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Taking the Initiative: Marijuana Law Reform and Direct Democracy

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TAKING THE INITIATIVE: MARIJUANA LAW REFORM AND DIRECT DEMOCRACY

*Tamar Todd**

Abstract

Marijuana law reform has undergone a dramatic transformation in the past 25 years since the passage of Proposition 215 in California in 1996, which removed penalties for medical patients to use and cultivate marijuana under California law. Prior to Proposition 215, no state allowed for the use of marijuana in any manner under state law. Today, marijuana is legal and regulated for medical use in 36 states and for all adults 21 and older in 19 states.

This transformational shift in state marijuana law and policy would not have happened but for the use of direct democracy, whereby voters can gather signatures to place a proposed statute or constitutional amendment on the ballot and vote on whether to enact the reform. By going directly to the ballot on the issue of marijuana, voters in many states bypassed elected officials' opposition to popular reforms and forced a new approach to marijuana policy.

Marijuana law reform has always had a close relationship with direct democracy; the need to enact reform through the voter initiative process has had a substantive impact on the scope and reach of legalization efforts. But the success of this effort has now, particularly in conservative states, impacted direct democracy itself. Lacking the ability to convince voters to oppose marijuana law reform on its merits, lawmakers have taken to attacking the process of direct democracy itself, and some courts have been willing partners. State lawmakers have introduced and enacted legislation in multiple states to make more difficult the process for voters to qualify and succeed at the ballot. And in relation to the November 2020 general election, several state supreme courts intervened to remove marijuana

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measures from state ballots, invalidate election results, and, in one instance, eliminate direct democracy altogether.

This Essay first describes the essential role of ballot initiatives in advancing marijuana law reform and the resulting backlash to the direct democracy processes in states where there is entrenched institutional opposition to reform. In these states, hostility to marijuana reform may have lasting consequences for both marijuana reform and all other reform efforts that have contemplated going directly to the voters, across the ideological spectrum. This Essay analyzes this phenomenon through an exploration of three recent instances of state supreme courts limiting access to the ballot in response to marijuana reform efforts and the potentially lasting damage these limitations will have on democracy.

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INTRODUCTION

The last two general election cycles have resulted in a national discourse about the meaning, and value, of democracy in the United States. Foundational questions about democracy have surfaced in the public consciousness recently: Is our right to vote protected? Do the votes of citizens of small states and large states have equal value? Are the mechanics of our election processes functional? Can the results of a validly held election be undone? Do the American people believe that our elections are fair and that their votes matter?

The November 2020 general election generated a storm of controversy and debate that focused primarily on the outcome of the 2020 Presidential Election and the effort to undermine its results levied by former President Trump and his allies. This has, in turn, led to efforts by many Republican state legislatures to limit access to voting in their states,¹ raising serious

1. See e.g., Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html> [https://perma.cc/B9DB-THEN]; Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could*

concerns about the impact of these efforts on democracy. While the spotlight is on national elected offices, including control of the presidency and Congress, another threat to democracy has emerged, quietly but no less perniciously. State legislatures and state courts in disagreement with laws adopted directly by the voters are aggressively moving to reverse those results, scuttling progressive reforms but even more fundamentally, undermining confidence in election outcomes and removing a lever of direct democracy that has existed for decades in many jurisdictions. In short, the successful use of the ballot initiative process to advance progressive causes has resulted in a curtailment of the democratic process. And there is one issue that has particularly advanced this troubling trend: hostility among conservative elected officials and judges to popular marijuana law reform.

More than any other issue, voters have transformed marijuana law through the initiative process. As early as the 1970s, municipal voters adopted ordinances to direct law enforcement to treat marijuana as its lowest law enforcement priority. In 1996, California voters removed state law penalties for medical marijuana patients to use and produce marijuana based on the recommendation of their physician.² Voters followed suit in a number of other states.³ Eventually, starting in 2012, voters started removing state penalties for all adults and for the commercial production and distribution of marijuana.⁴ Following these reforms, popular support

Create Hurdles for Tens of Millions of Voters, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/> [<https://perma.cc/K4N4-UWET>]; Geoffrey Skelley, *How the Republican Push to Restrict Voting Could Affect Our Elections*, FIVETHIRTYEIGHT (May 17, 2021), <https://fivethirtyeight.com/features/how-the-republican-push-to-restrict-voting-could-affect-our-elections/> [<https://perma.cc/GH8V-TY28>]; Matt Vasilogambros, *Republican Wave of Voting Restrictions Swells*, PEW (Mar. 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/25/republican-wave-of-voting-restrictions-swells> [<https://perma.cc/3E94-PT8Q>].

2. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2021).

3. See Sarah Trumble & Nathan Kasai, *America's Marijuana Evolution*, THIRD WAY (Aug. 24, 2017), <https://www.thirdway.org/report/americas-marijuana-evolution> [<https://perma.cc/G46D-8RRX>] (presenting a timeline of the enactment of medical marijuana ballot initiatives in Alaska, Oregon, and Washington in 1998, Maine in 1999, and Colorado, Hawaii, and Nevada in 2000).

4. See Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), <https://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> [<https://perma.cc/885D-SP68>]; see also Ray Sanchez & Michael Martinez, *Colorado Pot Law Called Springboard for Other States*, CNN (Jan. 6, 2014, 10:29 PM), <https://www.cnn.com/2014/01/03/us/marijuana-laws-united-states/index.html> [<https://perma.cc/E7FS-7VAT>]; Trumble & Kasai, *supra* note 3.

for marijuana legalization continued to increase nationwide,⁵ which politically and practically undermined the continued federal prohibition of marijuana and paved the way for other jurisdictions around the world to reform their laws.⁶ To those who believe that the prohibition of marijuana is a failed policy, borne of a drug war rooted in racism and resulting in the unnecessary arrest and sanction of hundreds of thousands of people, this story of direct democracy — first at the municipal level and then at the state level — is a success story, and perhaps a model for other law reforms.

But not everyone was celebrating. Opposition to legal marijuana has become the minority opinion in the United States,⁷ but it is a fierce opposition, and it finds a home in conservative legislatures and courts. This entrenched opposition has not succeeded at persuading voters of the policy merits of marijuana prohibition. Efforts to defeat marijuana law reforms based on policy arguments have generally failed.⁸ Opponents of

5. See generally Megan Brenan, *Support for Legal Marijuana Inches up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> [<https://perma.cc/4F4R-MDUW>] (documenting the rise since 2000 in public support for marijuana legalization across almost every demographic, including an increase of 50% support to 68% support between 2011 and 2020); Frank Newport, *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP (Oct. 17, 2011), <https://news.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx> [perma.cc/YB4G-H9WT] (documenting 50% of Americans supported legalization of marijuana the year prior to the enactment of the first legalization ballot initiative in 2012).

6. See generally Christopher Ingraham, *How Marijuana Legalization in Colorado and Washington Is Making the World a Better Place*, WASH. POST (Oct. 17, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/17/how-marijuana-legalization-in-colorado-and-washington-is-making-the-world-a-better-place/> [perma.cc/Z3EL-BLFE]; *Following Legalization in the US, Uruguay, Marijuana Gets Second Look*, CHRISTIAN SCI. MONITOR (Feb. 15, 2014), <https://www.csmonitor.com/World/Latest-News-Wires/2014/0215/Following-legalization-in-US-Uruguay-marijuana-gets-second-look> [perma.cc/BN32-QSJF].

7. See generally Brenan, *supra* note 5.

8. Since 2012, the overwhelming majority of marijuana legalization ballot measures were enacted by voters despite arguments made by opposition campaigns. See, e.g., BARBARA K. CEGAVSKE, STATE OF NEV., STATEWIDE BALLOT QUESTIONS 2016 (2016), <https://www.nvsos.gov/sos/home/showdocument?id=4434> [<https://perma.cc/9RLC-GCUF>] (posing as Question 2 an initiative to regulate and tax marijuana); *Alaska Marijuana Legalization, Ballot Measure 2*, BALLOTPEDIA, [https://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_\(2014\)](https://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_(2014)) [<https://perma.cc/8MKN-DXX3>] (last visited Feb. 16, 2022); *Arizona Proposition 207*, AZ. CTS. (2020), <https://www.azcourts.gov/prop207> [<https://perma.cc/6XZV-HZJN>] (last visited Feb. 16, 2022); *Colorado Marijuana Legalization Initiative, Amendment 64*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_\(2012\)](https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_(2012)) [<https://perma.cc/N4RL-PZ9X>] (last visited Feb. 16, 2022); *Maine Marijuana Legalization, Question 1 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Maine_Marijuana_Legalization_Question_1_\(2016\)](https://ballotpedia.org/Maine_Marijuana_Legalization_Question_1_(2016)) [<https://perma.cc/2WHY-GH5L>] (last visited Feb. 16, 2022); *Massachusetts Marijuana Legalization, Question 4 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Massachusetts_Marijuana_Legalization_Question_4_\(2016\)](https://ballotpedia.org/Massachusetts_Marijuana_Legalization_Question_4_(2016))

marijuana reforms have made dire predictions about the potential consequences of legalization, from a marijuana-related “drug use epidemic,”⁹ to increased crime,¹⁰ to marijuana-induced harm and death.¹¹ These dire forecasts have not materialized.¹² In virtually every jurisdiction

[<https://perma.cc/7BKE-SU5X>] (last visited Feb. 16, 2022); *Michigan Proposal 1, Marijuana Legalization Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Michigan_Proposal_1_Marijuana_Legalization_Initiative_\(2018\)](https://ballotpedia.org/Michigan_Proposal_1_Marijuana_Legalization_Initiative_(2018)) [<https://perma.cc/TY5N-DPYX>] (last visited Feb. 16, 2022); *Montana I-190, Marijuana Legalization Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Michigan_Proposal_1_Marijuana_Legalization_Initiative_\(2018\)](https://ballotpedia.org/Michigan_Proposal_1_Marijuana_Legalization_Initiative_(2018)) [<https://perma.cc/UZ8Z-NG6Z>] (last visited Feb. 16, 2022); *New Jersey Public Question 1, Marijuana Legalization Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/New_Jersey_Public_Question_1_Marijuana_Legalization_Amendment_\(2020\)](https://ballotpedia.org/New_Jersey_Public_Question_1_Marijuana_Legalization_Amendment_(2020)) [<https://perma.cc/SW2B-MABG>] (last visited Feb. 16, 2022); *Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_\(2014\)](https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_(2014)) [<https://perma.cc/3G9S-NKDV>] (last visited Feb. 16, 2022); *South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A_Marijuana_Legalization_Initiative_\(2020\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A_Marijuana_Legalization_Initiative_(2020)) [<https://perma.cc/L83B-QTL6>] (last visited Feb. 16, 2022); *The Control, Regulate and Tax Adult Use of Marijuana Act: Proposition 64*, CA.GOV (May 7, 2021, 2:37 PM), <https://post.ca.gov/proposition-64-the-control-regulate-and-tax-adult-use-of-marijuana-act> [<https://perma.cc/3TX8-UZKP>]; *Washington Marijuana Legalization and Regulation Initiative 502*, BALLOTPEDIA, [https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_\(2012\)](https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_(2012)) [<https://perma.cc/7BZE-97MD>] (last visited Feb. 16, 2022). Two initiatives that failed were Arizona Proposition 205 (2016) and Ohio Issue 3 (2015). See *Arizona Marijuana Legalization, Proposition 205 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Marijuana_Legalization_Proposition_205_\(2016\)](https://ballotpedia.org/Arizona_Marijuana_Legalization_Proposition_205_(2016)) [<https://perma.cc/B9QB-LDTE>] (last visited Feb. 16, 2022); see also *Ohio Marijuana Legalization Initiative, Issue 3 (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative_Issue_3_\(2015\)](https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative_Issue_3_(2015)) [<https://perma.cc/X87R-UH85>] (last visited Feb. 16, 2022). For an example of the types of policy arguments typically made by opponents to these ballot initiative campaigns, see *Toolkit*, SAM, <https://learnaboutsam.org/toolkit/> [<https://perma.cc/82NK-FUNV>] (last visited Feb. 3, 2022).

9. See David W. Murray & John P. Walters, *The Devastation That’s Really Happening in Colorado*, HUDSON INST. (July 10, 2014), <https://www.hudson.org/research/10427-the-devastation-that-s-really-happening-in-colorado> [perma.cc/B8XY-9W3W].

10. See James Conklin, Moussa Diop & Herman Li, *Contact High: The External Effects of Retail Marijuana Establishments on House Prices*, CATO INST. RSCH. BRIEFS (July 18, 2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/research-brief-122.pdf> [<https://perma.cc/6XSG-M9KX>] (noting that “[a] primary concern of [marijuana legalization] opponents is that legalizing marijuana will increase crime in local communities”).

11. See Kevin A. Sabet, Opinion, *SABET: Colorado Will Show Why Legalizing Marijuana Is a Mistake*, WASH. TIMES (Jan. 17, 2014), <https://www.washingtontimes.com/news/2014/jan/17/sabet-marijuana-legalizations-worst-enemy/> [<https://perma.cc/NUD6-AMH6>].

12. See, e.g., David J. Bier, *How Legalizing Marijuana Is Securing the Border*, CATO INST. (Dec. 19, 2018), <https://www.cato.org/policy-analysis/how-legalizing-marijuana-securing-border-border-wall-drug-smuggling-lessons> [<https://perma.cc/E49B-PFG3>] (finding “[s]tate-level marijuana legalization . . . has decreased the amount of drug

that has reformed its marijuana laws, those reforms have resulted in increased public acceptance of marijuana regulation and taxation, leading persons who once opposed or seriously questioned such change to rethink their positions and find common ground with reformers.¹³ Legalization has boosted public support because the reforms, while perhaps not without room for improvement, have resulted in a more effective allocation of public resources, access to medicine by patients in need, a reduction in racially-disproportionate policing, and the protection of personal liberty and autonomy.

However, despite these overall positive policy results, many elected officials and lawmakers, especially in the most conservative states, have not given up. In light of the failure to persuade the voters in these states on the merits, opponents have turned to restricting voters' access to the ballot to make it more difficult, if not impossible, to directly enact reforms. The consequences of this attack on direct democracy are clear and immediate for the future of marijuana reform in these jurisdictions but also threatening to the enterprise of all voter-initiated law reform.

This Essay begins with a brief history of the role direct democracy has played in the evolution of marijuana law reform. This was a role borne out of necessity, because popular support for reform has always far outpaced the will of elected officials. The Essay then provides case studies of this phenomenon from Nebraska, South Dakota, and Mississippi. During the 2020 election cycle, state supreme courts in each of these states either

smuggling into the United States across the southwest border"); Angela Dills et al., *The Effect of State Marijuana Legalizations: 2021 Update*, CATO INST. (Feb 2, 2021), <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update> [<https://perma.cc/8W6S-J4L2>] (“Reviews of the literature on the first wave of marijuana decriminalizations in the 1970s note that marijuana use did not change in response to relaxed restrictions.”); Benjamin Hansen, Keaton S. Miller & Caroline Weber, *Early Evidence on Recreational Legalization and Traffic Fatalities*, CATO INST. (Aug. 8, 2018), <https://www.cato.org/research-briefs-economic-policy/early-evidence-recreational-marijuana-legalization-traffic> [<https://perma.cc/R5V9-Z9QL>] (finding that “since legalizing marijuana, Colorado and Washington have not experienced significantly different rates of marijuana- or alcohol-related traffic fatalities”).

13. See, e.g., Patricia Calhoun, *John Hickenlooper, Three More Governors with Legal Pot Send Letter to Jeff Sessions*, WESTWORD (Apr. 3, 2017, 2:05 PM), <https://www.westword.com/marijuana/governors-of-four-states-with-legal-marijuana-send-letter-to-sessions-mnuchin-8936843> [<https://perma.cc/R5VF-BSZM>] (reporting the governors informed the U.S. Attorney General of their “apprehensions before our states adopted current laws,” but voiced full support for those laws); Ashley Killough, *Fiery Senate Speech on Pot Spotlights GOP Sen. Cory Gardner*, CNN (Jan. 5, 2018, 6:28 PM), <https://www.cnn.com/2018/01/05/politics/cory-gardner-marijuana-laws> [<https://perma.cc/X6Z7-9B6G>] (noting Republican Senator Gardner of Colorado opposed legalizing marijuana in 2012 but now staunchly supports Colorado’s law). See generally Brenan, *supra* note 5 (documenting the steep rise since 2000 in public support for marijuana legalization across almost every demographic).

removed a popular marijuana-related measure from the ballot or overturned the results of a validly held election. They did so, as this Essay suggests, in a transparent effort to halt, or at least slow, the pace of marijuana law reform in their respective states.

The Essay concludes with a warning that the implications and consequences of these judicial interventions are far-reaching. Certainly, limiting citizens' ability to place legislation directly on the ballot will slow the adoption of new marijuana laws in these states by limiting voters' ability to bypass their elected lawmakers in areas of policy where they disagree. But the implications extend beyond marijuana. The efforts to prevent marijuana law reform are changing the playing field for direct democracy altogether, making it more difficult for voters to reach the ballot on any issue. By undoing election results and invalidating legislation supported and enacted by voters, these state supreme court decisions threaten to further undermine confidence in democracy and our elections process altogether, at a time when voter confidence is already at an all-time low.

I. CIRCUMVENTING ELECTED OFFICIALS VIA DIRECT DEMOCRACY

Every election cycle, voters in many states across the country, in addition to voting for their representation in government, participate directly in policymaking by voting whether to adopt or reject constitutional amendments, state legislation, or municipal ordinances on a wide variety of issues. Ballot initiatives allow voters to bypass elected representatives to enact laws directly.¹⁴ In fact, many successful initiatives are the product of disagreement between voters and state lawmakers over how to address a particular policy issue.¹⁵

Direct democracy is a central component of lawmaking in many states. Twenty-four states have had at least one statewide initiative pass between

14. See *Initiative and Referendum Process*, NAT'L CONF. ST. LEGISLATURES (Jan. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx> [<https://perma.cc/HA6X-7FGU>] ("The citizen initiative process enables citizens to bypass their state legislature by placing proposed statutes and, in some states, constitutional amendments on the ballot.").

15. Medicaid expansion is one recent example of the phenomena. See Philip Rocco, *Direct Democracy and the Fate of Medicaid Expansion*, 1 JAMA HEALTH F. e200934 (2020) ("In this partisan atmosphere, ballot initiatives have emerged as an important mechanism to expand Medicaid in states where governors or state legislatures oppose it. This allows voters to engage in conflict expansion, transforming the decision from an interpartisan squabble among elected officials into a referendum on a broadly popular benefit.").

1904 and 2018.¹⁶ Both progressive¹⁷ and conservative¹⁸ reform movements have used ballot initiatives since the later 1970s to advance their agendas, starting with Proposition 13 in California, which severely capped property taxes.

The ballot initiative process holds, for some, a romantic notion of a populist form of pure democracy. Ordinary people whose needs are not being acted on by those in power can come together with an idea for a law, collect signatures from other voters to place that idea on the ballot, and change the law themselves — regardless of whether their elected lawmakers agree.¹⁹ It can and has been used as a means to build movements and civil engagement to develop the infrastructure necessary to develop political and organizing power.²⁰

Others believe the initiative process suffers from many of the same factors that corrupt legislatures in terms of the power and influence of money and lobbying. Private interests fund costly ballot initiative campaigns, with targeted, well-funded, political advertising.²¹ Private

16. See INITIATIVE & REFERENDUM INST., INITIATIVE USE (2019), [http://www.iandrinstitute.org/docs/IRI-Initiative-Use-\(2019-2\).pdf](http://www.iandrinstitute.org/docs/IRI-Initiative-Use-(2019-2).pdf) [https://perma.cc/LN4B-FEP5].

17. For example, ballot initiatives focused on expansion of rights, minimum wage, Medicaid expansion, death with dignity, and criminal justice reform. See *Who We Are*, BALLOT INITIATIVE STRATEGY CTR., <https://ballot.org/who-we-are/> [https://perma.cc/7Y66-NZL9] (last visited Feb. 3, 2022) (“[W]e work to transform our country into one that is equitable and just. In our work, we strive to challenge structural racism, and center the people most impacted.”).

18. For example, ballot initiatives focused on restricting labor rights, restricting abortion, tax reform, and same sex marriage (voters approved 34 of 35 measures banning same-sex marriage between 1998 and 2006). See INITIATIVE & REFERENDUM INST., BALLOTWATCH (2016), <http://www.iandrinstitute.org/docs/BW%202016-1%20Preview%202016-09-291.pdf> [https://perma.cc/BL8T-HBWZ].

19. See generally JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE (2020) (putting forth the argument that direct democracy can be used to address the disconnect between people and their elected officials).

20. See *What We Stand For*, BALLOT INITIATIVE STRATEGY CTR., <https://ballot.org/what-we-stand-for/> [https://perma.cc/U4ZM-452J] (last visited Feb. 3, 2022) (“We believe in movement building and empowerment, bringing communities into the work and leaving lasting infrastructure for continued social change.”).

21. For example, private individuals, corporations, and interest groups spent more than \$785 million on 12 ballot initiatives in California in 2020. See, e.g., Ryan Menezes, Maloy Moore & Phi Do, *Billions Have Been Spent on California’s Ballot Measure Battles. But This Year Is Unlike Any Other*, L.A. TIMES (Nov. 13, 2020), <https://www.latimes.com/projects/props-california-2020-election-money/> [https://perma.cc/VFV6-NPGT]; Reid Wilson, *Corporations, Interest Groups Spend Fortunes on Ballot Measures*, HILL (Sept. 1, 2018, 4:16 PM), <https://thehill.com/business-a-lobbying/404555-corporations-interest-groups-spend-fortunes-on-ballot-measures> [https://perma.cc/UR6P-GZVW].

interests often draft the legislation behind closed doors, without the benefit of a deliberative process.²²

Either way, voters have a long history of participating in the initiative process²³ to embrace or reject policy and directly decide how our constitutions and laws should be crafted. And they have repeatedly done so in ways that significantly part course with their representative government when it disagrees or fails to act on in an area that voters care about.²⁴

II. MARIJUANA LAW REFORM THROUGH DIRECT DEMOCRACY

There is no other area of law that has been as dramatically shaped and recreated by the ballot initiative process as marijuana.²⁵ With marijuana, to

22. For example, there is a significant difference in the detail, scope, and policy of focus of marijuana legalization laws enacted by voters and the ballot (See for example, Amendment 64 in Colorado (2012), Measure 91 in Oregon (2014), and Proposal 1 in Michigan (2018)) and the laws enacted thus far by state legislatures, such as in Illinois, New York, New Mexico, and Virginia. The law enacted legislatively generally provide more extensive reparative justice provisions, investment in communities most harmed by marijuana criminalization, and broader civil legal protections. This is the result of many factors, but one is the mechanism that the legislative process provides to debate and negotiation, the power of Black and Brown caucuses, and stronger avenues for minority voices to influence the substance of legislation.

23. See INITIATIVE & REFERENDUM INST., *supra* note 16 (documenting the 2,610 state-level initiatives on the ballot from 1904 to 2019).

24. See, e.g., Brady Dennis & David Weigel, *From Medicaid to Minimum Wage, Even Red State Voters Backed Progressive Measures*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/national/health-science/from-medicaid-to-minimum-wage-even-red-state-voters-backed-progressive-measures/2018/11/07/b0b61572-e2bc-11e8-ab2c-b31dcd53ca6b_story.html [<https://perma.cc/3QV4-CRD8>].

25. A number of jurisdictions around the world have replaced, or have started the process to replace, complete criminal prohibition of marijuana with a system of legal, regulated access by medical patients and, in some cases, adult consumers. But the use of the ballot initiative process to effectuate this change in policy is unique to the United States. In all jurisdictions, the reform efforts were led either by elected lawmakers or the courts. Uruguay legalized marijuana legislatively in 2013 in an effort led by its then President José “Pepe” Mujica. See Noah Rayman, *Uruguay First Country to Legalize Marijuana Industry*, TIME (Dec. 10, 2013), <https://world.time.com/2013/12/10/uruguay-poised-to-be-first-country-to-legalize-marijuana-industry/> [<https://perma.cc/2J53-A4TD>]. Canada followed suit legalizing and regulating for adult consumer in 2018 and fulfilling Prime Minister Justin Trudeau’s 2015 campaign pledge to legalize marijuana in Canada. See Ian Austen, *Trudeau Unveils Bill Legalizing Recreational Marijuana in Canada*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/world/canada/trudeau-marijuana.html> [<https://perma.cc/7Q4X-765Y>]. And the Supreme Courts of several other nations have loosened marijuana restrictions for adult marijuana users, including in South Africa, Mexico, and the Democratic Republic of Georgia. See Chris Roberts, *Georgia’s High Court Removes Marijuana Possession Penalties*, MARIJUANA MOMENT (July 30, 2018), <https://www.marijuanamoment.net/georgias-high-court-removes-marijuana-possession-penalties/> [<https://perma.cc/REZ9-7N3Y>]; *Mexico Marijuana: Top Court Decriminalises Recreational Use of Cannabis*, BBC NEWS (June 29, 2021), <https://www.bbc.com/news/world-latin-america-57645016> [<https://perma.cc/59FU-M86N>]; *South Africa’s*

put it simply, the voters and their elected officials disagree. The last several decades have seen a seismic shift in attitudes towards marijuana by voters,²⁶ which was not, until very recently, matched by a shift in attitude by their elected lawmakers.²⁷ This mismatch in opinion resulted in voters employing the ballot initiative process to reject the existing prohibitions on marijuana in favor of trying something new.²⁸

Dramatic departures from a prohibitionist approach to marijuana policy are not unique to the United States, but the use of the ballot initiative process to effectuate the change is. A number of jurisdictions around the world have replaced, or have started the process to replace, complete criminal prohibition of marijuana with a system of legal, regulated access

Highest Court Legalizes Cannabis Use, BBC NEWS (Sept. 18, 2018), <https://www.bbc.com/news/world-africa-45559954> [<https://perma.cc/M7K6-SZZC>]. One outlier to this is New Zealand where the legislature placed a ballot measure legalizing marijuana on the ballot in 2020 that was rejected by the voters. See Yan Zhuang, *New Zealand Voters Approve Euthanasia but Reject Recreational Marijuana*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2020/10/30/world/asia/new-zealand-euthanasia-marijuana.html> [<https://perma.cc/P5QQ-P5MW>].

26. See Brenan, *supra* note 5 (“Gallup first measured the public’s views of marijuana legalization in 1969, when 12% of Americans backed it; by 1977, support had more than doubled to 28%. It did not exceed 30% until 2000 but has risen steeply in the two decades since then, and is now twice what it was in 2001 and 2003.”).

27. The recent shift in support by elected officials is largely among Democrats. See David Weigel, *The Trailer: Democrats Say Legalizing Weed Is Good Policy — and Good Politics*, WASH. POST (Feb. 23, 2021, 6:14 PM), <https://www.washingtonpost.com/politics/2021/02/23/trailer-democrats-say-legalizing-weed-is-good-policy-good-politics/> [<https://perma.cc/H2C8-8BKB>] (“Legalization, which both Democrats and Republicans treated carefully just a few years ago, has quickly become more popular than either party. But its political support is mostly concentrated among Democrats, and the party increasingly sees it as an issue that can drive out voters.”); Giovanni Russonello, *The Country’s Evolving Marijuana Debate*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/04/20/us/politics/marijuana-democrats.html> [<https://perma.cc/WM4Q-X986>]. Vice President Kamala Harris provides one example of a lawmaker’s shifting attitude on marijuana. In 2010, as a prosecutor, she co-authored an official voter guide argument opposing a marijuana legalization measure on the California ballot that year and in 2014 she laughed off a reporter’s question about whether she supported marijuana legalization. See Kyle Jaeger, *Where Vice Presidential Candidate Kamala Harris Stands on Marijuana*, MARIJUANA MOMENT (Aug. 12, 2020), <https://www.marijuanamoment.net/where-vice-presidential-candidate-kamala-harris-stands-on-marijuana/> [<https://perma.cc/8MVB-U8LT>]. But by 2019 she sponsored legislation to federally deschedule marijuana and made marijuana law reform a prominent component of her 2020 presidential primary campaign. See *id.*

28. See Michael Pollan, *The Pot Proposition; Living with Medical Marijuana*, N.Y. TIMES MAG. (July 20, 1997), <https://www.nytimes.com/1997/07/20/magazine/living-with-medical-marijuana.html> [<https://perma.cc/YHK7-WHCD>] (“The passage of Proposition 215 marks the end of ‘Just say no’ — and the beginning of Americans saying a great many other things about drugs. It is a conversation that the war on drugs may not survive.”).

by medical patients and, in some cases, adult consumers.²⁹ In other countries, elected lawmakers or the courts led these efforts, not voters.³⁰

In the United States, however, the transformation of marijuana policy over the last 30 years is due, nearly entirely,³¹ to citizens' power to directly access the ballot to side-step reluctant lawmakers and rewrite the laws. The marijuana reform movement began in 1991 when Dennis Peron, an AIDS activist in San Francisco who was frustrated that AIDS patients lacked access to marijuana to ease their suffering, joined efforts with other local activists to write a local ballot initiative.³² Proposition P demanded that the city of San Francisco request that the California Legislature add marijuana to its list of approved medicines to treat various illnesses, including AIDS, and to not punish doctors who recommended it to their patients.³³ It succeeded with 80% of the vote and was followed the next year by the San Francisco Board of Supervisors' adoption of Resolution 141-92 on August

29. See *Cannabis Legalization in Canada, One Year On*, TRANSFORM DRUG POL'Y FOUND. (Oct. 1, 2019), <https://transformdrugs.org/publications/cannabis-legalisation-in-canada-one-year-on> [<https://perma.cc/PDQ6-M2M4>]; see also *Cannabis Legalization in Mexico: An Explainer*, TRANSFORM DRUG POL'Y FOUND. (Mar. 23, 2021), <https://transformdrugs.org/blog/cannabis-legalisation-in-mexicoan-explainer> [<https://perma.cc/7ELL-J5ZU>]; *Cannabis Legalization in Uruguay: Public Health and Safety over Private Profit*, TRANSFORM DRUG POL'Y FOUND. (Nov. 20, 2018), <https://transformdrugs.org/blog/cannabis-legalisation-in-uruguay-public-health-and-safety-over-private-profit> [<https://perma.cc/26YU-U9BQ>].

30. One outlier to this pattern is New Zealand where the legislature placed a ballot measure legalizing marijuana on the ballot in 2020 that was rejected by the voters. See Zhuang, *supra* note 25.

31. In the 1970s a number of states "decriminalized" marijuana, meaning that they removed jail time for minor marijuana offenses or reclassified such offense to be infractions rather than misdemeanors, including California (1976), Colorado (1975), Maine (1976), Minnesota (1976), Mississippi (1977), Nebraska (1977), New York (1977), North Carolina (1977), Ohio (1976), and Oregon (1973). See EMILEE MOONEY SCOTT, OFF. OF LEG. RSCH., CONN. GEN. ASSEMBLY, 2010-R-0204, MARIJUANA DECRIMINALIZATION (2010), http://www.antonioacasella.eu/archila/Mooney-Scott_2010.pdf [<https://perma.cc/3MJF-VU8W>]. But under these laws, marijuana was still prohibited for any purpose under state laws and, in some cases, led to increased enforcement.

32. See Jordan Heller, *From Drug War to Dispensaries: An Oral History of Weed Legalization's First Wave*, N.Y. MAG. (Nov. 14, 2018), <https://nymag.com/intelligencer/2018/11/marijuana-legalizations-first-wave-an-oral-history.html> [<https://perma.cc/LU9J-27BK>] (interviewing Dale Gieringer, director of California NORML and co-author of Proposition 215 stating that "'91 was also when the medical marijuana movement started, when Dennis Peron . . . and a bunch of his comrades put Proposition P on the San Francisco ballot. It was a symbolic because it was just a city initiative. But it was the first victory the marijuana reform movement had scored since the 1970s'")

33. See Richard Sandomir, *Dennis Peron, Early Medical Marijuana Advocate, Dies at 71*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/obituaries/dennis-peron-early-medical-marijuana-advocate-dies-at-71.html> [<https://perma.cc/L3UD-DBRX>].

28, 1992.³⁴ Resolution 141-92 urged the state to allow for medical access under Proposition P and directed the district attorney and the police to make enforcement of medical marijuana the lowest priority for law enforcement within the city and county.³⁵

In 1996, building upon the local success of Resolution 141-92, Peron and other activists wrote and successfully placed Proposition 215 on the California ballot to remove state-law criminal penalties for the personal use and cultivation of marijuana pursuant to a doctor's recommendation.³⁶ On November 5, 1996,³⁷ California voters enacted the statute with over 55% support, despite strong opposition from state elected officials. For example, then-Attorney General Dan Lungren declared Proposition 215 a "disaster" and "an unprecedented mess."³⁸ Notwithstanding the near unanimous opposition to the change from California's elected lawmakers and complete federal prohibition, voters amended the California statute to remove penalties for medical marijuana use under state law.

The picture at the federal level is more complicated. There is no federal ballot initiative process, so voters cannot directly change federal law. As a result, despite nationwide polling showing strong support for legalization

34. *Proposition P (November 1991)*, MARIJUANA LIBR., http://www.marijuana.library.org/Proposition_P_Nov_1991.html [<https://perma.cc/3V4T-Y2LL>] (last visited Feb. 16, 2022).

35. *See id.*

36. *See* Sandomir, *supra* note 33.

37. *California Proposition 215, Medical Marijuana Initiative (1996)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_215_Medical_Marijuana_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_215_Medical_Marijuana_Initiative_(1996)) [<https://perma.cc/2L3V-UPX9>] (last visited Jan. 18, 2022). Arizona voters enacted a similar measure, Proposition 200, during this same election allowing doctors to prescribe marijuana to seriously ill patients. *See Arizona Use or Possession of Controlled Substances, Proposition 200 (1996)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Use_or_Possession_of_Controlled_Substances,_Proposition_200_\(1996\)](https://ballotpedia.org/Arizona_Use_or_Possession_of_Controlled_Substances,_Proposition_200_(1996)) [<https://perma.cc/DVZ2-2JVS>] (last visited Jan. 18, 2022). However, a doctor's ability to prescribe controlled substances is federally controlled and the prescription of marijuana was not allowed making the Arizona initiative symbolic. Arizona voters subsequently enacted an effective medical marijuana initiative. *See Arizona Medical Marijuana Question, Proposition 203 (2010)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Medical_Marijuana_Question,_Proposition_203_\(2010\)](https://ballotpedia.org/Arizona_Medical_Marijuana_Question,_Proposition_203_(2010)) [<https://perma.cc/VM92-HS82>] (last visited Jan 18, 2022).

38. *See* John Balzar, *Voters Approve Measure to Use Pot as Medicine*, L.A. TIMES (Nov. 6, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-11-06-mn-62740-story.html> [<https://perma.cc/J2YS-RKGU>]; *see also* 21 U.S.C. §§ 829, 841, 844 (banning prohibited substances, including marijuana, under federal law).

across demographics and party lines,³⁹ marijuana remains almost completely prohibited by federal law.⁴⁰

That said, despite voters' inability to change federal law through direct democracy, their use of the ballot initiative process at the state and local level has worked to significantly depart from and undermine federal law. Between 1973 and 1978, 11 states decriminalized the possession or use of small amounts of marijuana.⁴¹ By the 1990s, starting with Measure P⁴² and in the face of mounting scientific evidence pointing to marijuana's medicinal benefits, voters began enacting measures to legalize marijuana under state law.⁴³ These reforms adopted by voters have been met with considerable success,⁴⁴ leading voters in other states to advocate for the adoption of similar reforms in their states. Additionally, in a majority of states, changes have occurred notwithstanding "the shadow of a strict

39. See Brenan, *supra* note 5 ("Gallup first measured the public's views of marijuana legalization in 1969, when 12% of Americans backed it; by 1977, support had more than doubled to 28%. It did not exceed 30% until 2000 but has risen steeply in the two decades since then, and is now twice what it was in 2001 and 2003.").

40. The possession, use, and distribution of marijuana is controlled at the federal level through the Controlled Substances Act (CSA), which classifies drugs into one of five "schedules" (i.e., categories) depending upon their medicinal value, potential for abuse, and psychological and physical effects on the body. See 21 U.S.C. §§ 811–812. Congress placed marijuana into Schedule I, which is the most severely restricted category. 21 C.F.R. § 1308.11 (2022). To be listed on Schedule I, a drug must have "no currently accepted medical use" and "a high potential for abuse." 21 U.S.C. § 812(b)(1). Among those drugs listed on Schedule II, which are less restricted than marijuana, are cocaine, codeine, oxycodone, and methamphetamine. 21 C.F.R. §§ 1308.1112 (2022). The federal government bans the manufacture, distribution, and possession of Schedule I drugs, including marijuana. *Id.* § 1308.11.

41. See generally CAL. HEALTH & SAFETY CODE § 11357 (West 1975); COLO. REV. STAT. § 18-18-406(1) (West 2021); ME. STAT. tit. 22 § 2383(1-A) (West 2018); MINN. STAT. § 152.027(a) (2022); MISS. CODE ANN. § 41-29-139(c)(2) (West 2022); NEB. REV. STAT. § 28-416(13) (West 2022); N.C. GEN. STAT. § 90-95(d) (West 2022); OHIO REV. CODE ANN. § 2925.11(C)(3) (West 2022); N.Y. PENAL LAW § 221.05 (McKinney 2022) (repealed 2021); OR. REV. STAT. § 475.864(3) (2022) (repealed 2017); *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

42. Measure P was a 1991 ballot initiative in San Francisco that called on the state of California to permit medical cannabis.

43. See, e.g., Igor Grant et al., *Medical Marijuana: Clearing Away the Smoke*, 6 OPEN NEUROLOGY J. 18, 23–24 (2012); INST. OF MED., MARIJUANA & MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999). See generally *State Medical Cannabis Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 3, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/58JW-XUJN>] (noting that as of 2021, 36 states and four territories have authorized marijuana for medical use).

44. See Kyle Jaeger, *Most People in Recreational Marijuana States Believe Legalization Is a Success, Poll Finds*, MARIJUANA MOMENT (May 13, 2020), <https://www.marijuana-moment.net/most-people-in-recreational-marijuana-states-believe-legalization-is-a-success-poll-finds/> [<https://perma.cc/TXU3-CV4W>] (reporting on a survey documenting that most people who live in states that have legalized marijuana for adult use broadly feel that the policy is successful).

federal ban on the drug.”⁴⁵ Such cascading state marijuana reform has transformed the legal landscape in this area.

Furthermore, in states that lack access to a statewide ballot initiative process or where there are financial or other barriers to accessing a state-level ballot initiative process,⁴⁶ voters have employed local initiative processes to change city and county ordinances that address marijuana offenses and enforcement.⁴⁷ For example, in Ohio, voters in 22 cities have approved municipal reforms to decriminalize marijuana.⁴⁸ In four West Virginia cities and four South Carolina cities, local campaigns organized to enact decriminalization ordinances in 2021.⁴⁹

III. THE MARIJUANA-DRIVEN DIRECT DEMOCRACY BACKLASH

State lawmakers and state courts have turned to attacking the ballot initiative process itself in response to voters adopting progressive initiatives that advance popular reforms. While state ballot initiative law sets forth a path for citizens to place legislation directly on the ballot, the state legislature often controls critical elements of the process that the citizens must follow to do so.⁵⁰ Depending on the state, lawmakers often control

45. See Robert A. Mikos, *The Evolving Federal Response to State Marijuana*, 26 WIDENER L. REV. 1, 2–3 (2020).

46. Drug policy reformers have used municipal level initiatives to advance broader drug policy reform, in addition to marijuana. For example, voters in a number of cities have recently decriminalized psychedelics through local referenda. See Kyle Jaeger, *Psychedelics Decriminalization Advancing in Three More Cities, Spanning from Coast to Coast*, MARIJUANA MOMENT (Aug. 3, 2021), <https://www.marijuanamoment.net/psychedelics-decriminalization-advancing-in-three-more-cities-spanning-from-coast-to-coast/> [<https://perma.cc/D6H5-QL56>].

47. For an overview of the nearly 100 localities that have enacted municipal laws or resolutions to either fully or partially decriminalizing minor cannabis possession offenses, see *Local Decriminalization*, NORML, <https://norml.org/laws/local-decriminalization/> [<https://perma.cc/Z5KL-VWR4>] (last visited Feb. 6, 2022).

48. See Kyle Jaeger, *Local Marijuana Decriminalization Efforts Launch in Ohio, South Carolina, and West Virginia*, MARIJUANA MOMENT (June 14, 2021), <https://www.marijuanamoment.net/local-marijuana-decriminalization-efforts-launch-in-ohio-south-carolina-and-west-virginia/> [<https://perma.cc/PBR9-EDWY>].

49. See *id.*

50. For a state-by-state list of initiative processes, see *State I&R*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstute.org/states.cfm> [<https://perma.cc/JF8F-EEKM>] (last visited Feb. 16, 2022). See also IDAHO CONST. art. III, § 1 (setting forth the initiative right (“The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature”), but allowing the legislature to establish the process (“under such conditions and in such a manner as may be provided by acts of the legislature”)); Elaine S. Povich, *Lawmakers Strike Back Against Voter-Approved Ballot Measures*, PEW (July 28, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/07/28/lawmakers-strike-back-against-voter-approved-ballot-measures> [<https://perma.cc/CJ3A-BCY3>] (“Many state legislatures also took steps to rein in future ballot initiatives. According to Ballotpedia, 186 bills were introduced [in 2017] concerning

who can collect signatures, how the signatures must be collected, the timeline for submission, the subject matter that can be considered, and the printing and verification requirements.⁵¹ These may appear to be mundane operational details, but they can be exploited to convert a simple and accessible process to one that is nearly impossible to successfully navigate. While voters in some states have a right to citizen initiative to bypass state lawmakers, the mechanics of that process and how difficult that right is to exercise is up to those very same lawmakers.⁵² In 2021, there were over 100 ballot measure process bills moving through 40 state legislatures.⁵³

In recent years, progressive movements that have leveraged wins through ballot initiatives to bypass Republican-controlled legislatures, including enacting minimum wage laws, restoring voting rights, legalizing marijuana, and adopting Medicaid expansion, have spurred a backlash to ballot initiatives in a number of Republican-controlled states.⁵⁴

Successful marijuana reform initiatives have prompted some of the most aggressive rollbacks of direct democracy. For example, in 2020, in response to a medical marijuana initiative circulating to qualify for the ballot in Idaho,⁵⁵ state lawmakers opposed to medical marijuana sought to pass a joint resolution to amend the Idaho Constitution to prohibit the enactment of any state law that would remove state law penalties for any psychoactive controlled substance unless it is prescribed and dispensed in accordance with federal law.⁵⁶ Idaho only allows voters to enact legislation

changes to the initiative process in 33 states Those bills added or lifted restrictions on the process, changed campaign finance rules, and added supermajority requirements, among other provisions.”).

51. See, e.g., *Laws Governing the Initiative Process in Florida*, BALLOTPEDIA, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Florida [https://perma.cc/2YYM-E9BW] (last visited Jan. 14, 2022).

52. There are constitutional limits on how far a legislation can go in restricting access to the ballot. See *Reclaim Idaho v. Denney*, 497 P.3d 160, 183 (Idaho 2021) (“The ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute. However, the legislature’s duty to give effect to the people’s rights is not a free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people’s best interest.”).

53. For an overview of proposed legislative changes in 2021 governing ballot measures, see *Changes in 2021 to Laws Governing Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Changes_in_2021_to_laws_governing_ballot_measures [https://perma.cc/74BS-GQWW] (last visited Jan. 14, 2022).

54. See Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html> [https://perma.cc/K79D-XM6S]. For example, in 2016 four minimum wage laws — Arizona, Colorado, Maine, and Washington — were enacted via ballot initiative. See *id.*

55. This measure likely would have qualified for the ballot but for COVID-19 derailing the signature gathering process.

56. S.J. Res. 101, 66th Leg., 1st Sess. (Idaho 2021).

through a ballot initiative, not to amend the state constitution.⁵⁷ Thus, this proposed amendment would have the effect of locking in the prohibitions created by existing drug laws in Idaho and removing the subject entirely from the purview of the voters to legislate in this area, thereby preventing the enactment of marijuana reform legislation.⁵⁸

The South Dakota Legislature requires that each petition be contained on a single piece of paper.⁵⁹ The sheets can be several feet wide and tall for complicated measures, known as the “beach-towel effect.”⁶⁰ In response to a 2020 medical marijuana initiative trying to navigate this requirement by printing the language in 6-point font, the Legislature changed state law to require each initiative to be printed in 14-point font on a single sheet of paper.⁶¹ Additionally, the Legislature changed the law to require that initiatives that raise taxes and fees, or require more than \$10 million in spending, obtain 60% of the vote to pass.⁶²

The motives behind many of the proposed reforms are not secret. During a debate on one of the South Dakota bills, Republican Representative Steven Haugaard of Sioux Falls frankly acknowledged that he is opposed to citizens making their own laws: “We started out as a republic Sadly, we’re tending in the direction of a democracy. And that democracy was only intended to be going to the polls to vote for your elected representative.”⁶³ Put bluntly by Reynold Nesiba, one of three

57. IDAHO CONST. art. III, § 1.

58. There are also examples of push back against local ordinances. In 2011, Missoula County prosecutor Fred Van Valkenburg convinced the state legislature to attempt to thwart the will of voters by passing a bill, HB 39, saying that a local initiative cannot determine local police priorities. See Gwen Florio, *Missoula County Attorneys Attempt to Override Marijuana Initiative Creates Uproar*, BILLINGS GAZETTE (Jan. 30, 2011), https://billingsgazette.com/news/state-and-regional/montana/missoula-county-attorneys-attempt-to-override-marijuana-initiative-creates-uproar/article_f5e32ab0-e42b-5528-b7f1-ded1958bdf26.html [<https://perma.cc/6VYF-FD6X>].

59. See S.D. SEC’Y OF STATE, HOW TO SUBMIT AND CIRCULATE A 2022 STATEWIDE INITIATED MEASURE OR CONSTITUTIONAL AMENDMENT PETITION (2022), <https://sdsos.gov/elections-voting/assets/HowToCirculate2022BQPetition.pdf> [<https://perma.cc/9NNZ-ZX2W>]; see also Seth Tupper, *Republican-Backed Bills Complicate Citizen Lawmaking*, S.D. PUB. BROAD. (Mar. 11, 2021, 1:42 PM), <https://listen.sdpb.org/news/2021-03-11/republican-backed-bills-complicate-citizen-lawmaking> [<https://perma.cc/6ZVQ-26PM>] (“The Secretary of State’s Office says the full text of a petition and its signature lines must be contained on a single sheet of paper. For complex proposals, those single sheets of paper may grow to several feet wide and tall.”).

60. See Tupper, *supra* note 59.

61. S. Res. 77, 96th Leg., Legis. Sess. (S.D. 2021) (requiring certain font size for initiative measure petitions and constitutional amendment petitions).

62. H.R.J. Res. 5003, 96th Leg., Legis. Sess. (S.D. 2021) (submitting to the voters at the next primary election and new constitutional amendment requiring for initiatives or legislatively propose constitutional amendment).

63. See Tupper, *supra* note 59.

Democrats in the 35-member South Dakota State Senate, “Republicans have every statewide office, 85 percent of the Legislature and every constitutional office. The one place where Democrats can make progress is through the initiated measure process, and the Republicans want to take that away, too.”⁶⁴

But the Legislature is not the only branch of state government where, in some states, the citizen initiative process is under attack. In states that have held off reforming their marijuana laws due to entrenched opposition by elected officials, a number of state courts, particularly in instances where citizens seek to amend the state constitution to change marijuana laws, have intervened to remove the option from the ballot or to invalidate election results.

This Essay now turns to three case studies, examinations of state supreme court decisions in Nebraska,⁶⁵ South Dakota,⁶⁶ and Mississippi,⁶⁷ following successful marijuana initiatives on the November 2020 ballot.⁶⁸ These decisions received local media attention but flew far below the national popular and even legal media radar. Yet, they are prime examples of the way in which conservative state courts are moving to aggressively beat back marijuana law reform efforts and, in the process, weaken, or in some cases even dismantle altogether, the direct democracy process.

A. Case Study: Nebraska

Nebraska is one of a few remaining states that lacks an effective medical marijuana program.⁶⁹ Despite being one of the first states to decriminalize simple marijuana to a civil infraction for a first offense in the late 1970s,⁷⁰ state lawmakers have failed to enact any meaningful marijuana law reform

64. See Epstein & Corasaniti, *supra* note 54.

65. State *ex rel.* Wagner v. Evnen, 948 N.W.2d 244 (Neb. 2020).

66. Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021).

67. In re Initiative Measure No. 65: Butler v. Watson, NO. 2020-IA-01199-SCT, 2021 WL 1940821 (Miss. 2021).

68. The Author consulted with the campaigns in all three of these states. Views expressed here are her own.

69. Idaho, Kansas, North Carolina, South Carolina, and Wyoming have not adopted state-level medical marijuana laws. See *Map of Marijuana Illegality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> [<https://perma.cc/Z2U8-R7AV>] (last visited Feb. 4, 2022).

70. See NEB. REV. STAT. ANN. § 28–416 (West 2022). Despite decriminalizing possession in 1979, Nebraska arrested almost 8,000 people in 2018 for marijuana possession making up almost half of all drug arrests in the state. See ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 74 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [<https://perma.cc/HK56-WL26>]. Black people are arrested at 3.1 times the rate of white people for marijuana possession in Nebraska. See *id.*

since, and some elected officials have demonstrated outright hostility to neighboring states' reforms.⁷¹

Nebraska voters and their elected officials disagree on the issue of marijuana, particularly medical marijuana. Seventy-seven percent of Nebraska voters favor legalizing medical marijuana for patients with serious or debilitating medical conditions,⁷² with vocal patients in the state advocating passionately for legislative reform.⁷³ However, in recent years, medical marijuana bills introduced in Nebraska have faced strong opposition from lawmakers and failed to advance through the Legislature.⁷⁴

Reform efforts have also been met with strong and vocal opposition from Nebraska Governor Pete Ricketts, who has aggressively fought against efforts to legalize medical marijuana under Nebraska law.⁷⁵ In response to a bill being considered by the state Legislature to allow medical marijuana, Governor Ricketts told reporters: "This is a dangerous drug that will impact our kids If you legalize marijuana, you're gonna kill your kids. That's what the data shows from around the country."⁷⁶ Governor Ricketts argued that the medical marijuana legislation introduced in

71. In 2014, Nebraska joined Oklahoma to file an original action in the U.S. Supreme Court to strike down Amendment 64, Colorado's voter enacted amendment to legalize marijuana, claiming that Colorado's removal of state marijuana penalties was preempted by federal law and would lead to marijuana being brought into Nebraska to the detriment of the state. *See Nebraska v. Colorado*, 577 U.S. 1211 (2016). The Supreme Court ultimately declined to hear the case. *See id.*

72. *See* Max Savage Levenson, *Election 2020: Nebraska Medical Marijuana Legalization Guide*, LEAFLY (July 29, 2020), <https://www.leafly.com/news/politics/election-2020-nebraska-medical-marijuana-legalization-guide> [<https://perma.cc/7LMS-KP5E>].

73. *See* Jael Pembrick, *Crowd Gathers at State Capitol in Support of Legalizing Medical Marijuana*, NEB. NEWS (July 2, 2020, 6:59 PM), <https://www.klknv.com/crowd-gathers-at-state-capitol-in-support-of-legalizing-medical-marijuana/> [<https://perma.cc/2JJX-MKHJ>].

74. LB 643, the "Cannabis Compassionate and Care Act," would have allowed patients with conditions such as Crohn's disease, epilepsy, opioid addictions, and some types of cancer to obtain marijuana in pill, oil, or liquid form. *See* Anna Gronewold, *Medical Marijuana Bill Fails in Nebraska*, ARGUS LEADER (Apr. 6, 2016, 6:43 AM), <https://www.argusleader.com/story/news/politics/2016/04/06/medical-marijuana-bill-fails-nebraska/82693392/> [<https://perma.cc/5FTJ-PVSJ>]. It was defeated in 2016 after failing to overcome a filibuster. *See id.* In 2021, Senator Anna Wishart introduced LB 474 to establish a medical cannabis program through the Nebraska Unicameral Legislature. *See* Kyle Jaeger, *Nebraska Medical Marijuana Legalization Bill Stalls in Legislature amid Filibuster*, MARIJUANA MOMENT (May 12, 2021), <https://www.marijuanamoment.net/nebraska-medical-marijuana-legalization-bill-stalls-in-legislature-amid-filibuster/> [<https://perma.cc/H4TE-6Q8S>]. Despite a strong public push from medical cannabis patients, their families, and other allies, the bill failed to overcome a filibuster. *See id.*

75. *See* William Cummings, *Nebraska Gov. Ricketts Warns: 'If You Legalize Marijuana, You're Going to Kill Your Kids,'* USA TODAY (Mar. 13, 2021, 4:53 PM), <https://www.usatoday.com/story/news/politics/2021/03/12/nebraska-gov-pete-ricketts-legal-marijuana-kill-your-kids/4663466001/> [<https://perma.cc/FL6Z-LG3D>].

76. *See id.*

Nebraska is a “dangerous” effort to go around the normal process of federal approval for medical drugs.⁷⁷ His official website states that legalizing medical marijuana “puts the well-being of Nebraskans at risk.”⁷⁸

The Nebraska Attorney General also strongly opposes medical marijuana stating: “Some say medical marijuana, I almost don’t even accept that title because I understand this comes from an industry that really has no medical concern.”⁷⁹ In 2019, he issued a flawed analysis that one of the medical marijuana bills in the state Legislature, the Medical Cannabis Act, would be preempted by the federal Controlled Substances Act.⁸⁰ Thirty-four other states have enacted laws similar to the Medical Cannabis Act pursuant to their Tenth Amendment powers, consistent with clear precedent from the U.S. Supreme Court,⁸¹ and largely without any preemption issue.⁸² The Attorney General’s legal analysis is so dubious that its intent seems likely aimed at undermining support for the bill rather than providing an accurate, impartial assessment of the actual legal risks.

77. *See id.*

78. *See Marijuana Is a Dangerous Drug*, OFF. GOVERNOR PETE RICKETTS, <https://governor.nebraska.gov/press/marijuana-dangerous-drug?autoplay=1> [<https://perma.cc/LHF5-49CT>] (last visited Jan. 15 2022). Additional comments on marijuana by Ricketts include: “States that legalize marijuana outright or incrementally (that is, through ‘medical marijuana’) have seen a human toll. This has included devastating effects on kids, tragic accidents, decreased participation in the workforce, and horrible mental health outcomes” and “[t]he multi-billion dollar marijuana industry will continue to say anything to get the drug legalized and avoid regulation for public safety. I urge Nebraskans to be steadfast in resisting their tactics.” Governor Pete Ricketts, *Marijuana: A Clear and Present Danger*, OFF. GOVERNOR PETE RICKETTS (Feb. 23, 2021), <https://governor.nebraska.gov/press/marijuana-clear-and-present-danger> [<https://perma.cc/SQ3D-UEA8>].

79. *See* Lauren Kummer, *Special Report: Medical Marijuana in Nebraska*, ADAM MORFIELD CNTY. ATT’Y, <https://adamorfild.com/uncategorized/special-report-medical-marijuana-in-nebraska/> [<https://perma.cc/EGZ5-4248>] (last visited Feb. 2, 2022).

80. *See* Robert Mikos, *Nebraska Attorney General Gives the State Some Bad Legal Advice Concerning Marijuana Legalization*, VAND. MARIJUANA L., POL’Y, & AUTH. (Aug. 4, 2019), <https://my.vanderbilt.edu/marijuanalaw/2019/08/nebraska-attorney-general-gives-the-state-some-bad-legal-advice-concerning-marijuana-legalization/> [<https://perma.cc/U8E4-C6NA>] (“[I]t should be pretty apparent by now that Congress has no power to preempt states from legalizing / authorizing marijuana possession and supply under state law. Simply put, the anti-commandeering rule enables states to legalize / authorize marijuana possession and sales.”).

81. *See, e.g.,* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018); *see also* *Printz v. United States*, 521 U.S. 898 (1997).

82. *Contra* Letter from Douglas J. Peterson, Att’y Gen. of Nebraska, & David A. Lopez, Deputy Solicitor Gen. of Nebraska, to Sen. Andrew La Grone, Nebraska Legis. (Dec. 20, 2019). Additionally, a federal budget rider specifically prevents federal action against these state laws. *See* *United States v. McIntosh*, 833 F.3d 1163, 1168, 1175–77 (9th Cir. 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).

To put it simply, the voters in Nebraska strongly support a policy reform that the majority of elected officials, including those with the most power, strongly oppose. Thus, like in many other states on the issue of marijuana, voters' only option for meaningful reform is to turn to the ballot initiative process to bypass intransigent elected lawmakers.

Nebraska has a long history of direct democracy. The initiative and referendum process in Nebraska was first established in 1912 through an amendment to the state constitution,⁸³ which declared: "The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative."⁸⁴ While not as commonly used as in some other states, Nebraska citizens have regularly exercised their legislative power to enact laws to address a range of issues, including soldiers' pay, legalizing bingo, property taxes, gun rights, and perhaps most famously, to establish a unicameral legislature that is unique to Nebraska.⁸⁵

The process in Nebraska is similar to that in many of the initiative states. Nebraskans may initiate legislation as either a state statute or as an amendment to the state constitution⁸⁶ and may repeal statutes adopted by the Legislature via veto referendum.⁸⁷ Additionally, the Legislature can legislatively refer, with a three-fifths majority vote, proposed constitutional amendments on the ballot for voters to adopt or reject.⁸⁸

For citizens to qualify an initiative for the ballot, there are a number of procedural requirements that must be met: (1) the signatures must be collected from a certain percentage of registered voters in the state — 10% for a constitutional amendment and 7% for a statutory measure; (2) they must be collected within a certain timeframe; and (3) they must meet distribution requirements among Nebraska's 93 counties.⁸⁹ Moreover,

83. See ROBERT B. EVNEN, SEC'Y OF STATE, STATE OF NEB., HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA (2019), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2018/state-initiative-and-referendum-packet.pdf> [<https://perma.cc/HG9K-DPXL>]. Many of the initial initiative supporters were alcohol prohibitionists trying to reduce the influence of liquor interests in politics. See *Nebraska, INITIATIVE & REFERENDUM INST.*, <http://www.iandrinstitute.org/states/state.cfm?id=17> [<https://perma.cc/426Y-Y9RA>] (last visited Feb. 2, 2022).

84. NEB. CONST. art. III, § 1.

85. See *Nebraska Initiatives (1912–2000)*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/docs/Nebraska.pdf> [<https://perma.cc/9GNL-ZPS6>]; see also INITIATIVE & REFERENDUM INST., *supra* note 16.

86. See NEB. CONST. art. III, § 2.

87. See *id.* art. III, § 3.

88. See *id.* art. XVI, § 1.

89. See *id.* art. III, §§ 2–3.

there are specific requirements as to what form the petition must take.⁹⁰ There are also substantive restrictions, including (1) that a ballot measure may not limit the Legislature's ability to enact taxes⁹¹ and (2) that each proposed measure must embrace only one subject, otherwise known as a "single-subject rule."⁹²

In 2019, frustrated by the failure to enact medical marijuana protections in Nebraska legislatively, two state lawmakers, Adam Morfeld and Anna Wishart, formed Nebraskans for Medical Marijuana. The express goal of this organization was to qualify an initiative for the ballot so that voters could directly reform marijuana laws.⁹³ Their petition to place the Nebraska Medical Cannabis Constitutional Amendment was filed with the Secretary of State for circulation and in June of 2020, they submitted over 182,000 signatures to the Secretary of State.⁹⁴ On August 27, 2020, the Secretary of State verified that the petition had enough valid signatures to qualify for the ballot.⁹⁵

A day prior to the last day for certification for the ballot, a law firm representing several unnamed Nebraska residents lodged an objection to the initiative's certification with the Secretary of State on the basis that the proposed initiative would violate Nebraska's single-subject rule and was legally insufficient.⁹⁶ The Secretary of State reviewed and rejected the challenge, and subsequently certified the initiative.⁹⁷ In *Wagner v. Evnen*,

90. See, e.g., NEB. REV. STAT. § 32-1405 (2021) (requiring petition must be filed with a statement as to the object of the petition and the text of the measure must be filed together with a sworn statement containing the names and address of the sponsors of the petition).

91. NEB. CONST. art. III, § 2 ("The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative.").

92. See *id.* ("Initiative measures shall contain only one subject.").

93. See NEBRASKANS FOR MEDICAL MARIJUANA, <https://www.nebraskamarijuana.org> [<https://perma.cc/3WMP-72LG>] (last visited Feb. 2, 2022).

94. See Brief of Intervenors at 8, State *ex rel.* Wagner v. Evnen, 948 N.W.2d 244 (Neb. 2020) ("On July 2, 2020, more than four months prior to the November 3, 2020, general election, the Sponsors properly submitted over 182,000 sufficient and valid signatures of registered Nebraska voters to Respondent for placement of the Medical Marijuana Initiative on the November 3, 2020, general election ballot."); see also Tom Angell, *Nebraska Medical Marijuana Campaign Submits 182,000 Signatures to Qualify for Ballot*, MARIJUANA MOMENT (July 2, 2020), <https://www.marijuanamoment.net/nebraska-medical-marijuana-campaign-submits-182000-signatures-to-qualify-for-ballot/> [<https://perma.cc/G5AX-X9DT>].

95. See generally Letter from Robert B. Evnen, Sec'y of State, Nebraska, to Mark Fahleson, Jason Grams & Max Kelch (Aug. 27, 2020) [hereinafter Evnen Letter] (on file with author).

96. See Letter from Mark A. Fahleson, Rembolt Ludtke, to Robert B. Evnen, Sec'y of State, Nebraska (Aug. 26, 2020) (on file with author).

97. See Evnen Letter, *supra* note 95, at 7 ("I conclude that the Amendment is legally sufficient and I shall not withhold it from the ballot unless otherwise ordered by a court of competent jurisdiction.").

the Lancaster County Sheriff then challenged the certification in the Nebraska Supreme Court raising the same single-subject claim, asking that the court remove the initiative from the ballot.⁹⁸

Single-subject rules are not an unusual requirement for legislation. Forty-three state constitutions require each piece of legislation be limited to a single subject.⁹⁹ But how the rule is interpreted and applied is inconsistent and varies across and within jurisdictions.¹⁰⁰ The main purpose of the single-subject rule is generally agreed to be twofold: to limit (1) “logrolling,” meaning the combining of two separate measures, each of which has minority support in order to garner majority support for the whole, and (2) “riders,” meaning adding a provision that does not have enough support on its own to a popular measure so that the popular measure carries the rider along.¹⁰¹

Nebraska’s single-subject rule was adopted by the voters via ballot initiative in 1998¹⁰² and only applied by the Nebraska Supreme Court to a voter ballot initiative once before in *Christensen v. Gale*.¹⁰³ In that case, the court adopted and applied the “natural and necessary connection test” for determining whether an initiative violates the single subject rule.¹⁰⁴ This test looks to whether “a proposed law, having natural and necessary connection with each other, and together, are a part of one general subject, the proposal is a single and not a dual proposition.”¹⁰⁵ In making this determination, the court looks to the proposed amendment’s “singleness of purpose and the relationship of the details to the general subject. The general subject is its primary purpose.”¹⁰⁶ In *Christensen*, the court upheld the Medical Assistance Act,¹⁰⁷ a proposed initiative to (1) expand Medicaid coverage to certain low-income adults in Nebraska and (2) direct the Nebraska Department of Health and Human Services to take actions necessary to maximize federal funding for medical assistance in the state. The court found that while maximizing federal funding was a secondary purpose, it had a natural and necessary connection to the expansion of

98. See *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244 (Neb. 2020).

99. See Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1633 (2019).

100. See *id.* at 1631 (“Even with the uptick in findings of violations in recent decades, the meaning of the rule remains murky, with the case law consisting of a mix of unpredictable ‘I know it when I see it’ decisions.” (internal citations omitted)).

101. See *id.* at 1634.

102. See Legis. Res. 32, 95th Leg., 1st Sess. (Neb. 1997).

103. See 917 N.W.2d 145 (Neb. 2018).

104. *Id.* at 156.

105. *Id.*

106. *Id.*

107. NEB. REV. STAT. §§ 68–901 to 68–991 (2017).

Medicaid because it would better enable the state to pay for the coverage.¹⁰⁸

The primary purpose of the Nebraskans for Sensible Marijuana Laws' proposed amendment was fairly straightforward — to legalize medical marijuana in Nebraska for persons with serious medical conditions. The language contained nine subsections related to this purpose: (1) allowing adult patients to use, possess, access, purchase, and produce marijuana if recommended by the physician; (2) allowing minor patients to do the same with permission from a parent or guardian; (3) allowing private entities to produce and provide marijuana to patients allowed to use under (1) and (2); (4) decriminalizing the allowed marijuana-related activities under state law; and (5) allowing the Legislature to enact health and safety regulations related to medical marijuana. Subsections (6)–(8) set forth a number of limitations on medical cannabis use. Subsection (9) simply defined “cannabis.”¹⁰⁹ The proposed measure was significantly simpler than many measures enacted previously by ballot initiatives in other states, many of which establish complex state regulatory programs as well as create patient registry and identification card programs, advisory boards, and tax and revenue streams.

The Nebraska Supreme Court disagreed. The court struck the entire initiative from the ballot. Even though sufficient signatures were collected and polling showed strong support for medical marijuana,¹¹⁰ Nebraskans were not permitted to vote on the initiative.

What was the court's reasoning? The court found that the Nebraska Medical Cannabis Constitutional Amendment (NMCCA) contained multiple different subjects — in violation of the single subject rule — and removed it from the ballot.¹¹¹ The court found that the initiative's general subject was to create a constitutional right for patients with serious medical conditions to produce and use cannabis subject to a recommendation by a physician, and that subsections (1) and (2) (allowing adult and minor patients to engage in these activities), subsection (5) (allowing the Legislature to regulate), and subsection (9) (defining cannabis) evidenced this purpose.

However, the court then found that subsections (3) (allowing private entities to produce and provide cannabis to patients) and (4) (decriminalizing the allowed conduct under state and local law) furthered a

108. *See Christensen*, 917 N.W.2d at 156.

109. *See* ADAM MORFELD, ANNA WISHART & NEBRASKANS FOR SENSIBLE MARIJUANA L., NEBRASKA MEDICAL CANNABIS CONSTITUTIONAL AMENDMENT (2019).

110. *See* Levenson, *supra* note 72.

111. *State ex. rel. Wagner v. Evnen*, 948 N.W.2d 244, 260 (Neb. 2020).

different purpose by providing the right to grow and sell and immunizing these activities. The court reasoned that subsections (1) and (2) were about individual rights and subsection (3) was about property rights and thus beyond the single purpose. And since subsection (1) allowed patients to produce marijuana, a patient's ability to access marijuana would not depend entirely on entities also being allowed to produce marijuana, and thus, subsection (3) was not necessarily connected to subsections (1) and (2).¹¹²

The court's reasoning is strained. A more logical and natural reading of the purpose of the proposed measure was to allow patients to use medical cannabis when recommended by the physician. The right to use was established through subsections (1) and (2). However, the right to use is meaningless without a mechanism for the marijuana to be produced and obtained by the patients. The source of marijuana was established through subsection (1) allowing patients to grow and subsection (3) allowing private entities to grow and provide to patients. There is simply no logic to the idea that the single-subject requirement mandates that the initiative limits patients to a single source of marijuana. While some patients can grow their own, other patients are elderly, incapacitated, lack an area to garden or a green thumb, and need to purchase their marijuana. However, both methods clearly fall together under an initiative with the purpose of providing patients access to medical marijuana. Without subsection (3), allowing private entities to produce and provide marijuana to patients, the right established in subsection (1), allowing adult patients to use, possess, access, purchase, and produce marijuana if recommended by a physician, becomes meaningless to many patients. There are few voters who would support the right of a patient to use medical marijuana but would oppose that patient's ability to obtain marijuana for use, undermining any serious claim of logrolling. This more reasoned approach is how the court analyzed the Medicaid initiative, where it found that the expansion of Medicaid was clearly connected to its funding source as both were intended to expand access to Medicaid.¹¹³ Additionally, it is also necessary for the activities in subsections (1) and (2) to have meaning for those engaging in the activities to be protected from arrest under subsection (4). If the allowed conduct is not decriminalized, then the purpose of the initiative is thwarted.

The court then went on to find the NMCCA had *six* additional purposes. Subsection (6) restricted medical marijuana use in public, in a correctional facility, while driving, or negligently, while subsection (7) restricted

112. *See id.* at 257.

113. *See Christensen*, 917 N.W.2d at 152–53.

medical marijuana use at work, and subsection (8) clarified that insurance was not required to cover medical marijuana. Together these subsections comprised a set of limitations to what the initiative was otherwise allowing. They simply narrow the rights being created. The court found that each of these limitations created a new subject by delving into additional areas of the law governing public spaces, employment, and insurance law.¹¹⁴ The court found that since a voter might want to approve or disapprove a right to use marijuana, but not want to approve or disprove the use of marijuana in a public space or while driving, this constituted impermissible logrolling: “On its face, the NMCAA indicates that these subjects of constitutional amendment were included for tactical convenience, not any natural and necessary connection. This is . . . an example of logrolling.”¹¹⁵

The court’s holding seems to create a new rule that limits initiatives to a single *provision* rather than to a single *subject* and that prohibits the inclusion of elements that are considered “tactical” based on their popularity with voters regardless of their relatedness to the purpose and subject of the initiative. Put simply, the court’s holding is that the single subject rule prohibits the voters from placing an initiative in the ballot that would *allow patients to use medical marijuana, except for in public*. The court considers the use of medical marijuana and the use of medical marijuana in public to be two separate subjects that must be presented as two separate initiatives to the voters.¹¹⁶ Because a restriction on marijuana use in public is a responsible public health provision making it likely popular with voters, the court views its inclusion “tactical” and is thus not allowed.¹¹⁷ Through its extreme narrowing of what constitutes a single subject, the court, in effect, removed the option for voters to enact an initiative to allow for medical marijuana with responsible guardrails, such as restrictions on public use and driving.

The court’s decertification of the NMCAA significantly limits Nebraska citizens’ right to the initiative as it creates a new rule that is so narrow as to be nearly impossible to follow. However, on the same day the court issued its decision removing the NMCAA from the ballot, it found that a trio of initiatives expanding gambling in Nebraska satisfied the single-subject rule, despite the initiatives containing multiple provisions touching numerous areas of substantive law, including taxing gambling to fund property tax

114. *See Wagner*, 948 N.W.2d at 259.

115. *Id.*

116. *See id.*

117. The dissent points out that the majority analysis would prevent citizens in a municipality that has previously banned dog ownership from proposing an initiative to allow for dog ownership with the exception of pit bulls. *See id.* at 170 (Papik, J., dissenting).

relief, as well as restrictions that limited activities otherwise allowed.¹¹⁸ In this decision, the court did not follow the logic it has just employed in *Wagner* that led it to conclude the restricting public use of medical marijuana was a different subject than legalizing medical marijuana. Here, this court held just the opposite: “Identifying and limiting the location of a new activity is a detail naturally and necessarily connected to its creation and not a separate subject” and that “logrolling has no application when propositions are related.”¹¹⁹ The court did not explain why these same principles do not apply to allowing the use of medical marijuana but not in public. This decision indicates that the court may be creating a special single-subject rule for marijuana-related initiatives that it will choose to not apply more broadly, or at least less stringently, to less disfavored subjects.

B. Case Study: South Dakota

Like Nebraska, South Dakota is one of the few states, prior to the 2020 election, that lacked any meaningful marijuana law reform. The state also has a strong history of aggressive enforcement against minor marijuana offenses. Unlike Nebraska however, South Dakota did not decriminalize possession of marijuana in the 1970s; it still remains a criminal offense.¹²⁰ Additionally, South Dakota was the only state that outlawed ingestion of a controlled substance where testing positive for marijuana on a drug screen can be a misdemeanor offense.¹²¹

Between 2009 to 2018, 31,883 people were arrested for marijuana in South Dakota; 95% of them were for possession offenses.¹²² In 2018, roughly one out of every ten arrests in South Dakota were for marijuana.¹²³ Moreover, the vast majority of marijuana arrests involved less than seven grams of the drug, and over 40% of all such arrests involved just one gram or less and not indicative of other criminal activity: 98.2% of marijuana violations in South Dakota from 2007 to 2016 were standalone offenses,

118. *See State ex rel. McNalley v. Evnen*, 948 N.W.2d 463 (2020).

119. *Id.* at 479–80.

120. S.D. CODIFIED LAWS § 22-42-6 (2021) (“It is a Class 1 misdemeanor to possess two ounces of marijuana or less.”).

121. *See id.* § 22-42-5.1; *see also* Lee Strubinger, *Former AG Urges State Lawmakers to Keep Ingestion on the Books*, S.D. PUB. RADIO (Oct. 10, 2019, 1:59 PM), <https://listen.sdpb.org/politics/2019-10-10/former-ag-urges-state-lawmakers-to-keep-ingestion-on-the-books> [<https://perma.cc/EF65-8Y8A>].

122. *See* JON B. GETTMAN, MARIJUANA ARRESTS IN SOUTH DAKOTA 3 (2018), <https://www.southdakotamarijuana.org/arrest-report> [<https://perma.cc/ER6T-TB8N>] (compiling data from the U.S. Department of Justice’s Uniform Crime Reporting (UCR) Program).

123. *See id.* at 16.

meaning the individual was not charged with any other crime.¹²⁴ In 2018, South Dakota had the highest total arrest rate of any state, increasing 176.1% since 2010.¹²⁵ In 2018, Black people were five times more likely than white people to be arrested for marijuana possession.¹²⁶

Until 2020, South Dakotans lacked any meaningful access to medical marijuana due to inaction by the Legislature¹²⁷ and failed ballot initiative attempts in both 2006¹²⁸ and 2010.¹²⁹ Despite the failed earlier ballot measures, a majority of voters now support medical marijuana and legalization for adult use.¹³⁰ Still, elected officials generally remain strongly opposed, led most prominently by Governor Kristi Noem who promised during her 2018 gubernatorial campaign to “oppose all attempts to legalize marijuana.”¹³¹ Governor Noem even vetoed a bill legalizing industrial hemp sent to her by the Legislature and penned an opinion piece in *The Wall Street Journal* on why she opposed the legalization of hemp,¹³² making South Dakota only one of three states not to legalize hemp as allowed under the federal farm bill.¹³³

124. *See id.* at 4.

125. *See* ACLU, *supra* note 70.

126. *See id.* at 88.

127. *See* H.R. Res. 1127, 84th Sess., Leg. Assemb. (S.D. 2009); *see also* H.R. Res 1128, 84th Sess., Leg. Assemb. (S.D. 2009).

128. *See South Dakota Medical Marijuana, Initiative 4 (2006)*, BALLOTPEdia, https://ballotpedia.org/South_Dakota_Medical_Marijuana_Initiative_4_%282006%29 [<https://perma.cc/ZGT5-9PT5>] (last visited Jan. 31, 2022).

129. *See South Dakota Medical Marijuana, Initiative 13 (2010)*, BALLOTPEdia, https://ballotpedia.org/South_Dakota_Medical_Marijuana_Initiative_13_%282010%29 [<https://perma.cc/D4LQ-7REL>] (last visited Jan. 31, 2022).

130. *See* Joe Sneve, *Poll: Most South Dakota Voters Support Legalizing Marijuana*, ARGUS LEADER (Sept. 18, 2020, 4:27 PM), <https://www.argusleader.com/story/news/2020/09/18/poll-most-south-dakota-voters-support-legalizing-marijuana/5828238002/> [<https://perma.cc/PRD8-SP4F>] (reporting on a poll from Public Opinion Strategies finding that 60% of respondents support full legalization and 70% support medical use legalization).

131. *See* Jacob Sullum, *9 Governors Get ‘A’ Grades for Marijuana Reform, up from 2 Last Year*, REASON (Jan. 24, 2019, 1:05 PM), <https://reason.com/2019/01/24/9-governors-get-a-grades-for-marijuana-r/> [<https://perma.cc/QLX4-A4BJ>].

132. *See* Kristi Noem, *Opinion, Why I Won’t Support Legalizing Hemp*, WALL ST. J. (Sept. 9, 2019, 6:38 PM), <https://www.wsj.com/articles/why-i-wont-support-legalizing-hemp-11568068697> [<https://perma.cc/GJ3X-HHFZ>].

133. *See generally* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. The other states are Idaho and New Hampshire. *See* Vishal Vivek, *A List of Legal Hemp States in the USA*, HEMP FOUND. (Feb. 7, 2020), https://hempfoundation.net/a-list-of-legal-hemp-states-in-the-usa/#12_Idaho [<https://perma.cc/4MTY-2ULV>]; *see also* Theresa Bennett, *Hemp’s Wild Ride in South Dakota Ends with Legalization*, HEMP GROWER (Aug. 6, 2020), <https://www.hempgrower.com/article/hemp-south-dakota-legalization/> [<https://perma.cc/4442-R85W>].

Like Nebraska, South Dakota has a long history with direct democracy. Father Robert Haire, a Catholic priest, was one of the originators of the initiative and referendum process, advocating for the adoption of direct democracy in South Dakota as early as the 1880s.¹³⁴ In 1898, the initiative and referendum were on the ballot and passed by a wide margin, making South Dakota the first state to adopt such a process allowing the voters to directly enact laws.¹³⁵ South Dakotans continue to be highly supportive of the citizen-led ballot initiative process as a way to make laws or change the state constitution.¹³⁶

With strong voter support in the face of lawmaker intransigence, two ballot campaigns placed both a medical-marijuana-initiated statute and a full legalization initiated constitutional amendment on the November 2020 ballot.¹³⁷ Both initiatives won handily on election day.¹³⁸ Initiative Measure 26 — to allow patients to use medical marijuana with a recommendation from their physician through the creation of a medical marijuana program — was enacted by 70% of the voters.¹³⁹ Furthermore, Constitutional Amendment A — to amend the South Dakota Constitution to remove penalties for the personal use of marijuana by adults who are 21 and older and allow the commercial production and distribution of marijuana — was enacted by the voters with 54% support.¹⁴⁰

134. See Katie Hunhoff, *Credit or Blame the Aberdeen Priest*, S.D. MAG. (Feb. 21, 2017), <https://www.southdakotamagazine.com/aberdeens-populist-priest> [<https://perma.cc/PYK7-RBT8>]; see also Patrick Gallagher, *Father Robert Haire: Humanity's Friend*, ABERDEEN MAG. (Dec. 2018), <https://aberdeenmag.com/2019/01/father-haire/> [<https://perma.cc/U3RP-S44S>].

135. See *History & Past South Dakota Ballot Questions*, S.D. SEC'Y ST., <https://sdsos.gov/elections-voting/upcoming-elections/ballot-question-information/general-ballot-question-information.aspx> [<https://perma.cc/D22W-CGM6>] (last visited Feb. 3, 2022).

136. See Bart Pfankuch, *Poll Part 3: South Dakotans Support Ballot Initiative Process and Oppose Lawmaker Interference*, MITCHELL REPUBLIC (May 27, 2021, 1:45 PM), <https://www.mitchellrepublic.com/news/poll-part-3-south-dakotans-support-ballot-initiative-process-and-oppose-lawmaker-interference> [<https://perma.cc/3LPV-RSG8>].

137. See *2020 Ballot Questions*, S.D. SEC'Y ST., <https://sdsos.gov/elections-voting/upcoming-elections/general-information/2020-ballot-questions.aspx> [<https://perma.cc/3YUC-8E2D>] (last visited Feb. 3, 2022).

138. See *South Dakota Official Election Returns and Registration Figures*, S.D. SEC'Y ST., <https://sdsos.gov/elections-voting/assets/ElectionReturns2020web.pdf> [<https://perma.cc/BS92-5N6H>] (last visited Feb. 3, 2022) (results of the 2020 General Election show that Amendment A won with 54% of the vote and Initiated Measure 26 won with 70% of the vote).

139. See *South Dakota Initiative Measure 26, Medical Marijuana Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Initiated_Measure_26_Medical_Marijuana_Initiative_\(2020\)](https://ballotpedia.org/South_Dakota_Initiated_Measure_26_Medical_Marijuana_Initiative_(2020)) [<https://perma.cc/5DA7-BKYK>] (last visited Feb. 3, 2022).

140. See *South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A_Marijuana_Legalization_Initiative_\(2020\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_A_Marijuana_Legalization_Initiative_(2020)) [<https://perma.cc/5298-FLJE>] (last visited Feb. 3, 2022).

The proponent of Amendment A was Brendan Johnson, the former U.S. Attorney for South Dakota under the Obama Administration. The opposition was led by Governor Noem, who chose to focus on Amendment A rather than the very popular Measure 26. She starred in an opposition ad stating: “The fact is, I’ve never met someone who got smarter from smoking pot . . . It’s not good for our kids. And it’s not going to improve our communities . . . As your governor, I’m urging all South Dakotans to vote no on legalizing marijuana this November.”¹⁴¹

Amendment A¹⁴² made lawful the possession, use, and cultivation of limited personal use quantities of marijuana; directed the department of revenue to license and regulate the production, testing, and sale of marijuana; and enacted a marijuana-specific tax to go to schools and the general fund. Additionally, it required the Legislature to legalize medical marijuana and hemp.¹⁴³ It was remarkably similar to successful voter-initiated amendments to legalize marijuana that were successfully adopted and implemented in numerous other states.¹⁴⁴

141. See Kyle Jaeger, *South Dakota Governor Urges ‘No’ Vote on Marijuana Legalization Initiative in New Ad*, MARIJUANA MOMENT (Oct. 23, 2020), <https://www.marijuanamoment.net/south-dakota-governor-urges-no-vote-on-marijuana-legalization-initiative-in-new-ad/> [<https://perma.cc/8NZN-XT9R>].

142. The text of Amendment A can be found at the South Dakota Secretary of State 2020 Ballot Questions webpage. See *2020 Ballot Questions*, *supra* note 137.

143. See *id.*

144. See *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_\(2012\)](https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_(2012)) [<https://perma.cc/X3Y4-JZQE>] (last visited Feb. 3, 2022); see also N.J. DIV. ELECTIONS, N.J. DEP’T OF STATE, OFFICIAL LIST PUBLIC QUESTION RESULTS FOR 11/03/2020 – GENERAL ELECTION: PUBLIC QUESTION NO. 1 (2020), <https://nj.gov/state/elections/assets/pdf/election-results/2020/2020-official-general-results-public-question-1.pdf> [<https://perma.cc/J7KC-ZX2K>]. For voter enacted constitutional amendments to legalize medical marijuana that were similar to Amendment A in complexity and substance, see *Arkansas Medical Marijuana Amendment, Issue 6 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment,_Issue_6_\(2016\)](https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment,_Issue_6_(2016)) [<https://perma.cc/RW2D-S8YG>] (last visited Feb. 3, 2022) (the ballot initiative was approved by 53% of state voters in 2016). See also *Colorado Medical Use of Marijuana, Initiative 20 (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Medical_Use_of_Marijuana,_Initiative_20_\(2000\)](https://ballotpedia.org/Colorado_Medical_Use_of_Marijuana,_Initiative_20_(2000)) [<https://perma.cc/4QFE-TPM3>] (last visited Feb. 3, 2022) (the initiative passed with 54 percent of the vote in 2000); *Florida Medical Marijuana Legalization, Amendment 2 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Medical_Marijuana_Legalization,_Amendment_2_\(2016\)](https://ballotpedia.org/Florida_Medical_Marijuana_Legalization,_Amendment_2_(2016)) [<https://perma.cc/7CWQ-Q69B>] (last visited Feb. 3, 2022) (approved by 71% of the electorate in 2016); *Missouri Amendment 2, Medical Marijuana and Veteran Healthcare Services Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri_Amendment_2,_Medical_Marijuana_and_Veteran_Healthcare_Services_Initiative_\(2018\)](https://ballotpedia.org/Missouri_Amendment_2,_Medical_Marijuana_and_Veteran_Healthcare_Services_Initiative_(2018)) [<https://perma.cc/L4PZ-6JRL>] (last visited Feb. 3, 2022) (enacted with 66% of the popular vote in 2018); *Mississippi Ballot Measure 1, Initiative 65 and Alternative 65A, Medical Marijuana Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_1,_Initiative_65_and_Alternative_65A,_Medical_Marijuana_Amendment_(2020)) [<https://perma.cc/D95N-KWQR>] (last visited

Immediately following the election, Pennington County Sheriff Kevin Thom and Superintendent of the South Dakota Highway Patrol Colonel Rick Miller, both of whom had publicly opposed the measure and campaigned against it, filed two complaints in South Dakota Circuit Court seeking to repeal the Amendment A.¹⁴⁵ Governor Noem then issued an executive order directing that the plaintiff bring the litigation on her behalf.¹⁴⁶

In the complaints, both Sheriff Thom and Superintendent Miller argued that the amendment does not adhere to the South Dakota Constitution.¹⁴⁷ They brought one challenge as an election contest even though they did not allege any evidence of irregularities in the voting or counting of votes. The circuit court dismissed this challenge.¹⁴⁸ The second challenge was a substantive claim that argued that Amendment A violated South Dakota's single-subject requirement and that it involved such a drastic rewriting of the South Dakota Constitution so as to require a constitutional convention rather than a simple initiative petition.¹⁴⁹

South Dakota's single-subject rule is a recent addition to the South Dakota Constitution, added via ballot initiative in 2018 to require that both initiated constitutional amendments and legislatively referred constitutional amendments concern only one single subject.¹⁵⁰ The Legislature placed it on the ballot as part of its effort to reform and restrict access to the ballot

Feb. 3, 2022) (Mississippians passed the Initiative in 2020); *Nevada Medical Marijuana Act, Question 9 (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada_Medical_Marijuana_Act,_Question_9_\(1998\)](https://ballotpedia.org/Nevada_Medical_Marijuana_Act,_Question_9_(1998)) [<https://perma.cc/MH2V-49QC>] (last visited Feb. 3, 2022) (first endorsed by 59% of voters in 1998).

145. See Brief for Appellants South Dakotans for Better Marijuana Laws, Randolph Seiler, William Stocker, Charles Parkinson, and Melissa Mentelam, *Thom v. Barnett*, 967 N.W.2d 261 (S.D. 2021) (Appeal No. 29546).

146. S.D. Exec. Order No. 2021-02 (2021), <https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.pdf> [<https://perma.cc/3XB8-L2AJ>].

147. See Brief for Appellants, *supra* note 145.

148. Sixth Circuit Judge Klinger rejected this challenge: "Contestants have not alleged any irregularities during the 2020 General Election, much less shown anything suggesting the will of the voters was suppressed. As a result, the issues alleged are not appropriately resolved in an election contest cause of action." *In re Election Contest as to Amendment A*, No. 32CIV20-186 (S.D. Cir. Ct. Feb. 8, 2021).

149. See Brief for Appellants, *supra* note 145 (claiming that Amendment A "proposed a drastic revision to the Constitution that could not be proposed by initiative under Article XXIII because it addressed multiple subjects and purported to add an entirely new article to the Constitution").

150. See *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, BALLOTPEDIA, [https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z,_Single-Subject_Rule_for_Constitutional_Amendments_\(2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z,_Single-Subject_Rule_for_Constitutional_Amendments_(2018)) [<https://perma.cc/X7VF-YR4T>] (last visited Jan. 18, 2022).

after nine initiatives appeared on the 2016 ballot.¹⁵¹ Speaker of the House Mark Mickelson was not coy about his intent in sponsoring changes claiming that the initiative process was “being cluttered and crowded out by folks that don’t live here So now, we get used as a testing ground because we’ve got cheap media markets and low ballot signature requirements to get on.”¹⁵²

The Sixth Circuit Court invalidated Amendment A, enacted by the voters only months earlier, on both grounds.¹⁵³ The court found that marijuana and hemp, although both cannabis plants, were different subjects and that enacting civil penalties, restricting penalties for various marijuana-related activities and services, and allocating tax revenue were not reasonably related to the overall topic of legalizing marijuana to constitute a single subject.¹⁵⁴ In doing so, the court tossed out the results of a validly held election where 55% of the voters were subject to a lengthy campaign in which they heard and flat-out rejected opponents’ policy-based argument.

Based on plaintiffs’ argument that Amendment A contained such an extensive rewriting of the South Dakota Constitution so to require a constitutional convention called by three-fourths of the Legislature and a majority vote of the people by initiative petition, the South Dakota Sixth Circuit found that Amendment A did, in fact, cross that threshold by removing certain authority held by the Legislature and the Governor and shifting it to a regulatory agency.¹⁵⁵ The decision was appealed to the South Dakota Supreme Court.¹⁵⁶ Five months after the voter enacted

151. House Bill 1141 established a task force to investigate the state’s initiative and veto referendum process and suggest changes to the legislature. *See 2017 Bills*, S.D. LEGISLATURE, <https://www.sdlegislature.gov/Session/Bills/27> [<https://perma.cc/U5HM-APHV>] (last visited Jan. 18, 2022).

152. Dirk Lammers, *2018 Legislators Chip Away at Initiated Measure Process*, CAP. J. (Sept. 24, 2019), https://www.capjournal.com/news/legislators-chip-away-at-initiated-measure-process/article_d258a640-3308-11e8-be49-9f9bb2167c9b.html [<https://perma.cc/TLX7-JXXV>].

153. *See Thom v. Barnett*, 967 N.W.2d 261, 266 (S.D. 2021).

154. The court also rejected the argument that the plaintiffs’ single-subject challenge was untimely and should have been brought prior to the election and the amendment being approved by the voters contrary to the process in several other states, such as Nebraska discussed above. *See id.*

155. *See Thom v. Barnett*, No. 32CIV20-187 (S.D. Cir. Ct. Feb. 8, 2021) (“Several provisions of Amendment A implement ‘far reaching changes’ in the basic nature of South Dakota’s governmental system by taking authority given to the Legislative and Executive branches and allocating it to the Department of Revenue.”).

156. *See Thom*, 967 N.W.2d.; *see also WATCH: Supreme Court Arguments on Amendment A*, KELOLAND MEDIA GROUP (Apr. 28, 2021, 2:03 PM), <https://www.keloland.com/news/local-news/south-dakota-marijuana/supreme-court->

amendment was to take effect, the Supreme Court invalidated Amendment A based on its determination that Amendment A violated the South Dakota Constitution.¹⁵⁷

The court found that Amendment A embraced three separate subjects unconnected to each other in purpose: (1) Recreational marijuana, through the creation of a system to legalize, regulate, and tax marijuana for adults 21 years of age and older; (2) hemp, by directing the Legislature to regulate hemp; and (3) medical marijuana, by directing the Legislature to allow access for medical use by qualifying patients.¹⁵⁸ The South Dakota Supreme Court stated that the purpose of the single subject rule is to prevent logrolling, “the ‘pernicious practice’ of combining unrelated provisions in one amendment to ensure passage of a provision that might otherwise fail had the provisions been submitted separately.”¹⁵⁹ The court expressed concern that the inclusion of the medical marijuana and hemp provisions forced voters who favor one or both of those changes to also approve recreational marijuana, while ignoring the long history of South Dakota and federal law treating and criminalizing all marijuana, including hemp, as one substance.¹⁶⁰

Additionally, the court ignores that Amendment A appeared on the same ballot as Measure 26, an alternative medical marijuana-only initiative providing voters who favored medical marijuana, but opposed recreational marijuana, an easy alternative option. That 70% of voters approved Measure 26 and only 54% of voters approved Amendment A undercuts the court’s suggestion of voter confusion. Voters who wanted medical marijuana, but not recreational marijuana, voted for Measure 26. Those who wanted both, voted for Amendment A. And in terms of hemp, the Legislature had already adopted hemp legislation at the time of the vote on Amendment A.¹⁶¹ Justice Myren points out in dissent that while the

arguments-on-amendment-a-to-livestream-on-keloland-com/ [https://perma.cc/66E8-R9QA].

157. *See generally Thom*, 967 N.W.2d at 282–83. Court declined to rule on the claim that Amendment A constituted a constitutional revision rather than an amendment. *See id.* at 276.

158. *See id.*

159. *Id.* at 279.

160. *See id.* at 290 (Myren, J., dissenting) (“The majority rejects any connected object or purpose between recreational marijuana, medical marijuana, and hemp based upon ‘their shared biological origin from the cannabis plant and a common plan to comprehensively regulate all products produced by’ that plant. It dismisses any such connection as insufficient for purposes of *Herried* and *Barnhart*. But this dismissal ignores the history of dual regulation Marihuana Tax Act of 1937.”).

161. *See generally* Lisa Kaczke, *Industrial Hemp Becomes Legal in South Dakota After Noem Signs Bill*, ARGUS LEADER (Mar. 27, 2020, 6:33 PM), <https://www.argus>

majority expresses concern about logrolling, it does not assert that voters were actually confused.¹⁶² He states that the majority opinion “departs from the ‘strong presumption of constitutionality’ we are to accord to Amendment A” in rejecting the express will of the voters.¹⁶³

C. Case Study: Mississippi

In 2020, voters in Mississippi overwhelmingly enacted a medical marijuana initiative¹⁶⁴ that resulted in not just a curtailing of voter initiative process but its complete destruction. Although Mississippi, like Nebraska, was one of the states to reduce penalties for marijuana possession in the late 1970s,¹⁶⁵ it also, like Nebraska, is among the few states to not adopt an effective medical marijuana program or reform its marijuana laws in any meaningful way.¹⁶⁶ Despite decriminalization in 2018, there were almost 9,000 marijuana possession arrests comprising 44% of all the drug arrests in the state that year.¹⁶⁷ Black people were 2.7 times more likely than white people to be arrested for marijuana possession.¹⁶⁸ And because there is no medical marijuana program, patients lack any meaningful access to marijuana even if their physician recommends it to treat or manage serious medical conditions.

Like the vast majority of voters throughout the United States,¹⁶⁹ Mississippi voters support providing access to medical marijuana by a large

leader.com/story/news/politics/2020/03/27/industrial-hemp-becomes-legal-south-dakota-after-noem-signs-bill/5058216002/ [https://perma.cc/DVK3-KWYA].

162. See *Thom*, 967 N.W.2d at 291 (Myren, J., dissenting) (“The majority concludes Amendment A represents precisely the type of logrolling Article XXIII, § 1 forbids. Yet, the majority makes no assertion that voters were misinformed about or confused by the Amendment.”).

163. *Id.* (quoting *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974)).

164. See, e.g., *Initiative Measure #65*, MISS. SEC’Y ST., <https://www.sos.ms.gov/elections-and-voting/initiative-measure-65> [https://perma.cc/BMX4-37F9] (last visited Feb. 3, 2022).

165. First offense possession of 30 grams is punishable by a \$250 fine rather than jail. See MISS. CODE ANN. § 41-29-139(c)(2)(A)(1) (2022).

166. See H.R. Res. 1231, 2014 Leg., Reg. Sess. (Miss. 2014). In 2014, “Harper Grace’s Act” was enacted approving limited quantities of cannabidiol if prescribed by a physician but failing to provide any meaningful access to cannabis for patients. See MISS. CODE ANN. § 41-29-136 (2022).

167. See ACLU, *supra* note 70, at 73.

168. See *id.*

169. See Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/> [https://perma.cc/F694-YQY5] (finding 91% of U.S. adults think medical marijuana should be legal).

margin. Public opinion surveys show high bipartisan support,¹⁷⁰ while elected lawmakers strongly oppose or refuse to act. Thus, following the pattern for reform employed by voters in many other states, Mississippi voters' only option to obtain the medical marijuana program they support is by going directly to the ballot.

Mississippi is one of the few southern states that has a ballot process allowing voters to directly place initiatives on the ballot.¹⁷¹ The process was adopted in 1992¹⁷² through a constitutional amendment placed on the ballot by the Legislature that succeeded with a decisive 70% of the vote.¹⁷³ At this time, it was hailed as a progressive reform.¹⁷⁴

However, qualifying an initiative for the ballot is not an easy task. While the Mississippi Constitution did not contain a single-subject requirement,¹⁷⁵ it required that initiative petitions be submitted to the Legislature to allow lawmakers to amend the proposed measure and then place an alternative on the ballot alongside the voter initiative measure to allow the voters to choose between the options.¹⁷⁶ Additionally, an initiated constitutional amendment required at least 12% of the total number of votes cast for the governor in the last gubernatorial general election immediately preceding the signature deadline, and the signatures were required to be distributed evenly across the state among each congressional district.¹⁷⁷

170. See Justin Dixon, *Survey Finds 81% of Mississippians Support Medical Cannabis Legalization*, WLBT (Sept. 2, 2020, 2:33 PM), <https://www.wlbt.com/2020/09/02/mississippians-support-medical-marijuana-survey-finds/> [https://perma.cc/RA2Y-AMB7]. Measure 1 and Amendment A, the medical marijuana questions on the ballot in 2020, passed with over 68% and 73% of the vote, respectively. See *Mississippi Ballot Measure 1, Initiative 65 and Alternative 65A, Medical Marijuana Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/Mississippi_Ballot_Measure_1_Initiative_65_and_Alternative_65A_Medical_Marijuana_Amendment_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_1_Initiative_65_and_Alternative_65A_Medical_Marijuana_Amendment_(2020)) [https://perma.cc/K4LB-YFEC] (last visited Feb. 3, 2022).

171. Arkansas and Florida have voter-initiated ballot measure processes, but South Carolina, Georgia, Alabama, Louisiana, Kentucky, Tennessee, North Carolina, West Virginia, and Texas do not. See *Amending State Constitutions*, BALLOTPEdia, https://ballotpedia.org/Amending_state_constitutions#initiated_amendments [https://perma.cc/Z8TD-7QUL] (last visited Feb. 3, 2022).

172. Mississippi had previously had an initiative process that the state supreme court invalidated in 1922. See *Mississippi, INITIATIVE & REFERENDUM INST.*, <http://www.iandrinstute.org/states/state.cfm?id=13> [https://perma.cc/D5X3-25YM] (last visited Feb. 3, 2022).

173. See *id.*

174. See *id.*

175. See MISS. CONST., art. XV, § 273.

176. See *id.* art. XV, § 273(7)–(8).

177. See *id.* art. XV, § 273(3).

Under the leadership of State Representative Joel Bomgar, a political committee named “Medical Marijuana 2020” was created to launch a campaign to enact a constitutional amendment to allow patients with a recommendation from their physician to use and access medical marijuana under state law.¹⁷⁸ Over the course of a year, the campaign collected and submitted over 214,000 signatures and Initiative 65 qualified for the ballot.¹⁷⁹

Initiative 65’s¹⁸⁰ substance was similar to many of the medical marijuana initiatives enacted by voters in other states, including those that amended various state constitutions.¹⁸¹ It established protections for qualifying patients to access limited amounts of medical marijuana for specific medical conditions upon the recommendation of a physician and directed the Mississippi Department of Health to implement and regulate a medical marijuana program that would include patient identification cards

178. See *Protect Our Vote Initiative 65 for Medical Marijuana*, MED. MARIJUANA 2020, <https://www.medicalmarijuana2020.com/> [<https://perma.cc/AYQ9-7XHN>] (last visited Feb. 3, 2022); see also Wyatt Emmerich, *A Sensible Argument for Medical Marijuana in Mississippi*, YAZOO HERALD (Jan. 23, 2020, 2:57 PM), <https://www.yazooherald.net/opinion-columnists/sensible-argument-medical-marijuana-mississippi#sthash.RoLN1MEk.dpbs> [<https://perma.cc/4444-DQJ2>].

179. See Kyle Jaeger, *Medical Marijuana Measure Officially Qualifies for Mississippi 2020 Ballot*, MARIJUANA MOMENT (Jan. 8, 2020), <https://www.marijuana-moment.net/medical-marijuana-measure-officially-qualifies-for-mississippi-2020-ballot/> [<https://perma.cc/TA4Y-83RG>].

180. Initiative 65 appeared on the Mississippi 2020 General Election ballot. See *Initiative Measure #65*, MISS. SEC’Y ST., <https://www.sos.ms.gov/elections-and-voting/initiative-measure-65> [<https://perma.cc/9JAP-3WJ5>] (last visited Feb. 3, 2022).

181. See *Arkansas Medical Marijuana Amendment (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment_Issue_6_\(2016\)](https://ballotpedia.org/Arkansas_Medical_Marijuana_Amendment_Issue_6_(2016)) [<https://perma.cc/MYK2-Z6UU>] (last visited Feb. 3, 2022) (Arkansas’s Issue 6, a ballot initiative, was approved by 53% of state voters in 2016); *Colorado Medical Use of Marijuana, Initiative 20 (2000)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Medical_Use_of_Marijuana_Initiative_20_\(2000\)](https://ballotpedia.org/Colorado_Medical_Use_of_Marijuana_Initiative_20_(2000)) [<https://perma.cc/8NZJ-32PR>] (last visited Feb. 3, 2022) (Colorado’s Amendment 20, an initiative, passed with 54% of the vote in 2000); *Florida Medical Marijuana Legalization Amendment 2 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Medical_Marijuana_Legalization_Amendment_2_\(2016\)](https://ballotpedia.org/Florida_Medical_Marijuana_Legalization_Amendment_2_(2016)) [<https://perma.cc/AJE6-WGEP>] (last visited Feb. 3, 2022) (Florida’s Amendment 2 was approved by 71% of the electorate in 2016); *Missouri Amendment 2, Medical Marijuana and Veteran Healthcare Services Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri_Amendment_2_Medical_Marijuana_and_Veteran_Healthcare_Services_Initiative_\(2018\)](https://ballotpedia.org/Missouri_Amendment_2_Medical_Marijuana_and_Veteran_Healthcare_Services_Initiative_(2018)) [<https://perma.cc/J3GL-WFZZ>] (last visited Feb. 3, 2022) (Missouri’s Amendment 2, enacted with 66% of the popular vote in 2018); *Nevada Marijuana Legalization, Question 2 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada_Marijuana_Legalization_Question_2_\(2016\)](https://ballotpedia.org/Nevada_Marijuana_Legalization_Question_2_(2016)) [<https://perma.cc/49YZ-W8CH>] (last visited Feb. 3, 2022) (Nevada’s Question 2, first endorsed by 65 % of voters in 1998).

and registration, licensing, and oversight of production and distribution.¹⁸² The Legislature then chose, in accordance with the process, to place an alternative medical marijuana initiative (Alternative 65A) on the ballot¹⁸³ along with Initiative 65 presumably either to confuse voters, offer voters a more modest reform, or to split the vote — since the Legislature could have enacted a medical marijuana law legislatively at any time, but chose not to.¹⁸⁴

Many elected leaders expressed strong opposition to Initiative 65. Governor Tate Reeves tweeted days before the election: “There are good folks on all sides of the medical marijuana debate. Most non-stoners say we should be careful & deliberate. Initiative 65 is the opposite. Experts say it would mean the most liberal weed rules in the U.S.! Pot shops everywhere — no local authority.”¹⁸⁵ Many of Mississippi’s health associations, including the Mississippi State Board of Health¹⁸⁶ and the Mississippi State Medical Association, also opposed the measure.¹⁸⁷

Initiative 65 and Measure 65A¹⁸⁸ appeared on the ballot together in November 2020. The ballot was structured so that voters first decided yes or no as to whether they wanted medical marijuana and then choose

182. See *Medical Marijuana*, MISS. SEC’Y ST., <https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IID=65> [<https://perma.cc/A3HF-F8LJ>] (last visited Feb. 3, 2022).

183. See Matt Harrison, *Mississippi Ballot Initiative Analysis: Initiative 65 and Alternative 65A (2020)*, REASONS FOUND. (Oct. 1, 2020), <https://reason.org/voters-guide/mississippi-ballot-initiative-analysis-initiative-65-and-alternative-65a-2020/> [<https://perma.cc/LF8C-93Y7>].

184. See Bobby Harrison, *Two Medical Marijuana Proposals Will Be on November Ballot, Some Believe Resulting in Confusion*, MISS. TODAY (Mar. 13, 2020), <https://mississippitoday.org/2020/03/13/two-medical-marijuana-proposals-will-be-on-november-ballot-some-believe-resulting-in-confusion/> [<https://perma.cc/SGX5-2LMR>] (“Supporters of the medical marijuana initiative say the legislative alternative is designed to confuse the voters and result in the defeat of both.”).

185. Tate Reeves (@tatereeves), TWITTER (Nov. 1, 2020, 6:49 PM), <https://twitter.com/tatereeves/status/1323049483953967104?lang=en> [<https://perma.cc/LD6Q-9H98>]; see also Giacomo Bologna, *Mississippi Leaders Told Voters Not to Legalize Medical Marijuana. They Voted for It Anyway*, CLARION LEDGER (Nov. 11, 2020, 2:13 PM), <https://www.clarionledger.com/story/news/politics/2020/11/11/medical-marijuana-mississippi-why-did-pass/6161855002/> [<https://perma.cc/A4P5-UW34>].

186. See *Medical Marijuana Will Be on Mississippi’s November Ballot*, WLOX (Jan. 8, 2020, 5:19 PM), <https://www.wlox.com/2020/01/08/medical-marijuana-will-be-mississippi-november-ballot/> [<https://perma.cc/HL2L-UWSZ>].

187. See Press Release, Mississippi State Med. Ass’n, Mississippi Physicians and AMA Urge “NO” Vote on Initiative 65, <https://myemail.constantcontact.com/Mississippi-physicians-and-AMA-urge—NO—vote-on-Initiative-65.html?soid=1103816735043&aid=EIF3K11A5VQ> [<https://perma.cc/86GK-DL8H>] (last visited Jan. 30, 2022).

188. See *Initiative Measure #65*, *supra* note 164.

between Initiative 65 and Measure 65A.¹⁸⁹ On the question of whether they wanted medical marijuana, over 65% said yes and over 73% chose Initiative 65.¹⁹⁰

Immediately prior to the election, however, the Mayor of the City of Madison, Mary Hawkins Butler, filed a lawsuit challenging Initiative 65's certification for the ballot.¹⁹¹ Mayor Hawkins Butler opposed the initiative on its substance because it limited cities' ability to regulate the location of medical marijuana businesses.¹⁹² However, her arguments against the initiative in her lawsuit were purely procedural.¹⁹³ The lawsuit claimed that the initiative process set forth in the Mississippi Constitution specified that no more than one-fifth of the signatures may come from each congressional district.¹⁹⁴ In 1992, when the initiative process was added to the Constitution, Mississippi had five congressional districts.¹⁹⁵ Following the 2000 Census, however, the number of congressional districts in Mississippi dropped to four.¹⁹⁶ Thus, the initiative requirements in the Constitution presented a mathematical impossibility as with only four districts, more than one-fifth of the signatures must come from each.¹⁹⁷

The state attorney general had addressed this conundrum in 2009 by issuing a legal opinion advising initiative sponsors to continue to collect signatures from the five old congressional districts, and this is what the sponsors of Initiative 65 did to qualify for the ballot.¹⁹⁸ After the 2000 Census, when the number of congressional districts was reduced from five

189. *See id.*

190. *See* Jimmie E. Gates, *Medical Marijuana in Mississippi Approved with Initiative 65 Vote. Here's What That Means*, CLARION LEDGER (Nov. 4, 2020, 12:44 PM), <https://www.clarionledger.com/story/news/politics/2020/11/04/mississippi-medical-marijuana-initiative-65-a-election-results/6035290002/> [<https://perma.cc/5R3E-DNHZ>]; *see also* *Mississippi Ballot Measure 1, Initiative 65 and Alternative 65 A, Medical Marijuana Amendment (2020)*, *supra* note 170.

191. *See* *In re Initiative Measure No. 65: Butler v. Watson*, No. 2020-IA-01199-SCT, 2021 WL 1940821, at *1 (Miss. 2021).

192. *See* Associated Press, *Analysis: Lawsuit Threatens Mississippi Medical Marijuana*, JACKSON FREE PRESS (Dec. 14, 2020, 12:38 PM), <https://www.jacksonfree.com/news/2020/dec/14/analysis-lawsuit-threatens-mississippi-medical-mar/> [<https://perma.cc/9PJY-NEFX>].

193. *See generally* *Butler*, 2021 WL 1940821 (arguing that the Secretary of State's certification of Initiative Measure No. 65 was unconstitutional based on the impossibility of satisfying the requirement that signatures be collected from five congressional districts when Mississippi currently now has only four congressional districts).

194. *See id.* at *1; *see also* MISS. CONST. art. XV, § 273.

195. *See Butler*, 2021 WL 1940821, at *15.

196. *See id.* at *14.

197. *See id.* at *6 (quoting an opinion from the Attorney General Office that “[i]t would be mathematically impossible to satisfy the requirements of Section 273 using just four districts”).

198. Voter Initiative Law, Op. Miss. Att’y Gen., 2009 WL 367638 (2009).

to four, two other initiatives were placed on the ballot and adopted by voters after their proponents used the same signature collecting approach as the sponsors of Initiative 65. Initiative 27 required voter identification at polls, and Initiative 31 restricted the government's ability to take land through eminent domain. Neither initiative was challenged, leaving both as good law.

Despite the substance of the challenge being a purely procedural issue, a number of opponents of medical marijuana filed amicus briefs with the Mississippi Supreme Court. They presented the court with policy-focused arguments about what they believe to be the harms of marijuana to public health — that it is a “gateway” drug to more illicit substances, causes loss of IQ, and leads to mental health disorders¹⁹⁹ — and asked the court to invalidate the initiative process based on these policy grounds.²⁰⁰ These were the same policy arguments that opponents made against Initiative 65 during the campaign that were overwhelmingly rejected by the voters.

On May 14, 2021, the Mississippi Supreme Court determined that Initiative 65 was improperly placed before the voters for failure to satisfy the initiative distribution requirement and, in the process, invalidated the people's right to an initiative in the state constitution. The court held that:

Whether with intent, by oversight, or for some other reason, the drafters of section 273(3) wrote a ballot-initiative process that cannot work in a world where Mississippi has fewer than five representatives in Congress. To work in today's reality, it will need amending — something that lies beyond the power of the Supreme Court.²⁰¹

A scathing pair of dissenting opinions pointed out the five congressional districts continue to exist in Mississippi statute — “Just crack open the Mississippi Code. Section 23-15-1037 is still right there on the books, and the five districts remain unchanged”²⁰² — and can be employed to satisfy the constitutionally mandated distribution requirement.²⁰³ Justice

199. See Frank Corder, *Amicus Briefs Pile Up in Support of Madison Mayor's Case Against Medical Marijuana Initiative 65*, Y'ALL POL. (Dec. 16, 2020), <https://yallpolitics.com/2020/12/16/amicus-briefs-pile-up-in-support-of-madison-mayors-case-against-medical-marijuana-initiative-65/> [<https://perma.cc/2MRM-TXEJ>].

200. See *id.*; see also Brief for Mississippi Sheriff's Ass'n as Amici Curiae Supporting Petitioner at 2, *Butler*, 2021 WL 1940821 (No. 2020-IA-01199-SCT) (“Marijuana is already the most used illicit drug in the United States and increased usage will have a corresponding effect of increased addiction. Data suggests marijuana use among adolescents is linked to a decline in IQ as well as potential mental health problems. This lack of a complete understanding of the impacts of the above, make it imprudent to legalize medical marijuana.”).

201. *Butler*, 2021 WL 1940821, at *12.

202. *Id.* at *15 (Maxwell, J., dissenting).

203. See generally *id.*

Maxwell's dissent asserts that the court's holding allows an issue solely involving federal congressional elections to "somehow *unintentionally* destroy[] Mississippi's constitutional citizen-based ballot-initiative process"²⁰⁴ and assumes a "legislative incompetence or malevolence and/or a desire of the people to put a selfdestruct [sic] sequence into the initiative process they granted unto themselves."²⁰⁵

While the position of the court on the policy behind Initiative 65 is unknown, the legal analysis employed by the majority, as pointed out in the dissent, stretched credibility. Were the court aiming to save the Mississippi Constitution from being amended to include medical marijuana, they destroyed a piece of it in the process.²⁰⁶

CONCLUSION

Democracy is under assault in numerous ways, with some methods of attack receiving less attention and being met with less alarm than others.

The ballot initiative process is one way for voters to engage directly in lawmaking by circumventing their elected representatives and directly deciding what laws to adopt or reject. In recent years, although not always, voters are acting to adopt more progressive policies than their elected representatives' support. Lawmakers in various states are also striking back to preserve their own power by restricting voters' ability to legislate.

This is the case with marijuana law reform. Voters and legislators simply disagree, making it a prime candidate for direct democracy. And over the past 30 years — at the municipal and then at the state level — the voters have repeatedly prevailed.

However, as the case studies here show, it is now conservative state courts that are doing the circumventing, twisting the doctrine of the initiative process in absurd ways to thwart the will of the voters on marijuana reform and halt its progress. It may be that this is really about marijuana and an entrenched institutional fear of departing from the status quo. But, as seen in Mississippi, the collateral damage of the hostility to marijuana reform is destroying direct democracy itself.

Those who see the initiative process as an important vehicle for democratic advancement and values would do well to pay attention to these otherwise obscure state supreme court rulings. These rulings likely only

204. *Id.* at *13.

205. *Id.* at *19.

206. As of February 2022, Mississippi *just* adopted a medical cannabis law. See M. Tae Phillips, *Mississippi Approves Medical Marijuana: What a Long, Strange Trip It's Been*, NAT'L L. REV. (Feb. 9, 2022), <https://www.natlawreview.com/article/mississippi-approves-medical-marijuana-what-long-strange-trip-it-s-been> [<https://perma.cc/2UF2-JREX>].

represent a bump in the road towards the eventual full legalization of marijuana, but the damage to democracy will be lasting.