years ago¹³⁵ is backed by poll numbers from 2008 when marijuana reform efforts were on the rise.¹³⁶ Baby Boomers were much likelier than older Americans to support legalizing marijuana and just a bit less likely than Millennials. Interestingly, the Generation X contingent that grew up in the Reagan years was somewhat less liberal but still much more so than the oldest Americans.¹³⁷ All that said, generational demographics do not have any automatic, autonomous effect. Framing explains their power, as I discuss below.

2. Political Momentum Does Affect Marijuana Policy, but It Is Caused by Framing Changes

Two media reports from the 2010s focused on “momentum” in marijuana reform. Writing in the *New York Times*, Rick Lyman wrote that “[a]dvocates of more lenient marijuana laws say they intend to maintain

127. Paul-Emile, *supra* note 23, at 712–13.

128. *Id.* at 713.

129. *Id.*

130. *See id.* at 730.

131. *See id.* at 731.

132. *See id.*

133. *See id.* at 731–32.

134. *See id.* at 732; Peter Reuter, *Why Has US Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75, 86–89 (2013).

135. *See* St. Pierre, *supra* note 126.

136. THE EDS. OF NEW STRATEGIST PUBL’NS, AMERICAN GENERATIONS: WHO THEY ARE AND HOW THEY LIVE 58 (7th ed. 2010).

137. *Id.*

the momentum from their successes” while “[t]heir opponents . . . are just as keen to slow the legalization drives.”¹³⁸ He quoted the executive director of one leading anti-marijuana organization: “We feel that if [marijuana legalization drives in] Oregon or Alaska could be stopped, it would disrupt the whole narrative these groups have that legalization is inevitable. . . . We could stop that momentum.”¹³⁹ “It is certainly important,” a political scientist agreed, for reformers to “maintain the[ir] momentum.”¹⁴⁰ Likewise, a CNN analysis of marijuana policy cited “an unprecedented spike in approval ratings [for marijuana legalization] just in the past year” and found that “the legal momentum shows no sign of abating.”¹⁴¹

Marijuana reform advocates had the wind at their back. After Colorado and Washington State legalized recreational marijuana, national opinion in favor of legalization rose ten points, to 58%.¹⁴² This was a nearly fourfold increase from 1969.¹⁴³ Even conservative Arkansans failed to pass a 2013 medical marijuana referendum by just two percentage points.¹⁴⁴ Still, as with demographics, momentum is not a complete story in itself: it is reactive at least as much as it is active.

3. Public Budgets Affect Marijuana Policy

After the 2007 economic recession, voters and policymakers looked for ways to keep governments solvent.¹⁴⁵ A number of economists had proposed marijuana’s legalization and taxation as a way to get governments in the green.¹⁴⁶ Incarceration is expensive—in the early 2010s, housing a prison inmate cost governments an average of more than \$21,000 in a private prison or more than \$32,000 in a public prison annually.¹⁴⁷ Much incarceration was caused by drug laws.¹⁴⁸ Before legalization in 2012, one study found that Colorado spent over \$36 million on marijuana prohibition annually.¹⁴⁹ Nearly 90% of that money targeted

138. Rick Lyman, *Pivotal Point Is Seen as More States Consider Legalizing Marijuana*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html> [https://perma.cc/A98J-93AY].

139. *Id.*

140. *Id.*

141. McLaughlin, *supra* note 98.

142. *See id.*

143. *See id.*

144. *See id.*

145. *See generally* CITIES UNDER AUSTERITY: RESTRUCTURING THE US METROPOLIS (Mark Davidson & Kevin Ward eds., 2018).

146. *See* Hardy, *supra* note 88.

147. *See* David B. Kopel & Trevor Burrus, *Law in an Age of Austerity: Reducing the Drug War’s Damage to Government Budgets*, 35 HARV. J.L. & PUB. POL’Y 543, 544 (2012).

148. *See id.* at 558.

149. *See id.* at 559.

possession.¹⁵⁰ Add in nearly \$40 million in trial and prison costs and taxpayers had fiscal reasons to support legalization.¹⁵¹

Colorado was no anomaly. One study estimated that in 2008, state governments spent \$5.4 billion on marijuana prohibition and the federal government spent \$3.35 billion.¹⁵² Even an estimate finding the numbers quoted above excessive concluded that California spent around \$150 million on prohibition in 2010, not counting indirect costs like conviction-related unemployment.¹⁵³ Marijuana prohibition cost so much because of its scale: it accounted for 43% of drug arrests—and over 6% of all arrests—in 2007.¹⁵⁴ Three years later, marijuana offenses were 53% of all drug arrests, and 80% of these were for possession.¹⁵⁵ There was one marijuana-related arrest in America every forty-two seconds in 2012.¹⁵⁶ According to one 2010 estimate, legalizing and taxing marijuana could net governments \$17.4 billion annually.¹⁵⁷ Fiscal arguments helped marijuana reform. As I discussed above, they helped some conservatives endorse it, too.

4. Profit Incentives Have a Moderate Net Effect on Marijuana Policy

This fiscal impact arises because marijuana is a multibillion-dollar industry. It is hard to accurately gauge the size of a market that remains partially illegal. But as of 2010, right before major policy shifts around recreational marijuana began, estimates put it at \$10 to \$40 billion.¹⁵⁸ Harvard economist Jeff Miron estimated the market to be \$14 billion.¹⁵⁹ An analysis by CNBC's Ariel Nelson thought that this number was too low, estimating the market to be \$35 to \$45 billion.¹⁶⁰ In the first month after recreational marijuana was legalized, Colorado's government took in \$3.5

150. *See id.*

151. *See id.*

152. *See* JEFFREY A. MIRON & KATHERINE WALDOCK, *THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION* (2010) 5, 7, <http://object.cato.org/sites/cato.org/files/pubs/pdf/DrugProhibitionWP.pdf> [<https://perma.cc/4VDY-U4R2>].

153. Jonathan P. Caulkins & Beau Kilmer, *Criminal Justice Costs of Prohibiting Marijuana in California*, in *SOMETHING'S IN THE AIR: RACE, CRIME, AND THE LEGALIZATION OF MARIJUANA* 25 (Katherine Tate, James Lance Taylor & Mark Q. Sawyer eds., 2013).

154. *See* MIRON & WALDOCK, *supra* note 152, at 3.

155. *See* Christian Gunadi & Yuyan Shi, *Cannabis Decriminalization and Racial Disparity in Arrests for Cannabis Possession*, 293 SOC. SCI. & MED. 114672, at 1 (2022).

156. *See* Steven Nelson, *Police Made One Marijuana Arrest Every 42 Seconds in 2012*, U.S. NEWS & WORLD REP. (Sept. 16, 2013), <http://www.usnews.com/news/articles/2013/09/16/police-made-one-marijuana-arrest-every-42-seconds-in-2012> [<https://perma.cc/NRS2-6XLL>].

157. *See* MIRON & WALDOCK, *supra* note 152, at 1.

158. *See* Ariel Nelson, *How Big Is the Marijuana Market?*, CNBC (Apr. 20, 2010), <http://www.cnbc.com/id/36179677> [<https://perma.cc/5SBX-6QYD>].

159. *See id.*

160. *See id.*

million from (medical and recreational) excise taxes.¹⁶¹ As of 2021, legal sales nationwide had reached \$27 billion.¹⁶²

The potential to enter a legal market of such size motivates investors to back reform. Take Karson Humiston, who started a marijuana industry recruiting company: by 2017, she employed thirty-one people, had placed thousands of employees, and secured \$2.5 million in a single round of investment funding.¹⁶³ Or consider Tripp Keber and Chuck Smith, whose Colorado company created over 100 marijuana-based edible products ranging from soda to candies.¹⁶⁴ Then, there were infrastructure leaders like Jennifer Defalco and Olivia Mannix, who opened a marijuana-tailored marketing agency, and Tom Valdez, who planned to start members-only smoking clubs.¹⁶⁵ People like these planned to make a living from marijuana. By 2022, nearly half a million U.S. jobs were connected to the marijuana industry.¹⁶⁶ There was even a university offering a bachelor's program in Cannabis Entrepreneurship.¹⁶⁷ However, the sector's growth depended on continued legal reform.

Investors, lenders, and landlords are all tied to marijuana, and money and property will not be safe without further reform, either. One Anaheim landlord found that out the hard way. After renting space to a medical marijuana dispensary, Tony Jalali faced a (later dismissed) federal civil forfeiture action seeking to seize \$1.5 million of his real estate.¹⁶⁸ If one landlord could be threatened with so much loss, how much might industry actors pay to see marijuana reform succeed? Banks and other institutions

161. See Jolie Lee, *Colorado Makes \$3.5M in Pot Revenue in January*, USA TODAY (Mar. 11, 2014), <http://www.usatoday.com/story/news/nation-now/2014/03/10/marijuana-revenue-colorado-taxes/6261131/> [https://perma.cc/3QKH-UFU2].

162. See Alicia Wallace, *US Lawmakers Are Warming Up to the Cannabis Industry*, CNN BUS. (Apr. 20, 2022), <https://www.cnn.com/2022/04/20/economy/cannabis-industry-momentum-legalization/index.html> [https://perma.cc/R9H7-JS8Z]; see also Paul Demko, *How One of the Reddest States Became the Nation's Hottest Weed Market*, POLITICO (Nov. 27, 2020), <https://www.politico.com/news/magazine/2020/11/27/toke-lahoma-cannabis-market-oklahoma-red-state-weed-legalization-437782> [https://perma.cc/9G5E-8EMQ] (discussing Oklahoma's billion-dollar medical marijuana industry).

163. MeiMei Fox, *2 Cannabis Entrepreneurs Share Their Secrets for Success*, FORBES (Apr. 20, 2018), <https://www.forbes.com/sites/meimeifox/2018/04/20/two-cannabis-entrepreneurs-share-their-secrets-for-success/?sh=2c9db1944fbd> [https://perma.cc/T9ZV-H9GL].

164. See Abby Haglage, *Ganjapreneurs Flock to Colorado Following Marijuana Legalization*, DAILY BEAST (Jan. 29, 2014), <http://www.thedailybeast.com/articles/2014/01/29/ganjapreneurs-flock-to-colorado-following-marijuana-legalization.html> [https://perma.cc/JVQ6-9YAT].

165. See *id.*

166. See Wallace, *supra* note 162.

167. *JWU to Offer Cannabis Entrepreneurship Degree*, JOHNSON & WALES UNIV. (Dec. 1, 2020), <https://www.jwu.edu/news/university-press-releases/providence/120120-cannabis-entrepreneurship.html> [https://perma.cc/PJ3T-AAWT].

168. See Scott Bullock, *Anaheim Property Owner & IJ Win Forfeiture Fight*, 22 LIBERTY & L., Dec. 2013, <https://ij.org/11/anaheim-property-owner-ij-win-forfeiture-fight/> [https://perma.cc/KJM7-FYTJ].

have been watching the status of the Secure and Fair Enforcement Regulation (SAFER) Banking Act, a proposed bill that would let the marijuana industry access normal financial services; the bill has passed the House of Representatives seven times without becoming law.¹⁶⁹

Entrepreneurial spirit and high-stakes investments mushroom as marijuana becomes legal in more places. It is tempting to think that profit incentives will see marijuana legalization through to completion as a matter of course. However, this conclusion would be premature for two reasons: 1) there are strong profit incentives working *against* marijuana policy reform, too, and 2) many other potentially lucrative vice industries remain illegal.

Civil asset forfeiture programs create increasingly high economic incentives for federal prohibition as legal marijuana becomes more profitable. In Mr. Jalali's case, the federal government sought a \$1.5 million parcel of property because a small part of it was rented out to a medical marijuana dispensary.¹⁷⁰ Thanks to "equitable sharing" provisions, state and local police have profit incentives to assist such efforts: before discretionary changes in federal policy, these agencies stood to receive up to 80% of the final take.¹⁷¹ Others with strong profit incentives to fight marijuana policy reform include the alcohol industry¹⁷² and various prohibition partners like "private prisons, drug testing companies, rehabilitation services, communication companies, contraband detection devices, interdiction services, and high-tech companies."¹⁷³

169. See Arunima Kumar & Sourasis Bose, *Cannabis Banking Legislation Moves Forward in US Senate*, REUTERS (Sept. 27, 2023), <https://www.reuters.com/world/us/senate-committee-votes-advance-amended-marijuana-banking-bill-2023-09-27/> [<https://perma.cc/7T7H-6PNP>] (discussing S. 2860, 118th Cong., 1st Sess. (2023)). Marijuana's rescheduling does not guarantee that financial institutions can serve the cannabis industry without violating federal law. Heidi Urness & Aaron Kouhoup, *Marijuana Reclassification Impacts Bank Servicing of Businesses*, BLOOMBERG L. (May 29, 2024), <https://news.bloomberglaw.com/us-law-week/marijuana-reclassification-impacts-bank-servicing-of-businesses> [<https://perma.cc/A5M5-WBL2>].

170. See Bullock, *supra* note 168; cf. *Prosecutor: Romulus Cops Bought Marijuana, Hookers*, CBS DETROIT (Sept. 27, 2011), <https://www.cbsnews.com/detroit/news/charges-announced-in-romulus-police-corruption-probe/> [<https://perma.cc/3GSW-CU6F>] (covering a case where Michigan police officers were accused of buying \$40,000 in marijuana and alcohol with forfeited money).

171. See Nick Sibilla, *The Shame of "Equitable Sharing"*, SLATE (Apr. 2, 2014), <https://slate.com/news-and-politics/2014/04/equitable-sharing-legalized-marijuana-and-civil-forfeiture-the-scheme-that-allows-local-cops-to-seize-pot-related-assets-and-profit-from-them-even-where-pot-is-legal.html> [<https://perma.cc/JYR8-BRMJ>]; LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, PART 1: POLICING FOR PROFIT* 46–50 (3d ed. 2020), <http://www.ij.org/part-i-policing-for-profit-3> [<https://perma.cc/77EY-FGEZ>] (describing the threats that equitable sharing continues to pose despite limited reforms).

172. See C. Ryan Barber, *Inside the Alcohol Industry's Lobbying Blitz on Cannabis*, LAW.COM (Feb. 11, 2019), <https://www.law.com/nationallawjournal/2019/02/11/inside-the-alcohol-industrys-lobbying-blitz-on-cannabis/> [<https://perma.cc/PN7Q-DTCQ>].

173. See St. Pierre, *supra* note 126.

Most importantly, even huge profits—or the potential for more—do not ensure reform’s success. Miron estimated that legalizing cocaine and heroin would bring in *nearly four times* as much excise tax revenue as legalizing marijuana,¹⁷⁴ yet there is almost no political will to do so.¹⁷⁵ Prostitution in Nevada, the one U.S. state where it is partly legal, draws annual revenues of \$35–\$50 million as of 2012, yet the prospects for legalization elsewhere are slim.¹⁷⁶ Cash does not speak so loudly that it can overcome the framing of harder drugs as very dangerous or prostitution as exploitative and immoral.¹⁷⁷ While profit incentives for reform abound, there is also money to be had in prohibition. Besides, they do not explain marijuana reform’s success when similarly lucrative causes remain unlikely to be legalized.

5. Access to Accurate Scientific Information Affects Marijuana Policy

St. Pierre pointed to a final material factor that has aided marijuana reform: access to accurate scientific information.¹⁷⁸ “The advent of the Internet in the mid 1990s,” he wrote, “allowed citizens to . . . educate themselves with verifiable and credible information about cannabis.”¹⁷⁹ Better access to preexisting information and updates in research helped drive reform. For instance, television medical commentator Dr. Sanjay Gupta publicly apologized in 2013 for his earlier opposition to medical marijuana: “I didn’t look hard enough,” he said, “I didn’t look far enough. I didn’t

174. See MIRON & WALDOCK, *supra* note 152, at 1.

175. Cf. Tom Lininger, *After the War on Drugs: Challenges Following Decriminalization*, 20 U.N.H. L. REV. 375, 377–78, 378 n.5, 382–85 (2022) (noting Oregon’s 2020 decriminalization by referendum of some *possession* of hard drugs—not legalized sale—and the attention it has drawn from lawmakers elsewhere, as well as implementation challenges).

176. See Rachel T. Macfarlane, Celene Fuller, Chris Wakefield & Barbara G. Brents, *Sex Industry and Sex Workers in Nevada*, in THE SOCIAL HEALTH OF NEVADA: LEADING INDICATORS AND QUALITY OF LIFE IN THE SILVER STATE 11 (Dmitri N. Shalin ed., 2017) https://cdclv.unlv.edu/healthnv_2017/sexindustry.pdf [<https://perma.cc/6P7P-J2R5>].

177. Alcohol and tobacco present different cases because their legal tolerance long pre-dated widespread awareness of their health risks. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–39, 143–56 (2000) (treating tobacco as exceptional because of its unique legal history). Gambling occupies middle ground: like marijuana, it is seen as recreational and fairly safe, but like prostitution, it is seen as exploitative and, sometimes, connected to the criminal underworld. It has achieved less political success than marijuana, but more than hard drugs and prostitution. For a call to scholars to take politics seriously in studying gambling laws, see Michael Nelson & John Lyman Mason, *The Politics of Gambling in the South*, 118 POL. SCI. Q. 645, 669 (2003).

178. See HUDAK, *supra* note 21, at 88–89 (noting that Americans in the first half of the twentieth century had little personal familiarity with marijuana, while federal officials of the day characterized it as a grave danger).

179. Allen St. Pierre, *supra* note 126 (emphasis removed). However, recall that marijuana’s scheduling was “influenced as much by politics as by science.” FOSTER, *supra* note 33, at 112. Regarding the role of access to information from other countries, see the discussion below of the Netherlands’s role in framing.

review papers from smaller labs in other countries doing some remarkable research, and I was too dismissive of the loud chorus of legitimate patients whose symptoms improved on cannabis.”¹⁸⁰ By the mid-2010s, studies suggested that health costs related to marijuana were only a fraction of those incurred because of alcohol and reform may not impact teenage use rates.¹⁸¹

This information countered the federal government’s claims that “marijuana is dangerous,” “[l]egalization of marijuana, no matter how it begins, will come at the expense of our children and public safety,” and “[i]t will create dependency and treatment issues, and open the door to use of other drugs, impaired health, delinquent behavior, and drugged drivers.”¹⁸² It also rebutted claims that legalization would cause use to “double and most likely triple.”¹⁸³

However, as with profit incentives, information can point in the opposite direction as well. Marijuana reform advocates, like other insurgents, can “be tempted to go to almost any extremes to attract followers.”¹⁸⁴ Insurgents’ overheated claims become liabilities when counterinsurgents

180. Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN (Aug. 8, 2013), <http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana> [https://perma.cc/GLG3-BMYC]; see also Orrin Devinsky & Daniel Friedman, *We Need Proof on Marijuana*, N.Y. TIMES at A27 (Feb. 12, 2014), <http://www.nytimes.com/2014/02/13/opinion/we-need-proof-on-marijuana.html> (urging of two epilepsy physicians for a looser federal regulatory regime to allow for more comprehensive scientific studies on marijuana); cf. Medical Marijuana and Cannabidiol Research Expansion Act, Pub. L. No. 117-215, 136 Stat. 2257 (2022) (codified as amended in scattered sections of 21 U.S.C., 42 U.S.C.) (authorizing more medical research).

181. See Dan Riffe, *Marijuana is Safer than Alcohol*, CNN (Oct. 24, 2013), <http://www.cnn.com/2013/10/22/opinion/riffe-marijuana-safety/> [https://perma.cc/KY4X-4GJZ]; cf. Michael T. French, Julia Zukerberg, Tara E. Lewandowski, Katrina B. Piccolo & Karoline Mortensen, *Societal Costs and Outcomes of Medical and Recreational Marijuana Policies in the United States: A Systematic Review*, 79 MED. CARE RSCH. & REV. 743, 746 (2022). The authors wrote:

Of the research that analyzed the impact of marijuana decriminalization, [medical marijuana laws], and [recreational marijuana laws] on adolescent cannabis use, 10 studies found an increase in adolescent marijuana use, while only two found a decrease in use. The other 10 studies included in this portion of the systematic review found no significant effect or evidence that marijuana policies changed adolescent use.

Id. (citations omitted).

182. DRUG ENF’T ADMIN., THE DEA POSITION ON MARIJUANA 25 (2013), https://digital.library.unt.edu/ark:/67531/metadc948972/m2/1/high_res_d/marijuana_position_2011.pdf [https://perma.cc/JE4F-GSHX]; cf. French, Zukerberg, Lewandowski, Piccolo & Mortensen, *supra* note 181, at 751–52 (finding mixed results from studies researching how marijuana reforms affect rates of impaired driving).

183. Drug Free America Foundation (@DrugFreeAmerica), X (Feb. 5, 2014, 6:00AM), <https://x.com/DrugFreeAmerica/status/431064725867085825> [https://perma.cc/RG2Y-UL9K] (depicting marijuana users as brain-eating zombies); cf. French, Zukerberg, Lewandowski, Piccolo & Mortensen, *supra* note 181, at 746 (finding much smaller and more ambiguous effects among adolescents ten years after the tweet).

184. U.S. ARMY & MARINE CORPS, *supra* note 16, § I-97.

show that reality is more complex.¹⁸⁵ This happened after Colorado and Washington State legalized recreational marijuana. One poll showed that Americans thought sugar was more dangerous than marijuana, even though the drug can negatively affect learning ability and cause “mental disorders, addiction, cardiovascular disorders, and certain types of cancers.”¹⁸⁶ Prohibitionists quickly trumpeted such information.¹⁸⁷ Accurate science’s role in reform is affected by both sides’ tendency to propagandize.

B. Framing Best Explains Marijuana Reform’s Success

The best reason for marijuana reform is changes in how people understand the drug. Prohibition has depended on politicians framing marijuana as dangerous.¹⁸⁸ A drug will be prohibited only as long as the public is convinced that it “pose[s] an ostensible threat to public health or safety” and “violate[s] fundamental moral values.”¹⁸⁹ Professor Kimani Paul-Emile notes this, but she misses something else: the general public must believe that prohibition is a proportionate response to the evils posed by a substance.

People generally want to be objective in choosing policies; they want to behave rationally.¹⁹⁰ They are not perfectly rational,¹⁹¹ but people can become aware of irrational inconsistencies in their choices.¹⁹² They might then become ready to consider alternate frames on an issue, ones that avoid

185. See *id.* § 1-13.

186. Khaled M. Hasan, *Cannabis Unveiled: An Exploration of Marijuana’s History, Active Compounds, Effects, Benefits, and Risks on Human Health*, 17 SUBSTANCE ABUSE: RSCH. & TREATMENT 1, 4 (2023); *contra* Brett Reinhard, *WSJ Poll: Candy Is Dandy But Pot Is Less Harmful*, WALL ST. J. (Mar. 12, 2014), <http://blogs.wsj.com/washwire/2014/03/12/wsj-poll-candy-is-dandy-but-pot-is-less-harmful/> [<https://perma.cc/2NL2-M3R3>] (“When Americans were asked their opinion on the most harmful of four substances, tobacco (49%) and alcohol (24%) came in first and second place, followed by sugar (15%) and marijuana. Only 8% said marijuana was the most harmful substance.”) (emphasis added).

187. See, e.g., Charles “Cully” Stimson, *Why We Shouldn’t Legalize Marijuana*, HERITAGE FOUND. (July 19, 2012), <https://www.heritage.org/crime-and-justice/commentary/why-we-shouldnt-legalize-marijuana> [<https://perma.cc/2H6P-XW4L>] (“Marijuana is an addictive, gateway drug. It significantly impairs bodily and mental functions, and its use is related to increased violence. These are facts. Yet proponents of legalizing the drug studiously deny or downplay the well-documented dark side of marijuana trafficking and use.”).

188. See Paul-Emile, *supra* note 23, at 694–95.

189. *Id.* at 710.

190. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 458 (1981).

191. See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 260 (2000) (“[A]ctors who operate in a social context of high complexity and opacity are heavily biased in the way they filter information into existing ‘mental maps.’ Confirming information tends to be incorporated, and disconfirming information is filtered out. Social interpretations of complex environments like politics are subject to positive feedback.”) (citation omitted).

192. See Tversky & Kahneman, *supra* note 190, at 458.

the problems their previous understandings caused.¹⁹³ Insurgents fill this role by noting “political estrangement” then offering a better way forward.¹⁹⁴

Public estrangement from prohibition arose because of weariness with the War on Drugs and people becoming aware of dissonance between brutal enforcement and marijuana’s lack of severity. Reform has won because people have accepted a new frame for thinking—that moderate, responsible marijuana use is tolerable—due to local legal permissiveness and personal familiarity.

1. War Weariness Has Changed Hearts and Minds

Marijuana prohibition became federal policy over fifty years ago. While reform insurgents did not take up arms, the War on Drugs has caused real destruction. I described above how the government targeted property and assets involved in marijuana, even those belonging to third parties like landlords. Additionally, marijuana prohibition has caused a tremendous number of arrests. The marijuana front of the drug war has impacted many communities, businesses, families, and people because of its scope alone, and this has changed some minds. For example, famed televangelist Pat Robertson endorsed marijuana legalization in 2012, saying, “I believe in working with the hearts of people, and not locking them up.”¹⁹⁵ He thought America had gone “overboard on this concept of being tough on crime,” to the point that “[p]risons are being overcrowded with juvenile offenders having to do with drugs.”¹⁹⁶

There have been shocking war abuses, too. Take one widely publicized raid by a SWAT team against a marijuana suspect in 2011.¹⁹⁷ Officers bashed in a door, woke two sleeping children, seized and handcuffed a man, and shot the family dog.¹⁹⁸ The police’s ultimate haul? One pipe “containing a small amount of marijuana residue.”¹⁹⁹ The suspect was charged with a misdemeanor.²⁰⁰ This raid was one of the 50,000 that took place every year.²⁰¹ Unlike most of the others at that point, though, this

193. *See id.*

194. U.S. ARMY & MARINE CORPS, *supra* note 16, § I-72.

195. Jesse McKinley, *Pat Robertson Says Marijuana Use Should be Legal*, N.Y. TIMES (Mar. 7, 2012), <http://www.nytimes.com/2012/03/08/us/pat-robertson-backs-legalizing-marijuana.html> [https://perma.cc/PF6R-LQR9].

196. *Id.*

197. *See* Norm Stamper, *Losing Hearts and Minds in the Drug War*, CATO UNBOUND (Nov. 9, 2011), <http://www.cato-unbound.org/2011/11/09/norm-stamper/losing-hearts-minds-drug-war> [https://perma.cc/SAG6-WBZT].

198. *See id.*

199. *Id.*

200. *See id.*

201. *See id.*

one was video-recorded and posted to the internet where it garnered nearly two million views.²⁰² It became “a teachable moment”: an opportunity for Americans to reflect on public policy and express frustration.²⁰³ Judge Andrew Napolitano, a libertarian legal commentator, voiced the astonishment of many: “This was America—not East Germany, not Nazi Germany, but middle America!”²⁰⁴

A quarter-century ago, a federal drug-enforcement official could go on national television and approve of beheading convicted drug dealers, saying he would be “morally justified” were he to “tear them from limb to limb.”²⁰⁵ But by 2011—a year before the landmark Colorado and Washington State legalization votes—a right-of-center television presenter could compare a suburban police raid to Nazism. Years of harsh enforcement diminished Americans’ support for prohibition.²⁰⁶

Marijuana reform advocates have used abusive enforcement in much the same way that insurgents use government missteps.²⁰⁷ Governments facing insurgencies tend to take aggressive approaches to security.²⁰⁸ This naturally leads to excesses and sometimes even to tyranny.²⁰⁹ Victims of government abuse and their families become ready recruits for insurgencies.²¹⁰ These effects are strengthened by the media and the internet.

People have seen serious mismatches between kicking down doors and the supposed harm of using marijuana. Advocates have responded by proposing new ways of thinking about the drug—as akin to alcohol or tobacco, rather than as social poison—and so turning public discomfort with prohibition into support for reform.

202. *See id.*

203. *See* Peter Wallsten & Mike Dorning, *President Cheers a ‘Teachable Moment’*, L.A. TIMES (July 31, 2009), <http://articles.latimes.com/2009/jul/31/nation/na-beer-summit31> [<https://perma.cc/FGF8-7MBR>] (explaining the term’s popularization after a different policing incident).

204. *See* Stamper, *supra* note 197.

205. *Beheading of Convicted Drug Dealers Discussed by Bennett*, L.A. TIMES (June 16, 1989), http://articles.latimes.com/1989-06-16/news/mn-2008_1_drug-dealers-beheading-fight-against-illegal-drugs [<https://perma.cc/SBD2-UDBY>] (quoting William J. Bennett).

206. Former president Donald Trump called for the death penalty for drug dealers while campaigning in 2018 and again in 2023, although his stance toward marijuana has wavered over time. *See* Dustin Jones & Devin Speak, *Trump Wants the Death Penalty for Drug Dealers. Here’s Why that Probably Won’t Happen*, NPR (May 10, 2023), <https://www.npr.org/2023/05/10/1152847242/trump-campaign-execute-drug-dealers-smugglers-traffickers-death-row> [<https://perma.cc/EV2N-TMVJ>]; *see also* Sliwoski & Nelson, *supra* note 40.

207. *See* U.S. ARMY & MARINE CORPS, *supra* note 16, § 1-45.

208. *See id.*

209. *See id.*

210. *See id.* A classic film portrays the role of this dynamic in Algeria’s fight for independence from France. *See* THE BATTLE OF ALGIERS (Igor Film & Casbah Film 1966).

2. Legal Permission Contributes to Changing Attitudes About Marijuana

Successful reform catalyzes further reform. In many Americans' minds, marijuana reform originated in the Netherlands, which has tolerated legal sale for nearly as long as the American federal government has intensely prosecuted it.²¹¹ Another Western nation's positive experience with permitting the recreational use of marijuana (albeit with regulatory challenges along the way²¹²) showed many Americans that the tidal wave of marijuana use predicted by prohibition supporters was not a likely outcome of reform.²¹³ "The experiences of Dutch coffee shops have been prominent in the American debate," wrote criminologist Peter Reuter in 2013, insofar as they "have not led to a major increase in use of marijuana or any other drug."²¹⁴

Meanwhile, in the United States, many states legalized medical marijuana well in advance of recreational marijuana.²¹⁵ The formal federal ban remains, but enforcement against state-authorized medical marijuana use was discretionarily suspended as early as 2013.²¹⁶ This meant that many Americans' home jurisdictions legally tolerated some marijuana use, licensed growers, and let dispensaries operate.²¹⁷ Fox correctly saw this as a gateway to further marijuana reform: "I think the presence of a well-regulated medical marijuana industry in Colorado contributed to support for making adult use and retail sales legal."²¹⁸ "Residents there didn't have to imagine what the legal marijuana market would look like; they already had a great working model"²¹⁹

Returning to framing theory, legal permissiveness gave people disenchanting with the War on Drugs an alternative frame for understanding marijuana. State legalization showed that marijuana did not have to be understood as an irredeemable danger.²²⁰ It could be tolerated. Framing effects were strengthened as foothold states like California, Colorado, and Washington State enacted reform.

211. See *While U.S. States Relax Marijuana Laws, Pot Haven Netherlands Cracks Down, with Mixed Success*, CBS/AP (Mar. 7, 2014), <http://www.cbsnews.com/news/while-us-states-relax-marijuana-laws-pot-haven-netherlands-cracks-down-with-mixed-success/> [https://perma.cc/D5WX-LE4Z] ("[T]he Netherlands hoped to stamp out [street-level marijuana sales] in the 1970s when it launched a policy of tolerating 'coffee shops' where people could buy and smoke pot freely.").

212. See *id.*

213. See Drug Free Am. Found., *supra* note 183.

214. Reuter, *supra* note 134, at 95.

215. See Shapiro & Mettler, *supra* note 68.

216. See Memorandum of James M. Cole, *supra* note 41, at 9.

217. See *id.*

218. E-mail from Morgan Fox, *supra* note 31.

219. *Id.*

220. See Paul-Emile, *supra* note 23, at 738.

These new status quos bolstered reform efforts, too. Once marijuana became legal in a jurisdiction, it proved very difficult to roll back. This is so for reasons that were well-known even centuries ago. Aquinas wrote of how “the mere change of law is of itself prejudicial to the common good.”²²¹ He anticipated theories about intransigence in modern political science.²²² William N. Eskridge Jr., for instance, noted that Congress has rarely been able to change a judicial interpretation of a law, “and the overrides in those cases required a herculean effort.”²²³ This is especially so where political actors sense that they have to compromise in light of others’ opinions.²²⁴ Once a status quo is in place, it changes politics.

This helps explain why marijuana reform advocates have often turned to referenda to change state laws instead of the legislative branch.²²⁵ Advocates may not have seen referenda as ideal, but they change the political environment.²²⁶ As St. Pierre wrote:

[I]f legislatures are unwilling to move on public opinion that massively favors law reform (i.e., in most all surveys, over 70% of the public support medical access to cannabis) and are non-responsive to the wants of their constituents, reformers are very thankful that the initiative process is availed to a large segment of the US population to check recalcitrant legislators.²²⁷

State-level victories have also changed the political situation for another key actor: the federal executive branch. In 2013, it discretionarily decided to stop enforcing prohibition in jurisdictions where marijuana is legal under local law.²²⁸ What happened next confirms Eskridge’s and St. Pierre’s theories. When the Trump Administration tried to rescind that decision in 2018, Colorado Senator Cory Gardner—himself a former prohibitionist who had criticized the earlier enforcement rollback²²⁹—threatened to block Department of Justice nominees until the president backed

221. AQUINAS, *supra* note 10, I-II, Q. 97, art. 2., resp.

222. *See id.*

223. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 367 (1991).

224. *See id.* at 378–79.

225. *See generally* Burrell Vann Jr., *Direct Democracy and the Adoption of Recreational Marijuana Legalization in the United States, 2012–2019*, 102 INT’L J. DRUG POL’Y 103583 (2022).

226. *See* E-mail from Allen St. Pierre, *supra* note 30 (“We always prefer legislation to voter initiatives.”); E-mail from Morgan Fox, *supra* note 31 (“[W]hen we have the support of the people but not the legislature, we take the issue to the people.”).

227. E-mail from Allen St. Pierre, *supra* note 30. The initiative process is not, though, available everywhere in the United States.

228. *See* Memorandum of James M. Cole, *supra* note 41.

229. *See* Bruce Kennedy, *Sen. Cory Gardner: How a Prohibitionist Became Legalization’s Defender*, LEAFLY (June 8, 2018), <https://www.leafly.com/news/politics/sen-cory-gardner-how-a-prohibitionist-became-legalizations-defender> [https://perma.cc/86HF-NNS2] (last updated July 28, 2020).

down.²³⁰ Why? Rescinding the policy “trampled on the will of the voters.”²³¹ Senator Gardner proved responsive to the preference of his home state. (Had he been even more so, he might have won reelection: a lack of enthusiasm by the marijuana industry reportedly contributed to his loss.²³²)

Framing effects amplify as more states legalize marijuana. Professor Eugene Volokh has written about “the mechanisms of the slippery slope.”²³³ A single change, like requiring that guns be registered with the government, can have a broad effect on framing.²³⁴ It might: (1) make citizens reframe gun ownership as a revocable privilege, rather than a fundamental right; (2) combine with other incremental legal reforms to lead to a much stricter regime than any one of them imposes by itself; (3) galvanize gun control’s supporters to press for more reforms; (4) discourage people from purchasing guns, thereby making other citizens less likely to know gun owners and so less sympathetic to gun rights; (5) make firearm confiscation more feasible; or (6) combine with other legal rules to enmesh gun owners in a more onerous regulatory regime.²³⁵ Law’s “expressive” effects can cause slippery slopes, too.²³⁶

Such slippery slope dynamics map onto marijuana reform. Early reforms: (1) made people less likely to see marijuana as illicit; (2) combined with laws around home privacy to help the marijuana industry grow;²³⁷ (3) encouraged reform advocates; (4) led more people to know and sympathize with marijuana users; (5) helped marijuana proliferate, making prohibition harder; and (6) combined with other principles like federalism to shield marijuana users.

Regarding the last point, *Gonzales* did not eliminate federalism, privacy, and other constitutional values from public discourse about

230. See Ali Rogin, *Trump Signals DOJ Taking More Hands-Off Approach to Marijuana Prosecution*, ABC NEWS (Apr. 13, 2018), <https://abcnews.go.com/Politics/trump-signals-doj-taking-hands-off-approach-marijuana/story?id=54455939> [<https://perma.cc/AQF9-T8L6>].

231. Kennedy, *supra* note 229.

232. See Natalie Fertig, *Cory Gardner’s Marijuana Problem*, POLITICO (May 23, 2020), <https://www.politico.com/news/2020/05/23/cory-gardners-marijuana-problem-275029>.

233. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

234. See *id.* at 1033–34.

235. See *id.*

236. See *id.* at 1036.

237. See, e.g., Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASH. POST BUS. (Feb. 14, 2014), http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html [<https://perma.cc/G9FF-9GTF>]; *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (holding that the right to privacy protects home possession of small amounts of marijuana for personal use).

marijuana. It merely removed the federal judiciary as their vindicator.²³⁸ But even those constitutional norms that precedent deems inapplicable, Steven Smith notes, “remain available for purposes of evaluating and criticizing governmental actions or institutions.”²³⁹ Those voicing such values “typically understand themselves to be expressing something about the essential character of the American Republic or about what ‘constitutes’ it as a political community”—court decisions notwithstanding.²⁴⁰ After all, as the Georgia Supreme Court recently noted, “a written constitution has a meaning of its own established not by the courts but by the people who ratified it, which courts must then interpret and apply . . . to particular cases”—a court “attempts to discern the meaning of the Constitution,” but does not supply “a meaning the Constitution does not already have.”²⁴¹

This helps explain why some federalists like Senator Gardner who might otherwise oppose marijuana reform advocate for users’ rights.²⁴² Constitutional values like federalism and popular sovereignty matter. Judge Sutton even wrote that “individual rights are the least important, least reliable, constitutional guarantees,” while power divisions “offer the ultimate protection of freedom.”²⁴³

Winning their first few political successes helped reformers sharpen focus on constitutional values and contributed significantly to the

238. Cf. Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017) (“Judicial supremacy is the conventional designation for the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case. Judicial departmentalism, by contrast, is the idea that the Constitution means *in the judicial department* what the Supreme Court says it means in deciding a case.”) (footnote omitted).

239. Smith, *supra* note 102, at 413; cf. William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 63) (available at SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902 (“[T]he general law might retain the longstanding Anglo-American presumption that everything is permitted if not forbidden—a presumption of liberty, so to speak—even as state legislatures use their police power to forbid more and more.”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2005) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with ‘the people themselves,’ and courts . . . were subordinate to their judgments.”).

240. Smith, *supra* note 102 at 417.

241. *Georgia v. SisterSong Women of Color Reprod. J. Collective*, 894 S.E.2d 1, 6 (Ga. 2023) (alteration in original) (internal quotations omitted) (citing *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803)).

242. See Andrew Sullivan, *More Fans of Marijuana Federalism*, THE DISH (Jan. 29, 2014), <http://dish.andrewsullivan.com/2014/01/29/more-fans-of-marijuana-federalism> [<https://perma.cc/Q6C5-L6TH>].

243. JEFFREY S. SUTTON, *WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* 2 (2022).

reframing of marijuana. It also brought the inertia that comes with being the status quo onto the side of reform, increasing reframing's power.²⁴⁴

3. Personal Familiarity Contributes Significantly to Marijuana Reform

Opinions about marijuana changed for two more key reasons: (1) those segments of the population most familiar with marijuana increasingly decide public policy, and (2) popular perceptions of who uses marijuana have changed.

Before considering these factors, it is important to appreciate why familiarity has had such an impact. Paul-Emile identifies three categories into which drugs are placed for regulation: markets, public health, and crime.²⁴⁵ It might seem as though drugs would be classified based on physical harm, addictiveness, therapeutic uses, and antisocial behavior, but this is not always so.²⁴⁶ Marijuana was “widely available as a commonly used appetite stimulant, muscle relaxant, analgesic, hypnotic, and anticonvulsant” in the early twentieth century.²⁴⁷ This would suggest that it should be regulated as a medical drug, as would the additional medical uses discovered since then.²⁴⁸ Instead, marijuana was long placed at the very core of American drug prohibition. Was this because marijuana is addictive? It can be,²⁴⁹ but not to the extent of regulated medicines like painkillers (as the world has learned so painfully). Is it because marijuana is just too harmful? It is not uncommonly so when compared with many regulated medical drugs—or commercially marketed ones like nicotine and alcohol.²⁵⁰

244. See generally Pierson, *supra* note 191 (explaining how small policy changes become self-reinforcing).

245. See Paul-Emile, *supra* note 23, at 694.

246. Paul-Emile goes further, writing that drugs are classified through power struggles alone, “regardless of whether the drug poses a threat to health or safety and even if the [classification] decision flouts empirical evidence grounded in medicine or science.” *Id.* at 695 (emphasis added).

247. *Id.* at 712–13.

248. See Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35 (2009).

249. See J. Wesley Boyd, *Is Marijuana Addictive?*, PSYCH. TODAY (Nov. 3, 2013), <http://www.psychologytoday.com/blog/almost-addicted/201311/is-marijuana-addictive> (arguing that marijuana generally lacks physiological indicators of addictiveness, but that use can become compulsive); cf. Maia Szalavitz, *Is Marijuana Addictive? It Depends on How You Define Addiction*, TIME (Oct. 19, 2010), <http://healthland.time.com/2010/10/19/is-marijuana-addictive-it-depends-how-you-define-addiction> [<https://perma.cc/G67R-LSLG>] (noting Mark Twain's observation: “Giving up smoking is easy, I've done it thousands of times.”).

250. See Bernie Pauly, Meghan Brown, Clifton Chow, Ashley Wettlaufer, East Side Illicit Drinkers Group for Education (EIDGE), Brittany Graham, Karen Urbanoski, Russell Callaghan, Cindy Rose, Michelle Jordan, Tim Stockwell, Gerald Thomas & Christy Sutherland, “If I Knew I Could Get that Every Hour Instead of Alcohol, I Would Take the Cannabis”: Need and Feasibility of Cannabis Substitution Implementation in Canadian Managed Alcohol Programs, 18 HARM

The answer is public comfort. When marijuana was first criminalized by many states, many white Americans dubbed it “Mexican opium,” blaming it for migrant violence and teen psychosis.²⁵¹ The public left behind this particular kind of discomfort with marijuana many generations ago—uncontrollable rage and madness are now popularly associated with other drugs like PCP, methamphetamine, and synthetic drugs like “bath salts.”²⁵² But political sobriety did not set in. Instead, in the late 1970s and early 1980s, leaders blamed “killer-weed” for sexual depravity and social disengagement.²⁵³ The federal government reversed a decade of increasing liberality toward marijuana with a “war on drugs” and “zero-tolerance” policies.²⁵⁴ Framing, then, has long driven drug policy. There are two reasons why it has shifted in favor of reform.

4. People Familiar with Marijuana Are Making Public Policy

Above, I forestalled consideration of demographics as a factor in marijuana reform because it means nothing by itself. But there is indeed a “clash of cultures over power and preeminence.”²⁵⁵ Different generations and different segments of the population react to marijuana in different ways. Older Americans still tend to see it as a socially dangerous drug.²⁵⁶ The oldest might even still consider it a cause of violence.²⁵⁷ In 1965, only 5% of Americans between the ages of 18 and 25 had ever used marijuana.²⁵⁸

But for many young Americans of the 1960s and early 1970s, marijuana symbolized personal freedom and individual expression.²⁵⁹ By 1980, over half of Americans aged 18 to 25 had used it—a tenfold increase in just fifteen years.²⁶⁰ This happened while law enforcement focused on

REDUCTION J. 65, 3 (2021); Jei Christensen & Jacque Wilson, *Is Marijuana as Safe as—or Safer than—Alcohol?*, CNN (Jan. 22, 2014), <http://www.cnn.com/2014/01/20/health/marijuana-versus-alcohol> [<https://perma.cc/GBJ7-L7GA>] (comparing the drug to alcohol and tobacco).

251. See Paul-Emile, *supra* note 23, at 713.

252. See Natasha Vargas-Cooper, *In the Heart of America's New Drug Nightmare*, SPIN (June 14, 2012), <http://www.spin.com/articles/bathlands-deep-heart-americas-new-drug-nightmare> [<https://perma.cc/J7SF-LNFU>] (describing public fear of alleged bath-salts-related incidents including “[a] 19-year-old West Virginia man . . . stab[ing] his neighbor’s pygmy goat while wearing women’s underwear; a Mississippi man skinn[ing] himself alive while under the influence . . . [and a man] chewing a homeless man’s head for 18 minutes”).

253. See Paul-Emile, *supra* note 23, at 731–32, 738.

254. *Id.*

255. U.S. ARMY & MARINE CORPS, *supra* note 16, § I-72.

256. See Paul-Emile, *supra* note 23, at 731–32, 738.

257. See *id.* at 713.

258. THE EDS. OF NEW STRATEGIST PUBL’NS, *supra* note 136, at 118.

259. See Paul-Emile, *supra* note 23, at 731.

260. THE EDS. OF NEW STRATEGIST PUBL’NS, *supra* note 136, at 118. For a description of the experimentation and spread of that time, see FOSTER, *supra* note 33, at 153–55.

heroin instead of middle-class youth experimentation.²⁶¹ That generation now controls many powerful social institutions, including “media, [government], education, business, [and] religion.”²⁶² In 1977, First Lady Rosalynn Carter acknowledged that her three sons had smoked marijuana.²⁶³ Decades later, then-Senator Barack Obama readily admitted to having inhaled marijuana when he was young.²⁶⁴ President George H. W. Bush dismissed revelations of schooltime marijuana use by then-Supreme Court nominee Clarence Thomas as “a minor matter.”²⁶⁵ President George W. Bush privately admitted to having smoked marijuana.²⁶⁶ Chances are, so could the reader’s pastor, boss, and favorite celebrity. Even if not all of them would endorse the drug, they are less likely to believe that it is a plague than were those of generations past.

The same dynamic applies to the century’s final children. 20% more of the population used marijuana in 2012 than did five years earlier, even as the use of other drugs fell.²⁶⁷ Nearly one in five Americans used marijuana at least once in 2019.²⁶⁸ Marijuana has featured prominently in popular culture for over a decade.²⁶⁹ The youngest voters are likeliest to support legalization.²⁷⁰

There is a non-age-related demographic factor, too. Racial minorities have been targeted the most by prohibition.²⁷¹ They are likeliest to see its reach in their daily lives, and they are more represented in political

261. FOSTER, *supra* note 33, at 115.

262. Email from Allen St. Pierre, *supra* note 30.

263. MOSHER & AKINS, *supra* note 21, at 55.

264. Katharine Q. Seelye, *Barack Obama, Asked About Drug History, Admits He Inhaled*, N.Y. TIMES (Oct. 24, 2006), <https://www.nytimes.com/2006/10/24/world/americas/24iht-dems.3272493.html>.

265. Stephen Labaton, *Thomas Smoked Marijuana but Retains Bush Support*, N.Y. TIMES, July 11, 1991, at A17, <https://www.nytimes.com/1991/07/11/us/thomas-smoked-marijuana-but-retains-bush-support.html>.

266. *Bush Admits to Smoking Pot in Taped Discussion*, ASSOC. PRESS (Feb. 21, 2005), <https://www.taipetimes.com/News/world/archives/2005/02/21/2003224003> [<https://perma.cc/3GQE-23HP>].

267. See Ryan Jaslow, *U.S. Drug Abuse Survey: Prescription Abuse Falls for Some, Marijuana Still Most Common*, CBS NEWS (Sept. 24, 2012), <http://www.cbsnews.com/news/us-drug-abuse-survey-prescription-abuse-falls-for-some-marijuana-still-most-common> [<https://perma.cc/3ET2-49JY>].

268. See *Marijuana and Public Health: Data and Statistics*, CDC (June 8, 2021), <https://www.cdc.gov/marijuana/data-statistics.htm> [<https://perma.cc/T5DH-MWVB>].

269. Matthew Gilbert, *Casual Marijuana Use Becomes Common on TV*, BOS. GLOBE ARTS (June 18, 2013), <http://www.bostonglobe.com/lifestyle/style/2013/06/17/many-shows-marijuana-puffs-are-part-performance/9mET79NyBCHbpIlpiCzjxM/story.html>.

270. See Jeffrey M. Jones, *Marijuana Views Linked to Ideology, Religiosity, Age*, GALLUP (Nov. 15, 2022), <https://news.gallup.com/poll/405086/marijuana-views-linked-ideology-religiosity-age.aspx> [<https://perma.cc/EQV9-PBYB>].

271. Dylan Matthews, *The Black/White Marijuana Arrest Gap, In Nine Charts*, WASH. POST WONKBLOG (June 4, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-black-white-marijuana-arrest-gap-in-nine-charts/> [<https://perma.cc/NM6V-BKCP>].

leadership than ever before.²⁷² Elite Black opinion may be more liberal toward marijuana than that of other Black citizens, and these leaders have contributed to reform.²⁷³

5. Medical Marijuana Reform Has Changed How People Perceive Marijuana Users

Marijuana is now available in much of the country with a prescription.²⁷⁴ It is a common remedy for people living with chronic illnesses.²⁷⁵ This has done three things to change public framing of the drug. First, it has given marijuana a whole new set of connotations. Marijuana is presumably banned because it is dangerous, but in many states, it is medicine. In many others, it is badly sought as a remedy for aching people and sick kids. This has direct effects on framing. The aesthetics of *Gonzales* were bad for prohibition: even the majority noted that one of the defendants' physicians "believe[d] that forgoing cannabis treatments would certainly cause . . . excruciating pain and could very well prove fatal."²⁷⁶ It is easier to legalize medical use of marijuana than recreational, but even this move can set off slippery slope effects. That is part of why NORML began its campaigns in the early 1970s with drives for medical marijuana,²⁷⁷ and why campaigns in the South—the region of the country most opposed to marijuana reform²⁷⁸—have long centered on that issue.²⁷⁹

272. See, e.g., Katherine Schaeffer, *U.S. Congress Continues to Grow in Racial, Ethnic Diversity*, PEW RSCH. CTR. (Jan. 9, 2023), <https://www.pewresearch.org/short-reads/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity> [<https://perma.cc/GZ3V-W3KU>] (noting that seven consecutive Congresses have broken records in terms of racial and ethnic diversity).

273. See, e.g., Shanti Ryle, *7 Black Politicians Leading the Way on Marijuana Legalization*, LEAFWELL, <https://leafwell.com/blog/pro-marijuana-politicians> [<https://perma.cc/6ZMW-6QW6>] (last visited Oct. 23, 2023); Katherine Tate, *Winds of Change: Black Opinion on Legalizing Marijuana*, in Tate, Taylor, & Sawyer, *supra* note 153, at 65–78 (exploring nuances in Black opinions).

274. *Medical Marijuana Laws*, *supra* note 70.

275. See Anup Patel, *Medical Marijuana*, EPILEPSY FOUND. (May 31, 2019), <https://www.epilepsy.com/treatment/alternative-therapies/medical-marijuana> [<https://perma.cc/4GU3-ADGV>] (“On June 25, 2018, the U.S. Food & Drug Administration (FDA) approved EPIDIOLEX® (cannabidiol, CBD) oral solution for the treatment of seizures associated with two epilepsy syndromes—Lennox-Gastaut syndrome and Dravet syndrome—in people two years of age or older. Epidiolex represents a new medication option for children with these types of epilepsy. It is also the first ever FDA approved medication to treat seizures in Dravet syndrome.”); Kevin P. Hill, *Medical Marijuana for Treatment of Chronic Pain and Other Medical and Psychiatric Problems: A Clinical Review*, 313 JAMA 2474 (2015).

276. 545 U.S. 1, 7 (2005).

277. See Email from Allen St. Pierre, *supra* note 30.

278. See *Medical Marijuana Laws*, *supra* note 70; Hansen, Alas, & Davis, *supra* note 70.

279. See *Medical Marijuana Gains in South*, ASSOC. PRESS (Feb. 9, 2014), <http://www.politico.com/story/2014/02/medical-marijuana-south-103293.html>.

Second, medical marijuana showed that use of the drug is not always as unhealthy as opponents make it out to be.²⁸⁰ It improves many patients' quality of life and there are now many Americans with friends and relatives who have used the drug.²⁸¹

Third, medical marijuana has shown that marijuana need not be only a cash crop for organized crime and violent dealers, as once predicted by the Department of Justice.²⁸² Instead, as Fox noted, "the presence of a well-regulated medical marijuana industry in Colorado" was "a great working model" leading up to recreational marijuana's legalization.²⁸³ Medical marijuana can be retailed through normal storefronts²⁸⁴ by ordinary businesspeople.²⁸⁵ It can be marketed by entrepreneurs and sold to adults as candy.²⁸⁶

Medical marijuana reframes the drug as the stuff of doctors, patients, and upstanding commerce. Combined with the personal familiarity many modern leaders have with marijuana and the presence of legal regimes tolerating it, medical legalization has helped give marijuana a pivotal makeover. Reframing has caused reform.

CONCLUSION: RECLAIMING SELF-GOVERNANCE

States can "serve as a laboratory" for different policies,²⁸⁷ and democratic federalism "embraces the right, indeed the duty, to engage in a

280. See discussion *supra* at pp. 32–33 & notes 179–180.

281. See, e.g., Young, *supra* note 77 (profiling the mother of a child patient who "had consistently voted against marijuana use" but now advocates for medical marijuana).

282. Compare Haglage, *supra* note 164 (describing one man's efforts to start Colorado's "IKEA of Weed," as well as other mild-mannered entrepreneurs), with DRUG ENF'T ADMIN., NATIONAL DRUG THREAT ASSESSMENT SUMMARY 18 (2013), <https://www.dea.gov/sites/default/files/resource-center/DIR-017-13%20NTA%20Summary%20final.pdf> (predicting that organized crime "will increasingly exploit the opportunities for marijuana cultivation and trafficking created in states that allow 'medical marijuana' grows and have legalized marijuana sales and possession").

283. Email from Morgan Fox, *supra* note 31.

284. See Bullock, *supra* note 168 (describing a normal landlord who rented out to a medical marijuana dispensary).

285. See, e.g., Michael Lester & Katy Steinmetz, *Inside a Christian Pot Shop*, TIME EXPLAINS (Apr. 20, 2014), <http://time.com/68604/god-cannabis-dispensary-jesus-medical-marijuana/>. The authors write:

Bryan and Lanette Davies run a medical marijuana dispensary in Sacramento, Calif., which they say they opened on the advice of God. The couple sells marijuana to patients battling AIDS and insomnia and arthritic disorders. They also use their shop, called Canna Care, as a vehicle for spreading their Christian faith. Bibles lie on a table in the lobby, free for the taking. And every day at 6 o'clock, all the shop's employees stop what they're doing to hold hands and pray. Patrons are invited to join and often do.

Id.

286. See Haglage, *supra* note 164.

287. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

rational, civic discourse.”²⁸⁸ State-level battles can contribute to overall wars for the public psyche, with each framing fight reshaping the public as formal federal law fades into irrelevance.

Marijuana is just one example. Consider the many local battles over undocumented immigration. People argue about frames in the states, pitting local sanctuary declarations against the rigid rule of law,²⁸⁹ while the relevance of federal law remains foggy.²⁹⁰ No matter the specific issue, a framing battle is one of the “periodic confrontations or blowups” over who decides the contours of public life and relevant values of the law: governmental elites or citizens.²⁹¹

Frustrated Americans can organize and resist centralized power just as insurgents fight more powerful conventional forces. Mao Zedong noted that insurgencies go through several phases.²⁹² First, they build up strength and recruit new supporters while using “a variety of subversive techniques to psychologically prepare the populace to resist the government.”²⁹³ Then, they use provocations to sap support for the government and expand their areas of influence.²⁹⁴ Finally, they assault the government directly using conventional means.²⁹⁵

288. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immig. Rights & Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. 291, 313 (2014) (plurality opinion); *see also* SUTTON, *supra* note 65.

289. *See, e.g.,* Pratheepan Gulasekaram Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019); Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 171–72 (2016). Professor McCormick writes:

Since the anti-sanctuary provisions were enacted in 1996, the perception that federal government efforts to vigorously enforce immigration laws and eliminate unauthorized immigration were being undermined by isolated pockets of state and local “sanctuary” efforts, has been replaced by a perception that Congress has repeatedly failed to fix a broken immigration system At the same time, though, the efforts of state and local governments to respond to the worsening immigration crisis have evolved and now include measures that seek to reinforce federal immigration enforcement, as well as those designed to protect unauthorized immigrants from immigration enforcement.

Id. (footnotes omitted). *See also* Terrence Stutz, *Dan Patrick, Julián Castro Clash Over Immigration in TV Debate*, DALL. MORNING NEWS (Apr. 15, 2014), <https://www.dallasnews.com/news/politics/2014/04/16/dan-patrick-julian-castro-clash-over-immigration-in-tv-debate> [<https://perma.cc/XZF8-RBBR>] (describing a debate between two leading Texas politicians on whether to frame undocumented immigration as a burden on limited public resources or an economic boon).

290. *See United States v. Texas*, 144 S. Ct. 797 (2024) (concerning federal and state authority around undocumented immigration); *Dep’t of Homeland Sec. v. Texas*, 144 S. Ct. 715 (2024) (same).

291. KRAMER, *supra* note 239, at 207 (discussing struggles over the authority to interpret the Constitution).

292. *See* U.S. ARMY & MARINE CORPS, *supra* note 16, § I-31.

293. *Id.* § I-32.

294. *See id.* § I-33.

295. *See id.* § I-34.

Marijuana reform advocates have made the first two moves. They built a coalition and broadcast government abuses, using prohibition's failures as an opportunity to reframe marijuana. They also won unconventional victories, accomplishing through states and referenda what they could not in the capitals. Mao would have predicted this force ripening into the recent direct attacks on prohibition.²⁹⁶ Unless the public's frame changes again, it seems likely that prohibition will fall.

To be sure, that victory should not end all deliberation about marijuana. Liberalization presents new challenges. Society can tolerate certain vices (or potential vices) while still discouraging their abuse and mitigating their harmful effects.²⁹⁷ Such interventions will become salient as reformers turn to other aspects of drug policy.²⁹⁸

However, in having those conversations, and in the victories ordinary citizens have already won, Americans challenge one of Deneen's hypotheses—that government, “moving like a ratchet wrench, always in one direction, enlarging and expanding in response to civic grievances,” leading “to citizens' further experience of distance and powerlessness.”²⁹⁹ The machine can be stopped. The American people can “keep a halter on those in power,” as Judge Sutton put it, and reclaim freedom for their communities and themselves.³⁰⁰ Acting together, they can uphold the basic concept of personal liberty that has too long lay dormant in the law—the freedom to do what one pleases, so long as it does not harm others, subject only to non-coercive guidance from their neighbors. Americans can claim anew the tradition of responsible self-governance that undergirds federalism and personal liberty alike.

296. See Statement on Marijuana Reform, *supra* note 42.

297. Portugal, for instance, decriminalized *all* drugs in 2001, but has continued to treat them as administrative offenses, with fines suspended for users who agree to seek treatment. See GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 3–4 (2009), https://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf.

298. See Jim Hinch, *What Happened When Oregon Decriminalized Hard Drugs*, ATLANTIC (July 19, 2023), <https://www.theatlantic.com/politics/archive/2023/07/oregon-drug-decriminalization-results-overdoses/674733> [<https://perma.cc/9T6J-J6YA>] (noting that Oregon's decriminalization of drugs immediately preceded a sharp rise in overdoses).

299. DENEEN, *supra* note 5, at 8.

300. SUTTON, WHO DECIDES?, *supra* note 65, at 370.