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# Obama, the Fourteenth Amendment, and the Drug War

Martin D. Carcieri

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## OBAMA, THE FOURTEENTH AMENDMENT, AND THE DRUG WAR

*Martin D. Carcieri\**

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*“Had those who drew and ratified the Due Process Clauses of the Fifth and Fourteenth Amendments 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 can invoke its principles in their own search for greater freedom.”<sup>1</sup>*

## I. INTRODUCTION

As we enter 2011, progress on marijuana law reform in the U.S. is mixed. At the state level, on the one hand, there is momentum. Following California’s lead in 1996, fifteen states now allow the medicinal use of marijuana.<sup>2</sup> As for recreational use, although California recently rejected Proposition 19 by a 54% to 46% margin,<sup>3</sup> this ballot initiative thrust the issue to the forefront of national and international political debate.<sup>4</sup> Indeed, plans are already underway to place similar yet refined measures on state ballots in 2012.<sup>5</sup> As Richard Lee, founder of Oaksterdam University and author of Proposition 19, thus remarked, “over the course of the last year, it has become clear that

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1. *Lawrence v. Tex.*, 539 U.S. 558, 578-79 (2003).

2. Devlin Houser, *Arizona Narrowly Approves Medical Marijuana*, N.Y. TIMES, Nov. 15, 2010.

3. See John Hoeffel & Maria L. LaGanga, *Youth Vote Falters; Prop. 19 Falls Short*, LOS ANGELES TIMES, Nov. 3, 2010. Proposition 19, the “Regulate, Control, and Tax Cannabis Act of 2010,” would have changed California law from a regime of marijuana prohibition to one of marijuana regulation and taxation.

4. See, e.g., Joe Klein, *It’s High Time*, TIME, Apr. 13, 2009, at 19; Timothy Egan, *Reefer Gladness*, N. Y. TIMES, Sept. 29, 2010; Jeffrey A. Miron, *Drugs and Conservatives Should Go Together*, LOS ANGELES TIMES, Sept. 29, 2010; George Soros, *Why I Support Legal Marijuana*, WALL STREET JOURNAL, Oct. 26, 2010; Ed Kilgore, *Fired Up?* THE NEW REPUBLIC, Oct. 26, 2010; Nicholas D. Kristof, *End the War on Pot*, N. Y. TIMES, Oct. 27, 2010; *High Time to Legalise Marijuana: Californians Should back Proposition 19*, FINANCIAL TIMES (London), Oct. 28, 2010; Andrew Ferguson, *How Marijuana Got Mainstreamed*, TIME, Nov. 22, 2010, at 30. As one journalist writes, “polls indicate Prop. 19 is by far the most recognizable measure on the ballot. It’s also been drawing international headlines because it would make California the first place in the United States to legalize recreational pot.” Kevin Fagan, *Prop. 19: Fight over Pot Starts to Heat Up*, SAN FRANCISCO CHRONICLE, Oct. 24, 2010.

5. See Stephen Gutwillig, *History is on Proposition 19’s Side*, LOS ANGELES TIMES, Nov. 3, 2010; Henry K. Lee, *Legal Pot Backers Vow to Try Again in 2012*, SAN FRANCISCO CHRONICLE, Nov. 4, 2010; Kevin Fagan, *Defeat of Pot Measure Shows Divide Lingers*, SAN FRANCISCO CHRONICLE, Nov. 7, 2010, and [www.mpp.org](http://www.mpp.org).

the legalization of marijuana is no longer a question of if but a question of when.”<sup>6</sup>

Notwithstanding such momentum at the state level, however, the prospects for reform at the federal level appear dismal for the near future. For its part, Congress has consistently refused even to instruct the DEA not to harass sick patients in states with medical marijuana laws.<sup>7</sup> For his part, President Obama has sent mixed signals on marijuana policy. On the one hand, he announced in 2009 that so long as state medical marijuana laws are faithfully observed, there would be no DEA intervention.<sup>8</sup> In 2010, by contrast, when polls leading up to the election indicated that Proposition 19 might succeed, Attorney General Eric Holder threatened to enforce federal marijuana prohibition if it did.<sup>9</sup>

With Proposition 19’s defeat, of course, the Administration dodged a bullet. Yet Obama almost certainly seeks reelection, and few politicians of either party will touch the marijuana issue.<sup>10</sup> Especially since the new Republican-controlled House of Representatives is even less likely to spur reform in this area than did the recent Democrat-controlled House, it seems clear that for the time being, federal marijuana prohibition<sup>11</sup> marches on.

If Obama is reelected, however, the situation transforms. Since the Twenty-second Amendment bars him from a third term,<sup>12</sup> and his future would be quite secure, he would be free to speak the truth on this issue, which includes the following: beyond its economic<sup>13</sup> and social<sup>14</sup> costs,

6. Kevin Fagan, ‘Resounding’ Rejection for Marijuana Measure, SAN FRANCISCO CHRONICLE, Nov. 3, 2010; See also Ethan Nadelmann, *Marijuana Legalization: Not If, But When*, HUFFINGTON POST, Nov. 3, 2010.

7. See, e.g., Hinchey Encouraged by Record House Support for Medical Marijuana; Vows to Keep Fighting for Amendment, STATES NEWS SERVICE, July 25, 2007.

8. See David Johnston & Neil A. Lewis, Obama Administration to Stop Raids on Medical Marijuana Dispensers, N. Y. TIMES, Mar. 19, 2009.

9. See Adam Nagourney, *U.S. Will Enforce Marijuana Laws, State Vote Aside*, N. Y. TIMES, Oct. 15, 2010, *The Feds Say No Way*, LOS ANGELES TIMES, Oct. 20, 2010, and *The Feds Weigh in on Proposition 19*, SAN FRANCISCO CHRONICLE, Oct. 27, 2010, at A15.

10. None of those who ran for Governor of California in 2010, for example, supported Proposition 19. See Bob Egelko, *Legal Pot a Tough Sell in (2010 California Gubernatorial) Race*, SAN FRANCISCO CHRONICLE, Aug. 8, 2009 and Joe Garofoli, *Bid to Legalize Pot is Counter to U.S. Trend*, SAN FRANCISCO CHRONICLE, Jan. 5, 2010.

11. The statutory basis of this prohibition, enacted in 1970, is the Comprehensive Drug Prevention and Control Act, popularly called the Controlled Substances Act, 21 U.S.C. § 801 - 904 (2009). The Controlled Substances Act (CSA) classifies marijuana as a Schedule One controlled substance, which means that in Congress’ view, it has a high potential for abuse, no officially accepted medicinal uses, and no safe level of use under medical supervision.

12. See U.S. CONST. amend. XXII.

13. As a single illustration, in a report signed by over 500 economists, including three Nobel Laureates, Harvard economist Jeffrey Miron estimated that ending cannabis prohibition would save

marijuana prohibition burdens a range of constitutional interests, including those arising under the First,<sup>15</sup> Fourth,<sup>16</sup> Fifth,<sup>17</sup> Sixth,<sup>18</sup>

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\$7.7 billion per year in government expenditures on its enforcement (\$5.3 billion accruing to State and local governments, while \$2.4 billion accruing to the U.S. government). He also estimated that ending the prohibition would yield tax revenue of \$2.4 billion annually if cannabis were taxed like all other goods and \$6.2 billion annually if it were taxed at rates comparable to those on alcohol and tobacco. Jeffrey A. Miron, *The Budgetary Implications of Marijuana Prohibition* (June 2005), <http://www.prohibitioncosts.org/endorsers.html>.

14. The rule of law and the legitimacy of the criminal justice system are undermined, for example, when government promulgates misleading propaganda to justify the enforcement of widely ignored laws. *See generally*, U.S. DRUG ENFORCEMENT ADMINISTRATION, <http://www.DEA.gov> (last visited Sept. 17, 2010) and OFFICE OF NATIONAL DRUG CONTROL POLICY, <http://www.ONDCP.gov> (last visited Sept. 17, 2010). Moreover, the black market in marijuana generates vast profits which make the violent gangs that control that market attractive to young people. It also gives public officials, with their typically modest salaries, incentives to cooperate with the underground market. Beyond this, families and individual lives are destroyed when nonviolent cannabis offenders are thrust into a world of prison gangs, sexual violence, hard drugs, and learned criminality. These problems are worsened by prison overcrowding, which forces the early release of violent offenders to make room for nonviolent ones. And perhaps the most tragic social cost of this prohibition is that it is largely a war on racial minorities. It is well documented that the U.S. has the world's highest prison population rate, that it has widely disproportionate felony conviction and incarceration rates by race, and that the picture is even worse for minorities with respect to drug crimes in particular. *See generally* JUDGE RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* (2004); JOEL MILLER, *BAD TRIP: HOW THE WAR AGAINST DRUGS IS DESTROYING AMERICA* (2004); ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* (2003); 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* (2001); William F. Buckley, Mayor Kurt Schmoke, & Police Chief Joseph McNamara, *The War on Drugs is Lost*, in MIKE GRAY, *BUSTED 198-209* (2002) [hereinafter, M. GRAY I].

15. As for freedom of speech, see *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002); Gerber, *supra* note 14, at 121-30, and Graham Boyd & Jack Hitt, *This is Your Bill of Rights*, in M. GRAY I, *supra* note 14, at 149. As for religious freedom, it has been argued that since adult marijuana use promotes spiritual centering and insight, it should be protected under the free exercise clause. *See, e.g.*, *Hawaii v. Mallan*, 86 HAW. 440, 444 (1998); Jacob Sullum, *Spiritual Highs and Legal Blows: The Power and Peril of Religious Exemptions from Drug Prohibition*, in REASON, June 2007, at 43-54, available at <http://reason.com/news/show/119721.html>; *Empt. Div. v. Smith*, 485 U.S. 660 (1988), however, held that the drug war trumps free exercise.

16. *See, e.g.*, Thomas Regnier, *The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 UMKC L. REV. 631 (2004); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VILL. L. REV. 851 (2002); Dave Kopel, *Smash-up Policing: When Law Enforcement Goes Military*, in M. GRAY I, *supra* note 14, at 155-58 (militarization of law enforcement); Jim Dwyer, *Casualty in the War on Drugs*, in M. GRAY I, *supra* note 14, at 159-63 (distortion of police practices).

17. The widely used practice of civil asset forfeiture in drug cases, for example, presents questions under the Double Jeopardy Clause, see *United States v. Ursery*, 518 U.S. 267, 270 (1996), and the Takings Clause, see *Bennis v. Michigan*, 516 U.S. 442, 443 (1996). *See also* Boyd & Hitt, *supra* note 15, at 151-52.

Eighth,<sup>19</sup> Tenth,<sup>20</sup> and Fifteenth<sup>21</sup> Amendments.<sup>22</sup> As a constitutional lawyer, further, the President knows that these problems may be but symptoms of an underlying constitutional infirmity, one rooted primarily in the Fourteenth Amendment. This article is written to help clarify the full range of understanding Obama would bring to a second term. Specifically, I defend two related, contested theses.

My core thesis, to which this article is primarily devoted, is a jurisprudential claim: contrary to state and lower federal court rulings, marijuana prohibition is subject to strict judicial scrutiny under leading

18. The use of anonymous informants in drug cases, for example, undermines the right to confront one's accusers. *See* *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Boyd & Hitt, supra* note 15, at 152.

19. Mandatory minimum sentences for possession or sale undermine the proportionality of punishment to offense, raising an issue of cruel and unusual punishment. *See, e.g.,* *United States v. Strahan*, 565 F.3d 1047, 1053 (7th Cir. 2009); *United States v. O'Dell*, 320 F.3d 674, 678 (6th Cir., 2003); *Boyd and Hitt, supra* note 15, at 152-53; *but see* Linda Greenhouse, *Justice Restore Judges' Control over Sentencing*, N. Y. TIMES, Dec. 11, 2007, at A1.

20. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court held that Congress' commerce power trumps the traditional police power of States, rooted in the Tenth Amendment, to regulate intrastate activity for the health and welfare of their citizens. *See generally* Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131 (2007); Ilya Slomin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006); Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1793-1800 (2003).

21. The Fifteenth Amendment guarantees voting rights regardless of race, yet "[t]hirteen percent of all adult black men—1.4 million—are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average. Election voting statistics offer an approximation of the political importance of black disenfranchisement: 1.4 million black men are disenfranchised compared to 4.6 million black men who voted in 1996." Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, 8 (Human Rights Watch & The Sentencing Project, 1998).

22. These arguments have been made elsewhere. Beyond the sources already referenced. *See, e.g.,* Norm Stamper, *America's Drug War and the Right to Privacy*, 68 MONT. L. REV. 285 (2007); Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006); Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753 (2006); Roger Pilon, *Tenants, Students, and Drugs: A Comment on the War on the Rule of Law*, CATO, <http://www.cato.org/pubs/scr/2002/pilon.pdf>; Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Steven Duke, *The Drug War and the Constitution in AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY* 41-59 (Timothy Lynch ed., 2000); Robert Sweet & Edward Harris, *Moral and Constitutional Considerations in Support of the Decriminalization of Drugs*, in *HOW TO LEGALIZE DRUGS* 430-84 (Jefferson M. Fish ed., 1998); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 245 (1994); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL L. REV. 1389, 1399 (1993); Dan Baumann, *The Drug War and Civil Liberties*, THE NATION, June 29, 1992; Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

relevant U.S. Supreme Court jurisprudence.<sup>23</sup> I support this thesis primarily by showing that under the Fourteenth Amendment, bodily autonomy—i.e., the control over the borders and contents of one’s body burdened by laws like marijuana prohibition—is a fundamental right, and that the Court has thus established a presumption in its favor, especially for adults in the home. I then reinforce this thesis with three further arguments: (1) marijuana prohibition violates “justice as regularity,”<sup>24</sup> (2) marijuana prohibition satisfies the “suspect class” trigger of strict scrutiny,<sup>25</sup> and (3) bodily autonomy is closely analogous to the fundamental right of free speech. In sum, I argue that all roads of constitutional analysis lead to strict scrutiny of marijuana prohibition.

My second thesis, resting largely on the first, is a policy claim: if reelected, Obama will be inclined, and ought, to urge Congress to end federal marijuana prohibition, letting States go their own way within federal guidelines.<sup>26</sup> As President, he knows that if he is convinced, on both policy and constitutional grounds, that the law must be changed, he need not wait for the Court to act—or more accurately, react. Especially if the current pace of state marijuana law reform continues through 2012, Obama’s recommendation will have broad support by the time he delivers his 2013 State of the Union address.

An *application* of strict scrutiny to marijuana prohibition is the subject of another article. Here I simply show that the President has ample reason under well-settled law to conclude that this prohibition is properly subject to that high standard. It may be that prohibition of cocaine, heroin and methamphetamine could survive strict scrutiny. These too are the subjects of other articles. Obama takes the rule of law seriously, however, and he would have grave doubts that marijuana prohibition could pass an honest application of strict scrutiny, in turn prompting him to urge Congress to end this costly war.

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23. The meaning and significance of strict scrutiny will be presented below.

24. JOHN RAWLS, A THEORY OF JUSTICE 207-08 (Rev. Ed. 1999) [hereinafter TJ].

25. The Supreme Court has never squarely addressed the precise question of whether marijuana prohibition is subject to strict scrutiny under the Fourteenth Amendment by virtue of burdening the fundamental right of bodily autonomy. *Raich*, 545 U.S. at 2, 32. (2005) focuses on Congress’ power under the Commerce Clause to preempt contrary state marijuana laws, and *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 494-95 (2001) is a statutory interpretation of the CSA.

26. This would require removing marijuana from Schedule One of the CSA and could include such federal restrictions on state law as bans on advertising of marijuana, sale to children, driving under the influence of marijuana, public use of marijuana, etc.

## II. THE CONSTITUTIONAL JURISPRUDENCE OF BODILY AUTONOMY

### A. Introduction

The Fourteenth Amendment provides that “no State . . . shall deprive any person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws.”<sup>27</sup> The President has written that he considers these provisions to be among the Constitution’s most important.<sup>28</sup> He knows, after all, that civil liberty is ultimately fused with equality—that where the law creates a presumption of liberty, each person has a vital interest in not having his liberty denied while others are allowed an equal or more harmful liberty.<sup>29</sup> As Professor Tribe thus recently observed, substantive due process “is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty . . . .”<sup>30</sup>

In this light, it is not surprising that due process and equal protection analyses blend into each other. Both start with the premise that one challenging a law as an unconstitutional violation of his rights ordinarily has the presumption against him. So long as government can show a legitimate interest or end in enacting the law, that is, that the law

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27. U.S. CONST. amend. XIV, § 1 (emphasis added).

28. See BARACK OBAMA, *THE AUDACITY OF HOPE* 90 (2006).

29. TJ, *supra* note 24, at 209.

30. Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1898 (2004). This view is confluent with that of Rawls, whose equal liberty principle is the fundamental norm of a just constitution. See TJ, *supra* note 24, at 53. Given the stature and legitimacy of Rawls’ work, I shall draw upon it at several points. I should thus say briefly why I think the President would be receptive to guidance from Rawls. Obama is a lawyer, to begin, steeped in the law of contracts. His view of a vibrant social contract as the essential foundation for political rights and obligations in a just society is thus not surprising. While the strengths of utilitarianism and intuitionism are plain for the President to see, further, he can also easily grasp their fatal limitations as overarching principles of justice. Given his command of the sources and structure of American law—the relationship among foundational principles, a constitution, statutory law, judicial and administrative decision making—he would find the four stage sequence and lexical ordering of the principles of justice valuable tools that invite application of those principles to concrete policy, legal, and constitutional problems. As a Democrat on the moderate political left, further, Obama embraces principles of equal liberty and fair equality of opportunity, rejecting conservative and libertarian claims that mere *formal* equality of opportunity yields a just and stable social order. As for the difference principle, finally, not only do Obama’s speeches, writings, and lawmaking efforts evince a genuine concern for the least advantaged of all races, but his life story exemplifies the fact, underscored by Rawls, that least advantaged status is no mere function of race. See generally TJ, *supra* note 24; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001) [hereinafter, JF]; see also JAMES T. KLOPPENBERG, *READING OBAMA: DREAMS, HOPES, AND THE AMERICAN POLITICAL TRADITION* 89-110 (2011).

is “rationally related” to advancing that interest, it will be upheld. This ends/means test, embodying a presumption for government and against the individual, is called rational basis scrutiny.<sup>31</sup>

In some cases, however, the Court has found either that the right burdened by a challenged law is “fundamental”<sup>32</sup> or that a classification the law employs is “suspect.”<sup>33</sup> In either case, it applies “strict scrutiny,”<sup>34</sup> and the presumption shifts to favor the individual.<sup>35</sup> While the law might still survive constitutional challenge, government now has an uphill battle: it needs not simply a legitimate interest in enacting the law, but a compelling one.<sup>36</sup> It must have, we might say, not just a reason, but a very good reason. Further, the law as a means must be not just rationally related to advancing the interest, but “narrowly tailored” to doing so.<sup>37</sup> There must be not just a plausible link between means and ends, in other words, but a close, efficient, causal link—one that is neither too over-inclusive nor under-inclusive.<sup>38</sup> On both the ends and

31. See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980); WILLIAM COHEN, DAVID DANIELSKI, & DAVID A. YALOF, *CONSTITUTIONAL LAW: CIVIL RIGHTS AND INDIVIDUAL LIBERTIES* 984 (6th ed. 2007). This general presumption in favor of the constitutionality of governmental action, it must be observed, is at it must be. If government did not usually enjoy this presumption, the political branches could be brought to a standstill by litigation forcing them to defend all their actions under strict scrutiny. In effect, this would be government by judiciary, which is antithetical to the republican government the U.S. Constitution creates.

32. The seminal case is *United States v. Carolene Products*, 304 U.S. 144, 152, n.4 (1938). Since then, the Court has recognized as fundamental such interests as marriage and procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); voting, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); and interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

33. The quintessential suspect classification the Court has recognized, also rooted in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), is race. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 8-9, 11 (1967). Beginning in the 1970's the Court developed intermediate scrutiny to test gender classifications, which were considered “quasi-suspect.” See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

34. Justice Douglas introduced this term in *Skinner*, 316 U.S. at 541.

35. William Cohen, David Danielski, & David A. Yalof, *Constitutional Law: Civil Rights and Individual Liberties* 984-85 (6th ed. 2007).

36. *Id.*

37. See, e.g., *Johnson v. Cal.*, 543 U.S. 499, 505 (2005); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2752 (2007).

38. See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.39 (1979); *McConnell v. FEC*, 540 U.S. 93, 207 (2003); *Cuellar v. United States*, 128 S.Ct. 1994, 2004 (2008). Legislative means are underinclusive with regard to legislative ends where they fail to include within their reach activity that threatens those ends. They are overinclusive, conversely, where they include within their reach activity that does not threaten those ends. Government being imperfect by definition, the fit between ends and means could never, and need never, be perfect. Where strict scrutiny applies, however, there is far less tolerance for overinclusion and underinclusion than under intermediate or rational basis scrutiny. See generally, Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989).

means portions of the analysis, a court applying strict scrutiny is skeptical of, not deferential to, government's arguments.<sup>39</sup>

## B. Core Thesis: Bodily Autonomy and the Fourteenth Amendment

### 1. Bodily Autonomy as a Fundamental Right

Since the 1980's, writes Professor Post, the Court has developed two approaches to identifying fundamental rights in its substantive due process jurisprudence—the traditional approach and the autonomy approach.<sup>40</sup> The former is drawn originally from *Palko v. Connecticut*<sup>41</sup> and embodied more recently in *Washington v. Glucksberg*.<sup>42</sup> Beyond the rule that an asserted fundamental right must be “deeply rooted in the Nation's history and tradition” as well as “implicit in the concept of ordered liberty,” *Glucksberg* demands a “careful description” of the right.<sup>43</sup> Relying on this traditional formulation, state courts and lower federal courts have long held that laws criminalizing the possession or use of marijuana, even by adults in private, burden no fundamental right, and so need only pass rational basis scrutiny.<sup>44</sup> As the Hawaii Supreme Court has written, for example,

We cannot say that smoking marijuana is a part of the “traditions and collective conscience of our people.” In Hawai'i, possession of marijuana has been illegal since 1931 . . . . In the rest of the United States, the possession and/or use of marijuana, even in small quantities, is almost universally prohibited. Therefore, tradition appears to be in favor of the prohibition against possession and use of marijuana . . . . Furthermore, we cannot say that the principles of liberty and justice underlying our civil and political institutions are violated by marijuana possession laws. We dare say that liberty and justice can exist in spite

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39. See generally Craig R. Ducat, CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT 86-89 (9th ed. 2009). Nonetheless, to be clear, government sometimes prevails even under strict scrutiny. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

40. See Robert Post, The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 89 (2003).

41. 302 U.S. 319 (1937).

42. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

43. *Id.* at 721.

44. See, e.g., *Raich v. Gonzales*, 500 F.3d 850, 866 (2007); *Hawaii v. Sunderland*, 115 Haw. 396, 409 (2007) (Moon, C.J., concurring and dissenting); *Seeley v. Washington*, 132 Wn.2d 776, 792 (1997); *United States v. Fogarty*, 692 F.2d 542, 547 (1982); *NORML v. Bell*, 488 F.Supp. 123, 134 (1980); *Washington v. Smith*, 93 Wn.2d 329, 336 (1980); *Hamilton v. Florida*, 366 So.2d 8, 10 (1978). A few state opinions have held marijuana prohibition unconstitutional, yet they either relied on state constitutional privacy clauses or applied rational basis scrutiny in order to do so. See, e.g., *Ravin v. Alaska*, 537 P.2d 494 (1975); *People v. Sinclair*, 387 Mich. 91 (1972).

of the prohibition against marijuana possession. *Therefore, the purported right to possess and use marijuana is not a fundamental right and a compelling state interest is not required.*<sup>45</sup>

This conclusion, I submit, cannot withstand analysis. To see why, we must evaluate bodily autonomy as a fundamental right under both approaches identified by Post.

To begin, the phrases “implicit in the concept of ordered liberty”<sup>46</sup> and “neither justice nor liberty would exist if they were sacrificed”<sup>47</sup> are vague and abstract, and so provide little real guidance. They draw us out onto Wittgenstein’s slippery ice, where language has little traction.<sup>48</sup> At best, they yield starting points for analysis. While a High Court may “dare say that liberty and justice can exist in spite of (marijuana) prohibition,”<sup>49</sup> then, this is a meaningless claim that can be neither proven nor disproven without heavy theoretical lifting. Reasonable people differ on the meaning of such terms, so we are entitled to know exactly how liberty can truly exist where the state can invade adults’ bodily autonomy, even in the home. We are entitled to know how justice can really exist when adults who privately consume marijuana are criminals while adults who consume far more dangerous substances like alcohol and tobacco, even in public, are within their rights for reasons that are widely understood.<sup>50</sup> The *Mallan* court does not remotely speak to such questions.

45. *Hawaii v. Mallan*, 86 Haw. 440, 445-46 (1998) (emphasis added).

46. *Id.* at 443.

47. *Id.* at 444.

48. As he famously wrote,

it is difficult as it were to keep our heads up . . . and not go astray and imagine that we have to describe extreme subtleties, which in turn we are after all quite unable to describe with the means at our disposal. We feel as if we had to repair a torn spider’s web with our fingers. . . . The more narrowly we examine actual language, the sharper becomes the conflict between it and our requirement. . . . We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground!

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I 39-40 (2001).

49. *Mallan*, 86 Haw. at 445.

50. It is widely understood, for example, that in a free society adults must presumptively be free to consume what they wish, and that U.S. Prohibition was repealed as a constitutional and policy failure. Beyond this, several authorities and leading studies declare that *marijuana is far less harmful than alcohol and tobacco*. As one concluded, “[a]n objective consideration of marijuana shows that it is responsible for less damage to the individual and society than are alcohol and cigarettes.” *Twentieth Annual Report of the Research Advisory Panel*, California Research Advisory Panel, 1989, <http://www.norml.org>. According to an article in *The Lancet*, a leading British medical journal, “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.”

By contrast, the other aspect of the first prong of the traditional approach—whether a right is “so rooted in the traditions and conscience

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*Deglamorising Cannabis*, 346 *THE LANCET*, Nov. 14, 1995, at 1241; a study recently commissioned by the U.S. government concluded that “users of marijuana are less likely to become dependent on the drug in comparison to alcohol and nicotine.” Janet E. Joy, Stanley J. Watson, Jr., & John A. Benson, Jr., *Marijuana and Medicine: Assessing the Science Base*, DIVISION OF NEUROSCIENCE AND BEHAVIORAL RESEARCH, INSTITUTE OF MEDICINE 98 (1999). See also ERIC GOODE, BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE 155 (1997); Schlosser, *supra* note 14, at 74. Indeed, “[d]espite its use by millions of people over thousands of years, cannabis has never caused a death.” Lester Grinspoon, *Cannabis, the Wonder Drug*, in *THE DRUG LEGALIZATION DEBATE* 101-02 (James A. Inciardi, ed., 1999). By contrast, alcohol related deaths total more than 100,000 per year, and tobacco causes more than 400,000 U.S. deaths each year. See J.M. McGinnis & W. H. Foege, *Actual Causes of Death in the United States*, in 270 *JAMA* 2207, 2207-12 (1993); Ting-Kai Li, M.D., *Alcohol Use Disorders and Co-Occurring Conditions*, THE NATIONAL INSTITUTE ON DRUG ABUSE (last viewed Dec. 7, 2010), <http://archives.drugabuse.gov/meetings/ccc/plenary2.html>; Glen R. Hanson, NIDA Acting Director, *NIDA's Continued Commitment*, THE NATIONAL INSTITUTE ON DRUG ABUSE (last viewed Dec. 7, 2010), [http://archives.drugabuse.gov/NIDA\\_notes/NNVol17N6/DirRepVol17N6.html](http://archives.drugabuse.gov/NIDA_notes/NNVol17N6/DirRepVol17N6.html). Thus, “[t]hrough cannabis use is not without harm, especially for adolescents, as a source of danger it is certainly trumped by alcohol, tobacco, reckless driving, criminality, and unsafe sexual behavior . . . . This begs the question: why not remove the inconsistency by changing the pot laws?” ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* 345, 358 (2001). Beyond this, there is evidence that marijuana is less dangerous than caffeine or fatty foods. As for coffee, one writer observes that “the risks of caffeine are greater than THC in every way . . . . Caffeine is physically addicting (with headache as the most often cited symptom) and can cause unnecessary stress, lightheadedness, breathlessness, and an irregular heartbeat or much worse in larger-than-average doses. Marijuana isn’t even remotely as dangerous—no deaths by overdose, no physical addiction, and minimal health risks . . . .” Gable, *in* Fish, ed., *supra* note 22, at 406 (quoting D. Larsen). As Gore and Earleywine write, further, “cannabis appears to have little addictive potential in the opinion of most experts, particularly when compared to other common drugs, including caffeine.” Robert Gore & Mitch Earleywine, *Marijuana's Perceived Addictiveness: A Survey of Clinicians and Researchers*, in *POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION* 185 (Mitch Earleywine, ed., 2007). As for fatty foods, “in March, the Centers for Disease Control and Prevention predicted that obesity will overtake smoking as the leading cause of preventable deaths in the United States by next year if current trends continue.” Rashad & Michael Grossman, *The Economics of Obesity*, 156 *THE PUBLIC INTEREST* 104. As Husak notes, “[P]eople overeat and grow obese, their health suffers, they may die prematurely. None of this is good . . . . What should be done about it? What about criminalizing it? . . . This is crazy . . . . The problem is not large enough to warrant such extreme infringements of liberty.” DOUGLAS HUSAK, *LEGALIZE THIS! THE CASE FOR LEGALIZING DRUGS* vii-viii (2002). In sum, since 1969, government-appointed commissions in the United States, Canada, England, Australia, and the Netherlands concluded, after reviewing the scientific evidence, that marijuana’s dangers had previously been greatly exaggerated, and urged lawmakers to drastically reduce or eliminate penalties for marijuana possession. See ADVISORY COMMITTEE ON DRUG DEPENDENCE, *CANNABIS* (Her Majesty’s Stationery Office 1969); CANADIAN GOVERNMENT COMMISSION OF INQUIRY, *THE NON-MEDICAL USE OF DRUGS* (Information Canada 1970); MARIHUANA: A SIGNAL OF MISUNDERSTANDING, THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE (Nixon-Shafer Report) (GPO 1972); WERKGROEP VERDOVENDE MIDDELEN, *BACKGROUND AND RISKS OF DRUG USE* (Staatsuigeveerij 1972); *DRUG PROBLEMS IN AUSTRALIA—AN INTOXICATED SOCIETY*, SENATE STANDING COMMITTEE ON SOCIAL WELFARE (Australian Government Publishing Service 1977).

of our people as to be ranked as fundamental”<sup>51</sup>—provides some guidance. Sometimes, after all, we can justifiably claim that a given right is embedded in American traditions and conscience. Indeed, bodily autonomy is a good example. Beyond its reflection in the Fourth Amendment,<sup>52</sup> leading Anglo-American political theory,<sup>53</sup> and the statutory law of alcohol, tobacco, caffeine, and fatty foods, “a right of control over one’s body has deep roots in the common law.”<sup>54</sup> As the Supreme Court observed over a century ago, “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.”<sup>55</sup> As Justice Cardozo later wrote, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>56</sup> Under the “historical roots” aspect of the traditional approach, then, bodily autonomy is plausibly a fundamental right even before we turn to the most recent case law.

The second part of the traditional approach, we saw, is the demand for a “careful description” of the asserted right. This brings us the other strand of the Court’s search for fundamental rights—the autonomy

51. *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).

52. “The right of the people to be secure in their persons . . . shall not be violated . . .” U.S. CONST. amend. IV.

53. In the eighteenth century, Jefferson asserted that “the legitimate powers of government extend to such acts only as are injurious to others.” Thomas Jefferson, *Notes on Virginia*, in JEFFERSON: HIS POLITICAL WRITINGS 36 (Edward Dumbauld ed., 1955). In the nineteenth century, expanding Jefferson’s insight into his famous “harm principle,” Mill wrote that “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.*” JOHN STUART MILL, ON LIBERTY (G. Himmelfarb, ed., 1869) (emphasis added). In the twentieth century, Rawls wrote that “the equal basic liberties (include) the rights and liberties specified by the *liberty and integrity (physical and psychological) of the person.*” JF, *supra* note 30, at 44 (emphasis added).

54. *Abigail Alliance v. Von Eschenbach*, 445 F.3d 470, 480 (D.C. Cir. 2006).

55. *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This is plain, for example, in tort and criminal law. The protection against unwanted physical contact is reflected in such crimes as assault, battery, rape, and kidnapping, as well as in associated intentional torts like false imprisonment. As the Tenth Circuit recently wrote, “nonconsensual sexual contact . . . by its very nature evinces a clear intention to disregard the victim’s dignity and bodily autonomy . . .” *United States v. Austin*, 426 F.3d 1266, 1275 (10th Cir. 2005) (quoting *McCann v. Rosquist*, 185 F.3d 1113, 1120 (10th Cir. 1999)). For centuries, thus, the common law has provided redress for invasion of bodily autonomy. It is even protected in unintentional torts like negligence and strict liability.

56. *Schloenforff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129 (1914).

strand, embodied in *Lawrence v. Texas*,<sup>57</sup> as it refines the careful description requirement. While *Lawrence* created no fundamental rights, one scholar has observed that

*Lawrence* emphasized . . . that the precise framing of a right ought not to be conflated with the narrowest and most concrete definition of the conduct the state seeks to punish; the appropriate level of generality may require a broader understanding of the asserted interest . . . . On the one hand, framing must not be overly narrow . . . . On the other hand, framing must not be so broad that the scope of substantive due process becomes limitless . . . .<sup>58</sup>

By these lights, bodily autonomy defined as control over the borders and contents of one's body, particularly within the home,<sup>59</sup> measures up well under *Lawrence*. It is not too broad, to begin, as it specifies concrete limits on the autonomy protected by the right. It literally protects a private physical space within a private physical space. It is thus not nearly as broad as "autonomy" or "liberty" or "privacy" or "the pursuit of happiness."<sup>60</sup>

Conversely, bodily autonomy is not too narrow under *Lawrence*. It does not, like *Mallan* and other cases, define the right at stake merely as smoking marijuana. *Lawrence*, after all, was clear that the right at stake there was not simply that of engaging in sexual conduct.<sup>61</sup> There is no fundamental right to smoke cigarettes either, but a sudden federal prohibition of tobacco would certainly be subject to strict scrutiny.

On this preliminary basis, bodily autonomy is plausibly a fundamental right under the Fourteenth Amendment. Yet a key advantage to framing the right at stake in marijuana prohibition as bodily autonomy is that it is stated broadly enough to have substantial roots in, and thus draw meaningful guidance from, the Court's leading relevant

57. 539 U.S. 558 (2003).

58. Note, Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana, 118 HARV. L. REV. 1985, 1987-88 (2005).

59. Justice Kennedy underscores this point, referring to "the most private of places, the home." *Lawrence*, 539 U.S. at 567. As Laurence Tribe describes Kennedy's opinion, "the Court was protecting the right of adults to define for themselves *the borders and contents* of deeply human relationships." Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1915 (2004) (emphasis added). While marijuana prohibition and anti-sodomy laws do not present identical constitutional questions, the concepts of "borders and contents" are useful in understanding the autonomy at stake in both.

60. See *People v. Sinclair*, 387 Mich. 91, 133 (1972) (Kavanagh, J., concurring).

61. See 539 U.S. at 567. While *Lawrence*, to be sure, protected a relational autonomy, this certainly included a bodily autonomy, specifically, for Mr. Lawrence, the right to decide whether, in the privacy of the home, to have another man's penis inside his body.

case law, especially that of liberty due process. To reinforce the status of bodily autonomy as a fundamental right, rendering marijuana prohibition subject to strict scrutiny, we thus now turn to a brief review of that jurisprudence. We shall take the cases according to the strength of the state interest asserted, beginning with those in which it is strongest and proceeding toward those in which it is weakest. While no right except freedom of thought is absolute, the portrait that will emerge is that of a strong presumption in favor of liberty as bodily autonomy.

## 2. The Presumption in Favor of Bodily Autonomy

Our starting point is the right to die cases, *Cruzan v. Director, Missouri Dept. of Health*<sup>62</sup> and *Glucksberg*. In *Cruzan*, a young woman was rendered vegetative in a car accident and eventually taken to a state hospital.<sup>63</sup> Once it was apparent that she had virtually no chance of regaining her mental faculties, her parents asked employees of the hospital to terminate the artificial nutrition and hydration procedures keeping her alive.<sup>64</sup> The employees refused to do so without court approval, and the case went to the Supreme Court.<sup>65</sup>

On the one hand, the Court held, the State's compelling interest in preserving life entitles it to require clear and convincing proof of a patient's wish to discontinue life saving procedures before honoring that wish.<sup>66</sup> On the other hand, assuming such proof is made, the Court affirmed the Fourteenth Amendment right of such a patient, based on his interest in bodily autonomy, to refuse the treatment.<sup>67</sup> Quoting an old precedent, the Court observed that "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."<sup>68</sup>

*Glucksberg* involved a State ban on physician-assisted suicide, even for terminally ill and suffering patients.<sup>69</sup> Among the reasons for the ban, Washington asserted a compelling interest in preserving human

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62. 497 U.S. 261 (1990).

63. *Id.* at 266.

64. *Id.* at 267.

65. *Id.* at 268.

66. *Id.* at 262, 286.

67. *Id.* at 278.

68. *Id.* at 269 (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

69. *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997).

life.<sup>70</sup> Writing for the Court, and grounding his decision in a historical and comparative analysis of the law of suicide, Chief Justice Rehnquist ruled for the State.<sup>71</sup> He held that the individual right asserted was not fundamental and that the ban was subject to rational basis scrutiny, which it could satisfy.<sup>72</sup> Yet three points are in order. First, although it did not prevail in *Cruzan*, the interest in preserving human life, at least in the abstract, is the most compelling of all state interests. All other public interests assume the preservation of human life, and so a State is on strong ground where it can plausibly assert this interest. Second, a key reason Rehnquist rejected the right claimed in *Glucksberg* is that, unlike the right claimed in *Cruzan*, it amounted to a right to coerce a third person (doctor) to administer a lethal dose to a patient.<sup>73</sup> Whatever else one thinks of this ruling, an adult's liberty to consume marijuana in his home does not remotely involve such third party coercion. Concurring in *Glucksberg*, thirdly, Justice Stevens wrote that "in most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the state's interest in preserving human life."<sup>74</sup> While the *Glucksberg* Court thus ruled for the State, Stevens expressly recognized the constitutionally protected status of bodily autonomy.<sup>75</sup> This implies a different outcome where a law violates bodily autonomy yet government can claim no plausible interest in preserving life. As we shall see, the state interests asserted in most bodily autonomy cases are not of this magnitude. Whatever the weight of the State's interest in preserving life in other circumstances, then, it is diminished in the case of a deeply comatose or terminal and suffering individual for the same reason and to the same degree as that individual's interest in refusing lifesaving medicine is enhanced.<sup>76</sup> Thus far, then, even when the state interest in invading bodily autonomy is strongest, the cases go both ways.

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70. *Id.* at 703.

71. *Id.* at 702.

72. *See id.* at 734.

73. As the Chief Justice framed the issue, "the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so" *Glucksberg*, 521 U.S. at 723.

74. *Id.* at 742 (Stevens, J., concurring); *Vacco v. Quill*, 117 S.Ct. 2293, 2306 (1997) (Stevens, J., concurring).

75. *Glucksberg*, 521 U.S. at 743 (Stevens, J., concurring).

76. *Id.* at 743-44.

We come next to *Jacobson v. Massachusetts*,<sup>77</sup> *Schmerber v. California*,<sup>78</sup> and *Winston v. Lee*.<sup>79</sup> In these cases, States asserted interests in preventing serious threats to, or punishing serious breaches of, public safety and welfare. In *Jacobson*, a town required the inoculation of all residents against smallpox.<sup>80</sup> Jacobson was fined when he refused to be inoculated, and he challenged this fine under the Due Process Clause of the Fourteenth Amendment.<sup>81</sup> In *Schmerber*, the petitioner had been in a car accident and appeared intoxicated to police when he arrived at a hospital.<sup>82</sup> In order to preserve any evidence of his intoxication for purposes of prosecution, they directed a hospital employee to take a blood sample from Schmerber over his objection.<sup>83</sup> A blood sample analysis disclosing a high blood alcohol level was introduced against him at trial, and he objected on Fourth and Fourteenth Amendment grounds.<sup>84</sup>

The Court held for the State in both cases, and this is not surprising. For one thing, the state interest in invading bodily autonomy was compelling in both cases: smallpox was a fatal threat to public health and safety in 1905,<sup>85</sup> and drunken driving remains so today. For another thing, the degree of state intrusion into bodily autonomy was relatively limited in both cases. A smallpox inoculation may be more intrusive than the extraction of blood, if only because something is being forced into the body rather than taken out. Yet neither is on a par with the forced feeding of a comatose or terminal suffering patient.<sup>86</sup> While

77. 197 U.S. 11 (1905).

78. 384 U.S. 757 (1966).

79. 470 U.S. 753 (1985).

80. *Jacobson*, 197 U.S. at 13.

81. *Id.*

82. *Schmerber*, 384 U.S. at 758.

83. *Id.*

84. *Id.* at 759.

85. Smallpox killed an estimated 60 million Europeans, including five reigning European monarchs, in the 18th century alone. Up to 30% of those infected, including 80% of the children under 5 years of age, died from the disease, and one third of the survivors became blind. Smallpox was responsible for an estimated 300–500 million deaths in the 20th century. As recently as 1967, the World Health Organization (WHO) estimated that 15 million people contracted the disease and that two million died in that year. After successful vaccination campaigns throughout the 19th and 20th centuries, the WHO certified the eradication of smallpox in 1979. To this day, smallpox is the only human infectious disease to have been completely eradicated from nature.

N. Barquet & P. Domingo, *Smallpox: The Triumph Over the Most Terrible of the Ministers of Death*, in ANN. 127 INTERN. MED. 635, 635-42 (1997); *Smallpox Factsheet*, WORLD HEALTH ORGANIZATION, <http://www.who.int/mediacentre/factsheets/smallpox/en/index.html>.

86. *Accord* Niebla v. County of San Diego, No. 90-56302, 1992 US App LEXIS 15049 (9th Cir. June 23, 1992), in which a State's interest in protecting a person from serious health problems

*Jacobson* and *Schmerber* are sound, then, they neither lessen the force of *Cruzan* nor control cases in which state interests are of a lesser magnitude than that in protecting and preserving life.<sup>87</sup>

In *Winston v. Lee*, by contrast, the Commonwealth of Virginia claimed that a bullet lodged under Lee's collarbone would help prove that he had committed an armed robbery.<sup>88</sup> It thus sought a court order forcing him to undergo surgery to remove the bullet.<sup>89</sup> The Supreme Court ruled, however, that Lee's interest in avoiding invasive surgery outweighed the state interest in violating his bodily autonomy.<sup>90</sup> While Virginia could claim a state interest on a par with those in *Jacobson* and *Schmerber*, thus, the gravity of Lee's interest in avoiding the bodily intrusion in question far exceeded those in the earlier cases. Because Virginia had other, if less incriminating, evidence with which to prosecute, it is not surprising that Lee prevailed.<sup>91</sup> Thus far, once again, the cases go both ways, even where state interests are compelling.

We come next to the abortion cases, in which States have claimed an interest in protecting *potential* human life. Given the importance of preserving human life generally, *Roe v. Wade*<sup>92</sup> and *Planned Parenthood v. Casey*<sup>93</sup> took seriously the State interest in protecting fetal human life (and maternal health). Nonetheless, *Roe* ruled for the individual, establishing a woman's presumptive<sup>94</sup> constitutional right to obtain an abortion. *Casey*, in turn, reinforced the core of that right, expressly recognizing "the two more general rights under which the abortion right is justified: the right to make family decisions and *the right to physical autonomy*."<sup>95</sup> As in *Winston*, then, the principle of bodily autonomy prevailed in the abortion cases, even over substantial state interests.

Thus far, we have reviewed cases involving important state interests. Yet not all state interests are of this magnitude. In *City of*

by forced blood transfusion outweighed her interest in bodily autonomy. This case involved a child, however. Likewise, see *Hanzel v. Arter*, 625 F. Supp. 1259, 1266 (1985), which upheld an Ohio law requiring public school children to be immunized against specific diseases.

87. In *Jacobson* and *Schmerber*, it should be noted, the claim of governmental authority was based not on the federal commerce power, as with the CSA, but rather on the state police power.

88. *Winston v. Lee*, 470 U.S. 753, 753 (1985).

89. *Id.*

90. *Id.* at 767.

91. It is notable that Lee sought not to keep out of his body what he did not want, or even to put into his body what he did want, but to keep in what he wanted in.

92. 410 U.S. 113 (1973).

93. 505 U.S. 833 (1992).

94. As *Roe*, 410 U.S. at 155, 162-64, and *Casey*, 505 U.S. at 875-76 make clear, the abortion right is time-, place-, and manner-limited.

95. 505 U.S. at 884 (emphasis added).

*Indianapolis v. Edmond*,<sup>96</sup> police had conducted suspicionless searches at highway roadblocks for the sole purpose of drug interdiction, and these were challenged on Fourth Amendment grounds. In the past, the Court had spoken of a “fundamental public interest in implementing the criminal law.”<sup>97</sup> Writing for the *Edmond* Court, further, Justice O’Connor called drug trafficking a serious problem.<sup>98</sup> Nonetheless, she held that the state interest in drug interdiction is simply a species of the “general interest in crime control,”<sup>99</sup> and thus could not justify the governmental action at issue.

This is a key distinction, reiterated in later decisions.<sup>100</sup> Whether or not they prevailed, the State interests asserted in *Glucksberg*, *Cruzan*, *Jacobson*, *Schmerber*, and *Winston* were all compelling interests, i.e., more substantial than the mere general interest in crime control. By contrast, O’Connor is clear in *Edmond* that the while the State interest in drug interdiction may be legitimate, it is not compelling, and so would not satisfy strict scrutiny.<sup>101</sup>

We come then to *Rochin v. California*.<sup>102</sup> Here, police witnessed the defendant, in his bedroom, swallow two capsules they reasonably believed were illegal contraband.<sup>103</sup> Unable to make him disgorge them, they took him to a hospital and had his stomach forcibly pumped in order to retrieve the evidence.<sup>104</sup> As Justice Frankfurter wrote, such conduct “shocks the conscience,”<sup>105</sup> violating the liberty protected by the Fourteenth Amendment.<sup>106</sup> Forcible stomach pumping, of course, is a far greater bodily intrusion than is a forced inoculation or blood extraction. Yet *Rochin* implicitly recognized what Justice O’Connor confirmed in *Edmond*—that the state interest in enforcing drug prohibition generally (and marijuana prohibition in particular) is far less

96. 531 U.S. 32 (2000).

97. *Zurcher v. Stanford Daily*, 436 U.S. 547, 560-61 (1978).

98. It is notable, however, that she never distinguished cannabis from drugs like cocaine and heroin, and never spoke to whether state marijuana regulation would reduce rather than increase drug trafficking.

99. *Edmond*, 531 U.S. at 44.

100. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 424 (2005); *Illinois v. Lidster*, 540 U.S. 419, 424 (2004); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001).

101. *Edmond*, 531 U.S. at 44.

102. 342 U.S. 165 (1952).

103. *Id.* at 166.

104. *Id.*

105. *Id.* at 172.

106. In *Glucksberg*, Chief Justice Rehnquist cited *Rochin* for the proposition that “the ‘liberty’ specially protected by the Due Process Clause includes (the right) to bodily integrity . . . .” 521 U.S. 702, 720 (1997).

substantial than that in preventing influenza or securing proof of drunk driving. Under current U.S. law, thus, it is not a compelling interest.

We come at last to cases in which government has no plausible interest, not even a legitimate one, in invading bodily autonomy. In *Griswold v. Connecticut*,<sup>107</sup> claiming an interest in preventing human conception,<sup>108</sup> the State had banned the sale or use of contraceptive devices, even for married couples in the privacy of the home.<sup>109</sup> By contrast to the abortion context, in which there is arguably a substantial state interest in protecting a human fetus,<sup>110</sup> there is no such interest where conception has not yet occurred.<sup>111</sup> Indeed, given the crisis of human overpopulation, there is no legitimate state interest in preventing conception, far less a compelling one. If abortion or unwanted children are to be avoided, then available contraception for those who want it is not just sound public policy, it is urgent. The Court thus quite reasonably invalidated the statute.<sup>112</sup>

Finally, of course, we come to *Lawrence v. Texas*.<sup>113</sup> Here, a state law had criminalized homosexual sodomy,<sup>114</sup> even by consenting adults in the privacy of the home.<sup>115</sup> Writing for the Court, Justice Kennedy finessed the question whether the individual has a fundamental right for Fourteenth Amendment purposes to engage in such conduct.<sup>116</sup> Yet this did not change the outcome, for even applying rational basis scrutiny, Kennedy wrote that “the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>117</sup> As Professor Barnett has argued, *Lawrence* established a “presumption of liberty” where adults act peacefully in the privacy of their homes.<sup>118</sup>

107. 381 U.S. 479 (1965).

108. *Id.* at 498.

109. *Id.* at 480.

110. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey* 505 U.S. 833 (1992).

111. *Griswold*, 381 U.S. at 486.

112. *See id.* at 479. Not all Justices in the majority joined Douglas’ reliance on “penumbras” from the Bill of Rights, yet all recognized the Fourteenth Amendment Due Process Clause as a source of the liberty at stake.

113. 539 U.S. 558 (2003).

114. *Id.*

115. *Id.* at 562-63.

116. *See id.* at 567; *Bowers v. Hardwick*, 478 U.S. 186 (1986) had held that no such fundamental right existed.

117. *Lawrence*, 539 U.S. at 578.

118. Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW* 35-37 (2002-2003), available at <http://www.cato.org/pubs/scr/2003/revolution.pdf>. This is consistent with Rawls’ proviso that liberty may only be restricted for the sake

Summing up, States have prevailed in bodily autonomy cases where they have sought to protect post-natal life,<sup>119</sup> prevent the spread of influenza,<sup>120</sup> and secure essential proof of serious crimes.<sup>121</sup> These rulings are consistent with Rawls' equal liberty principle, which requires that "each person is to have an equal right to the most extensive total system of equal basic liberties *compatible with a similar system of liberty for all*."<sup>122</sup> It is thus striking that, by contrast, even a state interest as strong as that in protecting fetal life mostly yielded to the individual liberty interest in the abortion cases.<sup>123</sup> Accordingly, where a State's interest in invading bodily autonomy is weak or nonexistent, e.g., in preventing conception (*Griswold*),<sup>124</sup> punishing private consensual adult sodomy (*Lawrence*),<sup>125</sup> or punishing the ingestion of drugs in the privacy of the home (*Rochin*),<sup>126</sup> the Court held for the individual.

Like most liberties, bodily autonomy is not absolute. Yet we can now see that the President would have ample reason to agree that the cases we have reviewed, forming "a coherent constitutional view over the whole range of (the Court's) decisions,"<sup>127</sup> reflect a strong

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of liberty. See TJ, *supra* note 24, at 186-93. It is noteworthy that the Eighteenth Amendment, which banned the manufacture, sale, or transportation of intoxicating beverages, did not ban their consumption. See U.S. CONST. amend. XVIII. Such an omission implies the drafters' recognition that criminalizing ingestion would run so afoul of basic constitutional values as to risk a failure of ratification if it were included in the amendment.

119. See *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

120. See *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905).

121. See *Schmerber v. California*, 384 U.S. 757, 758 (1966).

122. TJ, *supra* note 24, at 220 (emphasis added).

123. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey* 505 U.S. 833 (1992).

124. See *Griswold*, 381 U.S. 479 (1965).

125. 539 U.S. 558, 567 (2003). Let us not overlook that the liberty interest burdened by marijuana prohibition is strikingly parallel to that which prevailed in *Lawrence*. Both cases deal with the liberty of adults, not children, to decide what, in the exercise of autonomy and the pursuit of happiness, shall be taken into the most private of all places, their bodies, in the second most private of all places, their homes. On the latter point, the Court has written, "the Court since the enactment of the Fourth Amendment has stressed the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Oliver v. U. S.*, 466 U.S. 170, 178 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 601 (1979)). See also *Kelo v. City of New London*, 545 U.S. 469 (2005). Given the weak governmental interest in marijuana prohibition, then, and the strong individual interest burdened by such prohibition, President Obama would be inclined to conclude that it is unconstitutional under *Edmond* and *Lawrence* alone.

126. As Justice Frankfurter wrote, "due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science on a balanced order of facts exactly and squarely stated, on the detached consideration of conflicting claims, . . . on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Rochin v. California*, 342 U.S. 165, 172 (1952).

127. John Rawls, *POLITICAL LIBERALISM* 235 (1993).

presumption of liberty as bodily autonomy.<sup>128</sup> Using this presumption as a guidepost in assessing the constitutionality of marijuana prohibition, he is already inclined to bring a skeptical eye to arguments in its favor.<sup>129</sup>

### C. *Complementary Theses*

I have argued that marijuana prohibition is subject to strict scrutiny because bodily autonomy, which marijuana prohibition burdens, is a fundamental right. I now turn to three arguments which reinforce one or both parts of this, my core jurisprudential thesis.

#### 1. Justice as Regularity

The central command of the equal protection principle is that government may not treat differently those who are similarly situated.<sup>130</sup> Rawls calls this “justice as regularity,”<sup>131</sup> and as the Court wrote in a seminal case, “[w]hen the law lays an unequal hand on those who have committed intrinsically the *same quality of offense* . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”<sup>132</sup> More recently, it has observed, “[o]ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been

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128. By contrast, Obama knows that isolated cases like *Gonzales v. Raich*, which reject longstanding precedent, *see* Carcieri, *supra* note 20, at 1136-46, lack the legitimacy of the Court’s recognition, over the course of many years and many cases, of the presumption of liberty as bodily autonomy. In passing, the President would reject any claim that, since the laws on the books are often not enforced, the administration of U.S. marijuana prohibition does not violate due process. As he understands, when law enforcement officials have complete discretion whether to enforce the criminal law, this invites them to engage in the arbitrary, discriminatory treatment, often based on race, that violates due process.

129. De Marneffe writes that “a person who is not free to use drugs for recreation is not thereby denied *due process of law*.” Peter de Marneffe, *Do We Have a Right to Use Drugs?* 10 PUBLIC AFFAIRS QUARTERLY 229, 235 (1996) (emphasis added). Because I do not apply strict scrutiny to marijuana prohibition, I do not technically refute this claim. Yet de Marneffe makes this assertion in passing, and so he does not remotely undermine my showing that the leading relevant liberty due process cases establish a presumption of bodily autonomy. Even more telling, de Marneffe later concedes that “I am inclined to support not only marijuana decriminalization, but marijuana legalization as well.” DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS: FOR AND AGAINST* 180 (2005).

130. Since perfection can never be the standard for human institutions like government, this rule must be understood as forbidding *substantially* dissimilar treatment for those who are *substantially* similarly situated.

131. *See* TJ, *supra* note 24, at 207-08.

132. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964) (emphasis added).

intentionally *treated differently* from others *similarly situated* and that there is no rational basis for the difference in treatment.”<sup>133</sup> Obama would thus take very seriously the principle that those with similar cases must be treated similarly. Just as the state violates this principle when it treats individuals arbitrarily based on race, it violates it where it imposes a greater punishment on one person than it does on another for the same or a lesser offense.<sup>134</sup>

Now we saw that there is substantial evidence that marijuana use is less harmful than the use of alcohol and tobacco.<sup>135</sup> Under current law, then, it is not just that marijuana users are similarly situated to drinkers and smokers, yet differently treated. The imbalance is greater than this, for far from posing *as much* risk to genuine state interests as those who drink and smoke, especially in public, private adult marijuana users pose *far less*. Yet the latter are subject to criminal punishment while the former are not. The President would be inclined to agree that such a stark inconsistency is irrational and fundamentally unfair.<sup>136</sup>

## 2. Marijuana Prohibition and Suspect Classifications

Beyond this, secondly, we have seen that strict scrutiny is triggered under the Fourteenth Amendment not only when a law burdens a

133. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *See also* *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). This principle, Judge Posner has observed, is a basic element of the economic theory of law: “To count as law, a command ... must treat equally those who are similarly situated in all respects relevant to the command.” RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 393 (1972). Stated differently, punishment for an exercise of liberty, to be rational, must be commensurate with the risk and/or harm that that exercise of liberty actually poses to legitimate or compelling state interests. *See, e.g.*, Douglas Husak, *Do Marijuana Offenders Deserve Punishment?*, in *POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION 195-96* (Mitch Earleywine ed., 2007).

134. As Rawls rightly notes, the “similarly situated/differently treated” formulation does not take us very far. *See* TJ, *supra* note 24, at 207-09. Standing alone, that is, it is not an argument, but rather a label encapsulating an assertion of an equal protection violation. Like the harm principle with regard to liberty, it provides only a starting point or roadmap for constitutional argument regarding equality.

135. *See supra* note 50.

136. John Lovell, a lobbyist for the California Peace Officers’ Association and opponent of Tax Cannabis 2010 asks, “what good comes of it? . . . . What is the good of adding another mind-altering substance?” Dave Ferrell, *Weed Takes Root*, *SAN FRANCISCO WEEKLY*, Jan. 6, 2010. The answer is that Mr. Lovell simply ignores the equality dimension of constitutional law. He is trying, in Rawlsian terms, to privilege the good over the right. The state, however, cannot simply declare that it will punish some exercises of liberty but not others on grounds that some liberty is bad enough, and more would be worse. If those who exercise one liberty pose a lesser threat of harm to legitimate public interests than others, then the consistency at the heart of equal protection requires that they be punished no more than those others. Otherwise, there is little to stop a state from punishing, e.g., only one race for drinking alcohol or only one gender for smoking.

fundamental right, but also when it uses a “suspect classification.”<sup>137</sup> Race is the paradigm suspect classification, we saw, and the drug war’s disparate impact on racial minorities in all phases of the criminal justice system is well documented.<sup>138</sup> Yet even if Obama had doubts that such an impact embodies a suspect classification, he would find it hard to disagree that U.S. marijuana prohibition has long been motivated largely by racism. As Bonnie and Whitebread write, for example, based on their “brief survey of marijuana prohibition in the western states, we have concluded that its Mexican use pattern was ordinarily enough to warrant its prohibition, and that whatever attention such legislative action received was attended by sensationalist descriptions of crimes committed by Mexican marijuana users.”<sup>139</sup>

As Sloman adds:

“the first users of marijuana—that is, the first people to smoke cannabis for mostly recreational purposes—were members of minority groups . . . . [S]tate after state enacted some form of prohibition against the non-medical abuse of the drug. California in 1915, Texas in 1919, Louisiana in 1924, New York by 1927—one by one most states acted, usually when faced with significant numbers of Mexicans or Negroes using the drug.”<sup>140</sup>

As Booth elaborates:

“the press and ‘concerned citizens’ took up the call, driven not only by their zeal but also by their anti-Mexican attitudes, which were strengthened during the Depression when jobs were scarce and migrants seemed to be stealing work from the white work force. The Mexicans were accused, without any justification, of spreading marijuana across the nation. State marijuana laws were often used as an excuse to deport or imprison innocent Mexicans . . . .”

Although they had been using marijuana for years, it was not until 1938 that [Federal Bureau of Narcotics Director Harry] Anslinger finally came to realize the link between jazz musicians and the drug . . . . Once the association dawned on him, he set about going after the entertainment industry in general and jazz musicians specifically. They

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137. See *supra* note 31.

138. See *supra* note 7.

139. Richard J. Bonnie & Charles H. Whitebread II, “The Genesis of Marijuana Prohibition—Rationale in the West: Class Legislation,” in *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1016 (1970), available at <http://www.druglibrary.org/schaffer/library/studies/vlr/vlr2.htm>.

140. Larry “Ratso” Sloman, *Reefer Madness: A History of Marijuana* 29-30 (1979).

fitted nicely into his racist agenda: if they were not black, they were whites who had come under and been corrupted by black influence . . . .

What had been considered a drug threat during the two world wars—the German and, before and between the conflicts, the Chinese—was now replaced by colored men, this jingoism heightened not only because of the immigration situation but also by the American cant put out since the 1930s by Anslinger and the FBN. Concern was not only voiced about the fate of women in black hands: there was a worry that the young might also come under their spell, this given credence by the arrest, in August 1951, of the first white teenager found in possession of marijuana. Cannabis, the black man’s narcotic, was widely regarded as more dangerous than heroin or cocaine, not because of its potential for addiction but for its facilitation of multi-racial sexual communication.”<sup>141</sup>

Beyond the drug war’s racially disparate impact, then, there is evidence that racism has long been a dominant motive behind U.S. marijuana prohibition. Obama is thus justified in concluding not only that it burdens a fundamental right, but also that it embodies a suspect classification. He would thus likely agree that all roads of Fourteenth Amendment analysis lead to a presumption against, i.e., strict scrutiny of, marijuana prohibition.

### 3. Bodily Autonomy and Free Speech

Finally, while I have argued that my thesis has broad support in the Fourteenth Amendment, it is reinforced by the analogy between bodily autonomy and free speech. Rawls expressly includes both speech and “the physical integrity of the person” among the basic liberties protected by the equal liberty principle.<sup>142</sup> Moreover, neither speech nor bodily autonomy is a zero sum liberty.<sup>143</sup> Unlike some forms of affirmative action, for example, involving scarce, valuable resources, free speech

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141. MARTIN BOOTH, CANNABIS: A HISTORY 178-79, 207, 229-30 (2003). As one writer observes, “Anslinger’s appeal to racism and hysteria was unabashed.” Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. L. REFORM 707, 749 (1998) (citing Richard L. Miller, THE CASE FOR LEGALIZING DRUGS (1991)). Beyond interracial sex, Anslinger associated marijuana with deviant sex, insanity, and communism. See Schlosser, *supra* note 14, at 20. See also Milton Friedman, *There’s No Justice in the War on Drugs*, N.Y. TIMES, Jan. 11, 1998; Monroe Anderson, *It’s Time to Legalize Marijuana in Illinois*, CHICAGO SUN-TIMES, Nov. 12, 2006.

142. See TJ, *supra* note 24, at 53; JF, *supra* note 30, at 44.

143. A situation is characterized as zero-sum where “one side’s gain in every transaction is the other side’s loss.” John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 734 (1984).

and bodily autonomy are not denied to some simply because extended to others. While free speech is not absolute, then, the Court has come to recognize the strongest of presumptions in its favor.<sup>144</sup> Given the analogy between bodily autonomy and free speech, two doctrines in particular are illuminating.

The first is that of commercial speech. In *Rubin v. Coors Brewing Co.*<sup>145</sup> and *44 Liquormart, Inc. v. Rhode Island*,<sup>146</sup> the Court held that laws banning ads giving the public accurate information about retail prices of alcoholic beverages violate the First Amendment. As great a threat as such ads intuitively pose to public health and safety, that is, government cannot prove that a given ad will proximately cause, e.g., domestic violence or a fatal car crash.<sup>147</sup> Because liquor can be legally purchased and consumed by adults, moreover, even in public, the Court reinforced the presumption of liberty—even in the case of liquor ads.<sup>148</sup> On this basis, Obama would be skeptical that private adult marijuana use, unlike liquor ads, will proximately cause harms of the magnitude of domestic violence or a fatal auto collision.

The second doctrine is that of incitement to imminent lawlessness, the rule for which is stated in *Brandenburg v. Ohio*.<sup>149</sup> There, a man was convicted under a state criminal syndicalism statute for remarks he had made at a Ku Klux Klan rally.<sup>150</sup> In striking the law down, the Court held that government may punish incitement to imminent lawlessness only where it can show that the speech in question is both (1) *directed toward* producing serious imminent *harm* to others and (2) *likely* to do so.<sup>151</sup> Two points are in order.

First, this rule recognizes the distinction, reflected elsewhere in free speech law,<sup>152</sup> between (1) the *exercise* of liberty and (2) its likely, immediate, *harmful effects on third parties*, the latter being necessary to

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144. As Justice Douglas observed, “free speech is the rule, not the exception.” *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting). See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* ch.1 (3d ed. 2007).

145. 514 U.S. 476 (1995).

146. 517 U.S. 484 (1996).

147. See *Rubin*, 514 U.S. 476; *Liquormart*, 517 U.S. 484.

148. See *id.*

149. 395 U.S. 444 (1969).

150. *Id.* at 444-45.

151. *Id.* at 447.

152. Examples include the law of bribery, fraud, obscenity, criminal conspiracy, and criminal solicitation. See generally Gunther and Sullivan, *supra* note 144, ch.1.

ban or punish the former.<sup>153</sup> In light of the speech/bodily autonomy analogy, then, the law governing bodily autonomy should reflect this distinction as well. Before government can punish private adult marijuana use, that is, it should have to prove, and not merely assert, any substantial harms immediately caused by that exercise of liberty. If private adult marijuana use causes no such harms, then it should no more be punishable based on what may happen afterward than consumption of alcohol can be punished based on the drunken driving that may later take place.

Beyond this, secondly, application of the *Brandenburg* rule to private adult marijuana use suggests that punishing this exercise of liberty is even harder to justify than suppression of speech. Whatever harms, if any, private adult marijuana use is *likely* to cause others, it would be very difficult to show that it is *directed* to causing such harm. Even a speaker at a public rally who desires and advocates that public buildings be blown up is constitutionally protected if there is no imminent threat that anyone will do as he says.<sup>154</sup> In this light, Obama would recognize the absurdity of any claim that private adult marijuana users, in exercising their liberty, have any comparable malicious, destructive intent.<sup>155</sup>

In sum, the parallel between bodily autonomy and free speech reinforces the President's basis for concluding that marijuana prohibition is subject to strict scrutiny.<sup>156</sup>

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153. Professor Sunstein, President Obama's "Regulatory Czar," has referred to "real danger of public injury" as necessary to overcome the right to bear arms. See Cass Sunstein, *The Most Mysterious Right*, THE NEW REPUBLIC, Nov. 19, 2007, at 42, 47.

154. See *Brandenburg*, 395 U.S. 444.

155. *Id.*

156. Although it concerns a state constitutional privacy clause, a line of Hawaii Supreme Court cases provides further authority for this claim. As *Mallan* notes, the Hawaii Supreme Court has taken two approaches to interpreting Article I, section 6 of the Hawaii Constitution. The first approach, the *Mueller/Baehr* approach, tracks the traditional approach to substantive due process of *Palko* and *Glucksberg*, identified by Professor Post, *supra* note 40. The second approach is the *Stanley/Kam* approach, through which Article I, section 6 establishes a fundamental right where an individual views or reads pornographic material in his home. See *Hawaii v. Mallan*, 86 HAW. 440, 443-45 (1998). The court held that the combination of "the home as the situs of privacy" and the fact that "freedom of speech and freedom of the press are strongly implicated" yielded a constitutionally protected right. *Id.* at 444-45. Insofar as bodily autonomy is, like free speech, a zero sum liberty, and since we are focused on the activities of adults in the privacy of the home, *Stanley/Kam* provides doctrinal authority to reinforce the strong presumption against laws burdening the bodily autonomy of adults in the privacy of the home.

### III. CONCLUSION: TOWARD RATIONAL AND JUST POLICY REFORM

Beyond its economic, social, and other constitutional difficulties, I have argued, marijuana prohibition is subject to strict scrutiny under the Fourteenth Amendment. I have supported this primarily by showing that (1) bodily autonomy, which is directly burdened by marijuana prohibition, is plausibly a fundamental right, and (2) the Court's leading relevant case law has established a presumption in its favor. I have endeavored to reinforce my thesis, further, by arguing that (1) marijuana prohibition violates "justice as regularity,"<sup>157</sup> (2) its racist origins satisfy the suspect classification trigger of strict scrutiny, and (3) given the analogy between free speech and bodily autonomy, the strong presumption in favor of free speech should apply to bodily autonomy.

As noted, the application of strict scrutiny to marijuana prohibition is the subject of another article, and indeed, complex litigation. Yet I submit that Obama would have grave doubts that this prohibition could pass an honest application of that rule. As a stark matter of precedent, an adult woman has a limited right to expel a fetus from her body<sup>158</sup> and an adult man has a right in his home to have another man's penis inside his body.<sup>159</sup> Both, moreover, have the right to eat, drink and smoke themselves to death, even in public, contributing to serious social problems like drunken driving, second hand smoke, and burdens on the health care system. In this light alone, the President would find it hard to identify a principled basis in equality or liberty for denying those adults the right to consume marijuana in their homes.

Beyond constitutional law, finally, three key ideas in Rawls—legitimate expectations, public reason, and overlapping consensus—provide the President an even broader foundation for challenging Congress to end this war. I conclude with them.

As for the first, Rawls writes that it is not the satisfaction of moral desert, but rather legitimate expectations, that characterize a just distributive scheme under a sound contract theory.<sup>160</sup> From his viewpoint as a citizen, then, while knowing he cannot expect perfection from human institutions like government, the average person can legitimately expect that the law will not be so irrational and inconsistent as to criminalize the exercise of one liberty while other liberties, far

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157. TJ, *supra* note 24, at 207-08.

158. *See* *Roe v. Wade*, 510 U.S. 113 (1973).

159. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003).

160. *See* TJ, *supra* note 24, at 273-77.

more harmful, are merely regulated for reasons widely understood.<sup>161</sup> From *their* viewpoints as citizens (and not merely economic agents), those who profit from or are employed by the alcohol, tobacco, pharmaceutical, and prison industries have no legitimate expectation that private adult marijuana use will forever remain a crime simply so that their profits and employment will be maintained. The social contract of a reasonably just society, one worth passing onto their grandchildren, would never include such a provision.

As for public reason, we have seen that Obama can give powerful justifications for ending marijuana prohibition, justifications which those in a constitutional democracy can accept in their capacity as citizens.<sup>162</sup> We have seen, that is, that the President has support not only in policy terms of cost/benefit analysis but also on constitutional grounds. To be sure, authoritarian conservatives like William Bennett,<sup>163</sup> George Will,<sup>164</sup> Lou Dobbs<sup>165</sup> and John Walters<sup>166</sup> may never change their minds, having declared the war on marijuana one in which we can never surrender. Yet some are incapable of public reason. As Freeman writes, “there is no presumption that Social Darwinists, fundamentalists, neo-Nazis, or Southern slaveholders would be amenable to public reason, nor should any effort be made to accommodate their views.”<sup>167</sup> Moreover, these drug warriors do not speak for all conservatives. Beyond such persistent voices as those of William F. Buckley and Milton Friedman, for example, the heroic dissents of Justices O’Connor, Rehnquist and Thomas in *Gonzales v. Raich* show that some conservatives’ principled commitment to federalism overcomes any misgivings they have about liberal social policy.<sup>168</sup>

Yet let us even assume that all social conservatives are strongly inclined toward marijuana prohibition. Unanimity is not needed for

161. *Id.*

162. See John Rawls, *Political Liberalism* 212-53 (1993).

163. See William Bennett, *No Retreat, No Surrender; President Bush Signals a Renewed Offensive on Several Fronts in the Languishing War on Drugs*, *SAN DIEGO UNION-TRIBUNE*, May 20, 2001, at G1.

164. See George Will, *This War is Worth Fighting*, *WASH. POST*, June 16, 2005, at A29.

165. See Lou Dobbs, *A War Worth Fighting*, *THE WASH. TIMES*, Aug. 16, 2003, at A12.

166. See John P. Walters, *No Surrender: the Drug War Saves Lives*, *NAT’L REV.*, Sept. 27, 2004.

167. Samuel Freeman, *Introduction*, in *THE CAMBRIDGE COMPANION TO RAWLS* 40 (S. Freeman ed., 2003). Moreover, sweeping claims that marijuana must be illegal because it is immoral and undermines excellence contradict Rawls’ fundamental principle that in a just society, the right is prior to the good. See TJ, *supra* note 24, at 288-89.

168. See *Gonzales v. Raich*, 545 U.S. 1, 43-75 (O’Connor, Rehnquist, and Thomas, JJ., dissenting).

reform, and whatever their differences, the hard left, moderate left, and moderate right all value individual liberty, particularly autonomy in the privacy of the home. In Rawlsian terms, there is substantial overlapping consensus here, building by the day.<sup>169</sup> It will be even stronger if any of the states with current plans for Proposition 19-like initiatives in 2012 enact them into law, and if the President can use his political skills and capital in his second term to convince those conservatives who respect cost/benefit analysis and constitutional principle. As the President knows, some of them do.

By 2013, I conclude, support for ending federal marijuana prohibition will have reached a tipping point. Since Congress will not lead on this issue, it will have to follow.

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169. See *supra* notes 5-6.

