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I. INTRODUCTION

In this brief essay, I consider three law-reform movements that have treated state constitutional change as a tool for advancing their national policy aims. The movements for gun deregulation, marriage equality, and marijuana legalization each provide a concrete case study for how state constitutional change fits in with American federalism and constitutional change at the national level.

Others before me, particularly my symposium co-panelist Dean James Gardner, have offered deep and broad theoretical analysis of the interaction between state and federal constitutionalism.[1] I do not attempt such a magisterial approach here. Instead, I highlight comparative features of these three movements to reveal some counter-intuitive insights about how state constitutions relate to national legal change. Advocates in each of these areas have been able to use federalism as a tool to build "facts on the ground," literal spaces where their preferred policies are carried out.[2] Although these changes occur state by state and are often framed as the exercise of state sovereignty, their ultimate goal is always to influence national policy by demonstrating that their policies (once actually in place somewhere) are not scary. The three movements I will review here vary in interesting ways with respect to their

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1. *See, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM (2005).

2. Daniel Weinstock, *Cities and Federalism*, *in* FEDERALISM AND SUBSIDIARITY 284 (James E. Fleming & Jacob T. Levy eds., 2014).

use of state constitutional discourse. And the influence these state constitutional reforms have had on national policy has similarly varied.

To frame this inquiry, I focus on two themes. First, the theme of interactive federalism runs throughout these three movements. Interactive federalism, as I use the phrase here, is the perpetual dialogue between state and federal policies as each layer of government seeks to advance the interests of its own constituency.[3] The legal pluralism established by our federal system permits advocates to pursue (and achieve) change in states, even where federal policy appears firmly established.[4] While the capacity of states to protect individual rights above the federal floor is not novel, or even all that controversial, a common theme of these three law-reform movements is that even where federal law is in direct conflict with state policy, advocates have found success carving out safe legal space for their federally disfavored agendas. In other words, despite the formal supremacy of all federal law, states have been able to maintain legal regimes as a matter of practice that are legally irreconcilable with federal policy.[5] The marijuana legalization movement offers the most vivid example of this practice.

Second, the theme of rights helps understand how these three movements have used legal and rhetorical strategies to advance their ultimate policy preferences. Rights language rests on non-utilitarian grounds, which therefore is commonly anti-majoritarian.[6] In law, this rhetoric frequently gets translated as *constitutional.* In contrast, policy arguments emphasize social utility as a primary rationale. Such arguments appeal explicitly to the common good, and in that sense are inherently majoritarian. In law, this rhetoric tends to play out as *legislative* reform. Each of the three movements I discuss in this essay shows complex

3. *See* Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2135 (2006).

4. *See id.* at 2157.

5. *See id.* at 2142.

6. David A. Sklansky, *Private Policing and Human Rights*, 5 LAW & ETHICS HUM. RTS. 112, 124 (2011); *see also* David E. Guinn, *Constitutional Intent and Interpretation: A Response to Black's View of Constitutional Rights*, 11 GEO. MASON U. C.R. L.J. 225, 241 (2001).

movement over time and geography between rights and policy arguments, between constitutional and legislative law. The availability of state constitutions, specifically as constitutions, provides an extraordinary law space where rights-based arguments can find a foothold.

In the context of state constitutional change, then, the three law-reform movements—gun deregulation, marriage equality, and marijuana legalization—together demonstrate the importance of state constitutions as sources of energy for national change. State constitutions work in perpetual dialogue with federal law, pricking and prodding to find and exploit opportunities for change. Interactive federalism is, descriptively, a constant and deep-rooted aspect of American law. But it is not merely the existence of legal pluralism via states that generates these opportunities. The rights-based, potentially anti-majoritarian aspect of state constitutions expands the rhetorical strategies available to law-reform advocates and can further catalyze change at the national level.

The federal Constitution is, now, famously unamendable by formal means.[7] One might lament this development as steeling the cold grip of the dead hand, a calcification of the hold long-ago generations maintain on our contemporary community. But state constitutions breathe a revitalizing air into the body politic, an air capable of softening the rigid strictures of the Plan of the Convention. Viewed in this way, state constitutions are far from the constitutional margins that scholars and lawyers often consign them to. Rather, state constitutions are a central and necessary lever that keeps American constitutionalism alive.

I proceed with exploring these two themes of interactive federalism and rights rhetoric by reviewing the modern movement for gun deregulation in Part II. Then, in Part III, I discuss those parts of the movement for same-sex

7. *See generally* SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012) (arguing that the federal Constitution has become static and is politically unalterable); *see also* Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 221 (2016) (noting the political impossibility of changing important parts of the text of the federal Constitution). Of course, judicial interpretation continues to produce remarkable change in constitutional meaning as a practical matter.

marriage equality that touch on these themes. In Part IV, I tell the story of the movement for marijuana legalization and its use of state constitutionalism. Finally, I conclude with comments on what we can learn from a comparison of these three movements.

II. GUNS

The first state constitutions in the late eighteenth century and early nineteenth century did not all contain clauses protecting the right to bear arms, but where they did, they tended to be more explicitly protective of an individual's right to bear arms than the federal Second Amendment.[8] Nevertheless, these clauses were rarely litigated and courts often construed them narrowly to permit legislatures to regulate guns fairly comprehensively.[9] The state constitutional clauses tended not to present much of an obstacle to the states' exercise of their broad police powers to maintain public order and public safety.[10] Protection of gun rights up through the nineteenth century was essentially a non-issue; regulation was perceived to be reasonable and there was little to no rights-based litigation on the issue.[11] Political compromises on regulation centered on pragmatic and eminently utilitarian concerns, such as the risk presented by hunting near population centers.[12] The federal Second Amendment did not apply to states,[13] and so states were free to pass gun regulation limited only by the (largely unenforced) state constitutions.

However, with the rise of organized crime in response to federal Prohibition and the ensuing growth in federal criminal law along with the apparatus to enforce it, gun

8. *E.g.*, MICH. CONST. of 1835, art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state.").

9. *See* ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS 52 (2015) (collecting early states' pervasive regulation of guns in the name of public safety); *see also* Aymette v. State, 21 Tenn. (2 Hum.) 154, 159 (1840) (upholding gun regulation in the face of a state constitutional clause protecting the right to bear arms).

10. SPITZER, *supra* note 9.

11. *Id.* at 52-56.

12. *Id.* at 52.

13. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875).

regulation intensified at the national level. Congress passed the National Firearms Act in 1934, imposing a comprehensive regulatory system intended to remove guns from gangsters and deter the use of weapons in the commission of crimes by imposing federal taxes on firearms and requiring federal registration of specified guns most associated with criminality.[14] After the U.S. Supreme Court gave Congress wide berth to continue gun regulation by upholding the National Firearms Act,[15] advocates for gun rights made only sporadic attempts to litigate state constitutional claims—presumably on the assumption that the federal government was willing to enforce its criminal law, rendering state efforts to protect rights above the federal "ceiling" ineffectual.[16] Meanwhile, Congress continued to pass further restrictions on firearms.[17]

The federal push toward greater gun regulation was eventually matched by the states. Despite the fact that only six states lack a state constitutional clause explicitly protecting gun rights,[18] neither state nor federal courts aggressively enforced these clauses through the twentieth century. In perhaps the most typical state constitutional decision on the right to bear arms, the Illinois Supreme Court held in 1984 that a municipality could effectively prohibit handguns, despite the state constitutional clause protecting an individual right to bear arms.[19]

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14. Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968); *see also National Firearms Act*, ATF, https://www.atf.gov/rules-and-regulations/national-firearms-act [https://perma.cc/4WFZ-DY7S] (last visited Mar. 16, 2016).

15. United States v. Miller, 307 U.S. 174 (1939).

16. SPITZER, *supra* note 9. For example, the National Rifle Association, although formed shortly after the Civil War, did not systematically encourage members to oppose gun regulation until 1934 and did not begin lobbying on its own until 1975. *See A Brief History of the NRA*, NRA, https://home.nra.org/about-the-nra [https://perma.cc/C8ER-TMJZ] (last visited July 29, 2016).

17. 52 Stat. 1250 (codified as amended at 15 U.S.C. §§ 901-910) (establishing licensing and registration requirements); *repealed by* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 922-28 (2015)) (limiting the possession of certain weapons).

18. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-204 (2006).

19. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 277 (Ill. 1984).

Faced with limited prospects in the courts, gun advocates turned to legislation. In doing so, they adopted two important strategies, consistently with the two themes of this essay. They shifted rhetoric from rights-based arguments to policy arguments, and they developed strong national organizations to advance their goals. The National Rifle Association (NRA) began distributing advocacy materials to its members contemporaneously with Congress's turn toward greater regulation.[20] In 1975, the NRA stepped up its advocacy activity with the formation of its lobbying arm, the Institute for Legislative Action.[21] Since 1934, the NRA has consistently been involved in fighting gun regulations at both the state and federal levels, reflecting the importance of state-level legislation in both criminal and administrative law.[22]

Rhetorically, for much of the late nineteenth and early-to mid-twentieth centuries (a time when the courts were largely closed to gun-rights arguments),[23] gun advocates presented their position as sound policy. Advocates highlighted the "traditional" and ordinary uses of firearms, including for hunting and target shooting, alongside arguments about self-defense rights.[24] These arguments' efficacy rested on their reasonableness to political majorities; they are framed as consistent with, and even supportive of, state power and majoritarian rule.[25]

By the first years of the current century, more radical arguments began to dominate over the accommodationist and instrumentalist arguments that had persuaded state legislatures to adopt statutes protecting gun ownership and use.[26] Advocates' language about self-defense grew deeper, positioning self-defense as essentially a right of natural law

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20. *See A Brief History of the NRA, supra* note 16.

21. *Id.*

22. *Id.*

23. *See supra* notes 15-20 and accompanying text.

24. ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 207-08 (2013).

25. *See id.* (describing the efforts of the U.S. Revolver Association, a pro-gun group, to promote gun safety regulation).

26. *See* JOSHUA HORWITZ & CASEY ANDERSON, GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA 13-15 (2009) (describing the rhetorical shift to an emphasis on gun rights as a right against the government rather than a right against crime).

inherent in human dignity more than as a practical device in circumstances where crime is high and police are few.[27] And even beyond self-defense as an individual right to protect oneself from crime, pro-gun rhetoric drew in from the margins ideas about gun rights as collective self-defense from an oppressive government—guns as the necessary tools of popular resistance to federal authority.[28]

Finally, after centuries of supporting gun regulation, in 2008 the Supreme Court adopted the rights-based arguments and held that the federal Second Amendment protects an individual right to possess firearms.[29] In that case, *District of Columbia v. Heller*, Justice Scalia, a devoted hunter writing for the Court, cited early state constitutions (but not their permissive modern interpretations) as legal context for his interpretation of the Second Amendment.[30] He described Second Amendment rights in almost natural-law terms, without relying on conclusions about optimal public policy or utilitarian advantages of widespread gun ownership.[31] Framing the matter as one of counter-majoritarian rights was crucial to the plaintiffs' victory, as reflected by the Court's language in the majority opinion.[32] For example, the Court approvingly quoted *Cruikshank*'s declaration[33] that the Second Amendment protected, but did not grant, the right to bear arms, and went on to note, "Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies. These experiences caused Englishmen to be extremely wary of concentrated

27. *See, e.g.*, MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 90-94 (2014) (explaining the NRA's shift from a mostly pro-hunting group to a gun-rights group).

28. *See, e.g.*, Mike McPhate, *Michele Fiore, A Nevada Assemblywoman, Finds Unlikely Role at Oregon Standoff's End*, N.Y. TIMES (Feb. 11, 2016), http://www.nytimes.com/2016/02/12/us/michele-fiore-returns-to-spotlight-during-oregon-standoff.html?_r=0 [https://perma.cc/K33H-N7DW] (reporting on a gun-rights advocate's description of guns as protection from federal infringement of popular liberty).

29. District of Columbia v. Heller, 554 U.S. 570, 616 (2008).

30. *Id.* at 601-03.

31. *See id.* at 570.

32. *Id.*

33. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875).

military forces run by the state and to be jealous of their arms."[34] The Court went on to describe King George III's efforts to "disarm" the colonists as a motivating force behind the new Americans' devotion to the right to bear arms—a "protect[ion] against both public [meaning governmental] and private violence."[35]

Just two years later, in *McDonald v. Chicago*, the Court again invalidated a local ordinance that restricted possession of handguns, this time holding that the Second Amendment was incorporated against the states through the Fourteenth Amendment like most of the other protections established by the Bill of Rights.[36] Again, the Court's language reflected a philosophy of gun rights as not dependent on social welfare but a deeply ingrained feature of autonomous citizens.[37] The Court did not shy from the implication that gun rights exist in part to protect citizens from their government, although the Court never drew this idea to its logical conclusion that gun-bearing citizens might have a right to use force against federal officials if those officials disrespect constitutional liberties.[38] The natural-law rhetoric appeared again most recently in Judge Manion's dissent in the Seventh Circuit case of *Friedman v. City of Highland Park*, which upheld broad restrictions on certain kinds of guns.[39] Judge Manion read *Heller* and *McDonald* as expressly resting gun rights on natural-law grounds.[40]

In sum, advocates for protecting gun ownership shifted their rhetoric from policy-based majoritarian arguments to natural-law type rights arguments, and in doing so persuaded the U.S. Supreme Court to reach an expansive view of the Second Amendment. They did so with the interpretive help of early state constitutions, but without having built state constitutional protections for guns across a substantial number of states or a broad track record of judicial opinions adopting their positions. Instead, the states

34. *Heller*, 554 U.S. at 593.
35. *Id.* at 594.
36. 561 U.S. 742, 791 (2010).
37. *See id.* at 767-70.
38. *See id.*
39. 784 F.3d 406, 412-14 (7th Cir. 2015) (Manion, J., dissenting).
40. *Id.* at 414.

have been following the federal lead, in a pattern familiar to scholars of state constitutional rights' interpretation.[41]

III. GAYS

In the mid-twentieth century, enforcement of anti-gay sodomy laws was pervasive at the federal, state, and local levels.[42] Criminal enforcement in this era commonly took the form of "vice" raids on bars or clubs known to be popular with gay men.[43] The politicians and police would use the stigma and publicity of arrest to shame, punish, and exploit gay men and lesbians.[44] This would distract the public from official corruption, disrupt political opponents, and generally foster a sense of revulsion at non-conformity.[45]

Then, in 1969, a New York police raid on the Stonewall Inn yielded unexpected results. Instead of accepting their subjugation, the men inside resisted the police, leading to what is often characterized as a "riot."[46] The incident served as a spark that galvanized a nascent gay-rights movement.[47] Marriage equality rose to a prominent place on the new movement's agenda almost immediately.[48] These first suits were brought under the federal Constitution, but lacked both the support of national organizations and anything close to popular acceptance.[49] They were unceremoniously rejected by the U.S. Supreme Court in 1972 by a curt statement that the Court lacked jurisdiction over the appeal "for want of a substantial federal question."[50]

Even more than marriage equality, however, the gay-rights movement after Stonewall was understandably

41. *See, e.g.*, City of Seattle v. Evans, 327 P.3d 1303, 1309 (Wash. Ct. App. 2014) (holding that the Washington constitution protects an individual right to bear arms when used for self-defense).

42. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 3-5 (2013).

43. *Id.* at 4.

44. *Id.* at 4-5.

45. *Id.* at 5.

46. *Id.* at 16-17.

47. KLARMAN, *supra* note 42, at 17.

48. *Id.* at 18-20.

49. *Id.* at 20.

50. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

focused on decriminalization.[51] Anti-sodomy statutes, even when rarely enforced, stood as a practical and symbolic obstacle to the establishment of a non-discrimination norm.[52] Private employers and the government could point to the criminal codes as justification for all sorts of other anti-gay discrimination.[53] During this period, there was virtually no state constitutional litigation, but for the notable exception of *Kentucky v. Wasson*, where the Kentucky Supreme Court invalidated the state's anti-sodomy statute on state constitutional privacy grounds.[54] Despite the lack of success with constitutional arguments of both state and federal varieties, advocates kept their rhetoric squarely framed as a matter of rights, not utilitarian public policy.[55]

Eventually, state constitutional courts began giving marriage equality advocates the victories they had hoped for, starting with the tentative step of applying a heightened standard of review,[56] through to civil unions,[57] and finally all the way to marriage.[58] National organizations were instrumental in putting legal teams together, composing strategies, and financing the state-by-state litigation campaigns.[59] While the state high courts that affirmed marriage equality as a matter of constitutional rights certainly inspired backlash—from federal lawmakers through the Defense of Marriage Act[60] and from state lawmakers and voters through state constitutional amendments limiting marriage to opposite-sex couples or otherwise allowing for sexual orientation discrimination[61]—advocates also used the courtroom victories to create

51. *See* Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1073-74 (2005).

52. *See id.* at 1087.

53. *See id.* at 1086.

54. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992).

55. *See id.* at 516-17.

56. *See* Baehr v. Lewin, 852 P.2d 44, 65, 67 (Haw. 1993).

57. *See* Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

58. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

59. *See* MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON 224-33 (2014).

60. 28 U.S.C. § 1738C (2006).

61. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 623-24 (1996) (invalidating a state constitutional amendment that protected discrimination against gays and lesbians).

momentum that led to political victories. Both state legislative enactments and popular initiatives were passed to provide marriage equality, again with national coordination among a variety of national advocacy groups, law firms, and lobbyists.[62] Throughout these political successes, though, advocates consistently positioned their claims as about rights.[63] Polling numbers began to favor the movement, which helped persuade elected officials, but advocates continued to press the idea that marriage equality should be adopted for no reason other than its inherent justice.[64]

In the same year that the Massachusetts high court found a right to marriage equality in its state constitution,[65] the U.S. Supreme Court, in *Lawrence v. Texas*, finally eliminated the criminalization of homosexual conduct, reversing a nearly twenty-year old precedent.[66] The holding in *Lawrence* not only formally ended the official legal opprobrium criminalization had conveyed, it expressed a sense of the importance of gay men and lesbians to the American experience that provided a cultural context for further development of civil rights in this area. The Court embraced this development in *United States v. Windsor*, which invalidated the Defense of Marriage Act's clause prohibiting the federal government from recognizing same-sex marriages.[67] One by one, and then all in a rush, movement advocates turned back to the federal courts that had so thoroughly rejected their claims decades earlier.[68] Applying the logic of *Lawrence* and particularly *Windsor*, district court after district court invalidated state marriage statutes or constitutional clauses on federal constitutional grounds; for some time it seemed as if the Supreme Court would not need to take up the issue quickly because the

62. *See* SOLOMON, *supra* note 59, at 262-64.
63. *Goodridge*, 798 N.E.2d at 948-50.
64. *See* SOLOMON, *supra* note 59, at 175-77.
65. *Goodridge*, 798 N.E.2d at 948.
66. 539 U.S. 558, 578 (2003).
67. 133 S. Ct. 2675, 2682 (2013).
68. Zoe Tillman, *Same-Sex Union Foes to Pay Up*, NAT'L L.J. (Jan. 25, 2016), http://www.nationallawjournal.com/id=1202747728971/SameSex-Union-Foes-To-Pay-Up?s1return=20160217154504 [https://perma.cc/39GG-T428].

circuit courts were undivided.[69] But when the Sixth Circuit rejected a set of challenges to the discriminatory marriage statutes and constitutional amendments in Kentucky, Michigan, Ohio, and Tennessee,[70] the Supreme Court had little choice but to act. The result was the culmination of nearly fifty years of painstaking work: the nationwide establishment of marriage equality.[71]

IV. GANJA

Marijuana made its first inroads in American culture after the Pancho Villa conflict, which resulted in a highly porous border between Mexico and the American Southwest.[72] Shortly after the drug's introduction to American culture, Prohibition diverted many consumers from alcohol to marijuana.[73] In the following decades through the 1940s, marijuana also entered the United States with Caribbean immigrants, particularly through New Orleans.[74] Both patterns of marijuana importation associated the people who primarily supplied and used marijuana—Mexican immigrants and black Southerners linked to jazz—with the drug itself.[75] As a way of expressing racist revulsion at these minority cultures, American nativists began an anti-vice campaign with marijuana as its major target.[76] These anti-vice crusaders succeeded in obtaining the nation's first harsh criminal penalties for marijuana sale and use.[77] Once marijuana was criminalized,

69. *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); *see also* Doug Mataconis, *Justice Ginsburg Lifts Curtain on How Supreme Court Might View Same-Sex Marriage*, CHRISTIAN SCI. MONITOR (Sept. 20, 2014), http://www.csmonitor.com/layout/set/print/USA/Politics/Politics-Voices/2014/0920/Justice-Ginsburg-lifts-curtain-on-how-Supreme-Court-might-view-same-sex-marriage [https://perma.cc/65QM-B5E3] (quoting Justice Ginsburg as suggesting that the Supreme Court might not grant certiorari until opinions of federal appellate courts split on marriage equality).

70. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

71. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

72. *See* RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 2-3 (2004).

73. *See id.* at 3.

74. *See id.*

75. *See id.* at 2-3.

76. *See id.* at 3.

77. *See* GERBER, *supra* note 72, at 3.

federal, state, and local officials could use the anti-vice statutes to raid Chicano and African-American gathering places, imprison those communities' leaders, and spread a sense of fear and insecurity to society at large.[78] While native-born whites clearly used marijuana during these early decades, the drug was so closely connected with racial minorities in the popular mind that its criminalization did not provoke wide-scale backlash among white voters or politicians.[79] On the contrary, stories of raids and arrests served to validate sentiments of white superiority and further divide ordinary white Americans from racially marginalized groups.[80]

Later, in the 1960s, white anti-establishment "counterculture" took root, most influentially in colleges.[81] For young adults resisting the suffocating conformity of post-World War II America, marijuana offered a useful cultural weapon. Marijuana stood as a symbol of the marginalized communities that had withstood such harsh suppression before the war, and its use by white collegians expressed at least an aesthetic declaration of independence from their parents' whitebread norms.[82] Marijuana also provided a useful counterpoint to the alcohol use of the older generation. As marijuana's cultural connotations shifted from the preferred drug of southern minorities to the preferred drug of middle-class white college students, harsh anti-marijuana criminal enforcement began to fade.[83]

Then, with Reagan's sweep to power and the "Just Say No" campaign, the backlash swung into gear.[84] The 1980s war on drugs renewed lengthy prison sentences and vigorous prosecution for marijuana users, and again tied marijuana use to moral vice.[85] The criminal justice system was converted into an engine of moral purity, protecting

78. *See id.* at 4-9.
79. *See id.* at 8.
80. *See id.* at 14-15.
81. *See id.* at 18.
82. *See* GERBER, *supra* note 72, at 19.
83. *See id.* at 18-20.
84. *See id.* at 32-33.
85. *See id.* at 32-33, 39-40.

"good" Americans from the poor, racial minorities, and non-conformists on campus.[86]

By the early 1990s, the pendulum seemed to swing in the other direction. Advocates for decriminalization began to talk about marijuana use in the context of bodily autonomy and to link marijuana rhetorically with medical rights like the right to refuse medical treatment and to assisted suicide.[87] The notion of "medical" marijuana spread side-by-side with other priorities of the patient autonomy movement. Why should legislators interfere in the relationship between doctor and patient, advocates asked, especially when the implicated behavior could not be shown to harm others? Marijuana was typically described as "natural" at a time when mainstream American society was starting to question industrial consumer culture in food and medicine.[88] At the same time, cancer rates were high[89] and public health officials (along with attorneys general and plaintiffs' lawyers) intensified their attacks on tobacco.[90] In contrast to the highly manipulated tobacco products sold by opaque global corporations, marijuana decriminalization advocates consistently presented this non-commercially fabricated drug as an appropriate part of medical care.[91] Public discourse about medical marijuana consistently linked it with other health law advances like the popularization of the right to have a healthcare proxy, the right to make end-of-life decisions, and the right to refuse medical treatment.[92] These liberty-based arguments rarely addressed instrumentalist public policy concerns like the expense of prohibition enforcement. If the movement at that time had a face, it would have been a cancer-stricken

86. *See id.* at 33.

87. *See* GERBER, *supra* note 72, at 91.

88. *See, e.g.*, Organic Foods Production Act of 1990, 7 U.S.C. § 6501 (2012) (establishing the first nationwide standards for organic labeling).

89. *See* Sherri L. Stewart et al., *Cancer Mortality Surveillance—United States, 1990-2000*, CDC (June 4, 2004), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5303a1.htm [https://perma.cc/4XSK-6NN8] (describing cancer as the second leading cause of death in America during this decade).

90. *See, e.g.*, Horton v. American Tobacco Co., 667 So. 2d 1289 (Miss. 1995).

91. *See* GERBER, *supra* note 72, at 89.

92. *See, e.g.*, Daniel J. Pfeifer, Note, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 372 (2011).

grandmother using marijuana brownies to fight the nauseating effects of chemotherapy.

Advocates obtained small victories with this strategy as early as 1975, winning the state constitutional case of *Ravin v. State* on privacy grounds.[93] The Alaska Supreme Court's opinion in *Ravin* is rife with rights language and explicitly calls on the libertarian heritage of Alaska as a *ratio decidendi*.[94] Litigation pressing state constitutional privacy claims in other states never really gained popularity after *Ravin*.[95] Even so, legalization advocates were able to win political victories for decades afterward with rights-based arguments. For example, local laws protected medical marijuana use in a few California municipalities starting in 1996.[96] Unfortunately for their cause, Jack Kevorkian began drawing national attention to his radical views on assisted suicide.[97] As Kevorkian went to more and more extreme lengths to help patients die, the American public was repulsed.[98] Finally, in 1999, Kevorkian was found guilty of second-degree murder for assisting a patient to die.[99] His flamboyant disregard for how culturally prepared Americans were to tolerate assisted suicide led to a backlash that largely stifled further advances for bodily autonomy in the medical context. If medical marijuana remained in that rhetorical frame, it would have been tainted by association with Kevorkian's fringe beliefs.

Instead, advocates shifted their rhetorical strategy in the early 2000s to one emphasizing the burden on the taxpayer and the economy of marijuana criminalization.[100] Instead of the medical bodily autonomy movement,

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93. 537 P.2d 494, 511 (Alaska 1975).

94. *See id.* at 503-04.

95. Jason Brandeis, *The Continuing Vitality of* Ravin v. State*: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes*, 29 ALASKA L. REV. 175, 175 (2012).

96. *See* GERBER, *supra* note 72, at 94-95.

97. *See* Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), http://www.nytimes.com/2011/06/04/us/04kevorkian.html?_r=0 [https://perma.cc/64VD-35UJ].

98. *See id.*

99. *See id.*

100. *See* Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 281 (2010).

marijuana legalization began to be associated with the movement against over-incarceration.[101] Advocates highlighted the harsh penalties under state and federal law for "mere" possession of relatively small amounts of marijuana, and challenged the public and politicians to consider whether the suppression of marijuana was worth the costs of investigation, prosecution, incarceration, and the subsequent legal impairment of people who otherwise may be productive citizens.[102]

At the same time, legalization proponents continued to press "medical" marijuana as the most politically palatable reform. But instead of framing medical marijuana in deontological libertarian terms as a matter of bodily autonomy, discourse shifted to the efficacy of medical marijuana. The question became not, "who are you to tell me what I can do with my body," but "this is the only medicine that helps me, and until there is an effective alternative, who are you to tell my doctor what works for me?" Along the same lines, advocates intensified their comparison of relatively harmless marijuana with alcohol, a much more socially devastating drug.[103] As awareness of the dangers of drunk driving and the public health consequences of alcoholism expanded, legalization proponents consistently emphasized the lack of such broad harms from marijuana.[104]

Nevertheless, attempts to win federal courts' support for medical marijuana failed. In 2001, the U.S. Supreme Court soundly rejected the possibility of a medical-necessity defense to a federal marijuana prosecution in *United States v. Oakland Cannabis Buyers' Cooperative*.[105] A few years later, the Court definitively rejected a Commerce Clause challenge to the federal law criminalizing marijuana in *Gonzales v. Raich*,[106] and affirmed the supremacy of the Federal

101. *See* GERBER, *supra* note 72, 68-69.

102. *See, e.g., Decriminalizing Pot Will Reduce Prison Population, Have No Adverse Impact on Public Safety, Study Says*, NORML (Nov. 21, 2007), http://norml.org/news/2007/11/21/decriminalizing-pot-will-reduce-prison-population-have-no-adverse-impact-on-public-safety-study-says [https://perma.cc/Z2MY-8XBD].

103. *See* GERBER, *supra* note 72, at 85-86.

104. *See id.* at 86.

105. 532 U.S. 483, 498-99 (2001).

106. 545 U.S. 1, 32-33 (2005).

Controlled Substances Act (which placed marijuana in the top tier of harmful drugs)[107] against any state attempts to protect marijuana use, like California's "Compassionate Use Act."[108]

In practice, states with permissive laws on medical marijuana tended not to oversee marijuana prescriptions with special rigor.[109] California, in particular, was often accused of permitting doctors to hand out medical-marijuana patient cards for sham ailments like generalized soft-tissue pain, headaches, or other subjective patient-defined conditions.[110] In effect, this approach seemed to be a winking endorsement of recreational marijuana cloaked in the benevolent white coat of medicine.

In the following decade, the wink became an open eye. Marijuana reform proponents succeeded in obtaining "decriminalization" of marijuana in several large municipalities, including New York City.[111] Decriminalization meant that police and prosecutors acknowledged that marijuana possession remained a crime, but would deliberately de-prioritize enforcement of those criminal statutes below virtually all other law enforcement goals.

But advocates pushed further. National organizations like NORML allied with in-state activists to achieve statewide "legalization" of marijuana in Colorado, Oregon, and

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107. *See* 21 U.S.C. § 801(1) (2012).

108. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2016).

109. *See* Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING (Aug. 2012), http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html [https://perma.cc/5484-DSSH].

110. *See* Lessley Anderson, *Medical Marijuana, A Casual User's Tale*, N.Y. TIMES (June 12, 2005), http://www.nytimes.com/2005/06/12/fashion/sundaystyles/medical-marijuana-a-casual-users-tale.html??_r=0 [https://perma.cc/3GSR-67VK] (describing one California marathon runner's marijuana prescription due to migraines).

111. *See* Christopher Mathias, *Ending New York City's Low-Level Marijuana Arrests Doesn't Fix The Problem*, HUFFINGTON POST (Nov. 10, 2014, 9:55 PM), http://www.huffingtonpost.com/2014/11/10/new-york-city-marijuana-arrests_n_6136686.html [https://perma.cc/8FEK-ZBX8]; *Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy*, NYC (Nov. 10, 2014), http://www1.nyc.gov/office-of-the-mayor/news/511-14/transcript-mayor-de-blasio-police-commissioner-bratton-change-marijuana-policy [https://perma.cc/5VBA-97TP].

Washington.[112] In these states, legalization means formal legal immunity from prosecution for possession of recreational amounts of marijuana.[113] The turn to state constitutions, interestingly, did not reflect a shift back toward rights-rhetoric. Instead, proponents argued that anti-marijuana laws made criminals of too many people, cost the public treasury too much, resulted in racially disparate law enforcement, and diverted law enforcement resources from more important criminal justice goals.[114] The use of state constitutions to press these arguments, which rhetorically fit more comfortably with policy-driven legislative discourse than with constitutional anti-majoritarian discourse, reflects broad public skepticism that elected politicians are structurally capable of rational legislation on this issue.[115] Even with public support for legalization expressed to pollsters, politicians still seem to believe that they could too easily be painted as "soft on crime," and with that would come an electoral price too steep to pay.[116] Instead of a quick soundbite demonizing criminals, the argument for legalization seems to depend on more nuanced public education that political campaigns for state legislators are not well equipped to conduct.

On the other hand, the national movement—composed of seasoned professionals and backed by substantial

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112. *See* COLO. CONST. art. XVIII, § 16; OR. REV. STAT. ANN. § 475B.010 (West 2016); H.I. 502, 62nd Leg., Reg. Sess. (Wash. 2012); *Legalization*, NORML, http://norml.org/legalization [https://perma.cc/7SKN-JD8E] (last visited Mar. 16, 2016).

113. TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES 1, 1 n.4 (2014).

114. *See* The Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES (July 27, 2014), http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?_r=0 [https://perma.cc/NAE8-8QMK]; *see also* Harry Bradford, *Marijuana Law Enforcement Cost States An Estimated $3.6 Billion in 2010: ACLU*, CNBC (June 5, 2013, 9:40 AM), http://www.cnbc.com/id/100791442 [https://perma.cc/FXP4-NTJK].

115. *See* David Jarman, *When the Going Gets Tough, the Tough Go to the Initiative Process*, DAILY KOS ELECTIONS (Nov. 23, 2014, 4:59 PM), http://www.dailykos.com/story/2014/11/23/1346449/-When-the-going-gets-tough-the-tough-go-to-the-initiative-process [https://perma.cc/7N8Y-VLS3].

116. *See* Adam Nagourney, *Despite Support in Party, Democratic Governors Resist Legalizing Marijuana*, N.Y. TIMES (Apr. 5, 2014), http://www.nytimes.com/2014/04/06/us/politics/despite-support-in-party-democratic-governors-resist-legalizing-marijuana.html [https://perma.cc/PV77-55NG].

financial resources—succeeded in persuading the voters of Colorado, Oregon, and Washington (and, to a lesser degree, California) that the public's gut instinct to suppress crime vigorously could be outweighed by the social and economic advantages of legalization.[117] The intervention of out-of-state activists was a crucial factor in the passage of the amendments in all three states.[118] The availability of direct democracy as a tool for state constitutional change was equally crucial in advancing the legalization aims.

From a federalism perspective, the enshrinement of marijuana as a protected drug in state constitutions sets up a face-to-face conflict with federal law. The Federal Controlled Substances Act's placement of marijuana among the most dangerous drugs subject to regulation (with the most severe penalties attached) remains unrepealed.[119] The U.S. Supreme Court has repeatedly and emphatically upheld Congress's right to maintain its criminalization of marijuana,[120] a position consistently applied by the lower courts.[121] And the Supremacy Clause of the federal Constitution makes crystal clear that valid federal law sweeps aside any state law to the contrary.[122]

But instead of massive arrests and lengthy imprisonment for the growers, transporters, and dealers in the legalized states, the marijuana industry has succeeded in framing public discourse as if the participants—or rather, "conspirators," as federal law would have it—are engaged in

117. *See supra* note 112 and accompanying text.

118. *See id.*

119. *See* 21 U.S.C. § 812 (2012).

120. *See supra* notes 105-08 and accompanying text.

121. *See, e.g.*, United States v. Pickard, 100 F. Supp. 3d 981, 1010, 1012 (E.D. Cal. 2015) (rejecting a challenge to the CSA under the Equal Protection Clause and the Tenth Amendment); Jenkins v. Micks, No. 1:14-CV-3522 (NJV), 2014 WL 6241217, at *5 (N.D. Cal. Nov. 14, 2014) (rejecting a challenge to the CSA under the Due Process Clause); Wilson v. Holder, 7 F. Supp. 3d 1104, 1122-25 (D. Nev. 2014) (rejecting a challenge to the CSA under the First Amendment, the Due Process Clause, and the Equal Protection Clause); Krumm v. Holder, No. CIV 08-1056 JB/WDS, 2009 WL 1563381, at *13 (D.N.M. May 27, 2009) (rejecting a challenge to the CSA for failure to follow the CSA's rescheduling of controlled substances procedures); Kuromiya v. United States, 37 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (rejecting a challenge to the CSA under the First (privacy), Ninth, and Tenth Amendments; the Equal Protection Clause; and the Commerce Clause).

122. U.S. CONST. art. VI, cl. 2.

lawful conduct and, if anything, are burdened by the bureaucratic red tape imposed by federal over-regulation.[123] From the federal perspective, nothing has changed about the criminal status of marijuana as a matter of law.[124] So why are law enforcement officials not crushing the marijuana industry across the country, including in states that purport to have legalized it?

The explanation demonstrates just how powerful state constitutional law can be as a space for contesting national values and for creating law on the ground that can then influence other states and the national government. First, and most importantly, the federal government cannot compel state and local police to enforce the federal criminal statute, thanks to the Court's 1997 case of *Printz v. United States*, which established the "anti-commandeering" principle.[125] With local police bound by their state laws prohibiting the prosecution of marijuana users, any effort to enforce the Controlled Substances Act would have to come from federal officers. Not only would nationwide enforcement of anti-marijuana laws pose a tremendous fiscal burden on the Justice Department and other anti-drug agencies, it would present a politically distasteful scenario of regular federal patrols and raids in communities across the country accustomed to their primary policing services coming from local officials.

Second, for political reasons, the Justice Department decided to exercise prosecutorial discretion to refrain from pursuing participants in the marijuana industry in states with their own regulatory systems, even if those systems make marijuana widely available to consumers.[126] The basis for this policy is not constitutional interpretation, not a

123. *See, e.g.*, Nathaniel Popper, *As Marijuana Sales Grow, Start-Ups Step In for Wary Banks*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/dealbook/as-marijuana-sales-grow-start-ups-step-in-for-wary-banks.html?_r=0 [https://perma.cc/684K-X5N6] (characterizing the inability of marijuana growers and dispensaries to use the federal banking system as a business inconvenience overcome by start-up financial enterprises in the short term and making banks "comfortable" with the "compliance issues" in the long term).

124. *See* GARVEY & YEH, *supra* note 113.

125. 521 U.S. 898, 935 (1997).

126. Memorandum from James M. Cole, U.S. Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys (Aug. 29, 2013).

statute, not a regulation, and not even an executive order, but a mere "guidance" memo from the deputy attorney general to all federal prosecutors.[127] The president or attorney general could have a sudden change of heart and revoke this guidance with the snap of a finger, but marijuana industry participants seem completely confident that they are safe from the confiscation of their investments and harsh federal prison sentences for themselves and their employees.[128]

In part, this confidence may stem from a belief among participants that the existence of safe, functioning marijuana markets in American states without evidence of the parade of horribles frequently projected onto legalization will stand as a powerful persuasive device against federal intervention. The state constitutional protection of marijuana in those states creates a literal physical space where the otherwise-untested assumptions about the evils of marijuana can be confronted and disproved. In the face of that reality, anti-marijuana arguments lose their bite. Without geographic federalism, this would not be possible.

V. CONCLUSION

The three movements described in this brief essay employed shifting strategies to achieve their goals nationwide, and they are each in different stages of reaching success. The gun rights movement has followed what is perhaps the most conventional or predictable path: after failing to employ state constitutions effectively to establish rights (particularly in perceived tension with federal criminal law), moving on to win state-by-state victories, and a few federal legislative advances, on public policy grounds, then gradually shifting the rhetoric over time to one of rights, and then winning vindication for those rights in federal court under the federal Constitution. The movement for marriage equality started with rights rhetoric and never

127. *Id.*

128. Tim Mullaney, *As Marijuana Goes Legit, Investors Rush In*, USA TODAY (Apr. 8, 2013, 2:13 AM), http://www.usatoday.com/story/money/business/2013/04/07/medical-marijuana-industry-growing-billion-dollar-business/2018759/ [http://perma.cc/7PB7-CZ4 U].

wavered; litigation began (prematurely, in retrospect) in federal courts at a time when federal courts were perceived as most likely to protect civil rights, but then retreated and retrenched in state courts under state constitutions. After establishing marriage equality on the ground in states covering a sufficient percentage of the American population, the movement proceeded toward litigation on related issues in federal court before those victories cascaded into full, nationwide success. The as-yet least successful of the three movements, marijuana legalization, began (like the other movements) at the fringes of American politics and law. Advocates met early success in the normally fruitful effort to cast the issue as one of rights through linking marijuana use to bodily autonomy in the healthcare context. But after a setback in that approach, the movement quickly reconfigured to position marijuana legalization as a public policy issue, piggybacking on the relatively sudden public interest in over-incarceration and criminal justice reform. Contrary to conventional wisdom, shifting from a rights-based rhetoric to a majoritarian public policy rhetoric yielded astonishing results for the movement. Several states amended their state constitutions to protect marijuana use, and many more states saw political conversations about legalization that would hardly have been imaginable just thirty years ago.

Together, the stories of these movements show the value of state constitutions to national law reform. State constitutions can offer a testing ground, where arguments framed as non-instrumentalist rights can achieve success over limited geographical space; that space then serves as a living counterpoint to parade-of-horribles arguments against the asserted rights. The marriage-equality movement proves this value of state constitutions. State constitutions can also provide protection, contrary to what formal law suggests, for rights above a federal ceiling. Even if the federal government criminalizes conduct like gun ownership or marijuana use, legal and political success at the state level can eviscerate federal law enforcement efforts and carve out states where the federally-disapproved policy operates as the law in effect. State constitutionalism, and

not just federalism, helps to effectuate this strategy by providing advocates with the structure-of-government features that make adoption of the law reforms possible, such as state constitutionally created popular democracy or state constitutional recognition (or suppression) of municipal home rule. These constitutional devices make legal change within the states both easier to accomplish and more symbolically powerful, helping to make possible resistance to federal law. State constitutions also create legal space for advocates to shift between policy-driven and rights-driven arguments, according to whichever wins. When the marijuana and gun movements met dead ends with their rights arguments under state constitutions, they shifted to policy arguments. When those arguments began to succeed, the movements could return to constitutionalizing their gains—at the federal level for guns, and in the state constitutions for marijuana. And ultimately, the consistent and proven advantage of national networks to inspire and support intrastate constitutional change helps to draw activists from across the country together, to perceive their seemingly disparate challenges as mutually influential and connected. Paradoxically, in this sense, state constitutionalism bolsters nationwide civic republicanism and strengthens national unity.

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