

# Bootleggers, Baptists, bureaucrats, and bongos: How special interests will shape marijuana legalization

By Philip Wallach and Jonathan Rauch

## INTRODUCTION AND SUMMARY

Last November, the campaign for a state constitutional amendment in Ohio provided a glimpse of one possible future of marijuana legalization. Four other states and the District of Columbia had already passed legalization initiatives, but Ohio's was different. Its terms would have restricted marijuana production to ten sites—all of which were in the hands of the initiative's financial backers, who had put up more than \$20 million to pass the initiative.

Voters and even many legalization advocates, offended by the nakedly self-serving terms of the proposal, rejected it, but the effort amounted to a wake-up call. Where there are markets, regulations, and money, special interests and self-serving behavior will not be far away. However desirable technocratic regulation might (or might not) seem in principle, interest-group politics and bureaucratic priorities will shape the way marijuana is legalized and regulated—probably increasingly over time.

In and of itself, that fact is neither good nor bad; it is inevitable. But it calls for some careful thinking about how interest-group politics and the search for economic rents (as economists call protections favoring certain market participants over others) may inflect or infect one of the most important and challenging policy reforms of the modern era.

Why did legalization of marijuana break through in the face of what had long been overwhelming interest-group resistance? In a post-disruption world, how might the key social and bureaucratic actors reorganize and reassert themselves? As legalization ushers in a “new normal” of marijuana-related regulation and lobbying, what kinds of pitfalls and opportunities lie ahead? In this paper, we address those questions through the prism of what political economists often call the theory of *public choice*—the study of how interest groups and bureaucratic incentives influence policy outcomes. Our conclusions include these:



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- For many years, the marijuana-policy debate was dominated by an “iron triangle” of anti-legalization interests: moralists and public-health advocates who believe marijuana use is wrong or harmful; commercial and gray-market interests with stakes in drug treatment and medical marijuana; and law-enforcement and quasi-governmental entities whose budgets and missions are sustained by the war on drugs. Those interests’ combined firepower retarded change even as public support for marijuana prohibition softened.
- To make possible the wholesale disruption that has happened with marijuana legalization, public opinion change was necessary, but it was not sufficient. Also required was the disruption of the iron triangle. Reformers accomplished that in the late 2000s through a shrewdly crafted campaign of “asymmetric warfare” that aimed money and argumentation at the incumbent coalition’s weakest points. In particular, reformers shifted the public’s focus from harms of marijuana *use* to harms of marijuana *criminalization*.
- The resulting upset to the political equilibrium has been dramatic, but it may prove self-limiting. The rise of commercial marijuana interests and a potentially controversial “marijuana lobby” may impede legalization’s momentum as its opponents change the subject once again, from harms of *criminalization* to harms of *corporate predation*.
- The present disrupted regulatory environment is also unlikely to last. Old prohibitionist interests are discommodated and new commercial-marijuana interests are still getting organized, giving legalizing states a degree of regulatory freedom which is exceptional but probably not durable. Over time, multiple interests will coalesce and colonize the regulatory process.
- Despite widely touted concern that one or more disproportionately powerful players will dominate the regulatory system, regulatory incoherence should be a greater concern than regulatory capture. As policymakers increasingly need to navigate complex and conflicting interest-group politics, the result is at least as likely to be *overregulation* and *misregulation* as it is to be systematic *underregulation*.
- Although no protection is perfect, the emerging model of state-level regulation provides valuable insulation against interest-group depredations. Even if the federal government eventually legalizes marijuana, it should leave marijuana regulation primarily to the states. Independent policy evaluation, as Washington state is doing, may also help restrain regulatory caprice and interest-group opportunism.

## BOOTLEGGERS, BAPTISTS, AND BUREAUCRATS: SELF-INTEREST IN THE WAR ON DRUGS

Drug policy might seem, at first glance, to fall outside of the public choice framework. It is an arena in which deeply held moral visions of society clash: on one side, individuals’ autonomy and liberty to do as they wish with their own bodies, and on the other, the need to protect society from corrupting and degrading appetites and dependencies that can erode the bonds of community. Next to those warring ideological considerations, the scope for interest group competition might seem relatively small. But a public choice perspective turns out to offer important insights into why the drug war took on its current form in the first place, what kinds of interests were arrayed to defend the status quo, and how change has broken through in recent years.

Before turning to those insights, we should first lay out the basics of the public choice framework for anyone who may not be familiar with its now more than half-century-long development. Most broadly, the term “public choice”

is sometimes used to refer to the study of political phenomena using the traditional tools of economic analysis. But more often it refers to a narrower school of thought that focuses on the way that politics supplies laws and regulations to meet the demands of interest groups (in both the private and public sectors) rather than to satisfy some abstract notion of the public good.

By the middle of the twentieth century, a wide range of scholars sensed that old bureaucratic agencies (such as the Interstate Commerce Commission) had lost the populist zeal of their founders and basically acted as captured protectors of the very regulated interests they purportedly held in check.<sup>1</sup> In the 1960s, New Left scholars developed that critique further, suggesting that interest groups were steering the process from the very moment of agency creation.<sup>2</sup>

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At that point, a wave of economists who leaned right founded modern public choice by making the radically simplifying assumption that legislators themselves were simply selling off public policies to the highest bidders, which implied that political outcomes ought to be analyzed as the results of ongoing interest group competition rather than by reference to the lofty rhetoric politicians and bureaucrats use to publicly justify their choices.<sup>3</sup> Before long, those scholars began to treat government actors as just another interest group vying for public resources on their own behalf.<sup>4</sup>

Like any other way of thinking, public choice can be taken too far. Taken literally as a complete account of political life, it is demoralizing, anti-democratic, and often a poor descriptor. Trying to translate moral passions into the calculus of interest-group bargaining is often fruitless; public choice is a bad framework for understanding abortion politics, for example. But even where there are strong forces animated by deep feeling, adopting an interest-centric perspective can be illuminating.

Such is the case with America’s marijuana policies. To start with, we can draw on the now-familiar phrase “bootleggers and Baptists” to understand the coalition that supported drug prohibition. In a short comment for *Regulation*, the economist Bruce Yandle coined the phrase as a way of describing some of the strange-bedfellows coalitions that regulatory policy created. His point was that policies striking economists as socially inefficient might well be efficient ways of delivering favorable results to interest-group clients.

He elaborated with an analogy to Sunday closing laws for bars and liquor stores. The laws seemed like ineffective responses to social concerns about alcohol. But they persisted because they received public support from “Baptists,”

1 See especially Samuel Huntington, “The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,” *Yale Law Journal* 61 (1952): 467; Marver H. Bernstein, *Regulating Business by Independent Commission* (Greenwood Press, 1955).

2 Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Quadrangle Books, 1963); James Weinstein, *The Corporate Ideal in the Liberal State, 1900-1918* (Beacon Press, 1968); and Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge University Press, 1988).

3 George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2 (1971): 3-21; Sam Peltzman, “Toward a More General Theory of Regulation,” *Journal of Law and Economics* 19 (1976): 211-20; Gary S. Becker, “A Theory of Competition Among Pressure Groups for Political Influence,” *Quarterly Journal of Economics* 98 (1983): 371-400. They built on James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962).

4 Most influentially, William Niskanen, *Bureaucracy and Representative Government* (Aldine Atherton, 1971).

by which term Yandle meant all sorts of moral crusaders for temperance, and also not-so-public support from “bootleggers,” by which Yandle meant all the black-market suppliers who thrived when legal outlets were closed. Extending the insight, Yandle thought that “the most successful ventures” serving both politicians’ and interest groups’ ends would be those which “occur where there is an overarching public concern to be addressed (like the problem of alcohol) whose ‘solution’ allows resources to be distributed from the public purse to particular groups or from one group to another (as from bartenders to bootleggers).”<sup>5</sup> Over the years, Yandle and others have applied this framework to diverse regulatory areas, including climate change, tobacco, and Indian casino permits.<sup>6</sup>

But turning the metaphor back on the question of regulating intoxicating substances is also quite helpful. For instance, why did a national constitutional amendment banning the legal sale of alcohol succeed when it did? The need for alcohol taxes, which represented more than 30 percent of federal revenues as late as 1910, made it impossible for prohibition to succeed on the national level, in spite of the temperance movement’s many decades of impressively broad and diverse advocacy. When the Sixteenth Amendment enabled the federal government to pass an income tax (and the First World War prompted it to make extensive use of that power), the interests that would have been next in line to pay for government if alcohol revenues dried up no longer had reason to fear prohibition and no longer stood in its way.<sup>7</sup>

A similar story can be told about the birth and growth of federal drug policies, including those concerning marijuana. Even before the heyday of public choice scholarship, observers noted the ways in which government bureaucrats sought to raise the profile of marijuana as a social threat in order to improve their own standing. Federal drug policy in America began through the Harrison Act of 1914, “a regulatory measure in the ill-tailored guise of a federal revenue enactment.”<sup>8</sup> That left the Internal Revenue Bureau’s Narcotics Division responsible for drug enforcement. Searching for new ways of justifying its scope, the Narcotics Division (which became the Bureau of Narcotics in 1930) under Harry Anslinger promoted the idea of marijuana as a dangerous social menace and lobbied successfully for the passage of the low-salience Marihuana Tax Act of 1937.<sup>9</sup>

Public choice scholars have also focused on another historic aspect of drug-enforcement policy likely affected by bureaucratic self-interest, at both the federal and state levels: asset forfeitures as a source of law enforcement revenues. Seizures of the proceeds from black-market drug operations came to be an important source of revenues for the Bureau of Narcotics from the 1930s onward. Much later, in the midst of America’s crack cocaine epidemic, the Comprehensive Crime Act of 1984 allowed local police departments to keep the proceeds of assets forfeited in the course of drug crime investigations, which predictably led them to shift their enforcement focus to drugs and away from property crime.<sup>10</sup>

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5 Bruce Yandle, “Bootleggers and Baptists – The Education of a Regulatory Economist,” *Regulation* 1 (1983): 12 – 16, 14.

6 Bruce Yandle and Stuart Buck, “Bootleggers, Baptists, and the Global Warming Battle,” *Harvard Environmental Law Review* 26 (2002): 177-230; Bruce Yandle et al., “Bootleggers, Baptists and Televangelists: Regulating Tobacco by Litigation,” *Illinois Law Review* (2008): 1225-1284; Randy T. Simmons, Ryan M. Yonk, and Diana W. Thomas, “Bootleggers, Baptists, and Political Entrepreneurs: Key Players in the Rational Game and Morality Play of Regulatory Politics,” *The Independent Review* 15:3 (Winter 2011): 367-381.

7 See Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (Scribner, 2010) (Kindle Edition), loc. 1172.

8 Rufus King, “Narcotic Drug Laws and Enforcement Policies,” *Law and Contemporary Problems* 22 (Winter 1957): 113-131, 115.

9 Donald Dickson, “Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade,” *Social Problems* 16:2 (1968): 143-156. “Marihuana” is the spelling used in the legislation.

10 Bruce L. Benson, David W. Rasmussen, and David L. Sollars, “Police Bureaucracies, Their Incentives, and the War on Drugs,” *Public Choice* 83 (1995): 21-45; Brent D. Mast, Bruce L. Benson, and David W. Rasmussen, “Entrepreneurial Police and Drug Enforcement Policy,” *Public Choice* 104 (2000): 285-308.

## DEFENDING PROHIBITION: HOW STAKEHOLDERS RETARDED CHANGE

To judge from polling, public sentiment in favor of marijuana legalization began a gradual but steady rise more than 25 years ago, around 1990.<sup>11</sup> More than two decades ago, states began passing statutes permitting marijuana for medicinal uses. Yet the softening of public support for marijuana prohibition did not translate into outright legalization for recreational use and distribution—and indeed still has not done so at the federal level. Why the apparent disconnect? Here again, public choice theory offers insight. Numerous sorts of Baptists, bootleggers, and bureaucrats—and a number of groups that blur the categories—have all worked with varying levels of intensity to fend off challenges to the regime of marijuana prohibition.

**“Baptists.”** Figuratively speaking, “Baptists” are people whose involvement with marijuana policy is rooted not in narrow self-interest but in moral objections to using the drug. Of course, there are legitimate and, to many people, persuasive reasons to disapprove of marijuana use: like most other intoxicants, marijuana can play a destructive role in people’s lives, especially for heavy users.<sup>12</sup> Starting from that moral disapproval, criminalizing marijuana sales and possession is an intuitively appealing step. Though the evidence of many years attests that criminalizing marijuana will not come close to eliminating it, moralists and public-health advocates can argue with justification that criminalization reduces use of marijuana and sends an unambiguous social signal of disapproval.

That message is carried into politics by several different types. Least organized and least intense, but probably most important, is a large body of respectable opinion that frowns on marijuana use. Some people have emphasized the perceived indolence of “potheads,” others have linked marijuana use with criminality or antisocial behavior. Because of its history with hippies in the 1960s, marijuana has also had a culture war valence, and expressing disapproval was often a convenient way to signal respect for traditional values. Many parents and teachers regarded marijuana’s illegality as helpful in dissuading children and teenagers from using it.

This group is mostly what might be called a “latent” interest group: few of its members are actively involved in anti-drug politics.<sup>13</sup> Still, latent opponents are well represented in politics because politicians are mostly drawn from their ranks, and in most years they could be counted on to line up in defense of the status quo as a matter of course—even in surprising places. In 2006, advocates of marijuana legalization mounted a historically large \$3.6 million political campaign on behalf of an initiative in Nevada, a state that has a sizable tolerance for legalized vices.<sup>14</sup> There was

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<sup>11</sup> For a synoptic treatment of public opinion on marijuana regulation, see William A. Galston and E.J. Dionne, Jr., *The New Politics of Marijuana Legalization: Why Opinion Is Changing* (Brookings, May 2013).

<sup>12</sup> It seems noteworthy that marijuana dependence—which many advocates of legalization deny exists at all—is prominently featured in one of the most celebrated novels of the 1990s, David Foster Wallace’s *Infinite Jest*.

<sup>13</sup> A few, often motivated by personal experience, are, and so there are a handful of “anti-marijuana activist” individuals who have sought out political battles to which they can contribute even far from their own communities. For one example, a Julie Schauer of Virginia, personally contributed \$50,000 to the anti-legalization campaign in California in 2010. Martin Wisckol, “State’s Pot Activists Prep for 2016,” *The Orange County Register* (December 21, 2014).

<sup>14</sup> Except when otherwise indicated, campaign expenditure information throughout this paper is drawn from two sources: ballotpedia.org, and the National Institute on Money in State Politics at their website, followthemoney.org.



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very little effectively organized opposition, and yet the measure failed 44-56. As one Nevadan said, “You can drink, and you can gamble, and you can whore, but you better not be smoking dope.”<sup>15</sup> The poorly funded opposition unforgettably called itself the “Committee to Keep Nevada Respectable.”

As we will see, this kind of passive representation may prove evanescent if countervailing considerations begin pulling members of the group in other political directions. To assert itself durably, support for marijuana prohibition needs to channel latent anti-marijuana sentiment through

groups that can mobilize voters and bid for public attention—and such groups tend to organize in response to perceived threats. The so-called Parent Movement organized in the late 1970s against marijuana decriminalization, spawning institutional entities such as National Families in Action and a welter of locally based groups.<sup>16</sup> Likewise, the Community Alliances for Drug Free Youth began in California and sought to catalyze parents’ anti-drug groups through such awareness-raising activities as “Red Ribbon Week.” In response to the recent wave of legalization, a new wave of community-centered anti-marijuana organizing has arisen, spawning groups like Parents Opposed to Pot, Citizens Against Legalizing Marijuana, and the Take Back America Campaign.

The latent “Baptist” anti-marijuana sentiment is often captured and mobilized by actual Baptist preachers and other religious leaders who rally against drug abuse as a social evil besetting their flocks. Viewing marijuana as a gateway to serious drug addiction, religious leaders have argued that dealers should face harsh criminal penalties. Black clergy were especially important in championing mandatory minimum sentences for drug crimes (including marijuana offenses), first pioneered by Governor Nelson Rockefeller in New York in the 1970s.<sup>17</sup> More recently, ecumenical committees such as the International Faith Based Coalition seek to promote anti-drug education in religious schools.

Finally, a very different kind of “Baptist,” making arguments that purport to be morally neutral, has also played an important role in resisting the move toward marijuana legalization: public health researchers. Many of these actors either work within government or are funded by government, and so deserve to be discussed in the “bureaucrats” category, but some operate independently. RAND’s Drug Policy Research Center, founded in 1989, has historically been the most important center for these voices.<sup>18</sup>

It would be misleading to suggest that public health researchers inject any kind of traditional Baptist passion into marijuana policy debates; indeed, they try to do just the opposite, emphasizing value-neutral arguments that can be empirically supported. But many of these scholars, who may well be in favor of changing marijuana policies themselves, have nevertheless lent support to the policy status quo by building up the evidentiary record supporting the idea that marijuana is physically and socially harmful, often without giving comparable consideration to the

<sup>15</sup> Marshall Allen, “Reefer Redux,” *Las Vegas Sun* (September 22, 2006).

<sup>16</sup> Emily Dufton, “The War on Drugs: The Parent Movement and Zero Tolerance,” *The Atlantic* (March 29, 2012).

<sup>17</sup> See Michael Javen Fortner, *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* (Harvard University Press, 2015), 232.

<sup>18</sup> For an in-house history, see Peter Reuter, Rosalie Liccardo Pacula, and Jonathan P. Caulkins, “Addiction Research Centres and the Nurturing of Creativity: RAND’s Drug Policy Research Center,” *Addiction* (2010). It should be noted that, especially in recent years, RAND’s Drug Policy Center has pioneered new ways of trying to quantify the harms of prohibition and the potential benefits of legalized marijuana.

therapeutic or hedonic benefits of responsible marijuana use or to the social costs of the war on drugs.

**“Bootleggers.”** In Yandle’s typology, “bootleggers” are interests that participate in regulatory policymaking because doing so is a winning proposition for their bottom line. The obvious prototypes are the black-market alcohol importers and distillers that thrived during Prohibition and used private influence, secured mostly through bribery, to prolong and manipulate the enforcement regime that outlawed potential above-board competitors.<sup>19</sup> But the modern-day drug-war equivalent ought to be easy enough to picture: gang leaders with business models built on black market drug sales who could expect to be outcompeted by police-protected legal operations if they were permitted to exist. For obvious reasons, we have no way of knowing whether illicit drug market participants find concealed ways to influence marijuana politics, though it seems doubtful that their role is an important one.

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The influence of those we might think of as gray-market participants in marijuana markets is easier to observe. Because the legal status of marijuana varies across states from fully criminalized to legal for medical uses to fully legal and regulated under state law, some states have incumbent marijuana firms that profit from less-than-full legalization. The largest part of this business involves selling putatively “medical” marijuana to a wide variety of customers, some of whose medical needs are less than convincing but elicit “recommendations” from doctors for a modest fee. These semi-legal “bootleggers” should be motivated to defend their economic rents by opposing disruptive reforms.

That opposition did indeed manifest itself in Washington in 2012, when medical-marijuana interests mounted an organized, if rather miniscule, effort to defeat the state’s legalization initiative. Their representatives asserted that they opposed the initiative because it contained too many provisions hostile to their medical customers’ interests, including a provision that defined a level of THC in the bloodstream for driving-while-intoxicated laws in a way that (they said) would punish those who needed to use marijuana for legitimate medical needs. Steve Sarich, a colorful medical-marijuana purveyor who became the opposition’s de facto spokesman, denounced Washington’s legalization bill as “the new prohibition” because of its blood-level provisions.<sup>20</sup> Opposition from this quarter, however, was ambivalent, because medical-marijuana sellers and their customers were strong ideological supporters of legalization and imagined they could find new business opportunities in the larger market that legalization would bring.<sup>21</sup> All told, incumbent marijuana sellers donated only a few thousand dollars in the attempt to stop Washington’s regime change, a mere pittance when compared to what was spent in support.

Washington’s incumbent dispensaries were a fairly motley crew, operating in a legal gray area without regulation; most did not pay taxes. One could imagine a stronger push to protect interests in states where incumbent medical-marijuana businesses are both larger and better organized. That was the case in Colorado, where medical sellers were regulated since 2010. But Colorado’s legalization amendment coopted the state’s medical-marijuana operators

<sup>19</sup> HBO’s *Boardwalk Empire* provides wonderful texture.

<sup>20</sup> John H. Richardson, “Introducing the Great Marijuana Prohibitionists of 2012,” *Esquire* (November 2, 2012). Also see Dominic Holden, “Pot Activists vs. Pot Activists,” *The Stranger* (March 7, 2012).

<sup>21</sup> One might imagine that firms in legalized states might seek to protect their interstate customer base by opposing legalization efforts in neighboring states—but again, often marijuana sellers are deep believers in the value of ending marijuana prohibition, and they may additionally calculate that the benefits of legalization becoming more entrenched, in more states, outweighs any costs of out-of-state legal competition. Stephanie Condon, “Why Washington’s Marijuana Businesses Wouldn’t Mind Some Competition in Oregon,” *CBS News* (October 31, 2014); Lauren Dake, “Rivals Fail to Faze Local Pot Stores,” *The Columbian* (October 5, 2015).

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by giving them a privileged position in the new regime; not surprisingly, they became enthusiastic supporters. In coming state legalization battles in which incumbents are well established—notably California in 2016—an important factor may be whether these sorts of “bootleggers” can be brought on board.

“Bootleggers” of another sort will be more immovably committed to maintaining marijuana prohibition: those who profit from the mandated treatment business. The

legalization movement is especially fond of questioning the motives of this interest group, which of course (like all interest groups) professes public-spirited motivations.<sup>22</sup> Legalization advocates point out that every year, U.S. courts give hundreds of thousands of individuals the “choice” of facing prison time for marijuana possession or entering mandatory treatment programs, with the result that 57 percent of all of those in treatment for marijuana dependence are there as a result of a court order.<sup>23</sup> Although many people voluntarily seek professional help for marijuana dependence, a large part of the treatment industry is dependent on a stream of customers referred by the criminal courts as a result of marijuana prohibition.

The last two groups of “bootleggers” that deserve mention are industries that potentially see legal marijuana as competition. The first is the alcoholic beverage industry. Marijuana researchers are split on the all-important (at least from the public health perspective) question of whether marijuana and alcohol are complements or substitutes. One might surmise that if the two were clearly substitutes, the mammoth alcoholic beverage industry would turn out in force to oppose marijuana legalization, encouraging Americans to stick to the vices they know and love. Occasionally such moves have been made: the California Beer and Beverage Distributors gave \$10,000 to the anti-legalization campaign in their state in 2010. But, perhaps because such contributions offer an irresistible target for legalization advocates, alcohol interests have mostly been conspicuous by their absence from the marijuana legalization debate.

The second industry is pharmaceuticals, which has fought not just recreational legalization but also medical. Rightly or wrongly, many people regard marijuana as a form of alternative medicine, using it for nausea treatment, pain relief, epilepsy management, and more. Even where medical marijuana is already legal (as it is for a majority of Americans), broader legalization would make medical marijuana more accessible and thus more competitive with traditional pharmaceuticals. Although pharmaceutical companies have kept an arm’s-length distance from marijuana ballot initiatives, some critics of prohibition suggest that they have played a role in opposing legal change.<sup>24</sup>

**Bureaucrats and mixed types.** To a surprisingly large degree, the interest groups most active in organizing advocacy on behalf of continued marijuana prohibition are part of the government or directly depend on it. Their interests are often both principled and pecuniary. Many police officials and prosecutors fear that relaxing marijuana laws will impair their familiar patterns of policing, and many are morally invested in the war on drugs. At the same time, police departments often have their own bootlegger motivation: drug investigations and prosecutions, including

<sup>22</sup> An example cited prominently by legalization advocates is Mel Sembler, who made a fortune in Florida real estate and then established a chain of (non-profit) drug rehabilitation centers called Straight, Incorporated. Sembler (together with his wife) was the single largest donor to the anti-legalization campaign in Colorado in 2012, donating \$285,000 through the group Save Our Society from Drugs. See, e.g., Maia Szalavitz, “Romney Fat Cat’s Reefer Madness,” *The Fix* (September 23, 2012).

<sup>23</sup> Note that the source for this figure is somewhat dated. See spring 2002 ad posted at Common Sense for Drug Policy.

<sup>24</sup> Lee Fang, “Leading Anti-Marijuana Academics Are Paid by Painkiller Drug Companies,” *Vice* (August 27, 2014); Lee Fang, “The Real Reason Pot Is Still Illegal,” *The Nation* (July 2, 2014).



those targeting marijuana, are a leading source of asset forfeitures, which provide a significant revenue stream to police and sheriff departments. In Florida, for example, one county sheriff's department's annual strategic plan described marijuana seizures as helping to "meet eligible equipment or other non-recurring needs that could not be met by local funding."<sup>25</sup> Enforcement professionals whose expertise (and thus professional standing) revolves around drug enforcement naturally take a special interest in opposing decriminalization. Occasionally, as in the Oregon 2014 election, these forces have managed to contribute six-figure sums to anti-legalization campaigns.

Perhaps more important in framing debates around marijuana policy are two federal offices that include anti-marijuana research and advocacy as a part of their larger anti-drug mandates: the National Institute on Drug Abuse (NIDA, housed within the National Institutes of Health) and the White House Office of National Drug Control Policy (ONDCP, also known as the Drug Czar's office). Both entities are constitutionally committed to America's drug war—both domestically and internationally, where America has long been a proselytizer for the anti-drug creed. Consequently, they partake of a great deal of Baptist enthusiasm for the cause.

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By virtue of their missions and organizational placements, however, they also have plenty of bureaucratic self-interest in amplifying the threats posed by all illicit drugs—and in defending the idea that all illicit drugs deserve to be lumped together by public policy. They have often taken that message to the public with prevention advertising campaigns paid for by government funds, such as the (apparently unsuccessful) National Youth Anti-Drug Media Campaign in the early 2000s or the (apparently more successful) "Above the Influence" campaign in recent years.<sup>26</sup> ONDCP has been subject to complaints of engaging in illegal covert propaganda.<sup>27</sup> Going beyond advertising, these offices also support youth education programs, most notably Drug Abuse Resistance Education (D.A.R.E.). The ONDCP maintains extensive ties with, and often provides funding to, community anti-drug groups. Together, the offices do a good deal to project the authority of the federal government on the side of the anti-marijuana status quo.

NIDA also occupies a place at the center of the web of American marijuana research, in large part because it has a legal monopoly on the production of marijuana for any kind of scientific testing (which it administers in cooperation with the University of Mississippi). This is an awkward role for an organization which is legally devoted first and foremost to minimizing the harms of drug abuse and is therefore skeptical of any benign or useful purpose for marijuana. But more important is the agency's role as a funder of marijuana-related research. In exercising the agenda-setting authority that its considerable budget conveys, NIDA naturally pushes marijuana-related research toward harm minimization. As noted in the Baptist section above, this leads the public health community to lend its intellectual heft first and foremost to the proposition that marijuana is a dangerous drug.

<sup>25</sup> See, e.g., Fang, "The Real Reason Pot Is Still Illegal," op. cit. Nationally, concern that asset forfeiture creates a serious conflict of interest for law enforcement has led to a growing reform movement. In April, Florida passed a law usually requiring police to make an arrest in order to seize assets and imposing other constraints on the practice.

<sup>26</sup> US GAO, "Contractor's National Evaluation Did Not Find That the Youth Anti-Drug Media Campaign Was Effective in Reducing Drug Use," GAO-06-818 (August 2006); Michael D. Slater et al., "Assessing Media Campaigns Linking Marijuana Non-Use with Autonomy and Aspirations: 'Be Under Your Own Influence' and ONDCP's 'Above the Influence,'" *Prevention Science* 12 (March 2011): 12-22.

<sup>27</sup> See GAO letter to Congress B-303495 (January 4, 2005).

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Moral objectors, parents, religious figures, law-enforcement agencies, medical-marijuana purveyors, federal bureaucracies, drug-treatment providers, and more: combined, the interest-group forces arrayed against legalization are truly formidable. Our purpose in surveying them is not to take a policy position. Nor do we impugn their integrity. In politics and public policy, every party is interested, which is as it must and should be. Nor do we believe that their interestedness makes them wrong in what they say. Our goal here, rather, is to abstract from the substantive arguments about marijuana policy to understand how interest alignments affect social change. Only a few years ago,

advocates of decriminalization and other measures short of legalization were on the leftward end of respectable opinion about marijuana. Now, suddenly, legalization is winning broad mainstream support and once-unthinkable political victories, and decriminalizers find themselves on the *right* end of the debate.

How did that happen? Once again, Yandle offers helpful guidance. As he frames things, the challenge for the reformer seeking to disrupt an equilibrium of interests is to reframe the way the public understands the status quo's costs and benefits.<sup>28</sup> That is what marijuana reformers, after years of failure, finally managed to do.

## RECONFIGURING: HOW LEGALIZERS RESHAPED THE BATTLEGROUND

To dislodge a long-existing, well defended policy regime, advocates of change need (at least) two things: a shift in public opinion and a reconfiguration of the interest-group scene. On both scores, legalization advocates made winning moves over the last decade. They strategically changed their main message from the supposed harmlessness of marijuana to the staggering costs of the drug war. That allowed them to split the anti-marijuana public. And they used their messages and shrewdly crafted initiatives to neutralize or divide traditional opponents. Legalization in four states plus the District of Columbia in 2012 and 2014 has been the result, probably with more states to follow in 2016.

We leave discussion of changing public opinion to our colleagues Galston and Dionne, previously cited, and instead will focus our gaze on the interest-group environment. Although we devote more attention here to the opponents of marijuana legalization, the “bootleggers and Baptists” paradigm holds on both sides of the marijuana equation, albeit not symmetrically. If “Baptists” on the prohibitionist side are moralists and public-health advocates who see marijuana use as inherently wrong and harmful, their opposite numbers on the legalization side are libertarians who see marijuana use as a fundamental personal right and, for responsible users, a boon to personal well-being.

Until recently, their position found little resonance with the broader public. For decades, the marijuana-reform community stayed true to its roots in the 1960s and 1970s counterculture. The movement's attitude toward marijuana use was reflected in the acronym of its most prominent advocacy group, the National Organization for the Reform of Marijuana Laws (NORML), founded in 1970. Many of the movement's most prominent champions made no bones about their own hippie roots or their own marijuana use; they felt a strong sense that they would be betraying their

<sup>28</sup> Yandle, “Bootlegger and Baptists,” 14.

ideals if they were to accept mainstream society's assumptions and stereotypes about marijuana and its users. For many years, that integrity placed a ceiling on the legalization movement's success. Whatever the strength of the movement's policy arguments, and whatever the virtues of its advocates, at least since the 1980s the messengers were vulnerable to being marginalized by their own (sometimes conspicuous) rejection of the "square" community and its values.

As for "bootleggers," or commercial interests, their nearest equivalents on the pro-legalization side are interests that stand to benefit pecuniarily from legalization. With no prospect of a legal market, however, this group remained notional and had neither cause nor means to organize effectively. (One way in which prohibition has been quite successful, on its own terms, has been in blocking the formation of commercial marijuana interest groups—though at the perverse cost of diverting untold economic rents and social influence to the illegal commercial sector, domestically and internationally.)

Finally, as long as all levels of government were aligned in support of prohibition, there was little if any institutional bureaucratic or government-sector support for legalization. The odd sheriff or police chief who questioned prohibition's drain on law-enforcement energy and resources was about the extent of it. The result was, for many years, a kind of Bambi-meets-Godzilla mismatch in which a Baptist-bootlegger-bureaucrat iron triangle had little trouble marginalizing a mostly isolated, idiosyncratic-seeming group of legalizers.

Hippies and hemp enthusiasts are still out there, but an infusion of money into marijuana policy advocacy over the last two decades has otherwise transformed the organizational side of the legalization movement. This was largely the work of two billionaire philanthropists: George Soros, who has given some \$80 million to drug-policy research and advocacy since 1994, and the late Peter B. Lewis, who spent \$40 to \$60 million on marijuana legalization between 1980 and his death in 2013.<sup>29</sup> These contributions have underwritten the work of the Drug Policy Alliance (DPA) and the Marijuana Policy Project (MPP), as well as drug policy work done by the American Civil Liberties Union (ACLU), which together did much to transform the debate over marijuana legalization.

Those groups' main innovation has been to focus on the harms of criminalizing marijuana rather than on any purported benefits from its recreational use. They increased emphasis on the phrases "drug war" and "marijuana prohibition," and they reduced attempts to convince the public that marijuana use is a moral entitlement or wholesome lifestyle choice. They have successfully married the widespread sense that alcohol prohibition was a severe social blunder with the sense that social ills coming from marijuana use are no more threatening than those of alcohol. At least since the mid-2000s, the newer pro-legalization groups have explicitly promoted the message that marijuana should be regulated like alcohol rather than forced into dangerous black markets.

Legalization's advocates also understood the need to bring a much larger variety of institutional voices into the chorus of those questioning marijuana prohibition. They recruited organizations representing the interests of minority communities, including the NAACP and the League of United Latin American Citizens (LULAC). Minority organizations could speak with special moral authority about the costs of the drug war in their communities, especially to young

The "bootleggers and Baptists" paradigm holds on both sides of the marijuana equation, albeit not symmetrically.

<sup>29</sup> Justin Torres, "Drug Donors," *Philanthropy Magazine* (Fall 2014). Grants from Peter Lewis supported some of Brookings's research on marijuana legalization.

Hippies and hemp enthusiasts are still out there, but an infusion of money into marijuana policy advocacy over the last two decades has otherwise transformed the organizational side of the legalization movement.

people whose ability to lead productive lives was greatly impaired by marijuana-related contact with the criminal justice system (whether that included prison time or not). Leaders of recent legalization campaigns, prominently including the MPP, sought and received endorsements from minority organizations in nearly all recent ballot initiatives.

They also reached out to include voices capable of neutralizing some of the Baptists and bureaucrats who have prominently opposed legalization. Since 2002, that has

included Law Enforcement Against Prohibition (LEAP), which seeks to give voice to law-enforcement officials who have had firsthand experience fighting the drug war and have judged it counterproductive. More recently, Clergy for a New Drug Policy features an ecumenical group of preachers making a variety of anti-prohibition arguments, often focusing on the costs to parishioners.

Public-health groups that focus on the pernicious social effects of legalized marijuana are unlikely to become full-throated advocates of legalization, but they may be at least partially co-opted by promises to dedicate some of the tax revenue from legal marijuana to youth prevention, drug treatment, and research: which is to say, to the public health community. That was the strategy in Washington in 2012, where the initiative included a variety of revenue commitments to public health programs at a time when the state's budget was under stress. It mostly succeeded in neutralizing or in some cases reversing opposition in the public-health community.<sup>30</sup>

The final, and most recent, change in the interest-group landscape is the emergence of interests who see ways to reap gains from marijuana legalization and throw their weight behind reform as a way of realizing these gains. Now that recreational legalization is an established commercial fact in four states, revenue streams from state-legalized markets are beginning to flow. That can lead state officials and those who depend on state revenues to see legalization in a different light—not only in legalizing states but also in surrounding ones. Oregonians, for example, had to watch their residents purchase marijuana in (and thus send their tax revenues to) neighboring Washington, such that the state seemed to be leaving money on the table.<sup>31</sup> Partly for that reason, Oregon legalized marijuana in 2014, two years after Washington.

Probably more consequentially in the long run, business interests that seek to capitalize on legalization by financing or operating marijuana firms have begun to form themselves into organized interests. The founder of Oakland's Oaksterdam University, the premier center of education for marijuana growers-in-training, backed legalization in California in 2010 to the tune of \$1.5 million, according to news reports.<sup>32</sup> Even more emblematic of the growing commercial interest in marijuana is the 2010 formation of the National Cannabis Industry Association, which seeks to operate in the manner of a traditional trade group and now has almost 1,000 members.

<sup>30</sup> See Jonathan Martin, "Little Organized Opposition to Marijuana-Legalization Initiative," *Seattle Times* (October 4, 2012).

<sup>31</sup> "Second-Hand Influence from Our Neighbors to the North: Beginning Tuesday, Oregonians Will Be Able to Buy Recreational Marijuana in Vancouver, Sending Tax Revenue to Olympia that Could Be Going to Salem Instead," *Oregonian* editorial (July 8, 2014), A8.

<sup>32</sup> Chris Roberts, "Richard Lee, Oaksterdam University Founder: Marijuana Legalization Is 'Dead' in California," *Huffington Post* (September 9, 2011).

## THE BIG SWITCH: HOW DISRUPTORS BROKE THROUGH

Here is what has not succeeded in changing the prohibition paradigm: money. As the table shows, advocates of legalization (and decriminalization) have frequently and massively outspent opponents in ballot issues since 2000, with only one success before the breakthrough year of 2012. Money may be necessary, but it is not sufficient. What elements, if not spending (or not spending alone), bring about disruption?

Non-medical marijuana ballot issues since 2000 <sup>33</sup>				
State and Year	Type of Measure	Result	Pro- \$ (rounded)	Anti- \$ (rounded)
Alaska 2000 (Measure 5)	Legalization	Failed, 41-59	\$160,000	\$3,000 <sup>34</sup>
Colorado 2006 (Initiative 44)	Decriminalization	Failed, 41-59	\$202,000	\$1,087,000*
Nevada 2006 (Question 7)	Legalization	Failed, 44-56	\$3,686,000	No data – apparently minimal
Massachusetts 2008 (Question 2)	Decriminalization	Passed, 63-37	\$1,083,000	\$81,000
California 2010 (Proposition 19)	Legalization	Failed, 47-53	\$4,633,000	\$365,000
Colorado 2012 (Amendment 64)	Legalization	Passed, 55-45	\$2,287,000	\$707,000
Oregon 2012 (Measure 80)	Legalization	Failed, 47-53	\$481,000	\$50,000
Washington 2012 (Initiative 502)	Legalization	Passed, 56-44	\$5,027,000	\$16,000
Alaska 2014 (Measure 2)	Legalization	Passed, 53-47	\$1,117,000	\$189,000
Oregon 2014 (Measure 91)	Legalization	Passed, 56-44	\$13,992,000	\$305,000
Ohio 2015 (Issue 3)	Legalization	Failed, 36-64	\$21,550,000 <sup>35</sup>	\$2,170,570

\*Not all devoted to anti-marijuana campaigning; probably largely attributable to anti-gay marriage.

### 1. To overcome inertia, reformers concentrated their fire and framed their message as a socially responsible one.

Put another way: the actual quality of legalization campaigns really matters. For a pivotal group of voters, the *how* of legalization is of central importance. If legalization seems to be simply a matter of giving license to marijuana growers and smokers, latent suspicion of the drug is hard to overcome, and the respectable political class will stand against the change.

<sup>33</sup> As previously stated, information on campaign expenditures is drawn from ballotpedia.org and www.followthemoney.org, except as otherwise noted. Where there is a conflict, we present the better-documented information from www.followthemoney.org.

<sup>34</sup> Associated Press, “Pro-Pot Campaign Draws Big Bucks from Outside” (October 11, 2000).

<sup>35</sup> Ballotpedia and followthemoney.org sharply diverge on total pro-Issue 3 spending, with Ballotpedia reporting just \$11,959,000 spent in support of Issue 3. The figure we report is expenditures by Responsible Ohio PAC as recorded by the Ohio Secretary of State.



A number of failed ballot initiatives illustrate the pattern. In Alaska in 2000 (where small-scale marijuana possession was already effectively decriminalized), the campaign for legalization was seen as promoting a kind of user-friendly anarchy rather than a well-ordered system. This was poor ground for advocates of legalization to choose to fight on, a blunder likely influenced by ideological donors who sought to establish marijuana's social acceptability, at least on the frontier. The largest donor to the pro- campaign was an Arizona woman named Patricia Steward, who self-identified as "the Duchess of Hemp."<sup>36</sup> The measure failed 41-59.

The clearest illustration is the contrast between legalization's failure in Oregon in 2012 and its success there in 2014. Even as successful campaigns in Colorado and Washington laid a heavy stress on the responsible regulation that would accompany legalization, Oregon's 2012 campaign had a more libertarian feel that gave the impression that the new regime would simply be a free-for-all for the new marijuana industry. Every establishment politician and a wide variety of civil society groups lined up against the law, often emphasizing that even if some kind of legalization might be conceivable, such a poorly written change was not.<sup>37</sup> Despite a well funded and energetic campaign in favor of legalization, the voters rejected it 47-53. By 2014, the picture had completely changed. The country's professional legalizers were out in force, spending record amounts on the campaign and ensuring that the voters were confronted with the most palatable, reasonable-sounding version of legalization, emphasizing the importance of regulation. That message, probably aided by early returns from Colorado's and Washington's regulated systems, led to a 9-point swing in favor of legalization.

The need for a quality legalization vehicle shouldn't be over-read, and may be dated by now. Seeing legalization happen in the real world may have softened latent opposition, such that a less carefully crafted message might be able to succeed in, say, Nevada in 2016 where it could not in Nevada in 2006. Still, the ability to frame a credible "good government" pitch is one of the clearest ways in which the reconfigured interest-group scene can matter, because such groups play a powerful role in certifying reform as substantively responsible and politically acceptable. If and when legalization is effected by legislatures, rather than by plebiscite, the ability to package change in the maximally professional way is probably even more important.

The anti- campaigns on ballot issues have been, to a remarkable extent, poorly funded and disorganized. Pro-legalization forces have achieved spending advantages of at least three to one and often more than ten to one.

## **2. For reformers, opponents' surprise and disbelief is a powerful, but temporary, advantage.**

In the so-far short history of state marijuana legalization, advocates of change have faced the disadvantage that latent opinion has been against them. But as advocates have managed to break down the respectable consensus backing marijuana prohibition, that disadvantage has brought a corresponding advantage: their overconfident opponents have often failed to take legalization seriously. Those most comfortable with the status quo have been slow to update their mental model of legalization battles;

they imagine that any such fight will be about the social acceptability of the stoner lifestyle, and accordingly think that victory is assured even without a significant counter-mobilization effort.

<sup>36</sup> Associated Press, "Pro-Pot Campaign Draws Big Bucks from Outside" (October 11, 2000).

<sup>37</sup> E.g., "Flaws in Push to Legalize Pot," *Oregonian* editorial (July 29, 2012).

As a result, the anti- campaigns on ballot issues have been, to a remarkable extent, poorly funded and disorganized. Pro-legalization forces have achieved spending advantages of at least three to one and often more than ten to one (as the table shows). In other words, the Baptists, bootleggers, and bureaucrats have not yet begun to fight, instead largely relying on the resistance of latent opinion. That reliance is not always misplaced. But the legalization movement has clearly arrived as a force to be reckoned with, and there are good reasons to think that anti-legalizers will do better at counter-mobilization in the future.

### **3. Reformers portrayed the fight for legalization as a fight for a general interest triumphing over special interests.**

For decades, one of the most serious disadvantages facing marijuana legalizers was the perception that they represented a special interest, and not a particularly sympathetic one at that: stoners and lifestyle libertarians. Against them stood government agencies, the law-enforcement community, and public health experts, a prestigious coalition that could convincingly lay claim to speak for the public interest.

In Colorado and Washington, reformers did a shrewd job of inverting the calculus. By arguing that police departments would be freed up to devote more resources to really dangerous criminals, they framed legalization as a law-and-order reform. (One Washington campaigner remarked that those seeing pro-legalization ads might have been forgiven for thinking that Initiative 502 was a tough-on-crime measure.) By earmarking marijuana tax revenues for education and public health, they framed legalization as strengthening schools and prevention efforts. By hammering anti-legalizers as lobbyists for a failed and self-serving status quo, they framed themselves as speaking for public-spirited reform. Shifting the burden of special-interest stigma proved as effective as it was historically audacious.

## **REGROUPING: THE NEXT BATTLE**

Emphasizing responsible regulation, exploiting surprise, and assuming the public-interest mantle disrupted the iron triangle with a success that even reformers could not have anticipated. One of the public choice literature's central findings, however, is that once interest groups come into being, they stick around.<sup>38</sup> Put to flight, they can and often do regroup, recalibrate, and reassert themselves. On marijuana, they may already be doing so.

Legalization's opponents, such as the group Smart Approaches to Marijuana (SAM), have already laid groundwork for what they perceive to be their strongest message: that allowing legal commercialization of the marijuana market will end in domination by so-called Big Marijuana firms, whose marketing and political clout will legitimize the use of marijuana (including among minors), target and exploit problem users (whose black-market purchases currently represent a majority of sales), and result in marijuana's being under-taxed and under-regulated.<sup>39</sup>

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<sup>38</sup> See, e.g., Jonathan Rauch, *Government's End: Why Washington Stopped Working* (PublicAffairs, 1999), an account, based on the work of the economist Mancur Olson, of how interest groups form and accumulate over time, changing government and society in the process.

<sup>39</sup> For example, see Jonathan Caulkins, "Nonprofit Motive: How to Avoid a Likely and Dangerous Corporate Takeover of the Legal Marijuana Market," *Washington Monthly* (Spring 2014).

Unlike anti-drug messaging, which appealed primarily to social conservatives, anti-corporate messaging sounds notes that resonate with progressives.

This message relies on activating Americans' anti-business leanings, which are especially prevalent among progressive voters otherwise likely to support marijuana legalization. More than that, however, the argument seeks to re-shift the burden of proof that legalizers only recently placed on prohibitionists. Where drug warriors succeeded in framing the debate as being about the harms of marijuana, and placed the burden on legalizers to defend the self-destructive lifestyles of stoners and scofflaws, legalizers

succeeded in reframing the debate as being about the harms of prohibition, and placed the burden on drug warriors to defend the largely ineffective criminalization of a commonly used substance less dangerous than alcohol and tobacco. In their turn, SAM and other opponents of legalization seek to reframe the debate yet again—this time by making it about the harms of corporate predation and placing the burden on legalizers to defend a giant business lobby that will allegedly get rich by peddling a dangerous substance to vulnerable Americans, including children.

Central to this reframing is a classic public-choice argument: legalizers may make lofty promises to keep marijuana sellers in check, but if those sellers are large firms they will inevitably capture and manipulate the regulatory process on behalf of their own bottom line. Commercialization looks ominous in this light, and engagement between firms and regulators—an inevitable part of the regulatory process—inherently suspicious.<sup>40</sup> The explicit reference point is, of course, Big Tobacco, with the implication that Big Marijuana will obfuscate any evidence of its products' harms and will effectively block attempts to disrupt the revenue streams flowing from high-volume users, many of whom are poor and members of minority communities.<sup>41</sup> (SAM's motto: "Preventing Another Big Tobacco.")<sup>42</sup> Unlike anti-drug messaging, which appealed primarily to social conservatives, anti-corporate messaging sounds notes that resonate with progressives. Broadcasting the message loud and clear, the former director of federal policy at the Marijuana Policy Project has warned that "the industry is taking over the movement."<sup>43</sup>

The "special interest" stigma is also one that legalization's opponents have begun trying to shift back. As SAM put it in a characteristic press release, "Big Marijuana has shown itself to be a massive special interest group caring only about profits—not public health."<sup>44</sup> As legal marijuana commerce becomes a reality (at least on the intrastate level), a growing number of self-interested actors will emerge into the commercial marketplace and into the public debate. Groups like the National Cannabis Industry Association will bring resources, lobbying clout, and Main Street respectability to the marijuana business—but also, potentially, a public perception that the marijuana industry is as self-serving as any other commercial lobby. Over time, opponents of legalization may, with increasing plausibility, insist that marijuana is being legalized and regulated on behalf of special interests.

On this score, Ohio in 2015 provides the most vivid example. The coalition of investors behind the legalization push, ResponsibleOhio, was almost a caricature of 21<sup>st</sup> century crony capitalists. Imitating a group of investors who had managed to push through a referendum granting themselves a casino monopoly in Ohio, the ResponsibleOhio

<sup>40</sup> E.g., Mark Kleiman, "The Marijuana Movement and the Marijuana Lobby," *Washington Monthly* (October 1, 2015).

<sup>41</sup> For the latest salvo along these lines, see Rachel A. Barry and Stanton A. Glantz, "A Public Health Analysis of Two Proposed Legalization Initiatives for the 2016 California Ballot: Creating the New Tobacco Industry," Center for Tobacco Control Research and Education, UCSF (February 2016).

<sup>42</sup> "Statement from SAM Honorary Advisor Patrick J. Kennedy and SAM President Kevin Sabet," press release received by the authors (April 5, 2016).

<sup>43</sup> German Lopez, "Big Marijuana Is Coming—and Even Legalization Supporters Are Worried," *Vox* (December 2, 2015).

<sup>44</sup> SAM press release, April 5, 2016, op. cit.

campaign did sometimes try to prevent itself from being depicted as representing greedy business interests, for example by touting the benefits of marijuana for some sympathetic medical patients. (Medical marijuana is not legal in Ohio as of this writing.) But in general, they did a poor job of neutralizing the charge that the proposed reform was about private profits rather than public gain. Showing a remarkably weak grasp of how successful legalizers have reframed the question, they walked right into comparisons with Big Tobacco and Joe Camel by employing Buddy, a happy-go-lucky marijuana bud, as their campaign mascot. ResponsibleOhio's tone-deafness may be unusual, but future reformers will increasingly confront similar difficulties as marijuana reform moves into the realm of ordinary politics, and as the motives and interests of reformers attract more attention and political criticism.

The fight for legalization in more states and, ultimately, at the federal level will thus have to proceed against the backdrop of a better organized, better-messaged opposition. Given the breadth of change in public opinion, it is unlikely that momentum would shift back to a reinvigorated war on marijuana. The rate and extent of policy change in the states and (especially) at the federal level, however, remain in question, with much depending on the interest-group positioning and repositioning that has already begun.

Much will depend, too, on whether change is successful, both substantively and as perceived by the voting public. Which means we must turn to how public choice dynamics are likely to shape implementation.

## THE DEVIL'S IN THE DETAILS: THE IMPLEMENTATION GAME

Marijuana legalization has very rapidly gone from pie-in-the-sky to multi-state reality. During the transition, legalization has had the extraordinary feel of a movement triumphant. In that sense, it has much in common with another extraordinary shift over the past decade, the rise of same-sex marriage. But as the "new normal" settles in, the two policy areas quickly diverge. Now that same-sex marriage is the law of the land, it remains the subject of ideological controversy (mainly over ancillary issues such as religious objections), but it does not generate much in the way of bureaucratic politics. The switch has been flipped, the licenses are issued, and life goes on much as before.

In contrast, at its heart, marijuana policy is *regulatory* policy, and that entails creating new regulatory politics around the administration of legal regimes. When it comes to who wins and who loses from legalized marijuana, and how successfully (from whatever point of view) the policy is implemented, the devil is in the details. The number and intricacy of tasks confronting state regulators are daunting: everything from setting tax rates to determining impaired-driving limits to standardizing dosages in edible marijuana products. Though the public's extraordinary interest in establishing legalization as a fact will not carry over into interest in the fine print of regulations, the public will nonetheless be sensitive to perceptions (or credible accusations) that regulation is chaotic, ineffective, or captured by special interests. And, in a politically charged environment, the public perception of failed or corrupt regulation would make regulators' jobs all the more difficult. It matters, then, that regulation be reasonably effective and reasonably uncontentious—not just at first, but over time.

The number and intricacy of tasks confronting state regulators are daunting: everything from setting tax rates to determining impaired-driving limits to standardizing dosages in edible marijuana products.

Cultural differences between “corporate” and “counterculture” values also make the industry difficult to unite.

Are the politics around marijuana regulation destined to become the plaything of interest groups, once the flush of excitement surrounding legalization itself fades—and, if so, how troubling is that? The developing narrative of “Big Marijuana” suggests that concentrated commercial interests will capture and dominate the regulatory process, and then will use their clout to minimize industry regulation. Public-choice theory leads us to question

both assumptions.

As to the fears of domination by monolithic Big Marijuana, we doubt business interests will consolidate enough economically or politically to speak with one voice. As today’s moment of disruption ends and marijuana policy becomes normalized, we should expect a shifting but generally stable ecosystem of interest groups to emerge, and there is no reason to expect that balance to wholly favor big industry, or anyone else. The reality, indeed, is more likely to be that different industry participants, including growers, processors, and sellers, will have competing interests, and many interests will also be internally divided.

In Washington state, for example, fragmentation rather than consolidation seems to be the trend among business lobbies. Randy Simmons, a former state marijuana regulator, told us that business interests are already trading fire with each other over regulatory details, and that no consolidated front has formed. “It became the same kind of battle that you used to see in liquor lobbying in Washington, with the distributors against the manufacturers against the retailers,” he told us. “It’s the way it is in any business. I didn’t think it would happen that quickly in marijuana.” Hilary Bricken, a cannabis lawyer in Washington, told us that cultural differences between “corporate” and “counterculture” values also make the industry difficult to unite: “Politically, I don’t know if these people will ever be on the same page. You’ve got one group that’s married to the bottom line and loves regulation because it’s exclusive and keeps people out, and the other that wants no regulation at all, that wants to grow pot at home—it’s about the liberation of the plant. I don’t think a union of these types will ever happen.”<sup>45</sup>

As to fears that corporate lobbying will gut marijuana regulation, we might point out that a likelier result of large-business influence will be relatively more regulation, not less, and relatively higher prices, not lower. If experience with regulation in many other areas is a guide, large growers and distributors will support standards and licensing requirements that protect their investments by raising costs of entry and deterring disruptive innovations. Other things being equal, high regulatory compliance costs help larger players consolidate market share—all the more so in that marijuana regulation prioritizes tracking and restricting the product, not making it cheap and freely available. “Why would you want to police hundreds of dispensaries when you could just police ten big ones?” asks Bricken. “Those enforcement priorities require robust regulation, and robust regulation requires a lot of capital.”

The harder challenge than regulatory capture, we think, is that of *dynamic adaptability*: that is, maintaining regulatory flexibility and balance over time. As Wallach and Hudak found in their 2014 evaluations of implementation in Washington and Colorado, bureaucrats charged with formulating initial rules for licensing, inspection, and compliance in both states proved adept at incorporating a wide variety of voices into their policymaking processes and setting up

<sup>45</sup> Interview with Hilary Bricken, partner with Harris Moure in Seattle. We heard a similar story about Colorado from an industry lawyer there, who said that different industry groups “are taking completely opposite approaches.” For example, “The marijuana businesses are beginning to lobby against the hemp businesses,” and business interests are bickering over whether to seek caps on the issuance of new production licenses.



systems which, although imperfect, satisfied multiple stakeholders and gained the public's confidence.<sup>46</sup> Those states, however, had the luxury of operating in environments where interest-group politics was comparatively unformed and manageable. Commercial interests (and the political contributions and constituent networks that go with them) had yet to organize; traditional opponents of legalization could often be coopted with resources or were simply too discombobulated to counter-organize. And, with the rest of the country and the Justice Department looking on warily, the states could, and did, prevail upon interest groups to behave themselves and help regulators succeed. Administrators and legislators, therefore, enjoyed a relatively clear field.

The harder challenge is that of dynamic adaptability: that is, maintaining regulatory flexibility and balance over time.

Inevitably, that will change. Although Baptists and bootleggers will probably not succeed in rolling back legalization, well publicized abuses and excesses—everything from marijuana lollipops and child-friendly marketing to highway casualties and public consumption—will fuel calls for regulation to be tightened. Marijuana legalization to date is only partial, inasmuch as many kinds of consumption and sale remain illegal; changes that further restrict time, place, manner, and extent of use, for example, could significantly reduce the scope of legalization.

On the other side of the equation, as every regulator of a commercial market knows, industry groups quickly become indispensable “frenemies.” While trying to hold business interests at arm's length, regulators inevitably rely on them for information and real-world input, and they rely on companies' voluntary cooperation to do the vast bulk of everyday enforcement. In legal-marijuana states, rising revenues and growing political investments will inevitably strengthen business lobbies—especially if, as many legalization advocates dearly desire, Congress realigns federal law so it no longer threatens state legalization regimes with extinction if they make one false move. Although business groups will not be able to make policy unilaterally, they will grow better able to veto regulations they dislike.

Finally, and perhaps most important: As the landmark work of Mancur Olson first showed in 1965, and as experience has often confirmed since, in stable social contexts, interest groups and cartel arrangements tend to accumulate over time.<sup>47</sup> As they do so, they reduce both social and regulatory flexibility.<sup>48</sup> For both better and worse, bureaucrats and legislators face gradually increasing constraints as interest groups, rents, and the tyranny of the status quo burrow in. Revenue streams become entitlements for those dependent on them; licensing requirements become shelters for incumbents; and so on.

## STAYING ON TRACK: LOCALISM, REALISM, AND BENCHMARKING

What, then, may equilibrium look like in, say, ten or so years? Regulatory regimes will settle into path-dependent grooves that are hard to change. Organized interest groups will grow in number and vie for influence and rents. Political influence and legislative interference, no less than policy research and best practices, will shape policy.

<sup>46</sup> See, e.g., John Hudak, *Colorado's Rollout of Legal Marijuana Is Succeeding: A Report on the State's Implementation of Legalization* (Brookings, July 2014).

<sup>47</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard, 1965).

<sup>48</sup> Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidity* (Yale, 1982). See also Jonathan Rauch, *Government's End*, op. cit. Relevant to contemporary experience with marijuana is Olson's theory that social disruptions can wipe out or discombobulate entrenched interest groups, freeing up room for greater economic and social dynamism—but only temporarily, because interest groups will gradually reassemble and accumulate. Rauch argues that this problem, though not solvable, is manageable.

Those seeking regulatory change will need to run a gauntlet of veto points. In other words, normal interest-group politics will have replaced today's disrupted, relatively unconstrained regulatory environment.

We believe that the most important worry about marijuana regulation is not whether any particular interest captures the making of policy, because we expect interest-group competition to be relatively robust most of the time. Nor is it whether any particular regulation is sensible, though, inevitably, some will not be. Rather, it is whether the *cumulation* of interests and regulations can be managed to prevent growing irrationality or incoherence over time. That is, the larger risk is that marijuana policy will come to look like the tax code, growing increasingly incomprehensible and self-contradictory as policymakers try to satisfy competing constituencies and run a slalom of existing claims. Though we do not dismiss the risks of regulatory capture, we think the risks of regulatory incoherence are greater. In a world of normal (as opposed to disrupted) marijuana politics, *overregulation* and *misregulation* are at least as likely to be problems as is *underregulation*.

What can be done about that? Though we offer no magic bullets—and, none exist, even in principle, where public-choice dilemmas are concerned—we believe that simply being aware of the risks of regulatory rent-seeking and incoherence can help reduce parochialism and overreaction among regulators, at least on the margins. It's natural for lobbyists and regulators to keep close tabs on the activities and influence of interests on the other side of the table at any given moment, but guarding against a gradual buildup of regulatory incoherence and inflexibility (a subtler and more systemic problem) requires conscious effort.

We also believe marijuana regulation can benefit greatly from *decentralization*. Because marijuana remains illegal at the federal level, regulatory activity is of necessity being conducted entirely at the state level. That, we believe, is a signal advantage, for a variety of reasons.

First, states have different policy priorities and cultural preferences. States can tailor their regulation to local preferences and needs: for instance, setting tax rates and directing tax revenues as they see best. On the merits, there is little reason why the entire country should live with a single policy when community preferences are so diverse. Other things being equal, regulatory schemes attuned to local preferences are more likely to make people feel the system is behaving responsively and reasonably.

Second, decentralization can help prevent policy calcification. Though there is some risk of a regulatory “race to the bottom” as states compete for marijuana buyers, interstate regulatory competition provides a buffer against policies that veer too far toward dysfunctionality or distortion. Limiting regulatory purview to individual states acts as a firewall against the spread of interest-group deprecations or bureaucratic overreactions across multiple states; panicky regulatory overkill or an egregious rent-grab in one state need not reach others. Not least important, because state markets are comparatively small and diverse, interest groups are forced to spread their lobbying attention and investments across multiple markets, reducing their capacity to concentrate their firepower and secure nationwide monopoly rents, as they often can at the federal level.

Third, the classic “laboratories of democracy” argument applies well here. How best to regulate marijuana, after decades of strict prohibition, is an open question, and multifarious state regulatory models will provide a wealth of information on where policy sweet spots may lie. In turn, examples of better regulation in some states provide fodder with which to argue against interest-group deprecations in other states.

Fourth, arguments which, in other contexts, might weigh in favor of federal regulation seem less applicable to marijuana. If banking, insurance, or automotive markets are fragmented or segmented by conflicting state regulatory regimes, the efficiency costs to interstate commerce can be high. With marijuana, by contrast, it is not clear that *commercial* efficiency (cheap, large-scale production and distribution) and *social* efficiency coincide. Because the costs of growing and distributing marijuana (as opposed to doing so while avoiding law enforcement) border on trivial, and because price is an important influence on patterns of use (especially among youth), most responsible advocates worry about keeping the price of marijuana up, not down.

For all those reasons, the emergence of a state-based regulatory system is propitious. Legalizers may want to think twice before wishing for a quick move toward a national marijuana policy. Indeed, the best national policy may be the one already proposed by several Democrats and Republicans in Congress: allowing the states to have their own distinct policies, with federal intervention only on the edges to serve core federal interests.<sup>49</sup>

Another way to provide some insulation against regulatory incoherence and interest-group depredations, we believe, is to provide independent assessments of policy outcomes. In policy debates, muddy waters serve lobbies well. Every interest group can claim the policy it prefers works or the policy it attacks has failed; every group can cherry-pick the information it feeds to the media; every group can dredge up and recycle anecdotal horror stories and tales of woe. A single suicide or highway tragedy can inspire a far-reaching law or regulation as the public and policymakers respond to headlines or advocates' shrill claims.

Of course, there exists no ironclad defense against muddle and manipulation, but Washington state has launched a potentially helpful innovation. The state's marijuana legalization plan includes specially earmarked revenues for an independent agency, the Washington State Institute for Public Policy (WSIPP), to monitor and evaluate effects of marijuana legalization. Although one goal of the program is scientific (to gather intrinsically valuable knowledge), another is political: to provide a credible baseline against which to judge politicized and interested claims.<sup>50</sup>

With widely accepted hard data to look at, journalists and the public may be less susceptible to misinformation and junk science, and interest groups and politicians may be less likely to propagate them. No one is naïve enough to believe that WSIPP will always be right, or that anyone will always listen to what WSIPP says. Still, in much the same way that Congressional Budget Office scoring helps to reality-check self-serving or short-sighted legislative behavior, the availability of credible data seems likely to help cooler heads prevail over interest-group demagoguery and regulatory or legislative caprice.

Finally, we counsel realism. Public choice theory does not imply that policy colored by interest-group politics is necessarily illegitimate. Rather, public choice seeks to de-romanticize politics, by showing how the politics around *all* issues are colored by the self-interest of long-term players, and helping policymakers and the public adapt to that reality. If people hope for a system immune to lobbying and influence, they will be unhappy. Recall, however, that criminalization of marijuana has led to worst-of-all-worlds regulation: the product is widely available at fairly low prices, it is marketed to children (often by children), health and safety standards are nugatory, revenue streams are nonexistent, the regulatory regime is inflexible and calcified, and lawbreaking is the predominant business model.

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<sup>49</sup> See, for example, the Respect State Marijuana Laws Act of 2015 (H.R. 1940), introduced by six House Republicans and six Democrats.

<sup>50</sup> Philip A. Wallach, *Washington's Marijuana Legalization Grows Knowledge, Not Just Pot: A Report on the State's Strategy to Assess Reform* (Brookings, August 2014).

It is worth bearing in mind, too, that regulation of the medical-marijuana gray market has been, in many states, spotty, amateurish, and cronyistic. Because the recreational market is larger, more commercial, and less burdened by legal ambiguity, it is likely to be more competitive and subject to market pressures, which, other things being equal, should help prevent regulatory abuses. As Bricken told us, “When you get into these adult-use markets—it’s a real market!” A public-choice analysis tells us that perfect regulation is out of reach. But it also suggests that major improvements over the status quo ante are low-hanging fruit.

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