

Big Bills Are a Bust: Why Piecemeal Legislation is the Way to Go for Federal Cannabis Reform

*Sierra Taylor Horton**

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* - J.D., University of the Pacific, McGeorge School of Law, 2023; B.A. English, University of California, Davis, 2015. I would like to thank McGeorge School of Law Distinguished Professor Michael Vitiello and Adjunct Professor Robert Baca for their immensely helpful guidance as I wrote this article. I would also like to thank the Government Law Review’s Board of Editors and staff for their feedback and support. Finally, as always, a huge thank you to my family and friends for their encouragement.

I. INTRODUCTION

On April 20, 2021, United States Senate Majority Leader for the 117th Congress, Chuck Schumer, took to the Senate Floor and deemed 4/20 an “unofficial American holiday.”¹

It’s as appropriate a time as any to take a hard look at our laws that have over criminalized use of marijuana and put it on par with heroin, LSD, and other narcotics that bare little or no resemblance in their effects, either on individuals or on society more broadly,

Schumer stated.² “The War on Drugs has too often been a war on people, and particularly people of color.”³ With that declaration, Schumer openly advocated for the end of federal marijuana prohibition and doubled down on his promise to introduce a bill that would accomplish that goal.⁴ Exactly one year later, on April 20, 2022, news outlets reported that Schumer would file the promised bill—the Cannabis and Administration Opportunity Act (“CAOA”)—before Congress’s August 2022 recess.⁵ The

¹ Oma Seddiq, *Chuck Schumer Calls 4/20 an ‘Unofficial American Holiday’ as He Makes the Case for Marijuana Legalization*, INSIDER (Apr. 20, 2021, 12:46 PM), <https://www.businessinsider.com/schumer-calls-420-an-unofficial-american-holiday-talks-legalization-2021-4> [<https://perma.cc/SX88-VPBU>]; See German Lopez, *4/20, The Marijuana Holiday, Explained*, Vox, <https://www.vox.com/policy-and-politics/2019/4/19/18484698/what-is-420-meaning-marijuana-legalization> [<https://perma.cc/HY7U-6FBF>] (Apr. 20, 2021, 9:10 AM EDT) (describing 4/20 as a pro-marijuana holiday that began as part of the 1970s counterculture movement to protest “social and legal stigmas against marijuana.” The holiday has become a more mainstream, commercial event).

² Lopez, *supra* note 1.

³ *Majority Leader Schumer, Senate Finance Committee Chair Wyden and Senator Booker Release Discussion Draft of Cannabis Administration and Opportunity Act, Legislation to End the Federal Cannabis Prohibition and Unfair Targeting of Communities of Color*, SENATE DEMOCRATS (July 14, 2021), <https://www.democrats.senate.gov/newsroom/press-releases/majority-leader-schumer-senate-finance-committee-chair-wyden-and-senator-booker-release-discussion-draft-of-cannabis-administration-and-opportunity-act-legislation-to-end-the-federal-cannabis-prohibition-and-unfair-targeting-of-communities-of-color> [<https://perma.cc/T25U-TNUK>].

⁴ Lopez, *supra* note 1. See also Will Yakowicz, *Senator Schumer Says Bill to End Federal Cannabis Prohibition To Come ‘Shortly’*, FORBES (Mar. 31, 2021, 11:48 PM EDT), <https://www.forbes.com/sites/willyakowicz/2021/03/31/senator-schumer-says-bill-to-end-federal-cannabis-prohibition-to-come-shortly/> [<https://perma.cc/6LW6-PFY4>].

⁵ Hayes Brown, *Chuck Schumer’s Marijuana Bill is Looking Like a Pipe Dream*,

CAOA, which Democratic Senators Cory Booker and Ron Wyden are co-authoring with Schumer, has lofty goals.⁶ Notably, the bill seeks to decriminalize marijuana and remove it from the Controlled Substances Act (“CSA”).⁷ It would also “[p]ermit the movement of cannabis products through the channels of interstate commerce,” and impose a new federal excise tax—up to 25% of the removal price—on the sale of cultivated marijuana.⁸ The CAO A would establish and conduct studies into the effects of cannabis use for medical purposes, its impacts on the human brain, and “the impacts of driving under the influence of marijuana.”⁹ Among other regulatory aspects of the CAO A, the bill would also implement social equity programs that seek openly to benefit marginalized communities disproportionately harmed by the War on Drugs.¹⁰

MSNBC (Apr. 20, 2022, 9:58 AM PDT), <https://www.msnbc.com/opinion/msnbc-opinion/why-democrats-marijuana-legislation-going-smoke-n1294596> [<https://perma.cc/735A-PY99>]; Kyle Jaeger, *Schumer’s Marijuana Legalization Bill Not Coming This Month, As Senators Work to Finalize Provisions*, SCHEDULE 6 FOUNDATION: MARIJUANA MOMENT (Apr. 14, 2022), <https://www.marijuanamoment.net/schumers-marijuana-legalization-bill-not-coming-this-month-as-senators-work-to-finalize-provisions/> [<https://perma.cc/FUU3-QLP3>]; See Gustav Stickley V, *The Cannabis Administration and Opportunity Act: Too Much Too Soon? Too Little Too Late? Or Just the Right Time?*, JD SUPRA (Sep. 21, 2021), <https://www.jdsupra.com/legalnews/the-cannabis-administration-and-5667781/> [<https://perma.cc/2U99-46PY>] (explaining that Senator Schumer, along with his co-authors, originally introduced the CAO A on July 14, 2021. The deadline for public comment on the bill passed in September 2021 and it is likely that the CAO A’s drafters will revise the bill based on input received from special interest groups. Among the groups who provided input during the public comment period were the U.S. Cannabis Council, the DC Fiscal Policy Institute, and the Marijuana Policy Project.).

⁶ See Stickley V, *supra* note 5 (outlining the main goals of the CAO A); *Senator Booker, Majority Leader Schumer, and Senate Finance Committee Chair Wyden Release Discussion Draft of Cannabis Administration and Opportunity Act, Legislation to End the Federal Cannabis Prohibition and Unfair Targeting of Communities of Color*, CORY BOOKER (July 14, 2021), <https://www.booker.senate.gov/news/press/senator-booker-majority-leader-schumer-and-senate-finance-committee-chair-wyden-release-discussion-draft-of-cannabis-administration-and-opportunity-act-legislation-to-end-the-federal-cannabis-prohibition-and-unfair-targeting-of-communities-of-color> [<https://perma.cc/N2BA-WVGE>] (“For decades, our federal government has waged a War on Drugs that has unfairly impacted low-income communities and communities of color. While red and blue states across the country continue to legalize marijuana, the federal government continues to lag woefully behind. It is time for Congress to end the federal marijuana prohibition and reinvest in communities most impacted by the failed War on Drugs.”).

⁷ Stickley V, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Marcus Hernandez, *Cannabis Reform Hits the Senate: A Brief Overview of the Cannabis Administration and Opportunity Act*, JD SUPRA (July 21, 2021), <https://www.jdsupra.com/legalnews/cannabis-reform-hits-the-senate-a-brief-overview-of-the-cannabis-administration-and-opportunity-act-5667781/>

That the Senate would introduce such a progressive, pro-legalization bill such as the Cannabis Administration and Opportunity Act may have been unfathomable just a few decades ago.¹¹ However, public sentiment about marijuana use has changed drastically in recent years.¹² Bipartisan support among U.S. citizens for the legalization of marijuana is at an all-time high.¹³ According to a November 2021 Gallup survey, 68% of Americans support legalization for medical and recreational use.¹⁴ Despite the overwhelming public support, many legal and political commentators are skeptical of progressive politicians' attempts to end the federal prohibition of cannabis via the CAO or any other comprehensive legislation.¹⁵ An MSNBC opinion columnist even went so far as to ask what Senator Schumer "is smoking" to make him believe that the CAO's passage is anything but a "pipe dream."¹⁶

Reasons for legal commentators' and industry members' skepticism regarding comprehensive federal legislation make sense.¹⁷ Despite bipartisan support among voters, federal legalization of cannabis

www.jdsupra.com/legalnews/cannabis-reform-hits-the-senate-a-brief-6876917/ [<https://perma.cc/K4EU-KQPJ>]; see German Lopez, *The War on Drugs, Explained*, Vox, <https://www.vox.com/2016/5/8/18089368/war-on-drugs-marijuana-cocaine-heroin-meth> [<https://perma.cc/L7QZ-V78W>] (May 8, 2016, 1:21 p.m. EDT) (explaining the United States' cultural-political "war" against drugs, launched by President Richard Nixon in the 1970s).

¹¹ See discussion *infra* Part II (detailing the history of marijuana's over criminalization in the United States).

¹² *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), <https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx> [<https://perma.cc/P2MW-K3N6>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See e.g. Brown, *supra* note 5 (arguing that "despite the clear need for reforms, any chance of a comprehensive legalization bill passing in the Senate is looking more like a pipe dream"); see also Dhruvil Mehta, *Americans From Both Parties Want Weed to be Legal. Why Doesn't the Federal Government Agree?*, FIVETHIRTYEIGHT (Apr. 23, 2021, 6:00 AM), <https://fivethirtyeight.com/features/marijuana-legalization-is-super-popular-why-hasnt-it-happened-nationally/> [<https://perma.cc/YA2S-3SXV>] (pointing to the fact that Senate Democrats are not unanimously in support of Senator Schumer's Cannabis Administration and Opportunity Act or any other comprehensive cannabis reform bill, and that the issue of federal legalization may not be "a top priority for many voters").

¹⁶ Brown, *supra* note 5.

¹⁷ See Natalie Fertig, *House Passes Marijuana Legalization Bill (Again), But with No Clear Path Forward*, POLITICO (Apr. 1, 2022, 1:26 pm EDT), <https://www.politico.com/news/2022/04/01/house-passes-marijuana-legalization-bill-again-but-with-no-clear-path-forward-00022303> [<https://perma.cc/WKQ9-6L87>] (reporting on the "growing rift" between the Democrat and Republican parties, "and even among Democrats—on how to address cannabis policy").

is still an issue with heavy political overtones.¹⁸ Many politicians on both sides of the aisle are still hesitant to support the complete legalization of marijuana.¹⁹ Powerful stakeholders—including pharmaceutical giants, alcohol companies, and police unions—actively oppose legalization as well.²⁰ Hence, despite all of the public interest and media coverage surrounding Congress’s attempts at legalization, Congress has not actually made any substantive progress.²¹

One of the issues impeding cannabis reform lies in the debate about the efficacy of Congress’s attempts to pass a holistic bill like the CAO. ²² Many critics of comprehensive cannabis reform measures do not necessarily disparage the substance of such bills.²³ Instead, their issues lie mainly in the belief that comprehensive, all-at-once federal reform is politically impossible.²⁴ Despite the lack of political consensus surrounding legalization, these critics contend that other aspects of cannabis reform have much more bipartisan support and therefore should be addressed first.²⁵ Politicians have expressed strong support for legislation that would remedy *specific* issues facing the cannabis industry in states where the drug has been legalized for recreational or medicinal use.²⁶ These specific issues include banking reform, scientific research, and more.²⁷

The tension between comprehensive cannabis reform and piecemeal reform has already come to a head in Congress.²⁸ Democratic members of Congress have denounced narrower cannabis measures like the Safe

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ E.K. McWilliams & Nika Arzoumanian, *Federal Cannabis Reform: Inevitable but Inevitably Piecemeal*, LAW360 (Aug. 6, 2021, 5:34 PM EDT), <https://jenner.com/system/assets/publications/21185/original/McWilliams%20Arzoumanian%20Law360%20Aug%206%202021.pdf?1628610237> [<https://perma.cc/WBV8-XKFY>].

²¹ *See id.* (discussing the politics prohibiting the enactment of any meaningful cannabis legislation).

²² Nicholas Wu & Natalie Fertig, *Senate Democrats Split Over Legalizing Weed*, POLITICO (Apr. 20, 2021, 7:30 PM EDT), <https://www.politico.com/news/2021/04/20/senate-democrats-weed-legalization-schumer-483747> [<https://perma.cc/AUA6-8Y9S>].

²³ *See* Jeff Smith, *Cannabis Lobbyists Believe Incremental Steps are the Most Likely Path to Federal Reform*, MJBIZDAILY (Mar. 1, 2022), <https://mjbizdaily.com/marijuana-reform-will-involve-incremental-steps/> [<https://perma.cc/E7M2-K5Q6>].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Mike DeBonis, *Democratic Divide Puts Congressional Action on Marijuana in Doubt*, WASH. POST (Nov. 18, 2021, 6:00 AM EST), https://www.washingtonpost.com/politics/marijuana-democrats-legalize/2021/11/17/61dd37b4-47b3-11ec-95dc-5f2a96e0fa3_story.html [<https://perma.cc/RS74-BSML>].

and Fair Enforcement (“SAFE”) Banking Act, which would allow financial institutions to serve state-legal cannabis businesses without federal blowback.²⁹ While the House has approved the SAFE Banking Act six times, members of the Senate have refused to hold any hearings on the bill “because it does not address criminal justice reform.”³⁰ Passage of narrower bills such as the SAFE Banking Act, according to proponents of holistic legislation, would make it more difficult for Congress to later pass comprehensive reform measures.³¹ Senator Cory Booker described the potential passage of the SAFE Banking Act as a loss and stated that politicians who are advocating for the Act “are doing a big disservice to [Congress’s] ability to get restorative justice principles passed.”³²

Comprehensive cannabis reform via broad legislation such as the Cannabis Administration and Opportunity Act would provide the swiftest means of social reform for individuals affected by the criminalization of marijuana.³³ However, there are too many roadblocks that make comprehensive cannabis reform impossible.³⁴ Instead, this Article argues that lawmakers should approach the legalization of cannabis gradually through incremental, piecemeal legislation.³⁵ In support of this argument, this Article explores political and legal theories that tend to prove that piecemeal legislation is Congress’s most viable option for federal cannabis reform.³⁶

Part II of this Article briefly summarizes the history of marijuana’s complex history in the United States.³⁷ Part III describes the various forms of broad and narrow cannabis reform bills that have been, or are likely to be, introduced by members of Congress.³⁸ Part IV dives deeper into the tension between the two methods of reform and dissects the political issues at the heart of the debate.³⁹ Part IV also analyzes the “Path Dependency” and “Incompletely Theorized Agreement” theories

²⁹ *Id.*

³⁰ Fertig, *supra* note 17.

³¹ DeBonis, *supra* note 28.

³² *Id.*

³³ John Hudak & Sherese Bonner, *The Senate’s New Cannabis Reform Bill Can Do More for Drug War-Targeted Communities*, BROOKINGS (Sept. 2, 2021), <https://www.brookings.edu/blog/fixgov/2021/09/02/the-senates-new-cannabis-reform-bill-can-do-more-for-drug-war-targeted-communities/> [<https://perma.cc/AA6L-C37B>].

³⁴ *See* DeBonis, *supra* note 28.

³⁵ *See infra* Part IV.

³⁶ *See infra* Part IV.

³⁷ *See infra* Part II.

³⁸ *See infra* Part III.

³⁹ *See infra* Part IV.

that support an argument in favor of piecemeal cannabis reform.⁴⁰ Finally, Part V concludes that—based on these theories—piecemeal legislation is the most feasible, and thus most desirable, path forward.⁴¹

II. FROM “REEFER MADNESS” TO TOTALLY AVERAGE: A BLUNT EXPLANATION OF MARIJUANA’S COMPLEX HISTORY

A. *Before Moral Panic Ensued*

Marijuana has not always been a controversial drug.⁴² Even in ancient times, marijuana was lauded for its medicinal benefits and psychoactive effects, primarily in Asia.⁴³ Cannabis cultivation in America can be traced to the colonial era.⁴⁴ During this time, cannabis regulation was virtually nonexistent and farmers widely grew marijuana to produce hemp for industrial purposes.⁴⁵ It was not until the mid-1800s that American pharmacies began providing cannabis to consumers for medicinal purposes.⁴⁶ In the early 1900s, cannabis consumption for its intoxicant purposes became more popular.⁴⁷ It was during this time that states, as well as the federal government, first began to regulate cannabis and other psychoactive substances more heavily.⁴⁸

⁴⁰ See *infra* Part IV.

⁴¹ See *infra* Part V.

⁴² See HOWARD BROMBERG ET AL., CASES AND MATERIALS ON MARIJUANA LAW 1–2 (1st ed. 2019).

⁴³ *Id.* at 1; see also Steven A. Vitale, “Dope” Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States, 23 U. MIAMI BUS. L. REV. 131, 134 (2014) (stating that the earliest written records of cannabis use can be tracked to a Chinese medical compendium from circa 2727 BCE).

⁴⁴ BROMBERG ET AL., *supra* note 42, at 1; see also ROBERT DEITCH, HEMP—AMERICAN HISTORY REVISITED: THE PLANT WITH A DIVIDED HISTORY 16 (2003).

⁴⁵ BROMBERG ET AL., *supra* note 42, at 1.

⁴⁶ *Id.* at 2; see also Michael Berkey, *Mary Jane’s New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 417, 420 (2011).

⁴⁷ See JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 3 (2012).

⁴⁸ See BROMBERG ET AL., *supra* note 42, at 2 (“The first regulations affecting the sale of marijuana were state-enacted ‘poison laws’ that imposed labeling and other requirements on patent medicines sold in pharmacies . . . The concern motivating these laws was a lack of consumer awareness of the types of potentially harmful substances that were often contained in the patent medicines. These included a number of potentially harmful substances, such as strychnine . . . opiates, cocaine, marijuana, and alcohol.”).

*B. Entering the “Reefer Madness” Era*⁴⁹

In the early twentieth century, public perception about marijuana and other psychoactive drugs dramatically shifted.⁵⁰ The federal government—as well as the media—contributed significantly to the belief among many Americans at that time that marijuana-use correlated to increased rates of crime and violence.⁵¹ In 1936, the American Journal of Nursing stated that individuals under the influence of cannabis “would suddenly turn with murderous violence upon whomever is nearest” and “run amuck with knife, axe, gun, or anything else.”⁵² Under the direction of Commissioner Harry Anslinger, the Federal Bureau of Narcotics “spear-headed a public-relations campaign to portray marijuana as a social menace capable of destroying the youth of America.”⁵³

Within the public consciousness—at least among wealthy, white Americans—marijuana became negatively associated with low-income Black and Mexican-Americans.⁵⁴ The movement to criminalize marijuana depended on an ill-founded belief—stoked in part by President Nixon—that these minority groups were driven to aggression and crime by their cannabis consumption.⁵⁵ By the 1950s, the federal government had enacted regulations that taxed and criminalized marijuana possession and use, such as the Marihuana Tax Act of 1937 and the Boggs Act of 1951.⁵⁶

The War on Drugs eventually culminated in Congress enacting the

⁴⁹ See Kristin Hunt, *Marijuana Panic Won't Die, but Reefer Madness Will Live Forever*, JSTOR DAILY (Apr. 23, 2020), <https://daily.jstor.org/marijuana-panic-wont-die-but-reefer-madness-will-live-forever/> [<https://perma.cc/G37N-68FK>] (explaining that “Reefer Madness” is the title of a now well-known “exploitation” film from the 1930s, which portrayed allegorical tales about the supposed dangers of marijuana consumption. In it, “impressionable white teenagers [are] driven to death and destruction” after they smoke marijuana. The teenagers “hit and kill a pedestrian with a car; accidentally shoot a teen girl, killing her; beat a man to death with a stick . . . and jump out a window to their own demise.”).

⁵⁰ See BROMBERG ET AL., *supra* note 42, at 9; see also Vitale, *supra* note 43, at 135–136.

⁵¹ See Vitale, *supra* note 43, at 135 (“In the 1930s, the federal government initiated an anti-marijuana campaign, grossly exaggerating the drug’s negative effects to instill fear and deter use.”).

⁵² Hannah Carliner et al., *Cannabis Use, Attitudes, and Legal Status in the U.S.: A Review*, 24 CRITICAL PUB. HEALTH 1, 4 (2014).

⁵³ Vitale, *supra* note 43, at 135–36 (quoting JERROLD S. MEYER & LINDA F. QUENZER, PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR 327 (1st ed. 2005)).

⁵⁴ Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 872 (2013).

⁵⁵ See *A History of the Drug War*, DRUG POLICY ALLIANCE, <https://drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/AS49-X26G>].

⁵⁶ BROMBERG ET AL., *supra* note 42, at 10–11.

Controlled Substances Act of 1970 (“CSA”).⁵⁷ The CSA classified various substances into five categories, or schedules, “based upon the substance’s medical use, potential for abuse, and safety or dependence liability.”⁵⁸ The CSA categorizes marijuana as a Schedule I drug—the Act’s harshest classification—which means that marijuana has “a high potential for abuse” and no federally-recognized medical use for treatment in the United States.⁵⁹ For additional context, the CSA also classifies heroin and LSD as Schedule I substances—meanwhile substances such as cocaine, oxycodone, and fentanyl are categorized under Schedule II.⁶⁰ Under the CSA, possession and distribution of marijuana—even for medicinal purposes—are generally strictly prohibited and carry steep civil and criminal penalties.⁶¹

C. State Legalization & The 21st Century Cultural Shift

Since the 1970s, sociocultural attitudes about marijuana have become much more accepting.⁶² With this shift in attitudes has come a gradual shift in many state legislatures as well.⁶³ Currently, fifteen states and the District of Columbia have legalized adult, recreational cannabis use.⁶⁴ Thirty-five states and the District of Columbia have also legalized cannabis for medicinal use.⁶⁵ The ongoing illegality of cannabis at the federal level under the Controlled Substances Act has created a myriad of complex (and often expensive) issues for state-legal cannabis industries.⁶⁶ For example, state-legal cannabis businesses

⁵⁷ Controlled Substances Act, 21 U.S.C. §§ 801–889 (2018).

⁵⁸ See *id.* at § 812; see also *The Controlled Substances Act*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-information/csa> [<https://perma.cc/49TH-5DEC>].

⁵⁹ Lisa Gora & Natalie Moszczynski, *Declassifying Cannabis as a Schedule I Drug: How Can It Be Done and What Will the Effects Be?*, N.J. L. J. (Nov. 26, 2021), <https://www.law.com/njljournal/2021/11/26/declassifying-cannabis-as-a-schedule-1-drug-how-can-it-be-done-and-what-will-the-effects-be/>, [<https://perma.cc/BED9-BC63>].

⁶⁰ BROMBERG ET AL., *supra* note 42, at 600–01.

⁶¹ *Id.* at 599; see also Kamin & Wald, *supra* note 54, at 874 (“The punishment for violation of the CSA’s criminal provisions varies with the amount of drug involved but can be quite serious for large amounts—possession of 100 or more marijuana plants, for example, is punishable by up to forty years in a federal prison. The CSA also has extensive civil provisions, allowing for the forfeiture of property shown to have been used in the distribution and manufacture of a prohibited substance.”).

⁶² David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 18 (2020).

⁶³ *Id.* at 19.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 19–20.

⁶⁶ See Kyle Jaeger, *Congressional Researchers Highlight Growing Federal-State Marijuana ‘Policy Gap’ In New 100-Page Report*, MARIJUANA MOMENT (Apr. 25, 2022),

are unable to access the services of large financial institutions and are thus forced to operate in dangerous all-cash systems.⁶⁷ Other issues for state-legal cannabis businesses include taxation, access to insurance, and the “elephant in the room”: federal, criminal prosecution.⁶⁸ Meanwhile, state-legal cannabis consumers and those previously convicted of federal cannabis convictions are still at risk of—or currently suffering—adverse legal consequences under federal law as well.⁶⁹

D. Ogden, Cole, Sessions: The Unsustainable Memo Paradigm

In response to some of the issues created by the state-legal-but-federally-illegal paradigm, the executive branch—beginning with the Obama administration—has issued multiple memoranda via the U.S. Attorney General’s office that advise federal prosecutors on how to enforce federal cannabis laws in legalization states.⁷⁰ The Ogden Memo, issued in 2009 by Deputy Attorney General David W. Ogden, counseled that it would be “an inefficient use of federal law enforcement resources to prosecute patients and caregivers lawfully involved in State-sanctioned medical marijuana activities.”⁷¹

In 2011, Deputy Attorney General James M. Cole issued a memo

<https://www.marijuanamoment.net/congressional-researchers-highlight-growing-federal-state-marijuana-policy-gap-in-new-100-page-report/> [<https://perma.cc/TJG3-RAH3>] (explaining the consequences of the growing gap between federal law and states that have legalized cannabis).

⁶⁷ Nathan Reiff, *SAFE Banking Act*, INVESTOPEDIA, <https://www.investopedia.com/safe-banking-act-4587773> [<https://perma.cc/SS2G-JAM6>] (Sep. 30, 2021).

⁶⁸ Vitale, *supra* note 43, at 137–38.

⁶⁹ CORY BOOKER ET AL., CANNABIS ADMINISTRATION & OPPORTUNITY ACT: DISCUSSION DRAFT 10 (2021), <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> [<https://perma.cc/C9XK-SJMF>] (“[B]ecause individuals and organizations engaged in state-authorized, cannabis related activities are in violation of the CSA, they face legal consequences such as adverse immigration outcomes and ineligibility for federal public benefits, including loans, grants, and other benefits. Moreover, individuals with federal cannabis convictions face even greater challenges—they may be serving long sentences or struggling to maintain steady employment and housing because of their criminal records. And due to racial biases in arrests and prosecutions, these individuals are disproportionately likely to be people of color.”).

⁷⁰ Patton, *supra* note 62, at 23–25.

⁷¹ Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Just., on Investigating and Prosecutions in States Authorizing the Med. Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf> [<https://perma.cc/5ZXD-RZTC>] (hereinafter Ogden Memo); see also Patton, *supra* note 62, at 23.

that reiterated the Ogden Memo's advisements.⁷² In 2013, Cole issued the "Second Cole Memo" which provided updated guidance on the government's enforcement priorities for federal prosecutors.⁷³ Essentially, the Second Cole Memo advised federal prosecutors not to intervene in state-legal cannabis industries, so long as states maintained effective regulatory control of the industries themselves.⁷⁴

Though not legally binding, the policies set forth by the Second Cole Memo allowed members of state-legal cannabis industries greater peace of mind that they would not be subject to federal criminal liability.⁷⁵ According to one scholar, the Ogden and Cole Memos essentially "created a legal environment which allowed the fledgling cannabis industry to grow into a multi-billion-dollar sector."⁷⁶ The Second Cole Memo remained in place until 2018 when U.S. Attorney General Jeff Sessions, under the Trump Administration, rescinded the Ogden and Cole Memos in their entirety.⁷⁷ Attorney General Merrick B. Garland, appointed by President Biden, has yet to rescind the Sessions Memo.⁷⁸

⁷² Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use to U.S. Att'ys (June 29, 2011), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/264W-8XXL>] (hereinafter First Cole Memo).

⁷³ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. on Guidance Regarding Marijuana Enforcement to U.S. Att'ys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/58U6-N8VP>] (hereinafter Second Cole Memo) (outlining eight main enforcement priorities including "[p]reventing the distribution of marijuana to minors," "[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs," and "[p]reventing violence and the use of firearms in the cultivation and distribution of marijuana.").

⁷⁴ See *id.* See also Patton, *supra* note 62, at 25.

⁷⁵ See Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone That Legalize Pot*, CNN POL., <https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html> [<https://perma.cc/KS9B-HM4S>] (last updated Jan. 4, 2018, 5:44 PM EST).

⁷⁶ Patton, *supra* note 62, at 26.

⁷⁷ Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Just. on Marijuana Enforcement to U.S. Att'ys (Jan. 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/YA9D-C7SR>] [hereinafter Sessions Memo]. See also Patton, *supra* note 62, at 27 (stating that the Sessions Memo directed "U.S. Attorneys to treat cannabis industry activities the same as any other potential criminal conduct").

⁷⁸ See Rachel M. LaBruyere & Slates C. Veazey, *Attorney General Garland Reconfirms the DOJ's Hands-Off Approach Toward Federal Marijuana Prosecution*, NAT'L L. REV. (May 2, 2022), <https://www.natlawreview.com/article/attorney-general-garland-reconfirms-doj-s-hands-approach-toward-federal-marijuana> [<https://perma.cc/6Y89-47NT>] (explaining that Garland has not yet officially rescinded the Sessions Memo).

Following the U.S. Attorney General's publication of the Sessions Memo, members of the cannabis industry were fearful that the federal government would begin cracking down on their businesses.⁷⁹ Ultimately, these fears did not come to fruition.⁸⁰ One scholar has partially attributed the Sessions Memo's ineffectuality to the cannabis industry's intense inertia over the last decade that now "defies criminal law enforcement resistance."⁸¹

Even though the Sessions Memo has had little to no effect, its publication sheds light on one aspect of what is at stake by cannabis's continued prohibition under federal law.⁸² While they are a step in the right direction, progressive memos to federal prosecutors, such as the Ogden and Cole Memos, are not binding and thus do not create the kind of stability the cannabis industry needs to become more robust.⁸³ Finally, such memos only address criminal prosecution, and this is just one aspect of the state-legal-but-federally-illegal paradigm that the federal government needs to cure.⁸⁴ These memos highlight the growing need for Congress to take forceful, legislative action.⁸⁵

III. THE BATTLE OF THE BILLS: EVEN ALONG PARTY LINES, CONGRESS'S PATH TO CANNABIS REFORM IS ANYTHING BUT CLEAR

As previously mentioned, Congress is considering multiple paths forward when it comes to federal cannabis reform.⁸⁶ While some members of Congress—notably progressives—seek to accomplish cannabis reform in one fell swoop, other politicians on both sides of the aisle are more

⁷⁹ Patton, *supra* note 62, at 27.

⁸⁰ *Id.*

⁸¹ *Id.* at 27, 29 ("The cannabis industry has ceased to be an outlaw community of low capital outsiders and has become a multi-billion dollar, mainstream enterprise. Politically powerful individuals and corporations are now involved in the cannabis industry. The cannabis industry directly and indirectly employs thousands of people. In the current environment, a large-scale law enforcement crackdown on the cannabis industry would be intolerably economically disruptive and impolitic.")

⁸² See Jarrett, *supra* note 75.

⁸³ See *id.*

⁸⁴ See discussion *infra* Part III.

⁸⁵ See Jaeger, *supra* note 66 ("The gap between federal and state marijuana policies continues to widen and shows no signs of stopping, congressional researchers said in a new report that also lays out options for how lawmakers could address the growing schism.")

⁸⁶ See *supra* Part I.

amenable to piecemeal reform.⁸⁷ Section A will take a deeper look at the Marijuana Opportunity Reinvestment and Expungement Act (“MORE”), a proposed bill similar in nature to the Cannabis Administration and Opportunity Act (CAOA).⁸⁸ Section B will discuss various smaller bills that members of Congress can potentially pass.⁸⁹ Section C will dive further into the overarching political issues that are driving the debate between the two methods of dichotomous legislation.⁹⁰

A. The Marijuana Opportunity Reinvestment and Expungement Act

The MORE Act, sponsored by U.S. Representative Jerrold Nadler, would remove marijuana from the list of scheduled substances under the Controlled Substances Act.⁹¹ In doing so, it would remove criminal liability for the distribution, possession, or manufacturing of marijuana.⁹² The bill would also impose certain taxes on cannabis products and direct government agencies to conduct studies on the effects of cannabis use on society.⁹³ Like the CAOA, the MORE Act would also implement a variety of social equity efforts.⁹⁴ According to the MORE Act’s bill summary, the Act:

- [E]stablishes a trust fund to support various programs and services for individuals and businesses in communities impacted by the war on drugs,
- [P]rohibits the denial of federal public benefits to a person on the basis of certain cannabis-related conduct or convictions,
- [P]rohibits the denial of benefits and protections under immigration laws on the basis of a cannabis-related event (e.g., conduct or a conviction), [and]
- [E]stablishes a process to expunge convictions and conduct sentencing review hearings related to federal cannabis offenses.⁹⁵

These social equity efforts have driven the conversation around the

⁸⁷ DeBonis, *supra* note 28.

⁸⁸ See *infra* Part III.A.

⁸⁹ See *infra* Part III.B.

⁹⁰ See *infra* Part III.C.

⁹¹ Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022).

⁹² H.R. 3617.

⁹³ H.R. 3617 (stating that the MORE Act would direct certain agencies to study drugged driving, the effects of state legalization of cannabis on the workplace, and the impact of legalization on children).

⁹⁴ H.R. 3617.

⁹⁵ H.R. 3617.

MORE Act's potential passage⁹⁶—but they have also been the Act's biggest stumbling block.⁹⁷ The House has passed the MORE Act more than once—most recently on April 01, 2022—but there is little belief among political commentators that it will ever make it past the Senate.⁹⁸ According to political pundits, the MORE Act, like the CAO, requires 60 bipartisan votes to avoid a Republican filibuster in the Senate.⁹⁹ Republicans have been explicit that they would vote against cannabis reform bills that are too broad in scope and too focused on social equity and taking a stance against the War on Drugs.¹⁰⁰ Even brazenly pro-cannabis Republicans on Capitol Hill are opposed to the MORE Act, for the same reasons they are opposed to the CAO.¹⁰¹ Instead, Republicans interested in cannabis reform emphasize the fact that bipartisan support exists in both the House and the Senate to pass narrower legislation.¹⁰² Even some Senate Democrats have their doubts about broad cannabis reform, making passage of the MORE Act or the CAO even less likely.¹⁰³

B. A Non-Exhaustive & Brief Summary of Narrower Bills Seeking to Address Cannabis Reform

1. The SAFE Banking Act

As previously mentioned, the Safe and Fair Enforcement (“SAFE”) Banking Act seeks to remove federal prohibitions that penalize banking institutions for providing financial services to state-legal cannabis businesses.¹⁰⁴ Large banking institutions have categorically refused to

⁹⁶ See Fertig, *supra* note 17 (stating that House Speaker Nancy Pelosi has openly characterized the MORE Act as “a criminal justice reform bill”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ DeBonis, *supra* note 28.

¹⁰⁰ *Id.*

¹⁰¹ Fertig, *supra* note 17.

¹⁰² See DeBonis, *supra* note 28 (quoting Senator Rand Paul who asserted that the SAFE Banking Act, for example, “would garner 10 to 15 Republican votes if it came directly to the Senate floor this year,” while broader cannabis legislation would not receive *any* Republican votes).

¹⁰³ Fertig, *supra* note 17.

¹⁰⁴ SAFE Banking Act of 2021, H.R. 1996, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1996> [<https://perma.cc/J7WS-VGUX>]; see also Gustav Stickley V, *The SAFE Banking Act: A Reasonable and Narrowly Tailored Approach to Addressing Public Safety Concerns and Lack of Financial Services in Today's Cannabis Industry*, JD SUPRA (July 8, 2021), <https://www.jdsupra.com/>

service cannabis businesses out of fear of federal prosecution for “aiding or abetting” the violation of federal drug and money laundering laws.”¹⁰⁵ This lack of access to institutional banking has forced many cannabis companies to conduct all-cash systems.¹⁰⁶ All-cash systems make cannabis companies obvious targets for robberies and other public safety risks.¹⁰⁷ In turn, many cannabis companies “must expend substantial resources on security personnel and equipment, cash counting machines and safes.”¹⁰⁸

The SAFE Banking Act touches upon one area of cannabis reform where bipartisan consensus exists.¹⁰⁹ Unfortunately, the political debate between comprehensive and piecemeal reform has barred the bill’s passage.¹¹⁰ After the House of Representatives passed the SAFE Banking Act in April 2021 by a 3-to-1 margin, the House then voted to amend the SAFE Banking Act so that it could be attached to an omnibus, must-pass annual defense bill.¹¹¹ Soon after, Senator Schumer sunk the legislation in favor of holding out for potential passage of the CAO, instead.¹¹²

2. The Harnessing Opportunities by Pursuing Expungement (“HOPE”) Act

Representatives David Joyce (Republican) and Alexandria Ocasio-Cortez (Democrat), worked in partnership to introduce the HOPE Act on December 02, 2021.¹¹³ If enacted, the bipartisan bill would establish a \$20 million grant program through the Department of Justice that would help states manage the costs of expunging convictions for non-violent cannabis crimes.¹¹⁴ Proponents of the bill note its critical importance: while much of the cannabis reform conversation focuses on the need

legalnews/the-safe-banking-act-a-reasonable-and-2393575/ [https://perma.cc/6HVM-HSGW].

¹⁰⁵ DeBonis, *supra* note 28.

¹⁰⁶ Stickley V, *supra* note 104.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ DeBonis, *supra* note 28.

¹¹⁰ See Jacob Sullum, *Why Do Legalizers Keep Blocking Pot Banking?*, REASON (May 2022), <https://reason.com/2022/04/14/why-do-legalizers-keep-blocking-pot-banking> [https://perma.cc/GY9T-K6EK].

¹¹¹ *Id.*

¹¹² *Id.*; DeBonis, *supra* note 28.

¹¹³ Harnessing Opportunities by Pursuing Expungement Act of 2021, H.R. 6129, 117th Cong. (2021).

¹¹⁴ H.R. 6129; see also Morgan Fox, *NDAA Blues, But HOPE on the Horizon*, NAT’L CANNABIS INDUS. ASS’N (last visited Apr. 28, 2022), <https://thecannabisindustry.org/tag/the-harnessing-opportunities-by-pursuing-expungement-hope-act/> [https://perma.cc/UZ7Z-HQ9P].

to expunge federal convictions, the reality is that the overwhelming majority of cannabis convictions and arrests occur under *state law*.¹¹⁵

3. The Cannabidiol and Marihuana Research Expansion Act & The Medical Marijuana Research Act

The Cannabidiol and Marihuana Research Expansion Act, sponsored by two Democrats and a Republican, unanimously passed the Senate on March 24, 2022.¹¹⁶ Just a few weeks later, the Medical Marijuana Research Act, a bipartisan bill sponsored by Democrat Representative Earl Blumenauer and Republican Representative Andy Harris, passed the House in a 343–75 vote.¹¹⁷ As their names imply, both bills are narrowly tailored to address the federal barriers that impede scientific research of cannabis and cannabis-derived products.¹¹⁸ Neither bill seeks to legalize the substance.¹¹⁹ It is likely that the House and the Senate will work together to reconcile the two research bills.¹²⁰

IV. THEORETICAL FRAMEWORKS TO EXPLAIN WHY REFORM SHOULD BE A PROCESS, NOT A MOMENT

At its core, the biggest issue impeding federal cannabis reform is what gets in the way of most progressive legislation: conflicting ideologies over broad moral questions.¹²¹ As one political pundit so aptly put it, “cannabis

¹¹⁵ Fox, *supra* note 114.

¹¹⁶ Cannabidiol and Marihuana Research Expansion Act, S. 253, 117th Cong. (2022).

¹¹⁷ Medical Marijuana Research Act, H.R. 5657, 117th Cong. (2022); Kyle Jaeger, *House Passes Bipartisan Marijuana Research Bill to Let Scientists Study Dispensary Products, Days After Legalization Vote*, MARIJUANA MOMENT (Apr. 4, 2022), <https://www.marijuanamoment.net/house-passes-bipartisan-marijuana-research-bill-to-let-scientists-study-dispensary-products-days-after-legalization-vote/> [https://perma.cc/B3CE-KU9B].

¹¹⁸ Kyle Jaeger, *U.S. Senate Unanimously Approves Marijuana Reform Bill on Same Day That House Schedules Legalization Vote*, MARIJUANA MOMENT (Mar. 24, 2022), <https://www.marijuanamoment.net/u-s-senate-unanimously-approves-marijuana-reform-bill-on-same-day-that-house-schedules-legalization-vote/> [https://perma.cc/WAN9-EYMG].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Harry Enten, *Republican Lawmakers Aren't with the Public on Marijuana*, CNN (July 17, 2021, 2:01 PM), <https://www.cnn.com/2021/07/17/politics/republican-marijuana-public-opinion-analysis/index.html> [https://perma.cc/H3FM-3DU2] (stating that ideological splits among Republican lawmakers is a contributing factor to Congress's inability to pass any comprehensive cannabis-related legislation).

is still a cudgel in the culture war.”¹²² Some politicians who seemingly support cannabis legalization have admitted that they would vote against the MORE Act and the CAOAs, in part because those comprehensive bills make social justice issues their main focus.¹²³ Even the taxing provision of the CAOAs has equity at its center, with Senator Schumer stating that revenue from the CAOAs’s imposition of a steep federal tax could go toward restorative justice initiatives.¹²⁴ In essence, these bills require legislators to make a full-throttle endorsement of cannabis use and a clear denouncement of the War on Drugs—statements that politicians on both sides of the aisle are not yet prepared to make.¹²⁵

While some pundits believe that on-the-fence Democrats can be swayed to vote in favor of a comprehensive bill,¹²⁶ Republican politicians are explicit that they cannot be so swayed.¹²⁷

On the other end of the spectrum, politicians like Senators Schumer and Booker, who are eager for all-at-once reform, are also inflexible.¹²⁸ However, the critical difference is these progressive politicians do not necessarily oppose what the piecemeal cannabis bills stand for substantively.¹²⁹ Instead, they oppose the strategy of piecemeal legislation

¹²² Chris Roberts, *Are Republicans Better Than Democrats on Marijuana Legalization?*, FORBES (Nov. 30, 2021, 4:00 AM.), <https://www.forbes.com/sites/chrisroberts/2021/11/30/are-republicans-better-than-democrats-on-marijuana-legalization/> [<https://perma.cc/VEN8-F6WA>].

¹²³ See Nancy Ognanovich, *Pot Legalization Boosted as Schumer Makes Issue a Top Priority*, BLOOMBERG L. (Feb. 10, 2022, 5:00 AM), <https://news.bloomberglaw.com/cannabis/pot-legalization-boosted-as-schumer-makes-issue-a-top-priority> [<https://perma.cc/959K-FXFB>].

¹²⁴ *Id.*

¹²⁵ See *id.* (quoting Senator Jon Tester, a Democrat, who states that he is “not a big fan of pot,” but understands the issues state-legal cannabis companies are experiencing from having to deal in all cash and would therefore prefer legislation like the SAFE Banking Act over comprehensive legislation. The article also reports that other Democratic senators are not interested in comprehensive reform because their states have been “ravaged by the opioid epidemic.” Additionally, Republican Senator Kevin Cramer states that “most GOP senators don’t support broad marijuana legalization legislation efforts.” Republicans who *do* support full legalization, according to the Cramer, are those with more libertarian-leaning ideals who see legalization as a federalism issue—not an equity issue).

¹²⁶ See Fertig, *supra* note 17.

¹²⁷ See DeBonis, *supra* note 28 (“Republicans are warning that broader legislation simply can’t pass the Senate . . .”).

¹²⁸ See Fertig, *supra* note 17 (“Booker and Schumer have drawn a line in the sand on marijuana policy, refusing to even hold a hearing on a cannabis banking bill the House has approved six times because it does not address criminal justice reform.”).

¹²⁹ See *id.*

because it does not prioritize social equity efforts at the onset of reform.¹³⁰

Congress will only be able to make headway on cannabis reform at this juncture if it abandons the comprehensive legislation approach. Piecemeal legislation is the most realistic. Thus, it is the most viable approach to federal cannabis reform based upon the theories of “Path Dependency”¹³¹ and “Incompletely Theorized Agreements.”¹³² Comprehensive legislation requires an unrealistic amount of political and ideological agreement, while piecemeal reform is better suited to address the growingly complex issues of cannabis reform in a nuanced manner.¹³³

A. Path Dependency

Path Dependency is a theoretical concept that, when stripped down to its core, stands for the idea that “the past influences the future.”¹³⁴ According to one scholar, path dependency describes a phenomenon often seen in politics:

Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.¹³⁵

When a governmental body adopts a policy and subsequently enacts laws to enforce that policy, it places “extensive, legally binding constraints on [the] behavior” of political actors to maintain the status quo created by this dynamic.¹³⁶ Democratic political bodies such as Congress are particularly prone to path dependence, because decision-making within these bodies requires collective coordination amongst actors who often have conflicting goals.¹³⁷

Path dependency in politics is generally overcome through incremental

¹³⁰ See *id.*

¹³¹ See discussion *infra* Part IV.A.

¹³² See discussion *infra* Part IV.B.

¹³³ See Jaeger, *supra* note 66 (explaining the consequences of the growing gap between federal law and states that have legalized cannabis).

¹³⁴ See James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC’Y 507, 507 (2000).

¹³⁵ MARGARET LEVI, *COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE* 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997).

¹³⁶ Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 259 (2000).

¹³⁷ *Id.* at 261.

change during “occasional windows of exceptional opportunity.”¹³⁸ One example can be found in the United States’ attempts at health care reform.¹³⁹ In the 1990s, when then-President Clinton introduced “The Clinton Plan” to radically reform American healthcare policies, one scholar predicted that the plan would fail due to path dependency.¹⁴⁰ This scholar asserted that “American political institutions are not designed to accommodate large-scale reform; . . . they are designed to actively thwart it.”¹⁴¹ Many powerful stakeholders had too much to lose too quickly under the proposed Clinton Plan.¹⁴² And the idea of health care as a private good—not a public good—was already “the traditional philosophical underpinning of America’s health care system.”¹⁴³

Ultimately, predictions that Clinton’s comprehensive health care reform plan would be unsuccessful due to path dependency panned out.¹⁴⁴ Even when public opinions about universal health care shifted under then-President Barack Obama, path dependency still inhibited comprehensive health care reform.¹⁴⁵ Yes, the 111th Congress and President Obama ultimately enacted the Affordable Care Act (“ACA”) in 2010.¹⁴⁶ But the ACA was a much less comprehensive path forward than “the widely supported federal, single-payer insurance plan” that was initially on the table, but unflinchingly opposed by many stakeholders.¹⁴⁷ Additionally, the breadth of the ACA was stymied by several concessions President Obama made to lawmakers and interest groups to ensure the ACA would not die in the congressional committee system.¹⁴⁸

Enough lawmakers have already made it clear that a comprehensive

¹³⁸ David Wilsford, *Path Dependency, or Why History Makes It Difficult but Not Impossible to Reform Health Care Systems in a Big Way*, 14 J. PUB. POL’Y 251, 252 (1994).

¹³⁹ *Id.* at 251; see also McWilliams & Arzoumanian, *supra* note 20.

¹⁴⁰ Wilsford, *supra* note 138, at 271.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 272–73 (“In the narrow sense, by the end of the 1993-1994 Congress, intense hue and cry defeated the Clinton proposal (it was never brought to a vote); no alternative was adopted either.”).

¹⁴⁵ McWilliams & Arzoumanian, *supra* note 20.

¹⁴⁶ Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010) (enacted).

¹⁴⁷ McWilliams & Arzoumanian, *supra* note 20 (“Obama chose to build on Medicare and Medicaid and preserve private insurance rather than put forth the widely supported federal, single-payer insurance plan to minimize opposition from stakeholder groups and gain congressional approval.”).

¹⁴⁸ *Id.*

cannabis reform bill like the CAO or the MORE Act will not pass.¹⁴⁹ The path dependency theory explains, in part, why it is unrealistic to expect a comprehensive bill that addresses all cannabis-related issues in one fell swoop.¹⁵⁰ Under the path dependency theory, the government's decision to prohibit marijuana was a policy choice, which required extensive execution and buy-in from many of the country's institutions and lawmakers.¹⁵¹ For roughly five decades, the country's institutions—including Congress, administrative agencies, the Presidents, and the judiciary—have remained on a path tethered to the initial policy choice Congress made to prohibit cannabis within the Controlled Substances Act.¹⁵² Path dependency tells us it is unrealistic to expect any of these institutions to suddenly deviate from this path, especially Congress.¹⁵³ The longer an institution travels down one policy path, the more difficult it is for the institution to depart from that path;¹⁵⁴ cannabis reform is certainly not an area of policy excluded from this phenomenon.

B. Incompletely Theorized Agreements

“Incompletely Theorized Agreements” is a theoretical framework developed by Harvard Professor of Law Cass R. Sunstein.¹⁵⁵ Sunstein's thesis is that:

¹⁴⁹ See, e.g., Sullum, *supra* note 110.

¹⁵⁰ McWilliams & Arzoumanian, *supra* note 20.

¹⁵¹ *Id.* (“The path-dependency theory emphasizes how early policy choices shape later political dynamics. Simply put, when the government makes certain policy choices, institutions are developed to execute those policies, and affected parties including constituents, lawmakers and interest groups become stakeholders invested in preserving the status quo.”).

¹⁵² See Wilsford, *supra* note 138, at 256 (“Policy paths are paths in part because they are bounded by structures that confine, channel and shape them. . . . Structures are the institutions and processes by which these institutions function that are the culmination at any one moment of many previous decisions. Structures are laid out and evolve through both ‘high politics’ (for example, a whole new constitution) and ‘low politics’ (establishing a new program through the normal legislative process). Structures then channel present and future policy along certain paths. As such, they constitute an independent variable affecting policy outcomes. Structures change quite slowly.”).

¹⁵³ *Id.* at 274.

¹⁵⁴ Charles R. Epp, *Law's Allure and the Power of Path-Dependent Legal Ideas*, 35 L. & Soc. INQUIRY 1041, 1043 (2010).

¹⁵⁵ Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

[W]ell-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. *Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes.* They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions. This is an important source of social stability and an important way for diverse people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole.¹⁵⁶

Basically, Sunstein argues that parties are better able to come to agreement on decisions that do not require consensus on ambitious or large-scale theories.¹⁵⁷ Some ambitious theories might even be impossible for people to ever come to a *completely* theorized agreement.¹⁵⁸ Sunstein points to abortion as one example of people being able to come to an incompletely theorized agreement, but not a completely theorized one.¹⁵⁹ A group of judges can come to consensus on the incompletely theorized agreement that the United States Supreme Court should not have overturned *Roe v. Wade*.¹⁶⁰ They can come to this incompletely theorized agreement, even if they cannot come to a completely theorized, large-scale agreement on *why* the case should have remained good law.¹⁶¹ Sunstein's theory is particularly true when it comes to multimember bodies composed of people with diverse viewpoints such as judicial panels and, of course, Congress.¹⁶²

Incompletely theorized agreements are advantageous to Congress, given its extremely pluralist nature.¹⁶³ Regarding federal cannabis reform,

¹⁵⁶ *Id.* at 1735–36.

¹⁵⁷ *Id.* at 1735–45.

¹⁵⁸ *Id.* at 1739 (describing a completely theorized agreement as one where the parties are able to “accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion” and that requires consensus on high-level propositions).

¹⁵⁹ *Id.* at 1742.

¹⁶⁰ See *Roe v. Wade*, 410 U.S. 113 (1973); Sunstein, *supra* note 155, at 1742.

¹⁶¹ See Sunstein, *supra* note 155, at 1742 (“[S]ome people emphasize that the Court should respect its own precedents; others think that *Roe* was rightly decided as a way of protecting women’s equality; others think that the case was rightly decided as a way of protecting privacy . . .”).

¹⁶² *Id.* at 1738.

¹⁶³ See Robert Longley, *What is Pluralism? Definition and Examples*, THOUGHTCO.,

coming to incompletely theorized agreements is the only viable solution at this juncture. Enactment of the CAO or the MORE Act necessitate agreement on ambitious political theories about which many lawmakers relentlessly disagree.¹⁶⁴ As previously stated, these bills essentially require legislators to endorse cannabis use and clearly denounce the War on Drugs.¹⁶⁵ Secondly, the frameworks of both bills place social equity at the forefront of the reform movement, above all other goals.¹⁶⁶ Unfortunately, social justice and equity are highly politicized concepts, opposed by Conservatives on the basis that these concepts are too often tied up in “identity politics.”¹⁶⁷ For Republicans who support cannabis reform, the issue is primarily about states’ rights and economics—not equity.¹⁶⁸

Fortunately, smaller bills like the SAFE Banking Act and the Medical Marijuana Research Act do not require Congress to come to any broad, completely theorized agreements about cannabis reform.¹⁶⁹ These bills allow members of Congress to “lower the level of abstraction” and avoid the “high-level propositions,” discussed above, that they are diametrically opposed on.¹⁷⁰ That is, even if Congress cannot converge on the principles for why cannabis should become completely legal, it *can* agree that the all-cash system most cannabis businesses operate within is a danger to public safety.¹⁷¹ And it can agree that the federal government places too many constraints on cannabis-related scientific research that might help inform a decision to legalize cannabis down the line or help to protect state-legal consumers.¹⁷²

<https://www.thoughtco.com/pluralism-definition-4692539> [<https://perma.cc/W6HU-R8JU>] (July 31, 2019).

¹⁶⁴ DeBonis, *supra* note 28; Fertig, *supra* note 17.

¹⁶⁵ See Ognanovich, *supra* note 123; Wu & Fertig, *supra* note 22 (quoting a statement from Democratic Senator Jeanne Shaheen of New Hampshire, “I don’t support legalizing marijuana . . . We’re in the middle of an opioid epidemic, and the research that I’ve seen suggests that [this] is a way that more people get into drugs.”).

¹⁶⁶ Marcus Hernandez, *MORE Act: Federal Cannabis Legalization Reintroduced in House*, JDSUPRA (June 3, 2021), <https://www.jdsupra.com/legalnews/more-act-federal-cannabis-legalization-4151224> [<https://perma.cc/CGQ6-ATSB>]; DeBonis, *supra* note 28.

¹⁶⁷ See German Lopez, *The Battle Over Identity Politics, Explained*, Vox, <https://www.vox.com/identities/2016/12/2/13718770/identity-politics> [<https://perma.cc/7E9J-GX2E>] (Aug. 17, 2017, 2:00 PM) (defining identity politics).

¹⁶⁸ See Natalie Fertig & Mona Zhang, *New GOP Weed Approach: Feds Must ‘Get Out of the Way’*, POLITICO, <https://www.politico.com/news/2021/11/21/cannabis-democrats-republicans-523119> [<https://perma.cc/8A69-PSBU>] (Nov. 22, 2021, 11:29 AM).

¹⁶⁹ See Sunstein, *supra* note 155, at 1740–41.

¹⁷⁰ *Id.*

¹⁷¹ See discussion *supra* Part III.B.1.

¹⁷² See discussion *supra* Part III.B.3.

Even if the incompletely theorized, piecemeal approach is not the most ideal path forward for progressives, it is the most feasible. While this approach would deprioritize social equity as the focus of cannabis reform, it would not take social equity completely off the table.¹⁷³ As one cannabis lobbyist put it, “I think legalization is more of a process than a moment . . . and I don’t believe we will only have one bite at the apple, where every issue surrounding legalization gets resolved at once.”¹⁷⁴ Additionally, issues like lack of access to banking harm minority cannabis entrepreneurs just as much, if not more, than large cannabis corporations.¹⁷⁵ A bill like the SAFE Banking Act would have a tremendous impact on the industry—ultimately making it safer and more equitable.¹⁷⁶ It would also “help break the logjam” when it comes to cannabis reform as a whole.¹⁷⁷ Moreover, the incompletely theorized, piecemeal approach to cannabis reform can facilitate “moral evolution over time.”¹⁷⁸ Incompletely theorized agreements, according to Sunstein, allow “a large degree of openness to new facts and perspectives” in a way that completely theorized agreements do not.¹⁷⁹

V. CONCLUSION

Support for cannabis legalization within the American populace is at an all-time high.¹⁸⁰ However, despite this overwhelming

¹⁷³ See Smith, *supra* note 23.

¹⁷⁴ *Id.*

¹⁷⁵ See Jonathan D. Salant, *Minority Cannabis Owners Say Federal Banking Bill Should Pass Even Without Social Justice Provisions*, N.J..COM, <https://www.nj.com/marijuana/2021/10/minority-cannabis-owners-say-federal-banking-bill-should-be-passed-even-without-social-justice-provisions.html> [<https://perma.cc/E93B-9KXR>], (Jan. 06, 2022, 6:46 PM) (statement of Steve Hawkins, Chief Executive of the U.S. Cannabis Council, “It also has posed a great barrier to entry for minority and entrepreneurs, who are faced with the inability to access basic financial services and the opportunity to grow their businesses that would come through basic bank loans We’re finding that smaller operators, operators of color, who would be dependent more on banking services as small business operators, are being denied and falling behind”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (quoting Representative Ed Perlmutter).

¹⁷⁸ Sunstein, *supra* note 155, at 1749.

¹⁷⁹ *Id.*

¹⁸⁰ 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/4UVW-44H8>] (showing that 60% of U.S. adults say marijuana should be legal for medical and recreational use, 31% say it should be legal for medical use only, and only fewer than 10% say it should not be

support for cannabis legalization, Congress has been unable to make any meaningful headway.¹⁸¹ One of the main issues impeding cannabis reform at the federal level is the recurring battle amongst lawmakers and cannabis experts about what method of reform is best: comprehensive, all-at-once reform, or piecemeal incremental reform.¹⁸² While comprehensive bills such as the MORE Act or the CAO A would bring about the swiftest policy changes,¹⁸³ the reality is that Congress has little to no chance of actually passing either.¹⁸⁴

This Article argues that the latter method—the piecemeal incremental approach—is the most practicable path forward.¹⁸⁵ Bills like the SAFE Banking Act, the HOPE Act, the Cannabidiol and Marihuana Research Expansion Act, and the Medical Marijuana Research Act have bipartisan support amongst lawmakers.¹⁸⁶ While these piecemeal bills would not address every aspect of cannabis reform in one fell swoop, they do address important issues that are harming not only cannabis entrepreneurs, but consumers as well.¹⁸⁷ “Path Dependency” and Sunstein’s “Incompletely Theorized Agreements” are two robust theoretical frameworks that give credence to the piecemeal legislative approach.¹⁸⁸ One step at a time, Congress can remedy the ills created by the War on Drugs and by the current state-legal-but-federally-illegal paradigm that plagues the cannabis industry and cannabis users alike.¹⁸⁹

legal).

¹⁸¹ See DeBonis, *supra* note 28.

¹⁸² See *supra* Parts III–IV.

¹⁸³ See discussion *supra* Part I (describing the provisions of the Cannabis Administration & Opportunity Act (CAOA), which seeks to remove cannabis from the Controlled Substances Act); discussion *supra* Part III.A (describing the provisions of the Marijuana Opportunity Reinvestment & Expungement (MORE) Act).

¹⁸⁴ See *supra* Part IV; McWilliams & Arzoumanian, *supra* note 20; DeBonis, *supra* note 28.

¹⁸⁵ See discussion *supra* Part IV.

¹⁸⁶ See discussion *supra* Part III.

¹⁸⁷ *Id.*

¹⁸⁸ See discussion *supra* Part IV.

¹⁸⁹ See discussion *supra* Part II.