

WOULD GOVERNMENT PROHIBITION OF MARIJUANA PASS STRICT SCRUTINY?*

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INTRODUCTION

The federal government currently classifies marijuana as a Schedule I controlled substance under the Controlled Substances Act of 1970.¹ Essentially, marijuana production, possession, sale, and use are illegal.² In addition, any other plant similar to marijuana, including industrial hemp, is illegal.³ However, an argument was made for the existence of a fundamental right of bodily autonomy in an article by Martin D. Carcieri.⁴ This article also suggested that marijuana use may fall under this right of bodily autonomy, but the article did not delve into the issue, instead suggesting the issues involved be the topic of another law review article.⁵ If bodily autonomy is a fundamental right, and marijuana use falls under that fundamental right, any law prohibiting marijuana use would have to pass strict scrutiny.⁶

This Note asks and answers three questions. Part I asks, “Is a constitutionally protected fundamental right of bodily autonomy compatible with Supreme Court precedent and the Constitution such that the Court should recognize said right?” In answering this question, a light review of the strict scrutiny standard and currently recognized fundamental rights is undertaken to provide a framework for a discussion of federal and state precedent regarding the issue. Part II asks, “If there was to be a fundamental right to bodily autonomy, should marijuana use fall within this right?” In determining whether the bodily autonomy right should extend to marijuana use, the histories of tobacco, alcohol, and marijuana are examined to put in perspective a subsequent comparison of the three. Part III asks, “If there is a fundamental right to bodily autonomy and marijuana use falls under the right, would the current federal government prohibition of marijuana pass strict scrutiny for its infringement on bodily autonomy?” Here, the proposed compelling interests of morality, crime, and protecting health—as these relate to marijuana—are debunked, and the broad

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1. 21 U.S.C. §§ 801-971 (2006 & Supp. V 2011).

2. *Id.* § 41(a)

3. *Id.* § 841(b)(1)(A)(vii)

4. Martin D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303, 307-308, 311-12 (2011).

5. *Id.* at 329.

6. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to punitive sterilization); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (creating a higher level of judicial scrutiny for legislation that met certain conditions).

nature of the prohibition is demonstrated by citing the negative effects the federal government prohibition has had on U.S. industrial hemp production and medical marijuana research and use. In the end, this Note deems that the Supreme Court should take the following actions: (1) recognize a fundamental right to bodily autonomy; (2) include marijuana use in this right; and (3) strike down the current federal prohibition of marijuana for failing to meet strict scrutiny.

I. THE FOURTEENTH AMENDMENT, STRICT SCRUTINY, AND FUNDAMENTAL RIGHTS

We tend to take for granted our ability to decide what to do with our bodies. It is our naturally occurring assumption that we decide what to eat and drink, what clothes and hairstyle to wear, and what medicines and medical procedures we will endure. The public balks at the very idea of the government mandating anything with regard to these issues,⁷ acquiescing to regulation only when the public interest is in line with such a mandate.⁸ This is as it should be. No man or woman of sound mind should be controlled in such a way, and to do so would be a crime on the government's part that would not be long tolerated by the citizens.

In fact, the idea that we each decide what happens to our own bodies has a long history in the United States, with language dating back to at least 1891 suggesting such a right exists.⁹ However, there is currently no "bodily autonomy" right recognized by the U.S. Constitution, either in the Bill of Rights or in terms of those rights the Court has recognized as fundamental under the Fourteenth Amendment.¹⁰ Therefore, the question to answer is whether there exists any case law that supports the recognition of such a right. However, a brief discussion of the Fourteenth Amendment, the different levels of scrutiny, and the recognized and proposed fundamental rights are first necessary to lay the groundwork for understanding the issue itself.

When the Fourteenth Amendment recognizes a right as fundamental, laws burdening that right will be treated differently from laws burdening rights that have not been deemed fundamental.¹¹ The Fourteenth Amendment to the United States Constitution states, "No State shall . . . deprive any person of life, liberty,

7. See *Health Opinions: Should the Government Have a Say in Our Diets?*, DEBATE.ORG, <http://debates.juggle.com/should-the-government-have-a-say-in-our-diets> (last visited Mar. 20, 2013).

8. See generally U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 1. (instituting a prohibition on alcohol in the United States, which was later repealed when the prohibition lost popularity).

9. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

10. See U.S. CONST. amends. I-X; Carcieri, *supra* note 4, at 311-15.

11. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 768-69 (5th ed. 2005).

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹² Under either a due process or equal protection claim, a court usually starts with the presumption that the government statute, rule, or regulation burdening a right is valid and constitutional.¹³ Generally, for the courts to uphold the government action, the government is only required to demonstrate a “legitimate state interest” in enacting the statute, rule, or regulation, and a rational relationship between the statute, rule, or regulation and the interest to be furthered.¹⁴

However, courts can subject a law to heightened scrutiny if it either burdens a fundamental right or a suspect classification.¹⁵ In these cases, courts do not defer to the government.¹⁶ This is called strict scrutiny.¹⁷ Under strict scrutiny, the government interest in enacting the law must be compelling, and the law must be narrowly tailored to meet the interest.¹⁸ In terms of suspect class, only the class of race gets strict scrutiny.¹⁹

In terms of due process and equal protection, however, the list of fundamental rights has grown over time, and includes, at least arguably, privacy,²⁰ voting,²¹ travel,²² and access to the judicial system.²³

The most known fundamental right likely is the right to privacy. In *Griswold v. Connecticut*,²⁴ the Supreme Court, through an opinion by Justice Douglas, indicated that a Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy.²⁵ In finding a constitutional right to privacy, the Court pointed to the “penumbras” of the Constitution, and inferred that the First, Third, Fourth, Fifth, and Ninth Amendments collectively create a right to privacy.²⁶ This indicates the Court’s

12. U.S. CONST. amend. XIV, § 1.

13. See *Schweiker v. Wilson*, 450 U.S. 221, 239 (1981); *U.S. Ry. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

14. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

15. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

16. *Id.*

17. See *STONE ET AL.*, *supra* note 11, at 531.

18. See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

19. See *STONE ET AL.*, *supra* note 11, at 523, 533-45, 576-81.

20. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

21. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

22. See *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974) (applying strict scrutiny to Connecticut law denying an application for Aid to Families with Dependent Children assistance because appellee had not lived in Connecticut for one year based on the idea that the law restricts interstate travel).

23. *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971).

24. 381 U.S. at 479.

25. *Id.* at 486.

26. *Id.* at 484.

willingness to find that some rights are fundamental despite not being explicitly mentioned in the Constitution or its subsequent amendments.

Although privacy might be the right that comes to mind when fundamental rights are brought up, the ability of U.S. citizens to vote in elections is also an important aspect of our system of ordered liberty. In *Harper v. Virginia State Board of Elections*,²⁷ the Supreme Court held that Virginia's poll tax was unconstitutional because it was "inconsistent with the Equal Protection Clause."²⁸ In issuing its holding, the Court stated the following:

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.²⁹

The Court's use of strong, emphatic language in this holding illustrates the importance our legal system gives to fundamental rights.

Another right of U.S. citizens the Court has determined to be fundamental is the ability of each citizen to travel, at least between states. In *Shapiro v. Thompson*,³⁰ the Supreme Court held that a statutory prohibition against providing welfare benefits to those who had been residents of the state for less than one year created a discriminatory classification in violation of equal protection laws.³¹

The final right, access to the judicial system, is more tenuous than those previously listed because, as the Court indicated in *Boddie v. Connecticut*,³²

We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.³³

However, the Supreme Court did hold that in view of the importance of the marriage relationship in society and the state monopolization of divorce, due process of law prohibits a state from denying access to its courts to individuals who seek judicial dissolution of their marriages in good faith solely because of

27. 383 U.S. 663 (1966).

28. *Id.* at 665-66.

29. *Id.* at 670 (internal citations omitted).

30. 394 U.S. 618 (1966), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 657 (1974).

31. *Id.* at 641.

32. 401 U.S. 371 (1971).

33. *Id.* at 382-83.

an inability to pay fees.³⁴

Although these four cases represent the only fundamental rights somewhat recognized by the Supreme Court, at least two other rights have been proposed. Past litigants have suggested fundamental rights to education and government assistance programs, but the Supreme Court has rejected these arguments. In *San Antonio Independent School District v. Rodriguez*,³⁵ the Supreme Court held that it was improper to apply strict scrutiny to a challenge brought by several parents of poor school children concerning the reliance on local property taxation by the Texas school-financing system.³⁶ The Court discussed education as a fundamental right and, after indicating its support for public education,³⁷ concluded that education was not a fundamental right.³⁸ In *Dandridge v. Williams*,³⁹ the Court indicated that it would not apply strict scrutiny to denial of government assistance programs by holding that a Maryland regulation capping welfare benefits did not violate the Equal Protection Clause.⁴⁰

The Supreme Court has not recognized any new fundamental rights since the tentative endorsement represented by *Boddie* in 1971.⁴¹ This is evidence of a trend in the federal system to reel in the list of fundamental rights granted under the Fourteenth Amendment. However, it is not accurate to say the Supreme Court would be unwilling to recognize a right should a legitimate one, such as bodily autonomy, be brought to bear. Essentially, Supreme Court dicta supports bodily autonomy's position as a fundamental right, as evidenced by cases in the following section.

A. Supreme Court Precedent Supporting a Bodily Autonomy Fundamental Right

Although Supreme Court jurisprudence currently does not recognize bodily autonomy as a fundamental right, the existing fundamental rights arguably have bodily autonomy aspects. Furthermore, a significant amount of case law suggests that U.S. citizens should have a right to bodily autonomy.⁴²

34. *Id.* at 374, 383.

35. 411 U.S. 1 (1973).

36. *Id.* at 37.

37. *Id.* at 29-30.

38. *Id.* at 37.

39. 397 U.S. 471 (1970).

40. *Id.* at 472-73, 485.

41. *See Boddie v. Connecticut*, 401 U.S. 371, 382 (1971); *see also* STONE ET AL., *supra* note 11, at 768-844 (discussing fundamental rights).

42. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 564, 574, 578-79 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Cruzan ex rel. Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Boddie*, 401 U.S. at 382; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 254-55 (1891).

In 1891, the Supreme Court, in *Union Pacific Railway Co. v. Botsford*,⁴³ determined if the trial court could force an individual against her consent to undergo a medical examination for the purpose of ascertaining the extent of her injuries.⁴⁴ The Court held, “The order moved for, subjecting the plaintiff’s person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States.”⁴⁵ The Court, in reaching this holding, indicated that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”⁴⁶ This language strongly supports the position that bodily autonomy is a fundamental right.

In *Rochin v. California*,⁴⁷ a man swallowed two capsules that the police reasonably believed to be contraband.⁴⁸ The police pumped the man’s stomach in order to retrieve the contraband.⁴⁹ The Supreme Court held that the forced stomach pumping violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.⁵⁰ This ruling illustrates the Court’s willingness to protect an individual’s right to control his or her own body and creates significant support for the protection of bodily autonomy under the Fourteenth Amendment.

Although *Griswold v. Connecticut*⁵¹ is primarily known for its role in the creation of a fundamental right to privacy,⁵² privacy, itself, arguably is only an aspect of bodily autonomy.⁵³ In fact, the right to privacy and proposed right to bodily autonomy mirror each other significantly in terms of their essential argument for existence.⁵⁴ Joel Feinberg, a philosophy professor at the University of Arizona, described the interrelationship between privacy and personal or “bodily” autonomy as follows:

After all, we speak of “bodily autonomy,” and acknowledge its violation in cases of assault, battery, rape, and so on. But surely our total autonomy includes more than simply our bodily “territory,” and even in respect to it, more is involved than simple immunity to uninvited

43. 141 U.S. at 250.

44. *Id.* at 251.

45. *Id.* at 257.

46. *Id.* at 251.

47. 342 U.S. at 165.

48. *Id.* at 166.

49. *Id.*

50. *Id.* at 172-74.

51. 381 U.S. 479 (1965).

52. *Id.* at 486.

53. See 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 52-54 (1986).

54. *Id.* at 53 (talking about each individual as the sovereign of themselves whose “personal domain consists of the body, privacy, landed and chattel property, and at least vital life-decisions”).

contacts and invasions. Not only is my bodily autonomy violated by a surgical operation (“invasion”) imposed on me against my will; it is also violated in some circumstances by the withholding of the physical treatment I request (when due allowance has been made for the personal autonomy of the parties of whom the request is made). For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there. My authority is a discretionary competence, an authority to choose and make decisions.⁵⁵

Furthermore, in *Griswold*, the Court recognized the existence of “penumbras” of the Constitution that can create additional rights not found explicitly in the text of the document.⁵⁶ Given this, the Court extrapolated that the right to privacy exists, at least within a marriage.⁵⁷ Of particular interest for a discussion of bodily autonomy is the Court’s use of the Ninth Amendment, which provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵⁸ This amendment’s passage by the founders and use by the Court in *Griswold* to justify “creating” a right not previously found in the Constitution indicates that the rights enumerated by the Constitution are not all-inclusive. Therefore, the recognition of a bodily autonomy right by the Court would have a sound constitutional backing despite the fact it is not explicitly stated anywhere in the Constitution.

In *Lawrence*, the Supreme Court held a Texas law criminalizing sodomy, even between consenting adults, was a violation of the Fourteenth Amendment.⁵⁹ Although this case, like *Griswold*, is often cited in relation to privacy issues, it is also illustrative of at least the perceived trend of courts recognizing individual rights, a trend that could lead to the recognition of a bodily autonomy right.

In *Cruzan ex rel. Cruzan*, the Supreme Court inferred from its prior rulings that the Fourteenth Amendment gives a patient the right to refuse or discontinue life preserving procedures.⁶⁰ The Court cited *Botsford* in discussing the sacredness of an individual’s right to control his body.⁶¹ The Court’s citation of *Botsford* is telling because it indicates that the *Cruzan* Court was persuaded to rule as it did due to, in part, bodily autonomy arguments.

The Court has expressly recognized the existence of a bodily or physical autonomy right through dicta in several cases. For example, in *Winston v. Lee*,⁶² the Supreme Court held Lee’s interest in avoiding the surgery to remove a bullet

55. *Id.*

56. *Griswold*, 381 U.S. at 484.

57. *Id.* at 486.

58. U.S. CONST. amend. IX.

59. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

60. *Cruzan ex rel. Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

61. *Id.* at 269; *see also* *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

62. 470 U.S. 753 (1985).

from under his collarbone pursuant to a police request outweighed the state interest in violating his bodily autonomy.⁶³ Additionally, in *Roe v. Wade*,⁶⁴ the Court held women may obtain abortions despite the state's interest in preserving fetal human life.⁶⁵ The *Roe* Court cited *Botsford* in its discussion,⁶⁶ stated abortion is covered by the right to privacy,⁶⁷ and weighed the woman's right to privacy against the state's interest in protecting prenatal life.⁶⁸ The Court continued this discussion in *Casey* when it recognized that the two general rights under which the right of the mother in *Roe* was justified were the right to make family decisions and the right to physical autonomy.⁶⁹ These three cases taken together illustrate the fact that the Court has recognized a bodily or physical autonomy right in the dicta of its previous opinions.

B. Court Precedent from the States

Although there is ample United States Supreme Court precedent to demonstrate that a fundamental right to bodily autonomy should be recognized, there have also been a number of states that explicitly recognize or suggest that bodily or physical autonomy is a fundamental right.

The Alaska Supreme Court has expressed support in dicta for a "personal physical autonomy" category. In *Huffman v. State*,⁷⁰ the court held, in part, "the right to make decisions about medical treatments for oneself or one's children is a fundamental liberty and privacy right in Alaska."⁷¹ In so holding, the *Huffman* court indicated that controlling one's own medical treatment falls into the same category of "personal physical autonomy" as having control over one's own hairstyle and reproductive choices, which the Alaska Supreme Court had already determined that the Alaska Constitution protects as fundamental rights.⁷² The Alaska Supreme Court's characterization of "personal physical autonomy" as a category that would include activities protected under privacy, such as controlling one's own medical treatment, hairstyle, and reproductive choices, is indicative of the importance and weight that court gives to physical autonomy.

The Montana Supreme Court has expressed a stance similar to that of Alaska's Supreme Court, although the Montana court used slightly different language.⁷³ In *Armstrong v. State*,⁷⁴ the Montana Supreme Court indicated that

63. *Id.* at 756, 764, 766-67.

64. 410 U.S. 113 (1973).

65. *Id.* at 162-63, 167.

66. *Id.* at 152; *Botsford*, 141 U.S. at 251.

67. *Roe*, 410 U.S. at 154.

68. *Id.* at 150.

69. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992).

70. 204 P.3d 339 (Alaska 2009).

71. *Id.* at 346.

72. *Id.* (citing *Breese v. Smith*, 501 P.2d 159, 169-70 (Alaska 1972); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997)).

73. *Id.* at 384 (recognizing Montana's Constitution's inclusion of a textual right to privacy,

legislation requiring pre-viability abortions be carried out by physicians infringes on “the fundamental right of individual privacy guaranteed to every person under Article II, Section 10 of the Montana Constitution.”⁷⁵ Furthermore, that court held that the personal autonomy component of individual privacy “broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government, except in very limited circumstances not at issue here.”⁷⁶ The Montana Supreme Court’s endorsement of personal autonomy as a component of the fundamental privacy right in *Armstrong* supports the creation of a stand-alone physical or bodily autonomy right because the court here has already recognized physical autonomy as an issue that should be given the highest level of scrutiny due to its relation to privacy.

Alaska and Montana are not the only states whose judiciaries have discussed an autonomy right. In *State v. Presidential Women’s Center*,⁷⁷ the Florida Supreme Court stated, “The doctrine of medical informed consent is rooted in the concepts of bodily autonomy and integrity.”⁷⁸ In *State v. Miller*,⁷⁹ the Hawaii Supreme Court indicated that “[f]reedom from unjustified governmental intrusions into . . . bodily autonomy [is] at the core of the liberty protected by due process.”⁸⁰ In *In re R.K.*, the Illinois Court of Appeals found the state had failed to present adequate evidence to allow the involuntary administration of medication to the respondent after the respondent asserted, “[T]he State failed to prove that the benefits of the psychotropic medication to respondent outweighed the side effects of the medication and the loss of her ‘bodily autonomy.’”⁸¹

In 1914, *Schloendorff v. Society of New York Hospital*,⁸² New York’s highest court stated, “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁸³ This language from a case dating back to the last century embodies the history in the United States of recognizing an individual’s right to determine what happens to his or her own

causing the discussion, and decision, to rest mostly on privacy grounds, although the decision also included Feinburg’s discussion of the similarities between privacy and autonomy outlined in *supra* note 55 and accompanying text).

74. 989 P.2d 364 (Mont. 1999).

75. *Id.*

76. *Id.*

77. 937 So. 2d 114 (Fla. 2006).

78. *Id.* at 119.

79. 933 P.2d 606 (Haw. 1997).

80. *Id.* at 610 (citing *Foucha v. Louisiana*, 507 U.S. 71, 80 (1992)).

81. *In re R.K.*, 786 N.E.2d 212, 217 (Ill. App. Ct. 2003) (ruling in this manner after the Respondent made a bodily autonomy right, but the actual basis of the decision was the Mental Code, making it so that involuntary administration of a medication is not something that is to be done lightly, thus supporting the existence of a bodily autonomy right).

82. 105 N.E.2d 92 (N.Y. 1914), *abrogated by* *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957).

83. *Id.* at 93.

body in line with the holding in *Botsford*.

In *Herman v. State*, the Indiana Supreme Court, in 1855, found that a law that absolutely forbade the manufacture and sale of whisky, ale, porter, and beer, for use as a beverage was unconstitutional.⁸⁴ The suit was brought on *habeas corpus* grounds,⁸⁵ and in holding the law invalid, the court stated,

[F]or under our system of government, founded in a confidence in man's capacity to direct his own conduct, designed to allow to each individual the largest liberty consistent with the welfare of the whole, and to subject the private affairs of the citizen to the least possible governmental interference, some excesses will occur, and must be tolerated, subject only to such punishment as may be inflicted.⁸⁶

This holding and the logic behind it suggests the existence of a broad personal autonomy right that covers the use of alcohol as a beverage, and that this right is one of the fundamental principles that the U.S. was founded upon.

Although these cases provide a glimpse into where some states currently stand with regard to bodily autonomy, the Washington case of *Seeley v. State*⁸⁷ provides the greatest insight into this issue for the purposes of this Note. In *Seeley*, a terminally ill cancer patient who wanted to smoke marijuana to control the side effects of chemotherapy filed suit seeking declaratory judgment that it was a violation of the Washington Constitution that, per the Uniform Controlled Substance Act, marijuana was classified as a Schedule I controlled substance.⁸⁸ In discussion of the issues presented, Justice Sanders in dissent stated,

Roe and *Casey* clarify that the more personal the individual interest, the more that interest concerns bodily autonomy, the more that interest centers on purely personal concerns such as the avoidance of pain through a medical procedure, the less likely the governmental restraint will be upheld. The rationale behind *Glucksberg* is much the same. An absolute criminal bar to the use of marijuana includes specifically personal concerns of bodily autonomy coupled with the personal desire to mitigate if not alleviate needless physical suffering. These are grave interests which favor the individual.⁸⁹

The Washington Supreme Court went on to hold the following: (1) “[t]he privileges and immunity clause of the Washington Constitution does not provide greater protection than the Fourteenth Amendment of the Federal Constitution in the area of drug classification”; (2) the challenged statute was “appropriately analyzed under a rational basis test”; (3) the plaintiff failed to show that the legislature’s decision regarding its classification of marijuana was “arbitrary or

84. *Herman v. State*, 8 Ind. 545, 548-49, 558-59, 567 (Ind. 1855).

85. *Id.* at 545.

86. *Id.* at 563-64.

87. 940 P.2d 604 (Wash. 1997) (en banc).

88. *Id.* at 606-07, 613-14; *see also* WASH. REV. CODE § 69.50.204 (2012).

89. *Seeley*, 940 P.2d at 627 (Sanders, J., dissenting).

obsolete”; and (4) “frequent recurrence to [the] fundamental principles clause [of the Washington Constitution] does not create a right to use marijuana for medical treatment free from the lawful exercise of government police power.”⁹⁰ Although this holding was a blow to the medical marijuana movement, the court’s discussion of bodily autonomy is helpful to illustrate the states’ current understanding of Supreme Court precedent as well as the growing trend in state and federal court to recognize bodily autonomy as a right guaranteed by law in the United States.

C. Part I Conclusion A Bodily Autonomy Right

These cases indicate the willingness and trend of the judiciary in recognizing the right of an individual to control his or her own body. It is as the court stated in *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*⁹¹: “A right of control over one’s body has deep roots in the common law.”⁹² The United States Supreme Court has gone so far as to recognize a bodily autonomy right in dicta,⁹³ and it should now fully recognize bodily autonomy as a fundamental right.⁹⁴

II. MARIJUANA’S PLACE WITHIN A BODILY AUTONOMY RIGHT

The focus of this section is to determine if marijuana use falls in the proposed bodily autonomy right. It is important to note at the outset that Part II is not discussing the test for strict scrutiny. Instead, Part II seeks to establish that marijuana should be included in the proposed bodily autonomy fundamental right by comparing marijuana to alcohol and tobacco.

A. History

When analyzing issues, courts often look at the history of the issue in terms of the United States⁹⁵ and global⁹⁶ history. Also, courts analogize the issue currently being addressed to similar ones that past court decisions have already resolved.⁹⁷ Therefore, in determining if marijuana use would fall under the

90. *Id.* at 622-23 (majority opinion).

91. 445 F.3d 470 (D.C. Cir. 2006).

92. *Id.* at 480.

93. *See, e.g.,* *Winston v. Lee*, 470 U.S. 753, 767 (1985); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992).

94. *See* *Carcieri*, *supra* note 4, at 311-23.

95. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the well-known legal principle of *stare decisis* indicates that courts should generally respect the holdings of prior court cases).

96. *See* *Davidson v. Nichols*, 93 Mass. (II Allen) 514, 515 (Mass. 1866) (citing *Vaughan v. Menlove*, 132 Eng. Rep. 490 (Ct. Com. Pl. 1837)) (illustrating the idea that U.S. courts sometimes look outside the U.S. for guidance).

97. *See generally* *Marbury*, 5 U.S. (1 Cranch) at 137 (establishing the principle of judicial

proposed bodily autonomy right, a discussion of the history, both legal and otherwise, of tobacco, alcohol, and marijuana provides some important insight.

1. *Tobacco*.—A review of the history of tobacco use and cultivation in the United States reveals a crop and pastime closely aligned with the American tradition and experience. Tobacco production and use was widespread among Native Americans before the arrival of Europeans.⁹⁸ Smoking tobacco played religious or social purposes for some Native Americans.⁹⁹ During the 1700s, the demand for tobacco from Europe and the rest of the world fueled the agrarian economies of southern U.S. states like Georgia.¹⁰⁰

Approximately 1.1 billion people today currently use tobacco—one third of the adult population.¹⁰¹ The World Health Organization reports tobacco use to be the leading preventable cause of death worldwide, estimating it currently causes nearly six million deaths per year.¹⁰² This is despite the fact smoking rates among adults in the United States fell by half from 1965 to 2006, from 42% to 21%.¹⁰³ The U.S. Congress has never attempted to enact a nationwide tobacco smoking ban. In the United States, federal law indicates individuals must be eighteen to purchase and consume tobacco, but four states have increased the minimum age to nineteen.¹⁰⁴

Tobacco has played an important role in the development of the United States, both as a major crop for export¹⁰⁵ and a vice,¹⁰⁶ although its use has dropped recently, most likely due to the prevalence of anti-tobacco campaigns.¹⁰⁷ Like tobacco, marijuana has played an important role in United States history due to its status as a cash crop,¹⁰⁸ not to mention its medical¹⁰⁹ and personal uses.

review in terms of reviewing legislative action).

98. TOBACCO USE BY NATIVE NORTH AMERICANS 3-8 (Joseph C. Winter ed., 2000).

99. *Id.*

100. PAUL S. BOYER ET AL., THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 64 (6th ed. 2009).

101. SMOKE: A GLOBAL HISTORY OF SMOKING 26 (Sander L. Gilman & Zhou Xun eds., 2004).

102. WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2011, at 8 (2011), available at whqlibdoc.who.int/publications/2011/9789240687813_eng.pdf.

103. AM. CANCER SOC'Y, CANCER FACTS & FIGURES 2010, at 42 (2010), available at <http://www.cancer.org/acs/groups/content/@nho/documents/document/acspc-024113.pdf>.

104. Brock Parker, *Raising the Bar for Teens, Tobacco*, BOSTON.COM (June 7, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/06/07/raising_the_barfor_teenstobacco/ (listing Alabama, Alaska, New Jersey, and Utah as the four states having a higher minimum age for purchasing tobacco).

105. OAKLEY RAY & CHARLES KSIR, DRUGS, SOCIETY, AND HUMAN BEHAVIOR 266 (8th ed. 1999).

106. *Id.* at 284-85.

107. BRIAN KING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL SIGNS: CURRENT CIGARETTE SMOKING AMONG ADULTS AGED ≥ 18 YEARS—UNITED STATES, 2005-2010, 60 MORBIDITY & MORALITY WKLY. REP. 1207, 1208-09 (2011), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6035.pdf>.

108. JEAN M. RAWSON, CONG. RESEARCH SERV., RL32725, HEMP AS AN AGRICULTURAL

Alcohol has also served valuable functions in human society.

2. *Alcohol*.—A review of the history of alcohol illustrates that alcohol has also been an important aspect of culture and preservation for the United States, not to mention for the entirety of the human species.¹¹⁰ The earliest evidence of alcohol comes from China where wine jars date to about 7000 B.C.¹¹¹ Alcohol played a major part in colonial America as drinking beer and wine was often safer than drinking water.¹¹² People of all ages¹¹³ and both sexes drank alcohol during this time.¹¹⁴

Prohibition was instituted with the Eighteenth Amendment to the United States Constitution in 1919.¹¹⁵ This amendment prohibited “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States.”¹¹⁶ Congress passed the Volstead Act to enforce Prohibition,¹¹⁷ but most large cities were uninterested in enforcing the legislation, leaving the job to the federal government.¹¹⁸ Although alcohol consumption did decline during Prohibition, there was a dramatic rise in organized crime in the larger cities, whose organized crime syndicates used alcohol sales as a source of revenue.¹¹⁹ Prohibition became unpopular during the Great Depression as the repeal movement emphasized that repeal would generate enormous sums of tax revenue and weaken the base of organized crime.¹²⁰ The Twenty-First Amendment to the U.S. Constitution repealed nationwide prohibition in 1933,¹²¹ but prohibition survived for a while in a few southern and border states.¹²²

COMMODITY 2 (2005), available at <http://www.fas.org/sgp/crs/RL32725.pdf>.

109. See JACK HERER, *THE EMPEROR WEARS NO CLOTHES* 2 (11th ed. 2000) (“[M]arijuana and hashish extracts were the first, second, or third most-prescribed medicines in the United States from 1842 until the 1890s.”).

110. Bert L. Vallee, *Alcohol in the Western World: A History*, 278 SCI. AM. 80, 80-85 (June 1998), available at <http://www.beekmanwine.com/prevtopx.htm>.

111. PATRICK E. MCGOVERN, *ANCIENT WINE: THE SEARCH FOR THE ORIGINS OF VINICULTURE* 314 (2003).

112. Vallee, *supra* note 110, at 80-85.

113. *Id.*

114. ED CREWS, *DRINKING IN COLONIAL AMERICA, COLONIAL WILLIAMSBURG J.*, available at <http://www.history.org/foundation/journal/holiday07/drink.cfm>.

115. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

116. *Id.* § 1.

117. Volstead Act of 1919, H.R. 6810, 66th Cong. (1919).

118. Jeffrey A. Miron, *Alcohol Prohibition*, EH.NET (Feb. 1, 2010, 5:21 PM), <http://eh.net/encyclopedia/article/miron.prohibition.alcohol>; see generally THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933* (1998) (discussing at length prohibition era U.S. issues).

119. Miron, *supra* note 118; see also PEGRAM, *supra* note 118, at 85-85, 167, 174-75.

120. Miron, *supra* note 118; see also PEGRAM, *supra* note 118, at 183-85.

121. U.S. CONST. amend. XXI.

122. Miron, *supra* note 118; see also PEGRAM, *supra* note 118, at 186.

It is currently legal for any individual twenty-one or older to drink alcohol in the United States, although restrictions exist regarding what one may do while intoxicated.¹²³ “[E]xcessive alcohol use [is] the [third] leading lifestyle-related cause of death” for people in the United States.¹²⁴

It is easy to see an analogy between the prohibition of marijuana and the Eighteenth Amendment. Both regulate private conduct, arguably for primarily moral reasons, and the arguments for the repeal of both are similar: decrease crime and generate taxes.¹²⁵ The decrease in revenues seen by organized crime after Prohibition ended was indeed a devastating blow to these organizations’ abilities to perpetuate criminal activities, a blow that was lessened when these gangs turned to other illicit drugs, including marijuana, for a revenue stream.¹²⁶ Simple economics tells us that where there is a demand, there will arise a supply for that demand.

3. *Marijuana*.—Marijuana’s first recorded use as an intoxicant was in 2737 B.C.¹²⁷ It was recorded by the Chinese emperor of the time, Shen Nung.¹²⁸ The uses of marijuana, both social and medical, spread throughout Asia, North Africa, and the Muslim world, eventually reaching Europe, the Caribbean, and Central and South America.¹²⁹

In 1619, the Jamestown colony passed a law “making it illegal *not* to grow hemp,”¹³⁰ a genetically distinct variety of *Cannabis Sativa* L. characterized by its low level of the psychoactive chemical tetrahydrocannabinol (“THC”).¹³¹ Therefore, it must be noted that the current United States prohibition of marijuana, which includes hemp, is a complete 180-degree turn from how some early colonists approached marijuana, at least in terms of cultivation. In the United States in the 1800s, marijuana was occasionally prescribed as a medicine for diverse ailments and only rarely used as an intoxicant.¹³²

The properties of marijuana were not the real reason it was illegalized.

123. See, e.g., IND. CODE § 9-30-5 (2012) (discussing the offense of “Operating a Vehicle While Intoxicated”).

124. *Alcohol Use and Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Oct. 1, 2012), <http://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm>.

125. See HERER, *supra* note 109, at 39, 59.

126. GLOBAL COMM’N ON DRUG POL’Y, WAR ON DRUGS 4 (June 2011) [hereinafter GCDP REPORT], available at http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf.

127. RAY & KSIR, *supra* note 105, at 404-05.

128. *Id.* at 404.

129. MARTIN BOOTH, CANNABIS: A HISTORY 77 (2003) (quoting BAYARD TAYLOR, A JOURNEY TO CENTRAL AFRICA (1854)).

130. Affidavit of David P. West, Ph.D., ¶ 34, *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (No. CIV 02-5071).

131. Affidavit of Burton L. Johnson, Ph. D., ¶ 3, *Monson v. Drug Enforcement Admin.*, 522 F. Supp. 2d 1188 (D.N.D. 2007) (No. 4:07-cv-00042).

132. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 117 (1974).

Rather, in large part, it was the use of marijuana by Mexican immigrants bringing cheap labor into the American South and Southwest, and later by African-Americans, that fueled the hatred of marijuana.¹³³ The government, through the Federal Bureau of Narcotics ("FBN"), set about vilifying marijuana systematically in the 1930s.¹³⁴ This included propaganda movies and fabricated, falsified, or embellished news articles directed at making marijuana seem connected to crime, perversion, and mental instability.¹³⁵

The head of the FBN, Harry J. Anslinger, was intricately involved in this vilification process.¹³⁶ He even presented horror stories about marijuana to Congress at the preliminary congressional hearings of the Marihuana Tax Act in April 1937.¹³⁷ The Marihuana Tax Act provided that certain individuals and entities growing, using, or manufacturing marijuana must pay a tax.¹³⁸ Failure to do so would result in stiff fines and lengthy prison sentences.¹³⁹ Some argue the Marihuana Tax Act was a ploy on the part of various businessmen in the timber industry to reduce the production of hemp, which they had concluded was far better for paper production than wood pulp.¹⁴⁰ The American Medical Association opposed the act because it was imposed on physicians who wished to prescribe cannabis.¹⁴¹

After the Marihuana Tax Act passed, propaganda to vilify marijuana continued despite studies during the time suggesting such claims of villainy were false.¹⁴² An FBN publication in 1965 indicated, "[n]ever let anyone persuade you to smoke even one marijuana cigarette. It is pure poison."¹⁴³ In 1969, the Marihuana Tax Act was declared constitutionally invalid because the law functioned as prohibition in the guise of taxation.¹⁴⁴

The 1970s saw a general attempt at legalizing marijuana.¹⁴⁵ Several states decriminalized marijuana in the 1970s after President Nixon's administrative

133. BOOTH, *supra* note 129, at 77.

134. *Id.*

135. *Id.*

136. *Id.* at 154.

137. *Id.*

138. Marihuana Tax Act of 1937, Pub. L. No. 238, 50 Stat. 551 (1937).

139. *Id.*

140. LAURENCE FRENCH & MAGDALENO MANZANÁREZ, *NAFTA & NEOCOLONIALISM: COMPARATIVE CRIMINAL, HUMAN & SOCIAL JUSTICE* 129 (2004).

141. *Taxation of Marihuana: Hearings on H.R. 6385 Before the H. Comm. on Ways and Means*, 75th Cong. 1 (1937) (Statement of Dr. William C. Woodward, Legislative Counsel, Am. Med. Ass'n), available at <http://www.druglibrary.org/Schaffer/hemp/taxact/woodward.htm>.

142. LESTER GRINSPOON, *MARIHUANA RECONSIDERED* 17-20 (1971).

143. BOOTH, *supra* note 129, at 224.

144. *Leary v. United States*, 395 U.S. 6, 54, 115-16 (1969).

145. NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING*, at ch. 5 (1972), available at <http://www.druglibrary.org/schaffer/library/studies/nc/nmenu.htm>.

commission on marijuana recommended decriminalization as national policy.¹⁴⁶ However, Nixon himself was convinced drugs and crime went hand-in-hand, and he established the Drug Enforcement Agency, giving it vast powers to combat the spread of drugs.¹⁴⁷ It was also during the Nixon Administration that the Comprehensive Drug Abuse Prevention and Control Act of 1970 classified marijuana, alongside heroin and LSD, as a Schedule I drug, effectively illegalizing it.¹⁴⁸

Marijuana is still classified as a Schedule 1 drug, which, in layman's terms, means it is illegal.¹⁴⁹ Despite marijuana's illegal status, a 2009 national survey conducted by the U.S. Department of Health and Human Services reported that more than 11% of individuals surveyed *admitted* to having used marijuana in the year before they were surveyed.¹⁵⁰ This translates to more than 27.7 million U.S. citizens using marijuana in the last year, or more than one in ten citizens. The same survey indicated almost 7% of the U.S. population uses marijuana on a monthly basis.¹⁵¹

In 2005, U.S. citizens consuming marijuana comprised 12.6% of the population between the ages of fifteen and sixty-four.¹⁵² In 2009, more than half of individuals aged eighteen to forty-nine indicated they had consumed marijuana in their lives.¹⁵³ The total number of individuals who admitted to having used marijuana in their lifetimes was over 105 million in 2009, or 41.7% of the population.¹⁵⁴ Marijuana is currently "the most commonly used illicit drug" in the U.S.¹⁵⁵

As of the writing of this Note, fourteen states allow the possession of a small quantity for personal use to be treated as a civil infraction, which means there is no arrest or criminal record, or less.¹⁵⁶ Some states treat second offenses for

146. *Id.*

147. BOOTH, *supra* note 129, at 241.

148. Controlled Substances Act of 1970, 21 U.S.C. § 801 (1970).

149. 21 U.S.C. § 812(c)(10) (2006).

150. U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY ON DRUG USE AND HEALTH (2009) [hereinafter DEP'T OF HEALTH SURVEY], available at <http://www.icpsr.umich.edu/icpsrweb/SAMHDA/studies/29621>.

151. *Id.*

152. U.N. OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REPORT, at 244, U.N. Sales No. E.07.XI.5 (2007), available at http://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf.

153. DEP'T OF HEALTH SURVEY, *supra* note 150.

154. *Id.*

155. Office of Nat'l Drug Control Policy, *Marijuana Legalization* (Oct. 2010), http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf.

156. The thirteen states are: (1) Alaska (*see* ALASKA STAT. § 11.71.010 (2011) ("misconduct . . . in the first degree"); *id.* § 11.71.160 (Schedule III(A))); (2) California (*see* CAL. HEALTH & SAFETY CODE § 11054(d)(13) (West 2012) (Schedule I); *id.* § 11357 ("[u]nauthorized possession")); (3) Colorado (*see* COLO. REV. STAT. § 18-18-203(c)(XXIII) (2012) (THC as Schedule I); *id.* § 18-18-406 (penalties for possession)); (4) Connecticut (*see* CONN. GEN. STAT.

possession more harshly,¹⁵⁷ and the majority of states treat the sale of any quantity of marijuana as a crime.¹⁵⁸ Several states have decriminalized at least some kind or kinds of marijuana possession.¹⁵⁹ On November 6, 2012, voters in Colorado and Washington legalized recreational marijuana by referendum.¹⁶⁰ However, in 2005, the U.S. Supreme Court indicated the federal government has the final say regarding legality of marijuana due to the Commerce Clause,¹⁶¹ and the DEA has said its enforcement policy regarding marijuana remains the same.¹⁶²

In October 2011, Gallup conducted a poll that found 50% of Americans favor legalizing marijuana use.¹⁶³ This was the first instance of hard data supporting the assertion that half of the public favors legalization,¹⁶⁴ and this shift arguably

§ 21a-279 (2012)); (5) Maine (*see* ME. REV. STAT. tit. 17-A § 1102 (2012) (Schedule Z); *id.* § 1107-A (“[u]nlawful possession”)); (6) Massachusetts (*see* MASS. GEN. LAWS ch. 94C, § 32L (2012) (possession of one ounce or less)); (7) Minnesota (*see* MINN. STAT. § 152.02(h) (2012) (Schedule I); *id.* § 152.027 (possession and sale)); (8) Mississippi (*see* MISS. CODE ANN. § 41-29-113(c)(14) (2012) (Schedule 1); *id.* § 41-29-139 (possession for possession, sale, etc.)); (9) Nebraska (*see* NEB. REV. STAT. § 28-405(c)(10)-(15) (2012) (Schedule I); *id.* § 28-416 (penalties)); (10) Nevada (*see* NEV. REV. STAT. § 453.336 (2009) (penalties for possession)); (11) New York (*see* N.Y. PUB. HEALTH LAW § 3306(d)(13) (McKinney 2013); N.Y. PENAL LAW § 221.05 (McKinney 2013) (“[u]nlawful possession”)); (12) North Carolina (*see* N.C. GEN. STAT. § 90-94 (2012) (Schedule VI); *id.* § 90-95 (b)(2), (d)(4) (penalties)); (13) Ohio (*see* OHIO REV. CODE ANN. § 3719.41(C)(19) (West 2013) (Schedule I); *id.* § 3719.99 (“[p]enalties”)); and (14) Oregon (*see* OR. REV. STAT. § 475.864 (20011) (unlawful possession)).

157. *E.g.*, Colorado (*see* COLO. REV. STAT. § 18-18-203(c)(XXIII) (2012) (THC as Schedule I); *id.* § 18-18-406 (penalties for possession)).

158. *E.g.*, Connecticut (*see* CONN. GEN. STAT. § 21a-279 (2012)), and California (*see* CAL. HEALTH & SAFETY CODE § 11054(d)(13) (West 2013); *id.* § 11357 (“[u]nauthorized possession”)).

159. *E.g.*, Connecticut (*see* CONN. GEN. STAT. § 21a-279 (2012)), and Colorado (*see* COLO. REV. STAT. § 18-18-203(c)(XXIII) (2012) (THC as Schedule I)).

160. *Gov. Hickenlooper Signs Amendment 64 Proclamation, Creates Task Force to Recommend Needed Legislative Actions*, COLO. (Dec. 10, 2012), <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251634887823>; *Smoke the Vote*, NORML, normal.org/about/smoke-the-vote#co (last visited Mar. 26, 2013); Joel Connelly, *Washington Passes Measure to Legalize, Regulate, and Tax Marijuana*, SEATTLE PI (Nov. 6, 2012, 9:02 PM), <http://blog.seattlepi.com/seattlepolitics/2012/11/06/initiative-502-passes-to-legalize-regulate-and-tax-marijuana/>.

161. *Gonzales v. Raich*, 545 U.S. 1, 15, 32-33 (2005).

162. Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012, 11:46 AM), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

163. Frank Newport, *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP (Oct. 17, 2011), http://www.gallup.com/poll/150149/Record-High-Americans-Favor-Legalizing-Marijuana.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=All%20Gallup%20Headlines.

164. *Id.*

is the most significant development in the fight for marijuana legalization.

The history of cannabis plants in the United States goes back to its roots in the colonies. Throughout much of history, marijuana use in the United States was not a matter of government concern. Only when politics came into play in the 1930s, and again in the 1970s, with politicians and bureaucrats playing on racist sentiments and relying on factual fallacies, did marijuana use become illegal.¹⁶⁵ Studies and surveys show that marijuana users comprise a significant percentage of U.S. citizens, such as the 2011 Gallup Poll that indicated the majority of U.S. citizens are in favor of legalizing marijuana.¹⁶⁶ It is the position of this Note that past and present public opinion indicates the Constitution should protect an individual's decision to use marijuana as a bodily autonomy fundamental right.

B. Comparing the Vices

Although the history of marijuana in the United States creates a strong argument for its inclusion as a bodily autonomy right, history alone is not enough to place it under that umbrella. However, a comparison of marijuana's history to that of other drugs, most notably the legal vices of alcohol and tobacco, strengthens the argument. There are three general categories or reasons examined by this Note for why the government legalizes drugs: (1) impact on human health and physiology; (2) potential for abuse and dependence; and (3) relation to crime. This Note will cover marijuana's relationship to crime when discussing applying strict scrutiny to marijuana prohibition in Part III. Part III will also examine health issues related to marijuana use.

1. Health and Physiology.—Tobacco and alcohol—not to mention other illegal substances and prescription drugs—have a much greater negative effect on health and physiology than marijuana. “The smoking of cannabis, even long-term, is not harmful to health It would be reasonable to judge cannabis as less of a threat . . . than alcohol or tobacco.”¹⁶⁷ Lester Grinspoon has gone so far as to say, “Despite its use by millions of people over thousands of years, cannabis has never caused a death.”¹⁶⁸ This stands in stark contrast to the indisputable fact that alcohol-related deaths average more than 100,000 per year in the United States, and tobacco causes more than 400,000 deaths in the United States each year.¹⁶⁹ It is true that individuals have died while high on marijuana, and likely some have died because they undertook a task that they should not have undertaken while high. This Note's discussion of applying strict scrutiny to marijuana prohibition will further examine marijuana's health effects. However,

165. FRENCH & MANZANÁREZ, *supra* note 140, at 129-30; BOOTH, *supra* note 129, at 77.

166. Newport, *supra* note 163.

167. Editorial, *Deglamorizing Cannabis*, 346 LANCET 1241 (1995).

168. Lester Grinspoon, *Cannabis, the Wonder Drug*, in THE DRUG LEGALIZATION DEBATE 101-02 (James A. Inciardi ed., 2d ed. 1999) [hereinafter Grinspoon, *Wonder Drug*].

169. J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 J. AM. MED. ASS'N 2207, 2207-12 (1993).

the fact that marijuana is less harmful than the legal vices of alcohol and tobacco, in part shown by the number of deaths attributed to each of them each year, is an incredibly strong argument for including marijuana as a bodily autonomy fundamental right. Finally, since 1969, government-appointed commissions in five countries, including the United States, have concluded that marijuana's dangers had previously been exaggerated and urged their respective countries to drastically reduce or eliminate penalties related to marijuana.¹⁷⁰

2. *Dependence.*—The THC that makes marijuana users experience a high is unlike many other drugs in that it has little addictive potential.¹⁷¹ The U.S. Government once concluded that “users of marijuana are less likely to become dependent on the drug in comparison to alcohol and nicotine.”¹⁷² Dependence is an important issue, one that is often glossed over. Every year, millions of dollars are spent on campaigns and services for people to quit consuming tobacco,¹⁷³ and support groups, like Alcoholics Anonymous, are sometimes court-ordered for those who have become dependent on alcohol to drop their habit.¹⁷⁴ It is true that these programs exist for marijuana users, but they are not as prevalent as the government-funded anti-smoking campaigns.¹⁷⁵ These programs may also not be as necessary to help people to quit, as “cannabis appears to have little addictive potential in the opinion of most experts, particularly when compared to other common drugs, including caffeine.”¹⁷⁶ Therefore, as marijuana is not on the same level as alcohol and tobacco in terms of addictiveness, it seems it would be protected under a bodily autonomy right as this less addictive nature suggests marijuana will have the following effects: (1) pose less of a cost for society in terms of quit smoking campaigns; (2) have a smaller number of habitual users than tobacco and alcohol, making long term

170. See ADVISORY COMM. ON DRUG DEPENDENCE, CANNABIS, HER MAJESTY'S STATIONERY OFFICE (1968); CANADIAN GOV'T COMM. OF INQUIRY, THE NON-MEDICAL USE OF DRUGS, INFORMATION CANADA (1970); NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972); WERKGROEP VERDOVENDE MIDDELEN, BACKGROUND AND RISKS OF DRUG USE, STAATSUIGEVERIJ (1972); S. STANDING COMM. ON SOCIAL WELFARE, DRUG PROBLEMS IN AUSTRALIA-AN INTOXICATED SOCIETY, AUSTRALIAN GOV'T PUBLISHING SERV. (1977) [hereinafter Five Countries' Reports].

171. Robert Gore & Mitch Earleywine, *Marijuana's Perceived Addictiveness: A Survey of Clinicians and Researchers*, in POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION 176, 184-86 (Mitch Earleywine ed., 2007).

172. INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 98 (Janet E. Joy et al. eds., 1999) [hereinafter IOM REPORT].

173. Jodie Humphries, *Anti-Smoking Programs*, EHM (Dec. 11, 2009, 4:29 PM), available at <http://www.executivehm.com/news/anti-smoking-programs/>.

174. See Buddy T., *How Court-Ordered Alcoholics Anonymous Works*, ABOUT.COM (last updated Nov. 1, 2011), <http://alcoholism.about.com/od/dui/a/How-Court-Ordered-Alcoholics-Anonymous-Works.htm>.

175. Melissa Weinman, *Anti-Smoking Money Ill-Spent*, RED & BLACK (Feb. 13, 2008, 12:00 AM), <http://redandblack.com/2008/02/13/anti-smoking-money-ill-spent/>.

176. Gore & Earleywine, *supra* note 171, at 185.

health effects and costs associated with marijuana use less than those for tobacco and alcohol; and (3) result in fewer violent crimes perpetrated for the purpose of obtaining marijuana for personal use.

C. Part II Conclusion: Marijuana's Position Under an Autonomy Umbrella

Marijuana's history in the United States, and in human history in a broader sense, parallels the history of tobacco and alcohol. For instance, both tobacco and hemp were cash crops in the early United States, and both alcohol and marijuana have been the object of a government prohibition that has given criminal entities revenue through the black market sale of the substances during the prohibition. These similarities suggest that the law should treat alcohol, tobacco, and marijuana similarly. The similarities further suggest a bodily autonomy right should cover marijuana because alcohol¹⁷⁷ and tobacco use likely already are protected under a privacy or bodily autonomy argument. Furthermore, as alcohol and tobacco—which are proven to be generally more harmful to health and more addictive than marijuana when consumed—are legal for individuals to choose to consume, it is reasonable to think that a bodily autonomy right would protect marijuana consumption in the same way.

III. STRICT SCRUTINY APPLIED

If a court were to apply strict scrutiny to the federal prohibition of marijuana use, the federal government would have to show a compelling interest in prohibiting marijuana use as well as demonstrate that complete prohibition of marijuana is narrowly tailored to further that interest.¹⁷⁸

A. Compelling Interest

The first aspect of strict scrutiny is the government's responsibility to show that it has a compelling interest in restricting the right.¹⁷⁹ Examples of compelling government interests the judiciary has accepted as "compelling" include protecting children from abuse¹⁸⁰ and preventing voter fraud.¹⁸¹ Three interests the federal government could give to warrant marijuana prohibition are

177. *See Herman v. State*, 8 Ind. 545, 555 (Ind. 1855).

178. *See Roe v. Wade*, 410 U.S. 113, 155 (1973); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 539, 541 (1942).

179. *Roe*, 410 U.S. at 155; *see also Skinner*, 316 U.S. at 541.

180. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

181. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

as follows: marijuana use is immoral;¹⁸² marijuana use is related to crime;¹⁸³ and marijuana use has negative effects on health.¹⁸⁴

1. *Morality*.—The government could attempt to prohibit marijuana using morality as its compelling interest.¹⁸⁵ It is important to note that courts have been at least skeptical of purely moral interests of the government—i.e., those interests that have only to do with enforcing what is “right”—comprising a compelling interest in terms of strict scrutiny.¹⁸⁶ It is the position of this Note that any United States government entity, whether state or federal, enforcing any “moral” interest with no tangible effect on issues generally regulated by the government, such as matters of contract and property, is overreaching as a violation of separation of church and state. The United States is founded on ideas of personal liberty, including the right to decide our own religion and morals.¹⁸⁷ Whether the government should be permitted to assert morality as an interest at all in terms of satisfying due process tests is beyond the scope of this Note. Here, it is sufficient to say that a purely moral interest in prohibiting marijuana would, in all likelihood, fail to comprise a compelling interest, as the competing interest of bodily autonomy is arguably one of the most important basic human rights of any individual.¹⁸⁸

2. *Crime and Use*.—The government could also argue the prohibition of marijuana is warranted because the government has a compelling interest in controlling crime,¹⁸⁹ and due to marijuana’s relation to crime, decriminalization of marijuana will result in an increased number of users as well as increased crime. A 2003 study examines several states where marijuana had been decriminalized—meaning there was a reduction of the penalties imposed for simple possession—found that this decriminalization did increase use among high school students.¹⁹⁰ However, the increase was only 2%.¹⁹¹ Furthermore, studies in jurisdictions that decriminalized marijuana use in the 1970s showed

182. See *Washington v. Glucksberg*, 521 U.S. 702, 772 (1997) (discussing the six state interests of (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses).

183. See *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (discussing the compelling interest in finding, convicting, and punishing those who violate the law).

184. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

185. See *Glucksberg*, 521 U.S. at 772.

186. See *Lawrence v. Texas*, 539 U.S. 558, 578-579 (2003).

187. See U.S. CONST. amend. I.

188. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common laws than the right of every individual to the possession and control of his own person.”).

189. See *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

190. Rosalie Licardo Pacula et al., *Marijuana Decriminalization: What Does It Mean in the United States?* 8-9, 17 (Nat’l Bureau of Econ. Research, Working Paper No. 9690, 2004).

191. *Id.* at 17.

very little effect on use patterns.¹⁹² Regarding marijuana's relationship to crime, marijuana is the least likely out of marijuana, cocaine, and heroin to generate criminal activities because (1) the method of dealing marijuana is discreet; (2) very little marijuana is required to get high; and (3) a marijuana high typically does not trigger violence.¹⁹³ These, and possibly other factors, suggest "[m]aking marijuana legally available to adults on more or less the same terms as alcohol would tend to reduce crime."¹⁹⁴

The flip side of the crime discussion is that federal and state governments are spending huge sums of money to enforce the prohibition of marijuana. A study in 2004 claimed that Alaska was spending around \$25 million per year to enforce marijuana prohibition laws.¹⁹⁵ A separate study in 2003 concluded that Massachusetts spends around \$120.6 million per year on marijuana prohibition laws.¹⁹⁶ On a national level, a report in 2004 estimated that the national criminal justice system could spend as much \$7.6 billion enforcing marijuana laws in a year.¹⁹⁷ This is in spite of the fact that the Global Commission on Drug Policy, which included individuals such as former Secretary General of the United Nations, Kofi Annan, indicated, "The global war on drugs has failed, with devastating consequences for individuals and societies around the world End the criminalization, marginalization and stigmatization of people who use drugs but who do no harm to others."¹⁹⁸ In light of this, the large sums of money being spent by U.S. jurisdictions would be better spent elsewhere, especially in a time when most state governments are struggling to balance their books, and the federal government faces the prospect of further credit score downgrades due to out of control federal debt in the trillions of dollars.

Therefore, although government prevention of crime is admittedly a compelling government interest, decriminalizing marijuana would better serve that and other interests much more effectively than continued government

192. L. Johnson et al., *Marijuana Decriminalization: The Impact on Youth 1975-1980*, INST. FOR SOC. RES., Occasional Paper Series: Paper 13 (1981); Clifford F. Thies & Charles A. Register, *Decriminalization of Marijuana and the Demand for Alcohol, Marijuana and Cocaine*, 30 SOC. SCI. J. 385, 399 (1993).

193. David A. Boyum & Mark A. R. Kleiman, *Substance Abuse Policy from a Crime-Control Perspective*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 331, 341 (James Q. Wilson & Joan Petersilia eds., 2002).

194. *Id.* at 344.

195. Scott W. Bates, *The Economic Implications of Marijuana Legalization in Alaska*, ALASKANS FOR RTS. & REVENUES, at iv-v (2004), <http://www.prohibitioncosts.org/wp-content/resources/FinalBatesreport.pdf>.

196. Jeffrey A. Miron, *The Budgetary Implications of Marijuana Legalization in Massachusetts*, CHANGE THE CLIMATE 1, 11 (Aug. 2003), http://www.changetheclimate.org/budget/mass_budget.pdf.

197. JON B. GETTMAN, CRIMES OF INDISCRETION: MARIJUANA ARRESTS IN THE UNITED STATES, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS 115 (2004), available at http://norml.org/pdf_files/NORML_Crimes_of_Indiscretion.pdf.

198. GCDP REPORT, *supra* note 126, at 2.

prohibition.

3. *Health*.—Again, the health aspects of marijuana use come into play because the government could argue it has a compelling interest in protecting public health, and smoking marijuana can be harmful.¹⁹⁹ The Supreme Court has recognized a compelling interest for public health, but this compelling interest is attached to the states' police power²⁰⁰ and may not be applicable to the federal government.

It is important to note there are methods for using marijuana other than smoking it.²⁰¹ These include vaporizers, edibles, and alcohol tinctures.²⁰² Ingesting marijuana does not have any of the smoke-related effects on the lungs that smoking marijuana has. This is arguably the primary health concern regarding marijuana use. The American College of Physicians has indicated marijuana has the potential to be used safely under appropriate conditions.²⁰³ Furthermore, marijuana appears to have a therapeutic benefit, even according to the government, as evidenced by the successful patent application.²⁰⁴

Again, as earlier, it must be noted that government-appointed commissions in the United States, Germany, Canada, the UK, and Australia have reviewed the scientific evidence and concluded that marijuana's dangers had previously been exaggerated.²⁰⁵ These commissions urged their respective countries to drastically reduce or eliminate penalties related to marijuana.²⁰⁶ The existence of these studies is a strong argument against any government assertion that maintaining public health would be a compelling interest for marijuana prohibition. Furthermore, there has never been a recorded death attributed to marijuana overdose,²⁰⁷ but deaths related to the two primary legal vices in the United States, alcohol and tobacco, approach 100,000 and 400,000 lives, respectively, each year.²⁰⁸ Again, any argument by the government that ensuring public health

199. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (finding that states have a compelling interest in professional practices within state borders).

200. *Id.*

201. See, e.g., *Marijuana Tincture*, PATIENTS FOR MED. CANNABIS, <http://patients4medicalmarijuana.wordpress.com/medical-use-of-cannabis-video/marijuana-tincture/> (last visited Mar. 26, 2013) (An alcohol tincture is a solution of alcohol or of alcohol and water, containing animal, vegetable, or chemical drugs. In this instance, the THC from the marijuana is transferred from the plant itself into the alcohol.).

202. *Id.*

203. TIA TAYLOR, AM. COLL. OF PHYSICIANS, SUPPORTING RESEARCH INTO THE THERAPEUTIC ROLE OF MARIJUANA 1 (2008), available at http://www.acp.online.org/advocacy/where_we_stand/other_issues/medmarijuana.pdf.

204. Cannabinoids as Antioxidants and Neuroprotectants, U.S. Patent No. 6,630,507 (filed Feb. 2, 2001) (issued Oct. 7, 2003) (patent rights assigned to the U.S. Department of Health and Human Services).

205. See *supra* text accompanying note 170.

206. *Id.*

207. Grinspoon, *Wonder Drug*, *supra* note 168, at 101-02.

208. *Id.*; McGinnis & Foege, *supra* note 169, at 2207-12.

would be a compelling interest to allow the government to prohibit marijuana use is undermined by the fact that there were no deaths in the United States directly attributed to marijuana use in 2009.²⁰⁹

Lester Grinspoon, who was later an Associate Professor Emeritus in Psychiatry at Harvard Medical School, declared in 1971, “The single greatest risk encountered by the user of marihuana in any state in this country is that of being apprehended as a common criminal, incarcerated, and subjected to untold damage to his social life and career.”²¹⁰ Any health argument for a compelling interest made by the United States federal government would likely fail as marijuana simply is not as harmful as the federal government once claimed, and it is less harmful than alcohol and tobacco, both of which are legal at a certain age in the United States.

4. *Conclusion: Compelling Interest.*—The facts simply do not support the position that the U.S. Government has a compelling interest in prohibiting marijuana use. Any argument related to morality made by the U.S. Government will at least be met with harsh skepticism from the judicial wing; allowing such a morality argument would send a damaging message to a federal government that has always been constrained by the notion of separation of church and state. Furthermore, it is difficult for a financially stretched and vastly unpopular legislative branch of the federal government to even voice an argument for the regulation of marijuana use due to its “relationship to crime” when any relationship that exists between the two is likely a direct effect of the prohibition the government would be defending. Finally, scientific evidence suggests marijuana is simply not as dangerous as the U.S. Government once claimed, especially when compared to other substances the government allows adult individuals the choice to use. If any compelling government interest exists in prohibiting marijuana use in the United States, it is not related to morality, an independent cause of crime, or marijuana’s health effects.

B. *Narrowly Tailored*

Even if the government can scrape up a compelling interest for infringing on the bodily autonomy right through marijuana prohibition, it must also demonstrate the current law of a complete marijuana prohibition is narrowly tailored to meet whatever compelling interest is cobbled together.²¹¹ There are two reasons that any government attempt in this regard would fail: (1) the current prohibition on marijuana use also prohibits the growing of industrial hemp; and (2) the current prohibition on marijuana use also prohibits the use of marijuana as a medical remedy.

1. *Industrial Hemp.*—Industrial hemp has been an important crop for the

209. *Annual Causes of Death in the United States*, DRUGWARFACTS.ORG, http://www.drugwarfacts.org/cmc/Cause_of_Death#sthash4eMkbk42.dpbs (last visited Mar. 26, 2013); *About Marijuana*, NORML, <http://norml.org/marijuana> (last visited Mar. 26, 2013).

210. Grinspoon, *Wonder Drug*, *supra* note 168, at 2.

211. *See Roe v. Wade*, 410 U.S. 113, 155 (1973).

majority of the United States's history.²¹² In 1619, the Jamestown Colony passed a law making it illegal not to grow hemp.²¹³ Colonies in Massachusetts and Connecticut passed similar laws in 1631 and 1632.²¹⁴ Hemp was also produced on a massive basis for the war effort during World War I and World War II.²¹⁵

From the colonial period until the middle of the nineteenth century, hemp was a major crop in the United States due to its use as fabric, twine, and paper.²¹⁶ Despite the rise of the use of cotton due to technological advances,²¹⁷ farmers in the United States continued to grow hemp as a rotation crop because it is a natural herbicide.²¹⁸

Over the last seventy years, federal agencies' interpretations of narcotics laws, alongside the policies implemented in reliance on those interpretations, have completely obstructed the cultivation of industrial hemp such that domestic crops of hemp have not been grown in the United States since 1958.²¹⁹ Industrial hemp contains only a fraction of the amount of THC that the drug marijuana contains.²²⁰ In fact, hemp plants contain approximately less than .03% THC compared to the drug marijuana, which contains 3-15%.²²¹

Today, hemp is cultivated in more than thirty countries,²²² and it can be called a cash crop for several reasons. First, hemp has twice the "tensile strength" of cotton,²²³ but it does not require the harmful chemical pesticides needed by cotton.²²⁴ Second, hemp paper lasts for more than two centuries—three times longer than wood pulp paper—and hemp paper does not yellow as it ages.²²⁵ Also, wood pulp paper requires the use of nonrecyclable sulfuric acid for bleaching, but hemp paper can be processed with recyclable caustic soda.²²⁶ Finally, like fish oils, hemp oil contains high amounts of omega-3, a fatty acid the FDA has advised may reduce coronary heart disease.²²⁷

212. See Affidavit of David P. West, Ph.D., *supra* note 130; HERER, *supra* note 109, at 1.

213. See Affidavit of David P. West, Ph.D., *supra* note 130; HERER, *supra* note 109, at 1.

214. HERER, *supra* note 109, at 1.

215. *Hemp and Marihuana: Hearing on H.R. 2348 Before the S. Comm. on Finance*, 79th Cong. 14-16 (1945) (statement of George E. Farrell, Agric. Specialist, Bureau of Agric. Econ., U.S. Dep't of Agric.) [hereinafter *Hearing on H.R. 2348*].

216. RAWSON, *supra* note 108, at 1.

217. *Id.* at 1-2.

218. *Hearing on H.R. 2348*, *supra* note 215.

219. RAWSON, *supra* note 108, at 2.

220. *Id.* at 4-5.

221. Kevin Bonsor, *How Marijuana Works*, HOWSTUFFWORKS.COM, <http://science.howstuffworks.com/marijuana5.htm> (last visited Mar. 26, 2013).

222. Affidavit of David P. West, Ph. D., *supra* note 130, ¶ 68(a).

223. ROBERT DEITCH, HEMP—AMERICAN HISTORY REVISITED: THE PLANT WITH A DIVIDED HISTORY 221 (2003) (citing II ENCYCLOPEDIA AMERICANS 168 (1956)).

224. *Id.* at 221-22.

225. *Id.* at 219.

226. *Id.*

227. Affidavit of Dr. T. Randall Fortenberry, Ph.D., ¶ 8, *Monson v. Drug Enforcement*

The current marijuana prohibition effectively prohibits the cultivation of industrial hemp—a historic cash crop of the United States with a wide range of useful applications; as a result, the prohibition is not narrowly tailored even assuming a compelling government interest exists in prohibiting marijuana use.

2. *Medical Marijuana*.—In the mid-nineteenth century, the U.S. Pharmacopeial Convention (“USP”), a scientific nonprofit organization that sets standards for the quality, purity, identity, and strength of the medicines, food ingredients, and dietary supplements manufactured, distributed and consumed worldwide,²²⁸ listed cannabis as appropriate for treating fatigue, coughing fits, asthma, rheumatism, delirium tremens, migraine headaches, and menstrual symptoms.²²⁹ By 1900, use of cannabis as a medication had greatly fallen into disuse because it (1) was insoluble in water; (2) could not be injected via hypodermic syringe; (3) varied greatly in potency; (4) was difficult to standardize into doses; and (5) could not compete with newer, synthetic drugs designed to remedy the same ailments.²³⁰ In 1942, cannabis was removed from the U.S. Pharmacopoeia.²³¹

In 1999, the Institute of Medicine (“IOM”) published a study on the risks and benefits of marijuana-as-medicine.²³² It described marijuana’s substantial analgesic effects as well as its moderate success as an anti-emetic and appetite stimulant.²³³ The 1999 IOM study concluded though marijuana was not “completely benign,” there was enough evidence of a therapeutic effect to warrant further research.²³⁴ Several synthetic versions of the active agent in marijuana, THC, are approved by the FDA for treating appetite problems in cancer and HIV/AIDS patients.²³⁵ “Seventy-eight percent of Americans supported the [legality] of doctor-prescribed marijuana in the treatment of pain and suffering” in a November 2005 Gallup Poll.²³⁶

The fact the current federal prohibition of marijuana applies to marijuana’s medical uses, which are medically documented and sworn to by cancer and HIV/AIDS patients, shows the prohibition is not narrowly tailored even assuming a compelling government interest exists in prohibiting marijuana use.

Admin., 589 F.3d 952 (8th Cir. 2009) (No. 4:07-cv-00042).

228. *About USP*, U.S. PHARMACOPEIAL CONVENTION, <http://www.usp.org/aboutUSP/> (last visited Mar. 26, 2013).

229. HERER, *supra* note 109, at 9.

230. LARRY RASTO SLOMAN, REEFER MADNESS: A HISTORY OF MARIJUANA 26 (1979).

231. *Cannabis and Cannabinoids*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/healthprofessional/page3> (last modified Mar. 21, 2013).

232. IOM REPORT, *supra* note 172.

233. *Id.*

234. *Id.*

235. See RAY & KSIR, *supra* note 105, at 415-17 (“compassionate use protocol”); IOM REPORT, *supra* note 172; *Nabilone*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a607048.html> (last visited Mar. 26, 2013).

236. Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 676 (2009).

3. *Conclusion: Narrowly Tailored.*—The current federal marijuana prohibition extends to encompass two uses of cannabis plants that are historically important as well as useful for today's society. Therefore, it is likely marijuana prohibition would fail strict scrutiny's narrow tailoring requirement.

C. Part III Conclusion: A Failing Grade

In all likelihood, the current federal prohibition of marijuana would fail both requirements for constitutionality under a strict scrutiny analysis. There exists no compelling government interest related to morality, crime or health the government can point to in support of its prohibition of marijuana, and the current prohibition is not narrowly tailored because it outlaws the production of the cash crop industrial hemp as well as marijuana for its medically recognized uses.

D. Judicial Activism?

In general, courts tread the boundaries of Article 3 rarely, and then only with caution and care as evidenced by the refusal of courts to address political questions.²³⁷ This respect of separation of powers on the part of the courts is an important aspect of the United States political system and is something that should be dealt with using the utmost gravity. That being said, courts since *Marbury v. Madison*²³⁸ have been the final arbiters regarding what is and is not constitutional, as well as interpreters of what the Constitution actually says.²³⁹ It is in this spirit that many of the civil rights we enjoy today have been extracted out of a document that is in all actuality quite bare. Segregation could still be in place today without the bravery and tact displayed by the Court in *Brown v. Board of Education*.²⁴⁰

Although there is an argument to be made that it is Congress's responsibility to withdraw the federal prohibition of marijuana rather than the Court's duty to declare it invalid, the argument is a weak one given the Court's indispensable role in developing, refining, and enforcing civil rights. If the Court adhered to such a strict belief, judicial review would have no meaning, and we would have no fundamental right to privacy, travel, access to the courts, or to vote. In short, although it is not in the Court's interest, or power, to nonchalantly gallivant into the realms properly occupied by the legislative and executive branches, that is not the case here. Here, there exists a constitutional right more important than any other, the interest we all have as humans in our own person, which must be

237. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 208-34 (1962) (discussing when a political question is justiciable and when it is not).

238. *Marbury v. Madison*, 5 U.S. (1 Cranch) 37 (1803).

239. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 564, 574, 578-79 (2003) (finding intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment).

240. *Brown v. Bd. of Educ.* 347 U.S. 483 (1954), *supplemented by* *Brown v. Board of Educ.*, 347 U.S. 83 (1955).

accorded its rightful status with all due haste, lest the infringements on this right grow in number and magnitude.

IV. THE LOGICALLY DEFENSIBLE POSITION: A CONCLUSION OF SORTS

In life, there are few things we should take for granted, few things that cannot be taken from us. Our own body is one of these things. The decision of what to do with our own self is solely our own, and this decision can never be fully taken away. Even a prisoner may decide to sit or stand, pray or curse. This right we have in what happens to our body has no recognition in our current system of ordered liberty despite a long list of Supreme Court opinions opining about its importance.²⁴¹ In light of this, the Court should recognize, in more than dicta, a fundamental right to bodily autonomy. Furthermore, the cannabis plant's history in the United States dates back to the early colonies, where it was a mandatory crop for everyone to grow. In fact, marijuana use itself was illegalized for mainly political reasons. Given this history, a fair comparison of this naturally occurring plant to tobacco and alcohol, both legal vices in the United States, overwhelmingly suggests that marijuana should fall under a bodily autonomy right as it is far less harmful than these legal substances. Finally, there exists no compelling government interest in infringing on the bodily autonomy right by way of marijuana prohibition related to morality, the connection between marijuana and crime, or safeguarding the public health. Even if a dark horse compelling interest were to emerge, the fact that the current federal prohibition of marijuana also prohibits growing industrial hemp or using marijuana for its medical purposes means said prohibition is in no way narrowly tailored.

Therefore, the Supreme Court should: (1) recognize a fundamental right to bodily autonomy; (2) include marijuana use in this right; and (3) strike down the current federal prohibition of marijuana for failing to meet strict scrutiny.

241. See discussion *supra* Part I.A.