

# RE-THINKING LIBERTY: CANNABIS PROHIBITION AND SUBSTANTIVE DUE PROCESS

*By Matthew J. Routh\**

## I. INTRODUCTION

What is *Liberty*? The venerated word appears in the famous Declaration of Independence as an inalienable right.<sup>1</sup> Likewise, liberty appears in the language of the 14<sup>th</sup> Amendment to the Constitution, which was ratified on July 9<sup>th</sup>, 1868 and forbids states from denying any person “life, liberty or property, without due process of law.”<sup>2</sup> However, the Constitution never explicitly defines the word.

John Stuart Mill, the influential 19<sup>th</sup> century British philosopher, economist, and feminist conceives of liberty in his political essay *On Liberty* as essentially rooted in personal autonomy, balanced against the government’s interest of protecting society at large:

That the only purpose for which power can be rightfully exercised

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

2. U.S. CONST. amend. XIV, § 1.

over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>3</sup>

Of course most people, including John Stuart Mill, recognize that no individual has an absolute right of independence over oneself, especially considering the ever-increasing global interconnectedness of today's society as well as the complexities arising from a mélange of political, cultural, and social identities living together.

So how should the United States, specifically the Supreme Court, uphold and protect the individuality and personal autonomy of its citizenry while recognizing the importance of the federal government's role in maintaining order and the overall wellbeing of the collective individual? Most likely, there is no correct answer.

Nevertheless, the Supreme Court has unfailingly relied on history and *stare decisis* in guiding our society's incessant search for meaning behind liberty. However, history is not a stagnant, frozen, immutable thing of the past, but an omnipresent force molding views and ideals regarding what liberty means. Above all, knowledge of American history teaches us about our nation's past faults, including instances of oppression masquerading under the guise of upholding the moral order of its people. As the saying goes, "those who do not know history are doomed to repeat it."

Take for instance, the prohibition of cannabis within the United States. Henry J. Anslinger was the former commissioner of the U.S. Treasury Department's Federal Bureau of Narcotics and played a critical role in implementing federal legislation prohibiting the sale, possession, cultivation, and consumption of cannabis,<sup>4</sup> colloquially known within American nomenclature as *marijuana* or *marihuana*.<sup>5</sup> During the formative years of

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3. John Stuart Mills, *On Liberty*, at Ch. 1, para. 9 (1859).

4. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 94 (Lindesmith Center, 1999).

5. Harborside Health Center, *The "M" Word*, Harborside (2014), <https://www.shopharborside.com/learn/the-M-word.html> (last visited Jan. 17, 2017) ("The 'marijuana' term started off life as a Mexican folk name for cannabis, but was first popularized in the US by the notorious yellow press publisher, William Randolph Hearst. Hearst was a racist, as well as being committed to the prohibition of marijuana, which threatened his timber investments.").

cannabis prohibition at the beginning of the 20<sup>th</sup> century, Mr. Anslinger was instrumental in educating the American public on the dangers of cannabis, and is widely attributed with these claims regarding cannabis prohibition:

There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others. . .Reefer makes darkies think they're as good as white men.<sup>6</sup>

In 2016, these comments are widely considered loathsome and patently false. However, the United States has built a cornucopia of legislation prohibiting and criminalizing cannabis possession, cultivation, and consumption upon a foundation of medical inaccuracies and abhorrent hatred toward immigrants and racial minorities. This article maintains that cannabis' classification and prohibition as a Schedule I narcotic violates an individual's fundamental right to bodily integrity under the 14<sup>th</sup> Amendment liberty clause. Ultimately, this article concludes that the government does not have a compelling interest to override this liberty interest through prohibiting cannabis consumption for recreational or medicinal purposes.

Part II discusses the evolution of the Supreme Court's interpretation of the 14<sup>th</sup> Amendment's liberty clause. Moreover, Part II illustrates how the Court has persistently emphasized liberty under the 14<sup>th</sup> Amendment as a concept, over nearly one hundred years of Supreme Court precedent, reflecting the forms of liberty prerequisite for personal dignity and autonomy. Moreover, Part II demonstrates how, despite the Court's embrace of a categorical approach toward liberty, the Court has never disavowed the underlying principles and essence of liberty as a concept rooted in personal autonomy under the 14<sup>th</sup> Amendment.

With this history in mind, Part III argues the Supreme Court should finally adopt a conceptual approach toward liberty for future 14<sup>th</sup> Amendment fundamental rights cases. Additionally, this article argues that Justice Stevens' articulation of a substantive due process analysis revolving around whether a right is implicit in the concept of ordered liberty should be the applicable legal standard for the Supreme Court. Lastly, Part III argues that this autonomous approach, as applied to cannabis' current prohibition under the Controlled Substance Act, violates an individual's fundamental right to bodily integrity under the 14<sup>th</sup> Amendment liberty clause.

## II. THE EVOLUTION OF SUBSTANTIVE DUE PROCESS CONSTITUTIONAL JURISPRUDENCE

Generally speaking, the doctrine of substantive due process is based on the concept of non-enumerated rights within various amendments of the

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6. NICK WING, *MARIJUANA PROHIBITION WAS RACIST FROM THE START, NOT MUCH HAS CHANGED*, HUFFINGTON POST (JAN. 25, 2014), [HTTP://WWW.HUFFINGTONPOST.COM/2014/01/14/MARIJUANA-PROHIBITION-RACIST\\_N\\_4590190.HTML](http://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html) (LAST VISITED JAN. 17, 2017).

constitution, i.e., the government cannot unduly burden certain rights and liberty interests regardless of the procedure involved.<sup>7</sup> The Court has held that the liberty interest at stake for a non-enumerated right must be deemed “fundamental” in order to trigger substantive due process analysis under strict scrutiny.<sup>8</sup> To pass strict scrutiny, the legislature must have passed the law to further a compelling governmental interest and must have narrowly tailored the law to achieve that interest.<sup>9</sup>

In determining what constitutes as a fundamental right, the Court has taken two approaches. The first is a categorical approach which emphasizes how the right asserted must be carefully formulated under a historical methodology examining whether the fundamental right at issue is “deeply rooted in our Nation’s history and tradition, and implicit in the concept of ordered liberty.”<sup>10</sup> The second is a conceptual, autonomous approach that examines “the forms of liberty prerequisite for personal dignity and autonomy.”<sup>11</sup>

#### ***A. Early Origins of Substantive Due Process & The Lochner Era***

As with any proper constitutional analysis, this section begins with the text of the 14<sup>th</sup> Amendment: “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>12</sup> While liberty is never explicitly defined within the Constitution, the concept of non-enumerated rights dates back to the drafting of the Bill of Rights itself, specifically the 9<sup>th</sup> Amendment.<sup>13</sup> The primary author of the 9<sup>th</sup> Amendment, James Madison, proffered the amendment “to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.”<sup>14</sup> The concurring opinion, by Justice Goldberg and joined by Chief Justice Warren and Justice Brennan, in *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965), further elaborated on the concept of non-enumerated rights, stating:

The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied

7. See Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 1986 (2005).

8. See generally *id.*

9. Emanuel Francone, *Strict Scrutiny*, LEGAL INFORMATION INST. (June 2016), [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny).

10. *Id.*; see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

11. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 89 (2003).

12. U.S. CONST. amend. XIV, § 1.

13. See *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

14. *Id.* at 489 n.3 (“Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that ‘no language is so copious as to supply words and phrases for every complex idea.’ The Federalist, No. 37 (Cooke ed. 1961), at 236.”).

such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.<sup>15</sup>

This notion of the 14<sup>th</sup> Amendment and liberty as encompassing non-enumerated “substantive” rights gained traction within the Supreme Court in the subsequent years after its ratification in 1868.<sup>16</sup>

The concept of liberty as incorporating non-enumerated rights culminated in the landmark case of *Lochner v. New York*.<sup>17</sup> In *Lochner*, the Court held that New York laws restricting the hours of employment in bakery shops violated the right to contract enjoyed by employers and employees under the liberty clause of the 14<sup>th</sup> Amendment.<sup>18</sup> In reaching this decision, the Court grappled with the inherent police powers of the State regarding the safety, health, morals and general welfare of the public as well as the competing personal liberty interests of individuals entering an employment contract.<sup>19</sup> Although *Lochner* doesn’t explicitly reference the 9<sup>th</sup> Amendment, its discussions relating to the non-enumerated right of contract as well as the 14<sup>th</sup> Amendment allude to the concept of an individual to be free in his person.<sup>20</sup> However, the Supreme Court eventually rejected the notion of liberty protecting economic rights such as the “right to contract.”<sup>21</sup> This rejection became evident in cases such as *West Coast Hotel Co. v. Parrish*<sup>22</sup> and *Nebbia v. New York*,<sup>23</sup> which continued the Court’s tendency to defer to legislative discretion in the area of economic and property rights.<sup>24</sup>

### ***B. Liberty as an extension of Self Determination***

However, non-enumerated, non-economic personal rights remained intact, and post-*Lochner* Supreme Court cases demonstrate how these personal rights remained at the core of protections within the 14<sup>th</sup> Amendment’s liberty clause. During the *Lochner* era, *Meyers v. Nebraska* and *Pierce v. Society of the Sister* began articulating the broader conceptual principles behind the 14<sup>th</sup> Amendment and personal rights under the liberty clause.<sup>25</sup> The seminal case of

15. *Id.*

16. See *Allgeyer v. Louisiana*, 165 U.S. 578, 587–88 (1897) (holding that the Due Process Clause protected the unenumerated right to contract).

17. See *Lochner v. New York*, 198 U.S. 45, 64 (1905).

18. *Id.* at 53, 57, 64.

19. *Id.*

20. See *Id.* at 56.

21. Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of McDonald v. City of Chicago and United States v. Windsor*, 1 TEX. A&M L. REV. 129, 132–33 n.19 (2013).

22. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937).

23. See *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

24. Broyles, *supra* note 21, at 133.

25. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sister of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

*Meyers* not only captured the autonomous nature of the liberty clause that future Supreme Court generations would affirm, *Meyers* recognized the State's inherent police powers as well as the vast economic, political, and societal changes resulting from the massive influx of immigrants at the turn of the century.<sup>26</sup>

*Meyers* involved a Nebraska statute prohibiting the teaching of languages other than English within an educational setting, resulting in a misdemeanor penalty if violated.<sup>27</sup> The plaintiff in the case was an instructor from a parochial school who unlawfully taught the subject of reading German to a young student who had not yet attained and completed the 8<sup>th</sup> grade.<sup>28</sup> In affirming the judgment of conviction, the Nebraskan Supreme Court reasoned the salutary purpose and effects of the legislation was a valid exercise of the State's police powers and did not conflict with the 14<sup>th</sup> Amendment.<sup>29</sup>

Keeping in mind the State's purpose and Nebraskan Supreme Court's reasoning, the United States Supreme Court emphasized how the issue was "whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment."<sup>30</sup>

In construing the 14<sup>th</sup> Amendment, the *Meyers* court formulated the principles and essence of liberty surrounding personal rights that long survived the economic rationale behind *Lochner*:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly

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26. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923).

27. *Id.* at 397.

28. *Id.* at 396–97.

29. *Id.* at 397–98 ("The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl v. State*, 102 Ohio St. 474, 132 N. E. 20; *State v. Bartels*, 191 Iowa, 1060, 181 N. W. 508.").

30. *Id.* at 399.

pursuit of happiness by free men.<sup>31</sup>

In articulating values of self-determination such as “freedom from bodily restraint,” “acquiring useful knowledge,” and “those privileges long recognized at common law,” the Court further elaborated on what the 14<sup>th</sup> Amendment and liberty protected, stating,

The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.<sup>32</sup>

With this interpretation of liberty in mind,<sup>33</sup> the Court reasoned that “[e]vidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”<sup>34</sup> Furthermore, the Court underscored the importance of applying the protections of the Constitution “to all, to those who speak other languages as well as to those born with English on the tongue.”<sup>35</sup>

In concluding the statute violated an individual’s personal liberty rights under the 14<sup>th</sup> Amendment,<sup>36</sup> the Court claimed that its decision does not diminish the inherent police powers of the State. “That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.”<sup>37</sup> Ultimately, *Myers* held that “the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. . . We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.”<sup>38</sup>

The framework surrounding the constitutional interpretation of the 14<sup>th</sup> Amendment and liberty as a concept involving personal, autonomous rights of self-determination are principles the Supreme Court has repeatedly bolstered for almost a century, from *Pierce v. Society of Sisters* (1925)<sup>39</sup> to *Obergefell v.*

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31. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

32. *Id.* at 399–400.

33. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“[I]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

34. *Meyer*, 262 U.S. at 401.

35. *Id.*

36. *Id.* at 403.

37. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

38. *Id.* at 402–03.

39. *Pierce v. Society of the Sisters*, 268 U.S. 510, 534–35 (1925) (“Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often

*Hodges* (2015).<sup>40</sup> Perhaps no case better enunciates the principles behind the 14<sup>th</sup> Amendment than *Griswold v. Connecticut*, which involved a Connecticut statute banning medical professionals from distributing contraceptives to married couples.<sup>41</sup> In addition to reinforcing the principles of liberty articulated in cases such as *Meyers* and *Pierce*, *Griswold* went further in describing how non-enumerated, autonomous liberty rights of self-determination, or as the court calls it, “privacy,”<sup>42</sup> are intrinsically intertwined among the enumerated guarantees of the Bill of Rights.<sup>43</sup>

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516—522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’<sup>44</sup>

Furthermore, *Griswold* is significant in its affirmation of *Meyers*’s understanding about the State’s police powers<sup>45</sup> while simultaneously recognizing that “[s]uch a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent

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heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state...The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

40. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“Choices about marriage shape an individual’s destiny. . . . There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”).

41. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (“Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.”).

42. *McDonald v. City of Chicago*, 561 U.S. 742, 864 (Stevens, J., dissenting) (“Our substantive due process cases have episodically invoked values such as privacy and equality as well, values that in certain contexts may intersect with or complement a subject’s liberty interests in profound ways. But as I have observed on numerous occasions, ‘most of the significant [20th-century] cases raising Bill of Rights issues have, in the final analysis, actually interpreted the word ‘liberty’ in the Fourteenth Amendment.”).

43. *Griswold*, 381 U.S. at 482–85.

44. *Id.* at 484.

45. *Id.* at 482 (“[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”).

activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>46</sup>

### *C. Liberty as an Extension of History: A Formula for Rights*

Despite the Court’s established framework of liberty and the 14<sup>th</sup> Amendment as a concept rooted in self-determination and the common law, later Supreme Court cases began shifting the focus of substantive due process analysis away from an autonomous approach toward a predominantly historical, categorical approach.<sup>47</sup> In overturning an East Cleveland housing ordinance that limited occupancy of a dwelling unit to members of a single family and only recognized a few enumerated categories of related individuals as a “family,” the Court in *Moore v. City of East Cleveland* cautioned hesitancy and restraint when considering issues of fundamental rights and substantive due process:

As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary the boundary of the nuclear family. Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teachings of history (and), solid recognition of the basic values that underlie our society.”<sup>48</sup>

Moreover, *Moore* emphasized the appropriate limits of substantive due process such that they include fundamental rights, such as the integrity of the family, “deeply rooted in this Nation’s history and tradition.”<sup>49</sup> Ultimately, *Moore* does not disavow the concepts of liberty previously articulated in order to fashion a new framework.<sup>50</sup> Rather, it re-affirmed how history and the common law, as not merely a stagnant occurrence of the past but a living

46. *Id.* at 485.

47. *See Moore v. City of E. Cleveland*, 431 U.S. 494, at 503 (1977); *see also Washington v. Glucksberg*, 521 U.S. 702, at 710 (1997).

48. *Moore v. City of East Cleveland*, 431 U.S. 494, 496, 502-503 (1977).

49. *Id.* at 503.

50. *Moore*, 431 U.S. at 501 (Harlan, J., dissenting) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)) (“Due process has not been *Id.* at 501 (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.” (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961))).

tradition, informs judicial discretion in evaluating an individual's personal rights against the backdrop of the liberty demands of society as a whole.<sup>51</sup>

However, the language in *Moore* cautioning restraint toward judicial intervention as well as the importance of history becomes the impetus behind *Washington v. Glucksberg* formulating a rigid, two-pronged inquiry into liberty under the 14<sup>th</sup> Amendment, asking whether the right at issue is deeply rooted in our nation's history and traditions, and implicit in the concept of ordered liberty.<sup>52</sup> In *Washington v. Glucksberg*, the Court upheld a Washington statute banning assisted suicide as not violating an individual's 14<sup>th</sup> Amendment liberty interest.<sup>53</sup> The holding relied predominantly on the absence of legal recognition of assisted suicide,<sup>54</sup> along with the court's acceptance of prohibition of assisted suicide as rationally related to the government's legitimate purpose toward the preservation of life.<sup>55</sup>

Afraid that a conceptual, autonomous approach to liberty and the 14<sup>th</sup> Amendment would involve too many subjective elements of judicial interpretation along with overly complex balancing of interests,<sup>56</sup> *Glucksberg* stated, as a threshold inquiry, a plaintiff must carefully formulate the interest at stake.<sup>57</sup> In requiring petitioners to narrowly define the right at issue, the Court hoped this would "rein in" the inevitable subjective aspects of judicial review and ground the analysis in historical-based roots.<sup>58</sup> If after deciding that the alleged right was fundamental by applying the two-pronged test mentioned earlier, the Court would then determine whether the alleged right is protected under the liberty component of the 14<sup>th</sup> Amendment.<sup>59</sup> However, as future courts have reasoned, this rigid historical methodology undermines the essence of liberty as an offspring of self-determination and autonomy.

#### ***D. Autonomy Strikes Back: A Return to a Conceptual Approach Toward Liberty***

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51. *See id.*

52. *Glucksberg*, 521 U.S. at 720–22.

53. *Glucksberg*, 521 U.S. at 735.

54. *Id.* at 728 ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").

55. *Id.* at 728–31.

56. *Id.* at 722 ("In our view, however, the development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment – never fully clarified, to be sure, and perhaps not capable of being fully clarified – have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement – that a challenged state action implicate a fundamental right – before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.").

57. *Id.* at 721–22.

58. *Id.*

59. *Id.*

In overturning<sup>60</sup> *Bowers v. Hardwick*,<sup>61</sup> the Court in *Lawrence v. Texas* affirmed the principles of autonomy and personal dignity as critical concepts embedded within liberty and articulated in cases such as *Meyers*, *Pierce*, *Griswold*, and *Eisenstadt*.<sup>62</sup> Additionally, while recognizing and respecting the significance of *stare decisis*, the Court stated it is not an “inexorable command.”<sup>63</sup> Even more significantly, *Lawrence* raised serious doubts regarding the predominantly historical methodology employed by *Bowers*<sup>64</sup> and *Glucksberg* when examining substantive due process and fundamental liberty rights:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation

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60. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (citation omitted) (“The Court began its substantive discussion in *Bowers* as follows: ‘The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so or a very long time.’ That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986))).

61. *Bowers v. Hardwick*, 478 U.S. 186, 190–96 (1986) (examining the constitutionality of a Georgia statute criminalizing sodomy. In holding that the sodomy statute did not violate the fundamental rights of homosexuals, the Court narrowly defined the liberty right at stake as homosexuals engaging in acts of consensual sodomy. In reaching this conclusion, the Court utilized the deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty standard of defining fundamental liberty rights, as seen in *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977), and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

62. *Lawrence*, 539 U.S. at 565.

63. *Id.* at 577 (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”); see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

64. *Lawrence*, at 568, 570–71 (“At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character. . . . [i]n summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”).

can invoke its principles in their own search for greater freedom.<sup>65</sup>

Furthermore, in holding that “homosexuals’ right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in home without intervention of government,”<sup>66</sup> the Court once more underscored the importance of understanding liberty under the 14<sup>th</sup> Amendment as a concept rooted in personal autonomy.<sup>67</sup> The Court again discussed the importance of personal autonomy, stating, “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>68</sup>

Culminating in the 2015 case, *Obergefell v. Hodges*, the Supreme Court further distanced itself from the strictly historical methodology employed by *Glucksberg* and *Bowers*, highlighting its constitutional jurisprudential shift toward a more autonomous, conceptual approach in examining fundamental liberty rights under the 14<sup>th</sup> Amendment.<sup>69</sup> However, the Court also affirmed the importance of judicial restraint and the democratic process.<sup>70</sup> Ultimately, the Court’s analysis accentuated the importance of the right of the individual to be free from the unlawful exercise of governmental power.<sup>71</sup>

65. *See id.* at 579.

66. *Id.* at 577–78 (Stevens, J., dissenting) (alteration in original) (“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986))).

67. *See id.*

68. *See also id.* at 574 (“In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: ‘These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.’” (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

69. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”).

70. *Id.* at 2605 (citations omitted) (“Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, noting the ‘right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.’” (quoting *Schuette v. BAMN*, 134 S.Ct. 1623, 1636–37 (2014))).

71. *Id.* at 2606 (citations omitted) (“The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’ This is why ‘fundamental rights may not be

In sum, despite the Court's disagreement on the applicable standard in analyzing substantive due process, for nearly one hundred years the Supreme Court has never disavowed, but has rather emphatically affirmed, the core principles of liberty under the 14<sup>th</sup> Amendment as a concept rooted in personal dignity and autonomy.

### III. CANNABIS PROHIBITION AS A VIOLATION OF THE 14<sup>TH</sup> AMENDMENT

As the above cases show us, the central question is this: when examining issues involving substantive due process, how can the Supreme Court best employ a legal standard that recognizes the autonomous and conceptual essence of liberty under the 14<sup>th</sup> Amendment while simultaneously avoiding the pitfalls of the due process era of *Lochner*? With this question in mind, Part III of this article argues that the Supreme Court should conclusively adopt the conceptual approach toward liberty that focuses on personal dignity, self-determination and autonomy when examining issues of fundamental rights under the 14<sup>th</sup> Amendment liberty clause. Moreover, Part III argues the Supreme Court should adopt the conceptual, autonomous liberty standard articulated by Justice Stevens in one of his last dissents while on the Supreme Court in *McDonald v. City of Chicago*.<sup>72</sup>

#### A. Liberty under a historically forward thinking, autonomous standard

As mentioned above, Justice Stevens wrote a lengthy dissent opinion in *McDonald v. City of Chicago* disagreeing with the plurality's analysis of whether the 2<sup>nd</sup> Amendment applies to the states.<sup>73</sup> First, Justice Stevens argued that the main inquiry in determining whether or not a right is fundamental under the liberty clause of the 14<sup>th</sup> Amendment should be whether the challenged practice "violates values 'implicit in the concept of ordered liberty.'"<sup>74</sup> Second, Justice Stevens articulates what constitutes the framework behind "implicit in the concept of ordered liberty":

Rather than seek a categorical understanding of the liberty clause, our precedents have thus elucidated a conceptual core. The clause safeguards, most basically, "the ability independently to define one's identity," . . . "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny," . . . and the right to be respected as a human being. *Self-determination, bodily integrity, freedom of conscience, intimate*

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submitted to a vote; they depend on the outcome of no elections.'" (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943))).

72. *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (holding that Chicago's gun restrictions violated the Second Amendment's protection of the right to bear arms. Moreover, the plurality ruled that the right in question is "fundamental to our scheme of ordered liberty" and is "deeply rooted in the Nation's history and tradition." Therefore, the Court incorporated the right in question against the states under the Fourteenth Amendment's Due Process Clause).

73. *Id.* at 890.

74. *Id.* at 871 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); see also BROYLES, *supra* note 83, at 135.

*relationships, political equality, dignity and respect—these are the central values we have found implicit in the concept of ordered liberty.*<sup>75</sup>

Furthermore, “Justice Cardozo’s test [i.e., implicit in the concept of ordered liberty] undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy.”<sup>76</sup> Accordingly, Justice Stevens provided a list of eight judicial guideposts for applying the Cardozo test, including: “historical and empirical data of various kinds,” “[t]extual commitments laid down elsewhere in the Constitution,” “judicial precedents,” “English common law,” “legislative and social facts,” “scientific and professional developments,” “practices of other civilized societies,” and “above all else, the ‘traditions and conscience of our people . . . .’”<sup>77</sup>

This liberty test, by centering the analysis on whether the right is implicit in the concept of ordered liberty, captures the essence of liberty under the 14<sup>th</sup> Amendment, specifically, the ability to independently define one’s existence. Moreover, by including factors such as “judicial precedents,” “the English common law,” and “the traditions and conscience of our people,” this conceptual standard emphasizes the importance of grounding Supreme Court substantive due process jurisprudence in history, reasoned judgment, *stare decisis*, and respect for the democratic process “without injecting excessive subjectivity or unduly restricting the States’ ‘broad latitude in experimenting with possible solutions to problems of vital local concern.’”<sup>78</sup>

Additionally, the Supreme Court should adopt this conceptual approach and set of judicial factors in analyzing liberty because it recognizes that no right is absolute and ensures the Court will always assess and compare “the strength of the individual’s liberty interests and the State’s regulatory interests.”<sup>79</sup> This ideal conforms to prior substantive due process cases discussed in Part II such as *Meyers* and *Griswold*, which emphasized the Court is not a super-legislature.<sup>80</sup>

Above all, the Supreme Court should adopt this conceptual standard of liberty because it recognizes the inherent problems in applying a strictly historical methodology, as seen in *Glucksberg*. Justice Stevens discusses the irrefutable flaws in relying primarily on a stagnant view of history in attempting to analyze an alleged fundamental right under the 14<sup>th</sup> Amendment:

More fundamentally, a rigid historical methodology is unfaithful to the Constitution’s command. For if it were really the case that the Fourteenth Amendment’s guarantee of liberty embraces only those rights “so rooted in our history, tradition, and practice as to require special protection,” . . . *Glucksberg*, 521 U.S., at 721, n. 17, 117 S.Ct.

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75. *McDonald*, 561 U.S. at 879–80 (emphasis added).

76. *Id.* at 872.

77. *Id.*

78. *Id.* at 877.

79. *Id.* at 879.

80. *See generally Meyer*, 262 U.S. at 402; *see also Griswold*, 381 U.S. at 482.

2258, then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection. Cf. *Duncan*, 391 U.S., at 183, 88 S.Ct. 1444 (Harlan, J., dissenting) (critiquing “circular [ity]” of historicized test for incorporation). That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently “‘rooted’”; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.<sup>81</sup>

As Justice Stevens notes, the United States’ history unfortunately includes, among other things: slavery and segregation of African Americans,<sup>82</sup> the suppression of women in the political process,<sup>83</sup> the annihilation and systematic exclusion of Native Americans,<sup>84</sup> the forced internment of Japanese born United States citizens,<sup>85</sup> persecution of public school educators for teaching evolution in the classroom,<sup>86</sup> and the persecution of gay men and women.<sup>87</sup> If the Supreme Court were to continue applying a solely categorical, historical methodology toward liberty and fundamental rights under the 14<sup>th</sup> Amendment, then African Americans would still be considered three-fifths of a person and women wouldn’t be allowed to vote, because both concepts are undeniably “deeply rooted in our Nation’s history and traditions.” Consequently, this frozen view of history and liberty is unsustainable.

### ***B. Cannabis Prohibition Violates an Individual’s Fundamental Right to Bodily Integrity under the 14<sup>th</sup> Amendment liberty clause***

Under the substantive due process analysis used by Stevens in his dissent to *McDonald*, cannabis’ classification as a Schedule I narcotic under the

81. *McDonald*, 561 U.S. at 875–76.

82. See, e.g., U.S. Const. Art. I, § 2 (repealed 1865); U.S. Const. amend. XIII; *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896) (“A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.”).

83. See U.S. CONST. amend. XIX.

84. 25 U.S.C.A. § 174 (1830).

85. See e.g., *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Yasui v. U.S.*, 320 U.S. 115 (1943); *U.S. v. Korematsu*, 323 U.S. 214 (1944).

86. See *Scopes v. State*, 154 Tenn. 105 (1927).

87. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia statute criminalizing homosexual sex as illegal sodomy).

Controlled Substances Act (CSA) violates an individual's fundamental right to liberty under the 14th Amendment. To clarify, the issue is not about a fundamental "right to smoke weed," or a fundamental "right to get high." Rather, the fundamental right at issue involves bodily integrity; more specifically, whether the federal government has a compelling interest to forcibly prevent an individual within their home from voluntarily consuming cannabis for either a recreational or medicinal purpose.

Accordingly, this section applies the factors outlined by Justice Stevens' autonomous fundamental rights standard and concludes that cannabis' classification and prohibition as a Schedule I narcotic violates an individual's fundamental right to bodily integrity under the 14<sup>th</sup> Amendment liberty clause because the federal government does not have a compelling interest in the unwanted prevention of an individual within their home from voluntarily consuming cannabis for either a recreational or medicinal purpose.

### **1. Bodily Integrity is a Fundamental Right Protected by the 14th Amendment**

Bodily integrity, or the notion of having autonomy over personal decisions about one's body, is a principle long established as warranting significant protection of liberty under the 14<sup>th</sup> Amendment.<sup>88</sup> However, it has also been established that this right is not absolute, and the federal government has a compelling interest in protecting the public health of its people.<sup>89</sup> Indeed, prior Supreme Court precedent has examined liberty interests involving bodily integrity within a prison. Ultimately, the Court's recognition that an "individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs"<sup>90</sup> can be closely analogized to whether an individual has a significant constitutionally protected liberty interest in personally consuming cannabis within the confines of their home.

At first glance, one might be reasonably tempted to ask how prior precedent holding that a prisoner within the confines of a correctional facility having a constitutionally protected liberty interest in avoiding the unwarranted administration of psychotropic drugs for trial competency purposes, an interest "that only an essential or overriding state interest might overcome,"<sup>91</sup> can be

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88. See *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942); see also *Rochin*, 342 U.S. at 172; *Griswold*, 381 U.S. at 485; *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood*, 505 U.S. at 851–52; *Glucksberg*, 521 U.S. at 720; *Sell v. U.S.* 166, 178 (2003); *Lawrence*, 539 U.S. at 573–54.

89. See *Planned Parenthood*, 505 U.S. at 846; see also *Sell*, 539 U.S. at 180–81.

90. *Sell*, 539 U.S. at 178 (citing *Washington v. Harper*, 494 U.S. 210, 221 (1990)).

91. *Id.* at 178–89 (Although the Court holds that a mentally ill prisoner can be involuntarily medicated in order to render that defendant competent to stand trial, the Court emphasizes "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests...This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare."); See also *Harper*, 494 U.S. at 221–22; *Riggins v. Nevada*, 504 U.S. 127, 134–35 (1992).

reasonably analogized to personally consuming cannabis within the confines of one's home. However, Supreme Court precedent surrounding fundamental liberty rights under an autonomous, conceptual approach informs us that both issues lay at the crux of liberty, namely, "the individual's right to make certain unusually important decisions that will affect his own destiny. . . . [s]elf-determination, bodily integrity, freedom of conscience. . . are the central values we have found implicit in the concept of ordered liberty."<sup>92</sup>

In the context of forcing prisoners to take psychotropic drugs, the government infringes upon an individual's physical and psychological bodily integrity by administering a substance. Similarly, in forcibly preventing an individual from voluntarily administering cannabis within their home, as seen in cannabis' classification as a Schedule I narcotic under the CSA, the federal government infringes upon an individual's physical and psychological bodily integrity by preventing the administration of cannabis. Therefore, if a prisoner within a correctional facility has a fundamental liberty interest in avoiding the unwanted administration of antipsychotic drugs that only an essential or overriding state interest might overcome, then reasoned judgment dictates that a free citizen within the confines of their home must have a fundamental liberty interest in avoiding the unwanted prevention (through the CSA) of administering cannabis within their home without an essential or overriding state interest. Simply put, both issues involve the deprivation of personal choice about one's body that demands a compelling government interest.

## **2. The Federal Government does not have a Compelling Interest in the Unwanted Prevention of an Individual Within their Home from Voluntarily Consuming Cannabis for either a Recreational or Medicinal Purpose**

As mentioned above, bodily integrity, or the notion of having autonomy over personal decisions about one's body, is a principle long established as warranting significant protection of liberty under the 14<sup>th</sup> Amendment.<sup>93</sup> As such, the government must have a compelling interest in protecting the health of the American people in order to justify its criminalization and prohibition of cannabis. Consequently, this section applies the substantive due process factors outlined by Justice Stevens to the history surrounding cannabis prohibition and concludes that the federal government cannot justify its classification as a Schedule I narcotic under the CSA.

### ***a. Legislative & Social History of Cannabis in the United States***

The medicinal and agricultural benefits of cannabis were recognized as far back as five thousand years, well before the existence of the United

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92. *McDonald*, 561 U.S. at 879–80.

93. *See Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942); *see also Rochin v. California*, 342 U.S. 165, 172 (1952); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 851–52 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Sell v. U.S.* 166, 176 (2003); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

States.<sup>94</sup> In fact, early American colonial laws required townships to grow specified amounts of *cannabis sativa*, or hemp, based on its population size.<sup>95</sup> Additionally, the stalk of hemp contains no psychotropic characteristics and produces a fiber-like quality used during colonial times for numerous purposes.<sup>96</sup> For example, the sails on the U.S.S. Constitution as well as several drafts of the Declaration of Independence both used hemp.<sup>97</sup>

Moreover, hemp was used to make rope and textiles, and was cultivated in large scale by George Washington, Thomas Jefferson, Benjamin Franklin, and other well-known colonialists.<sup>98</sup> With respect to the plant's medicinal benefits, cannabis was recognized within the United States pharmacopoeia from 1850 to 1942 and distributed to treat a variety of ailments up until the late 19<sup>th</sup> and early 20<sup>th</sup> century.<sup>99</sup>

### **i. The Rise of Opioid Addiction & Xenophobia**

However, a massive influx of immigrants into the country after the Civil War, coupled with the rise of an opioid epidemic, radically altered the country's perceptions and policies toward substance use and addiction.<sup>100</sup> At the turn of the century, the number of individuals addicted to cocaine, opium, morphine and heroin was estimated to be between one-quarter and one-half million Americans, which represented roughly one percent of the population.<sup>101</sup> This large population of addicts included more woman than men, more whites than blacks, and was not located in any specific geographic region or population centers and predominantly affected the middle class.<sup>102</sup> The opioid epidemic stemmed from various sources. The first was the over-prescription of opioids, which began during the Civil War as a treatment for injured soldiers and subsequently continued because of easy accessibility of such drugs along with the absence of regulations for druggists in refilling large prescriptions of morphine and other opiates.<sup>103</sup> This over-prescription of opioids led to accidental addiction.<sup>104</sup>

Another cause of accidental narcotics addiction stemmed from the widespread availability of patent medicines, colloquially known as "snake

94. Lester Grinspoon, M.D. & James B. Bakalar, *Marihuana: The Forbidden Medicine* 3 (rev. ed. 1997) ("The first evidence of the medicinal use of cannabis as an herbal published during the reign of Chinese Emperor Chen Nung five thousand years ago.").

95. JUDGE JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 20 (Temple University Press 2001).

96. *Id.*

97. *Id.*

98. *Id.*

99. See D. Mark Anderson, Benjamin Hansen, & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & Econ. 333, 335 (2013).

100. Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 974, 981-982 (1970).

101. *Id.* at 982.

102. *Id.* at 982-83.

103. *Id.* at 983.

104. *Id.*

oils.”<sup>105</sup> Marketed as a “cure for whatever ails you,” these substances usually contained large doses of cocaine or morphine.<sup>106</sup> As a result, a large number of middle-class agrarian housewives became addicted to narcotics.<sup>107</sup> For example, cocaine was an ingredient in Coca-Cola from 1886 until 1900 and Bayer Pharmaceutical Products introduced heroin in 1898, selling it over the counter for a year before marketing aspirin.<sup>108</sup> To combat this unregulated pharmaceutical market, the United States passed the Pure Food and Drug Act of 1906, which didn’t aim to prohibit these substances, but rather required that medications contain accurate labeling of their contents.<sup>109</sup> Later amendments to the Act strengthened the requirements for accurate information regarding the potency of these drugs as well as whether the medications met federal standards.<sup>110</sup>

However, the Harrison Narcotics Act of 1914 was the first major federal legislation that began shifting the country’s approach to drug addiction and recreational use toward criminalization and demonization.<sup>111</sup> The Harrison Act was a taxing bill that required registration and taxation of all persons who imported, produced, dealt in, sold, or gave away opium, cocaine, or their derivatives.<sup>112</sup> Although the bill appeared primarily concerned with physicians and druggists dispensing addictive substances such as opium and heroin, the Act ultimately “fostered an image previously associated primarily with opium—that of the degenerate dope fiend with immoral proclivities,”<sup>113</sup> culminating with the Supreme Court’s decision in *Webb v. United States*, 249 U.S. 96 (1919).<sup>114</sup> *Webb* involved the incarceration of a physician and druggist under the Harrison Act for prescribing morphine to individuals without the applicable paperwork.<sup>115</sup>

Against the backdrop of American opioid addiction was the surge of Asian and Mexican immigration in the southern and western regions of the country, as well as the racial prejudices fueling the prohibition of narcotics. The first legislative movement toward the criminalization of opium for non-medicinal purposes began on the west coast in the late 1880s; in fact, the laws, along with judicial decisions relating to opium criminalization, embodied the conception of addiction as a result of immorality along with strong racist overtones.<sup>116</sup> For example, after upholding the conviction of an immigrant distributing opium, the Oregon court in *Ex parte Yung Jon* stated:

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105. Gray, *supra* note 95, at 21

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 22.

112. Bonnie & Whitebread, *supra* note 4, at 987.

113. *Id.*

114. *Id.* at 987–88 (holding that preventing withdrawal was not a legitimate medical use that justified a prescription to an unregistered person).

115. *Id.*

116. *Id.* at 966–97.

Smoking opium is not our vice, and therefore it may be that legislation proceeds more from a desire to vex and annoy the "Heathen Chinese" in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.<sup>117</sup>

Meanwhile, an influx of Mexican immigrants created large minority populations in the western states, causing federal and state governments to focus on a new brand of narcotic: marijuana.<sup>118</sup> At the time, the recreational use of cannabis was virtually unknown to the American public and thought to be confined to regions west of the Mississippi and located within these large Mexican communities.<sup>119</sup> By 1930, sixteen of these states had prohibited the sale or possession of cannabis with little public discourse, derogatory and blatantly racist references toward Mexicans, and the assumption of a causal connection between criminal conduct and use of the Mexican "killer weed."<sup>120</sup> Though implicit at first, the discriminatory nature of the laws became readily explicit in states such as Montana and Colorado as well as throughout the nation.<sup>121</sup> For instance, in the weeks leading up to cannabis legislation, the *Montana Standard* newspaper published sentiments in the legislature:

There was fun in the House Health Committee during the week when the Marihuana bill came up for consideration. Marihuana is Mexican opium, a plant used by Mexicans and cultivated for sale by Indians. "When some beet field peon takes a few rares of this stuff," explained by Dr. Fred Fulsher of Mineral County, "He thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary bullfights in the 'Bower of Roses' or put on tournaments for the favor of 'Spanish Rose' after a couple of whiffs of Marijuana. The Silver Bow and Yellowstone delegations both deplore these international complications." Everybody laughed and the bill was recommended for passage.<sup>122</sup>

While the proliferation of cannabis prohibition continued in the west, the northeastern states began its own crusade against the "killer weed." In 1914, the New York City Sanitary Laws were amended to include cannabis as a prohibited narcotic, making New York the first state to pass a law significantly regulating cannabis.<sup>123</sup> Months after the amendments, the *New York Times* ran an article on the legislation, stating:

This narcotic has practically the same effect as morphine and cocaine, but it was not used in this country to any extent while it was

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117. *Id.*

118. HARBOR SIDE HEALTH CENTER, *supra* note 5. For the remainder of this paper, the scientific and non-pejorative word for marijuana, cannabis, will be used.

119. BONNIE & WHITEBREAD, *supra* note 4, at 1012.

120. *See id.*

121. *Id.* at 1014.

122. *Id.* at 1014–15.

123. *Id.* at 1016.

easy to get the more refined narcotics. . .[T]he inclusion of cannabis indica among the drugs to be sold only on prescription is only common sense. Devotees of hasish are now hardly numerous enough here to count, but they are likely to increase as other narcotics become harder to obtain.<sup>124</sup>

The impetus behind New York and numerous northeast states in passing such legislation was that cannabis prohibition would prevent addicts from substituting it for the drugs which had become much more difficult to obtain, such as alcohol, opium, and morphine.<sup>125</sup>

## ii. “Reefer Madness” & The Marihuana Tax Act of 1937

In the following years, various states across the country passed marijuana legislation, culminating in the federal Uniform Narcotic Drug Act in 1934 and the 1937 Marihuana Tax Act.

After undergoing multiple revisions, the Uniform Narcotic Drug Act was passed in 1934 due to the Harrison Act’s failure to create and implement statewide uniformity with regard to narcotic prohibition.<sup>126</sup> Surprisingly enough, cannabis was considered an option for states to include in its list of prohibited substances and was not initially required.<sup>127</sup>

However, the educational contours of the legislation were left to the Federal Bureau of Narcotics and its commissioner, Harry J. Anslinger.<sup>128</sup> The Bureau began an aggressive campaign in the press, legislative chambers, and any other forum it could find to rally public support for the nationwide implementation of the Act.<sup>129</sup> Despite the Bureau’s efforts to advocate for the implementation of the bill, by late 1935 only ten states had fully enacted the Uniform Narcotics Act, due in part to a combination of public apathy and administrative resistance.<sup>130</sup> As a result of these difficulties, the Bureau began to re-focus attention and changed policy strategies by focusing on the new drug menace, marijuana.<sup>131</sup>

As part of this new strategy to demonize, racialize, and sensationalize cannabis consumption, the Bureau and Mr. Anslinger joined forces with newspapers and public officials who sought to emphasize the drug’s degenerate qualities, whether real or imagined.<sup>132</sup> To illustrate, in 1936 the Bureau received a letter from the editor of the *Alamoosa Daily Courier* recounting an attack against a girl by a Mexican-American allegedly under the influence of cannabis, stating:

I wish I could show you what a small marihuana cigarette can do to one of our degenerate Spanish speaking residents. That’s why our

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124. BONNIE & WHITEBREAD, *supra* note 4, at 1017.

125. *Id.* at 1019.

126. *Id.* at 1030.

127. *See generally* BONNIE & WHITEBREAD, *supra* note 4.

128. *Id.* at 95–97.

129. *Id.* at 1038.

130. *Id.*

131. *Id.*

132. BONNIE & WHITEBREAD, *supra* note 4, at 1037.

problem is so great; the greatest percentage of our population is composed of Spanish-speaking persons, most of whom are low mentally, because of social and racial conditions.<sup>133</sup>

In response, the Bureau agreed to further its “educational campaign to describe the weed and tell of its horrible effects.”<sup>134</sup> This educational campaign included remarks by Mr. Anslinger and the Bureau such as, “Police officials in cities of those states where it is most widely used estimate that fifty percent of the violent crimes committed in districts occupied by Mexicans, Spaniards, Latin-Americans, Greeks, or Negroes may be traced to this evil.”<sup>135</sup>

“Reefer Madness”<sup>136</sup> culminated in the passage of the Marihuana Tax Act of 1937, which was considered necessary in order to streamline and facilitate the enforcement of the Uniform Narcotic Act.<sup>137</sup> The brief, three-day Congressional hearing surrounding the proposed Act was devoid of substantiated facts and scientific evidence, and a lack of reasoned Congressional inquiry is evident throughout the testimony.<sup>138</sup> Throughout the testimony, Bureau Chief Harry Anslinger purported that “Mexican laborers have brought seeds of this plant into Montana and it is fast becoming a terrible menace, particularly in the counties where sugar beets are grown.”<sup>139</sup>

Along with shedding no light on the patterns of use, Mr. Anslinger repeatedly emphasized the drug’s effects: insanity, criminality, and death.<sup>140</sup> To support these allegations, Mr. Anslinger relied primarily on three things: “a variety of horror stories from newspapers cited by Mr. Anslinger and others about atrocious criminal acts committed by individuals under the influence of the drug [all of which were unsubstantiated]; studies by Eugene Stanley, the District Attorney of New Orleans, linking the drug and the population of the Louisiana jails; and an inconclusive experimentation on dogs.”<sup>141</sup> An example of this questionable evidence is seen in a study conducted by the Bureau’s doctor that tested the effects of cannabis on dogs, but was unable to establish a link between a dog’s response to the drug and a human’s.<sup>142</sup> Even more revealing, the doctor didn’t fully comprehend the effect it had on dogs:

Mr. McCormack: Have you experimented upon any animals whose reaction to this drug would be similar to that of human beings.

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133. *Id.*

134. *Id.* at 1036.

135. *Id.* at 100.

136. *Reefer Madness*, IMDB, <http://www.imdb.com/title/tt0028346/> (last visited May 4, 2016) (The 1937 propaganda film *Reefer Madness* is a “[c]autionary tale [which] features a fictionalized and highly exaggerated take on the use of marijuana. A trio of drug dealers lead innocent teenagers to become addicted to “reefer” cigarettes by holding wild parties with jazz music.”).

137. BONNIE & WHITEBREAD, *supra* note 4, at 1049.

138. See *The Marihuana Tax Act of 1937*, SCHAFER LIBRARY OF DRUG POLICY, <http://www.druglibrary.org/schaffer/hemp/taxact/taxact.htm> (last visited May 4, 2016).

139. BONNIE & WHITEHEAD, *supra* note 4, at 1055.

140. *Id.*

141. *Id.* at 1055–56.

142. *Id.* at 1057.

Dr. Munch: The reason we use dogs is because the reaction of dogs to this drug closely resembles the reaction of human beings.

Mr. McCormack: And the continued use of it, as you have observed the reaction on dogs, has resulted in the disintegration of the personality?

Dr. Munch: Yes. So far as I can tell, not being a dog psychologist. .<sup>143</sup>

The lone witness representing the American Medical Association (A.M.A.), Dr. Woodward, had major reservations regarding the evidence put forward by the Bureau and critically questioned the lack of credible medical evidence, ultimately not supporting cannabis prohibition.<sup>144</sup> Dr. Woodward, along with representatives from industries requiring the partial usage of cannabis plants in their products, were routinely dismissed and marginalized as obstructionists.<sup>145</sup> After quickly making its way through the Senate and House, the only question remaining was whether the A.M.A. agreed with the bill.<sup>146</sup> Mr. Fred Vinson, who would later sit on the Supreme Court as Chief Justice, stated the A.M.A. did not object and actually supported the bill.<sup>147</sup>

Consequently, the Marihuana Tax Act passed through Congress with little debate and virtually no public attention.<sup>148</sup> The Act required all buyers, sellers, importers, growers, physicians, veterinarians, and any other persons who dealt in cannabis commercially, prescribed it professionally, or possessed it to purchase a tax stamp in order to possess cannabis legally.<sup>149</sup> The onerous restrictions and excessive costs effectively encouraged non-compliance and created a *de facto* prohibition.<sup>150</sup> The Act remained in effect for almost three decades until it was held unconstitutional in 1969.<sup>151</sup>

### iii. Post Marihuana Tax Act Legislation & Tough on Crime Laws

Over the next thirty years, different presidents and Congress politically benefited from the continuation of “tough on crime” laws, as seen in the Boggs Act of 1951 and Narcotic Control Act of 1956, both of which imposed stricter sentencing requirements for all illicit drug offenses.<sup>152</sup> In 1961, the U.S. government convinced numerous countries to ratify the Single Convention of

143. *Id.*

144. BONNIE & WHITEHEAD, *supra* note 4, at 1057–58.

145. See BONNIE & WHITEHEAD, *supra* note 4, at 1060 (“The Chairman: If you want to advise us on legislation, you ought to come here with some constructive proposals, rather than criticism, rather than trying to throw obstacles in the way of something that the Federal Government is trying to do. It has not only an unselfish motive in this, but they have a serious responsibility.”).

146. *Id.* at 1062.

147. *Id.*

148. *Id.*

149. Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legal Marijuana*, 119 PA. ST. L. REV. 333, 337 (2014).

150. *Id.*

151. See generally *Leary v. United States*, 395 U.S. 6 (1969) (overturning Leary’s conviction for possession of marijuana without a tax stamp and holding that a federal tax stamp requirement violated Leary’s Fifth Amendment right against self-incrimination).

152. GRAY, *supra* note 95, at 27.

Narcotic Drugs, essentially binding countries to our preferred method of dealing with drugs, i.e., prohibition and criminalization.<sup>153</sup> The United States' policy views toward drug prohibition culminated with President Nixon's infamous declaration of a "War on Drugs" and its progeny, the Comprehensive Drug Abuse Prevention and Control Act of 1970 (i.e., The Controlled Substances Act or CSA).<sup>154</sup> The Act consolidated prior anti-drug legislation and established schedules of illicit drugs that remain in existence to the present day.<sup>155</sup>

The CSA categorized all controlled substances into five classifications (i.e., schedules) based on medical value, harmfulness, and potential for abuse or addiction.<sup>156</sup> Cannabis was designated as a Schedule I, which is reserved for the most dangerous drugs that have a high potential for abuse and no recognized medical use in the United States.<sup>157</sup> The Drug Enforcement Agency (which is within the Department of Justice) is tasked with enforcing the law along with categorizing the drugs within the schedules.<sup>158</sup>

Prior to the Act's enactment, the National Commission on Marijuana and Drug Abuse was created in 1970 as a fact-finding committee into the medical effects of cannabis consumption.<sup>159</sup> In addition to debunking many of the earlier myths spawned by the hysteria about cannabis and dependency, violence, and safety, the Commission recommended ending criminalization:

[w]e believe that government must show a compelling reason to justify invasion of the home in order to prevent personal use of marihuana. We find little in marihuana's effects or its social impact to support such a determination. Legislator enacting Prohibition did not find such a compelling reason 40 years ago; and we do not find the situation anymore compelling for marihuana today.<sup>160</sup>

Despite the growing medically informed hesitance toward cannabis prohibition, the substance was categorized as a Schedule I narcotic, where it sits today. In the following years after the enactment of the CSA, the Reagan Administration drastically increased spending and tough on crime laws, introducing legislation such as the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Acts of 1986 and 1988, all of which increased federal penalties for drug trafficking and sentencing.<sup>161</sup> Additionally, the 1998 Higher Education Act disqualified young people from receiving federal aid for college if they had ever been convicted of cannabis possession.<sup>162</sup> Offenses like robbery, rape, or manslaughter did not similarly disqualify them.<sup>163</sup>

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153. *Id.*

154. *Id.*

155. *Id.*

156. Hull, *supra* note 149, at 338.

157. *Id.*

158. *Id.*

159. BONNIE & WHITEBREAD, *supra* note 4, at 262–70.

160. *Id.* at 271.

161. GRAY, *supra* note 95, at 27.

162. *Id.* at 27–28.

163. *Id.*

***b. Present Day Legislative Initiatives on Comprehensive Cannabis Reform Policies***

Since President Nixon's infamous declaration of a War on Drugs,<sup>164</sup> the United States has undertaken billions in costs<sup>165</sup> and inflicted immeasurable harm upon the liberty of people within the country and throughout the world. As seen earlier, cannabis prohibition was spawned from racial discrimination toward immigrant groups such as Mexicans, African Americans, Latinos, and other racial minorities.

Considering the prohibition's legal origins, disturbing trends toward disproportionate arrests and incarceration of minority groups still exist today.<sup>166</sup> To illustrate, half of the amount of cannabis possession arrestees in 1990 in California were African-American, Latino, Asian, or members of other nonwhite groups and 35% were under age 20.<sup>167</sup> In 2010, that number increased to 64% nonwhite and 52% under age 20, while cannabis possession arrests of teenagers of color rose from 3,100 in 1990 to 16,400 in 2010, a 300% arrest increase greater than the population growth in that group.<sup>168</sup> Looking at these perspectives in another light, while nearly 1 in every 1,000 African-Americans in Butte County were imprisoned for a marijuana offense, none of the white residents of Alameda or Marin counties were.<sup>169</sup>

Concurrently, racial minorities are also targeted on the East Coast. In New York, derisively nick-named the "Marijuana Arrest Capital of the World,"<sup>170</sup> when examining the 7,110 misdemeanor marijuana arrests, African-Americans were arrested for misdemeanor cannabis possession 1,494 times or 50.47 percent of the total city arrests during the first quarter of 2015 while Hispanics were arrested 1,130 times, or 38.18 percent; both groups accounted for 88.65 percent of the total.<sup>171</sup> Meanwhile, 228 (7.70 percent) of these arrests were for Whites while Asian/Indian comprised 79 (2.67 percent) of these arrests.<sup>172</sup>

These disproportionately high rates of minority arrests generate high rates of minority incarceration. To demonstrate, "the most serious offense for

164. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the economic, social, political and cultural impact the prohibition and criminalization of narcotics such as cannabis, crack cocaine, cocaine and others have had on the United States and the entire world).

165. *Drug War Statistics*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/drug-war-statistics> (last visited May 5, 2016).

166. MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, *MISDEMEANOR MARIJUANA ARRESTS ARE SKYROCKETING AND OTHER CALIFORNIA MARIJUANA ENFORCEMENT DISPARITIES* (2011), [http://www.cjcj.org/files/Misdemeanor\\_marijuana\\_arrests.pdf](http://www.cjcj.org/files/Misdemeanor_marijuana_arrests.pdf).

167. *Id.*

168. *Id.*

169. *Id.*

170. John Del Signore, *Welcome to NYC: Marijuana Arrest Capital of the World*, GOTHAMIST (Feb. 10, 2011, 5:09 PM), [http://gothamist.com/2011/02/10/welcome\\_to\\_nyc\\_the\\_marijuana\\_arrest.php](http://gothamist.com/2011/02/10/welcome_to_nyc_the_marijuana_arrest.php).

171. Victoria Bekiempis, *Whites Just 8% of New York City's Marijuana Arrests*, NEWSWEEK (June 12, 2015, 9:38 AM), <http://www.newsweek.com/how-do-misdemeanor-marijuana-arrests-affect-violent-crime-341145>.

172. *Id.*

208,000 of the 1,325,305 people in the US sentenced to state facilities at the end of 2013 was a conviction involving illegal drugs. That represents 15% of all sentenced prisoners under state jurisdiction. Of this total: 67,800 (32.6%) were non-Hispanic white, 79,900 (38.4%) were non Latino/Hispanic African Americans, and 39,900 (19.2%) were Latino/Hispanic.”<sup>173</sup> All things considered, the early discriminatory origins of cannabis prohibition give credence to criticism stating how cannabis laws disproportionately target minorities groups for arrests and incarceration.

Finally recognizing the economic and humanitarian costs of the War on Drugs, states across the country have begun to enact policies and laws reflecting modern science and knowledge with respect to recreational and medicinal cannabis use. For example, eight states will now permit adult-use of marijuana for medical and recreational purposes.<sup>174</sup> Moreover, another 18 states have comprehensive medical marijuana laws, and more than a dozen have limited medical marijuana laws.<sup>175</sup> To further illustrate the shift in comprehensive cannabis reform policies, in 2016 the U.S. Senate passed the Military Construction and Veterans Affairs Appropriation Bill, “which includes language to allow Veterans Administration (VA) doctors to recommend medical marijuana to their patients in states where medical marijuana is legal.”<sup>176</sup> Moreover, on March 10<sup>th</sup>, 2015, Senators Cory Booker (D-NJ), Rand Paul (R-KY), and Kirsten Gillibrand (D-NY) introduced the Compassionate Access, Research Expansion and Respect States (CARERS) Act, which “is the first-ever bill in the U.S. Senate to legalize marijuana for medical use and the most comprehensive medical marijuana bill ever introduced in Congress.”<sup>177</sup>

### *c. Judicial Precedents Regarding Cannabis Consumption*

As of 2016, only two major cases directly involving cannabis have come before the Supreme Court: *United States v. Oakland Cannabis Buyers' Co-op*<sup>178</sup> and *Gonzales v. Raich*.<sup>179</sup> Since *Oakland Cannabis* primarily involves

173. E. ANN CARSON, US DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248955, PRISONERS IN 2014 16, 30 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

174. Laura A. Bischoff, *Voters Say Yes to Legal Marijuana in Eight States*, DAYTON DAILY NEWS (Nov. 18, 2016, 12:02 PM), <http://www.daytondailynews.com/news/voters-say-yes-legal-marijuana-eight-states/mYITnHX8SI8jz9WdKjioMM>.

175. *Id.*

176. Press Release, Drug Policy All., Senate Approves Funding Bill That Allows Veterans to Access Medical Marijuana (Nov. 10, 2015), <http://www.drugpolicy.org/news/2015/11/senate-approves-funding-bill-allows-veterans-access-medical-marijuana>.

177. *Id.* See Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 603, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/683/text>.

178. 532 U.S. 483, 490 (2001) (finding the Controlled Substance Act does not contain an implied medical necessity exception to prohibitions on manufacture and distribution of marijuana).

179. 545 U.S. 1, at 10 (2005) (The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We

statutory construction<sup>180</sup> and *Raich* involves Congress' commerce clause powers,<sup>181</sup> neither case addresses cannabis within the context of substantive due process and the 14<sup>th</sup> Amendment liberty clause.

However, on remand, the Ninth Circuit in *Raich v. Gonzales* held that the application of the Controlled Substances Act to growers and users of marijuana for medical purposes, as otherwise authorized by California Compassionate Use Act, did not violate substantive due process guarantees, since the right to decide on physician's advice to use medical marijuana to preserve bodily integrity was not deeply rooted in the United States' history and traditions and implicit in concept of ordered liberty.<sup>182</sup>

Despite recognizing that "it is beyond dispute that marijuana has a long history of use-medically and otherwise-in this country"<sup>183</sup> and despite recognizing that numerous states had passed laws "decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill. . .[and] passed resolutions recognizing that marijuana may have therapeutic value, and [permitted] limited use through closely monitored experimental treatment programs,"<sup>184</sup> the circuit court employed the categorical, *Glucksberg* methodology<sup>185</sup> of whether the asserted right is deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty. As a result of this application, the court failed to analyze or describe what constitutes implicit in the concept of ordered liberty (other than make conclusory statements that medicinal marijuana is not implicit in the concept of ordered liberty).<sup>186</sup>

As illustrated earlier, the pitfalls of a solely historical, categorical approach toward substantive due process "promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently " 'rooted.'"<sup>187</sup> To contrast the Ninth Circuit's approach, this article includes another source of persuasive authority that correctly applies a conceptual, autonomous analysis toward liberty that more closely resembles Justice Stevens' substantive due process

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accordingly vacate the judgment of the Court of Appeals.).

180. See *Cannabis Buyers*, 532 U.S. at 490–95.

181. *Raich*, 545 U.S. 1 at 22.

182. See *Raich v. Gonzales* 500 F.3d 850, at 864–866 (2007) ("Accordingly, the question becomes whether the liberty interest specially protected by the Due Process Clause embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, when all other prescribed medications and remedies have failed... We agree with *Raich* that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is "fundamental" and "implicit in the concept of ordered liberty."").

183. *Id.* at 865.

184. *Id.* at 865–66.

185. *Id.*

186. *Raich*, 500 F.3d at 866.

187. *McDonald v. City of Chicago*, 561 U.S. 742, 876–77 (2010).

standard.<sup>188</sup>

In the landmark Alaskan Supreme Court case of *Ravin v. State*, the court employed a conceptual, autonomous approach<sup>189</sup> toward substantive due process in holding “the citizens of the State of Alaska have a basic right to privacy in their homes under Alaska’s constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.”<sup>190</sup> In reaching its conclusion, the Court relied on textual commitments to the U.S. Constitution<sup>191</sup> involving privacy in the home along with the respect for privacy within the home enumerated in the Alaskan Constitution.<sup>192</sup> For example, the Court looked at the layers of privacy contained within the Bill of Rights, noting, “[a]t one end of the scale of the scope of the right to privacy is possession or ingestion in the individual’s home. If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. The importance of the home has been amply demonstrated in constitutional law.”<sup>193</sup>

With this holding, the Alaskan court pivoted the discussion to “whether the State has demonstrated sufficient justification for the prohibition of possession of marijuana in general in the interest of public welfare; and further, whether the State has met the greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.”<sup>194</sup> After examining scientific psychological and sociological data relating to cannabis consumption and its effects on users,<sup>195</sup> the Court concluded:

However, given the relative insignificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or

188. *Ravin v. State*, 537 P.2d 494, 502 (Alaska 1975).

189. *Id.*

190. *Id.* at 504.

191. *Id.* at 502–03 (“Among the enumerated rights in the federal Bill of Rights are the guarantee against quartering of troops in a private house in peacetime (Third Amendment) and the right to be ‘secure in their . . . houses . . . against unreasonable searches and seizures . . .’ (Fourth Amendment). The First Amendment has been held to protect the right to ‘privacy and freedom of association in the home. The Fifth Amendment has been described as providing protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life. The protection of the right to receive birth control information in *Griswold* was predicated on the sanctity of the marriage relationship and the harm to this fundamental area of privacy if police were allowed to ‘search the sacred precincts of marital bedrooms. And in *Stanley v. Georgia* the Court emphasized the home as the situs of protected ‘private activities.’”).

192. *Id.* at 504.

193. *Id.*

194. *Id.*

195. *Ravin v. State*, 537 P.2d 494, 505–08 (Alaska 1975).

possession of it in the home for personal use. Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for per-sonal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.<sup>196</sup>

Indeed, since this case was decided in 1975, scientific and professional advancements toward cannabis research as well as changing societal views toward cannabis consumption, both within the United States and abroad, further strengthen this conclusion: the federal government does not have a compelling interest to infringe upon an individual's fundamental right to bodily integrity under the 14<sup>th</sup> Amendment within their home to consume cannabis for medicinal or recreational reasons.

#### **d. Scientific Developments Regarding Cannabis Consumption that Contradict the Federal Government's Classification of Cannabis as a Schedule I Narcotic.**

Despite federal restrictions hampering the development of medicinal research for cannabis because of its classification as a Schedule I narcotic, the scientific community has made significant strides in further understanding the substance's medicinal qualities as well as its overall effects on the human body.

In medicinal cannabis states, doctors predominantly prescribe the substance to manage pain such "as headaches, a disease like cancer, or a long-term condition, like glaucoma or nerve pain."<sup>197</sup> Moreover, doctors can prescribe cannabis "for muscle spasms caused by multiple sclerosis, nausea from cancer chemotherapy, poor appetite and weight loss caused by chronic illness, such as HIV, or nerve pain, seizure disorders, and Crohn's disease."<sup>198</sup> Furthermore, "the FDA has also approved THC, a key ingredient in cannabis, to treat nausea and improve appetite; available by prescription in Marinol (dronabinol) and Cesamet (nabilone)."<sup>199</sup> The medicinal benefits of cannabis have tangibly affected people throughout the country and world. Take for example, the case of Charlotte Figi.<sup>200</sup> Ms. Figi began having seizures shortly after birth and was having 300 seizures a week by age 3, despite being on

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196. *Id.* at 511.

197. Anne Harding, *Medical Marijuana*, WEBMD, <http://www.webmd.com/pain-management/features/medical-marijuana-uses> (last visited May 5, 2016).

198. *Id.*

199. *Id.*

200. Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN HEALTH (Aug. 8, 2013, 8:44 PM), <http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/>.

several different medications.<sup>201</sup> After administering medicinal cannabis, her seizures have been limited to 2 or 3 per month.<sup>202</sup> More recently, scientists “reported that THC and other cannabinoids such as CBD slow growth and/or cause death in certain types of cancer cells growing in laboratory dishes. Some animal studies also suggest certain cannabinoids may slow growth and reduce spread of some forms of cancer.”<sup>203</sup>

With respect to questions surrounding cannabis use killing brain cells and lowering one’s IQ, “numerous studies have proven cannabis does the opposite, promoting the growth and development of new brain cells;”<sup>204</sup> while cannabis can cause some temporary cognitive changes such as a decrease in short term memory, these changes are reversible when an adult stops using cannabis.<sup>205</sup> Moreover, another study “showed that heavy cannabis users have an equal or lower rate of lung and respiratory tract cancers than non-users even though cannabis smoke has been proven to contain cancer-causing products of combustion.”<sup>206</sup>

As previously seen in *Ravin v. State*,<sup>207</sup> the federal government has attempted to justify cannabis prohibition because of its possible deleterious effect on drivers. However, “although cannabis intoxication has been shown to mildly impair psychomotor skills, this impairment does not appear to be severe or long lasting.”<sup>208</sup> Nevertheless, “this impairment does not appear to play a significant role in on-road traffic accidents.”<sup>209</sup> With respect to the federal government’s argument dating back to the origins of cannabis prohibition that the substance is addictive and is a “gateway” to other narcotics, cannabis dependence occurs, but is rare.<sup>210</sup> In fact, recent research demonstrates that cannabis can serve as an exit drug from other substances such as alcohol or

201. *Id.*

202. *Id.*

203. *Marijuana and Cancer*, AM. CANCER SOC’Y, <http://www.cancer.org/treatment/treatmentsandsideeffects/physicalsideeffects/chemotherapyeffects/marijuana-and-cancer> (last revised Mar. 4, 2015).

204. See Ismael Galve-Roperh et al., *The Endocannabinoid System and Neurogenesis in Health and Disease*, 13 NEUROSCIENTIST 109, 109–14 (2007); IllegallyHealed, *This Doctor Destroys Cannabis Myths Once and for All*, RESET.ME (Mar. 8, 2016), <http://reset.me/story/this-doctor-destroys-cannabis-myths-once-and-for-all>.

205. See Robert J. Tait et al., *Cannabis Use and Cognitive Function: 8-Year Trajectory in a Young Adult Cohort*, 106 ADDICTION 2195, 2195–2203 (2011); IllegallyHealed, *supra* note 210.

206. See Mia Hashibe et al., *Marijuana Use and the Risk of Lung and Upper Aerodigestive Tract Cancers: Results of a Population-Based Case-Control Study*, 15 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 1829, 1829–34 (2006); IllegallyHealed, *supra* note 210.

207. *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

208. *Marijuana and Driving: A Review of the Scientific Evidence*, NORML, <http://norml.org/library/item/marijuana-and-driving-a-review-of-the-scientific-evidence> (last visited May 5, 2016).

209. *Id.*

210. See James C. Anthony et al., *Comparative Epidemiology of Dependence on Tobacco, Alcohol, Controlled Substances, and Inhalants: Basic Findings From the National Comorbidity Survey*, 2 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 244, 244–68 (1994); IllegallyHealed, *supra* note 210.

heroin.<sup>211</sup>

**e. Practices of Other Democratic Nations Regarding Cannabis.**<sup>212</sup>

In 2015, a 4-1 decision by the Mexican Supreme Court held that prohibition on using cannabis violated “the right to the free development of personality – and was therefore unconstitutional.”<sup>213</sup> Indeed, the War on Drugs has had devastating repercussions on that country, including a “decade-long militarized crackdown on drug cartels costing the lives of around 100,000 people.”<sup>214</sup> In May 2014, “then-president José Mujica signed groundbreaking regulations for Uruguay’s marijuana market, making the South American nation the first country in the world to legalize sales of the drug, passed by the country’s senate in December 2013 – allowed marijuana users to access in three ways: by growing it at home, or buying it from pharmacies or collective ‘grow clubs.’”<sup>215</sup>

In 2001, the Portuguese government decriminalized all of its formerly illicit narcotics.<sup>216</sup> Since then, drug use has “declined overall among the 15- to 24-year-old population, those most at risk of initiating drug use.”<sup>217</sup> Astonishingly, there has also been a decline in the “percentage of the population who have ever used a drug and then continue to do so, as well as decreases in drug induced deaths, decreases in imprisonment on drug-related charges, and increase in visits to health clinics that deal with addiction and disease.”<sup>218</sup>

**f. The Traditions and Conscience of Our People**

In addition to recognizing the importance of constitutional precedent and legislative directives when examining issues involving liberty and the 14<sup>th</sup> Amendment, the conceptual, autonomous approach toward liberty advanced by Justice Stevens also includes “the traditions and conscience of our people.”<sup>219</sup>

211. Amanda Reiman, *Cannabis as a Substitute for Alcohol and Other Drugs*, BIOMED CENTRAL (December 3, 2009), <https://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-6-35>.

212. Justice Stevens articulates the importance of examining the practices of other democratic nations throughout the world as a factor to consider when analyzing a particular liberty issue. See *McDonald*, 561 U.S. at 879–80. Although the exact language Stevens chooses is “practices of other civilized nations,” this article replaces the ambiguous and possibly controversial word “civilized” with “democratic.”

213. David Agren, *Mexico Supreme Court Rules Ban on Marijuana Use Unconstitutional*, THE GUARDIAN (Nov. 4, 2015), <https://www.theguardian.com/world/2015/nov/04/mexico-supreme-court-recreational-marijuana-legal>.

214. *Id.*

215. Frederick Bernas & Camille Lavoix, *Uruguay Cannabis Market Still Struggles for Legitimacy a Year After Historic Ruling*, THE GUARDIAN (July 13, 2015), <http://www.theguardian.com/world/2015/jul/13/uruguay-marijuana-cannabis-market-sale-legitimacy>.

216. Zeeshan Aleem, *14 Years After Decriminalizing All Drugs, Here’s What Portugal Looks Like*, POLICY MIC (Feb. 11, 2015), <http://mic.com/articles/110344/14-years-after-portugal-decriminalized-all-drugs-here-s-what-s-happening#.ynrMNgTj>.

217. *Id.*

218. *Id.*

219. *McDonald v. City of Chicago*, 561 U.S. 742, 879–80.

While Justice Stevens does not define the contours of this factor, this article approaches it through the examination of the American people's views and opinions on cannabis consumption. A recent poll shows 58% of Americans support the legalization of cannabis in the United States, matching the high point in Gallup's 46-year study.<sup>220</sup> Likewise, cannabis has had an indelible impact upon the social and cultural landscape of the United States, spanning across film,<sup>221</sup> music,<sup>222</sup> and literature.<sup>223</sup> Ultimately, both indicate that cannabis has long been discussed and recognized within the American psyche for generations.

#### IV. CONCLUSION

When a voter referendum in 2012 legalized the recreational cultivation, growth, and possession of cannabis in Colorado, Governor Hickenlooper declared, "[t]his will be a complicated process, but we intend to follow through. That said, federal law still says marijuana is an illegal drug so don't break out the Cheetos or gold fish too quickly."<sup>224</sup> Time and again, politicians and media pundits<sup>225</sup> throughout the country perpetually dismiss arguments against cannabis prohibition and the War on Drugs by denying the merits of cannabis legalization, simply chalking it up to "stoners wanting to get high" or rehashing the old, false allegations that cannabis is a gateway drug.<sup>226</sup> These simplistic characterizations of cannabis legalization detract from the untold harm drug prohibition has inflicted upon millions of people throughout the United States and the world.

This article combats the false narratives that pervade the political landscape through a scholarly examination of the history of cannabis prohibition as well as the scientific, social, economic, and cultural effects of the War on Drugs. Moreover, this article illustrates the importance of critically analyzing and understanding American History when examining issues

220. Jeffrey M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP (Oct. 21, 2015), <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx>.

221. Adam Conner-Simons, *Smoke Signals*, BOSTON.COM, <http://www.boston.com/ae/movies/gallery/cheechchong/> (last visited May 5, 2016).

222. Mark Schiff, *15 Surprising Advocates for Marijuana in the Music Industry*, AXS (July 9, 2014), <http://www.axs.com/15-surprising-advocates-for-marijuana-in-the-music-industry-14181>.

223. *A Literary History of Cannabis in the United States: Racism, Classism, and the Beats in Post-WWII America*, BLOOMWELL (Sept. 3, 2015), <http://www.bloomwellbend.com/literary-history-marijuana-us/>.

224. Matt Ferner, *Amendment 64 Opponents Speak Out on Legal Weed: Hickenlooper Says 'Don't Break Out the Cheetos' Yet; AG Suthers Calls Out the DOJ*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/11/07/hickenlooper-federal-law-\\_n\\_2088989.html](http://www.huffingtonpost.com/2012/11/07/hickenlooper-federal-law-_n_2088989.html) (last updated Nov. 8, 2012).

225. See Ricardo Baca, *Rush Limbaugh Tries to Understand the Concept of 'Wake and Bake,' Fails*, CANNABIST, <http://www.thecannabist.co/2015/06/30/rush-limbaugh-wake-and-bake-medical-marijuana/37156/> (last updated June 30, 2015).

226. *Ben Carson on Drugs*, ON THE ISSUES, [http://www.ontheissues.org/2016/Ben\\_Carson\\_Drugs.htm](http://www.ontheissues.org/2016/Ben_Carson_Drugs.htm) (last updated Oct. 1, 2016).

involving the 14<sup>th</sup> Amendment and substantive due process. If “history is the intellectual form in which a civilization renders account to itself of its past,”<sup>227</sup> then the Supreme Court’s current substantive due process standard of 14<sup>th</sup> Amendment liberty rights is unsustainable.

In a constantly evolving society that ceaselessly looks toward the future in reflecting upon Liberty and its centrality to individual life, the Supreme Court must approach history with a sense of humility and unyielding devotion. In the words of Founding Father Thomas Paine, “the greatest tyrannies are always perpetuated in the name of the noblest causes.”<sup>228</sup>

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227. K. LAWSON YOUNGER, JR., *ANCIENT CONQUEST ACCOUNTS: A STUDY IN ANCIENT NEAR EASTERN AND BIBLICAL HISTORY WRITING* 26 (1990).

228. Thomas Paine, *Common Sense*, Philadelphia (printed and sold by W. and T. Bradford (1776)); Bartleby.com, 1999, [www.bartleby.com/133/](http://www.bartleby.com/133/).