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Drug Wars

Final Paper

MARIJUANA: FEDERAL AUTHORITY AND STATES SOVEREIGNTY

“Well, John Marshall has made his decision, now let him enforce it.”
President Andrew Jackson¹

Although for much of the twentieth century, Americans have struggled with the social issues surrounding marijuana: of which an important issue is who has the authority to regulate marijuana. Historically, early America agrarian society was deeply linked with marijuana. Later, Americans began to use marijuana for medicinal purposes. Medical doctors preached the benefits of marijuana to cure many ills. Then, during the early twentieth century, there was an increase in the recreational use of marijuana. In response, as an outgrowth of racial prejudices and the prohibition movement, Americans mobilized a campaign to prohibit all marijuana use in the United States. This being case, this paper will not focus upon the moral arguments of marijuana use. Instead, the issue hinges upon Constitutional law. Do states have the Constitutional right to create their own laws as guaranteed under the Tenth Amendment? In this case, may states regulate, as they see fit, the use of marijuana? Or, do the Supremacy and Commence Clauses give the authority to the federal government to regulate marijuana as they see fit?

Even if the United States Supreme Court creates a doctrine to support of the Federal Government's authority, the federal government does not have the resources to enforce the regulation of marijuana without state and local law enforcement. This paper will argue, unless a constitutional amendment is passed to regulate marijuana, the federal government will have no choice, but to cede the authority to regulate marijuana to the states based upon the Tenth Amendment, since the federal government lacks the resources, and cannot overcome the political reality.

MARIJUANA: A HISTORICAL LINK TO AMERICA'S EARLY BEGINNING:

From the very early days of American history, marijuana played a role in many ways. Marijuana was never used as a recreational drug in the early days of America. Early Americans would no more have smoked marijuana than Americans today might smoke cotton or paper. Marijuana was a profitable plant to be harvested as hemp. Hemp was used as paper, cloth, and later for legitimate medical uses.

The domestic hemp industry was prosperous during the early days of the American republic, due in large part to slave labor. The harvesting of hemp was backbreaking. Nevertheless, plantations owners were so motivated by hemp profits they paid wages to slaves to encourage hemp production.ⁱⁱ By the middle of the 19th century, hemp was Americas third largest crop, exceeded only by cotton and tobacco.ⁱⁱⁱ

Also, growing hemp was a demonstration of independence and a part of the struggle against a tyrannical king. A guidebook for raising hemp, written by the Edmund Quincy (cousin to John Adams) was read by George Washington.

Washington was obsessed with growing hemp and increasing the yield of hempseeds.^{iv} Washington, and other Founders sought to use hemp as a means to economic independence, especially from England.^v Thomas Jefferson's original first draft of the Declaration of Independence was written upon hemp paper.^{vi} Hemp growers from Virginia provided much of the fiber that was used in the uniforms for Washington's soldiers.^{vii} Finally, one of the first acts of rebellion the colonist preformed was refusing to send raw hemp to England for processing.^{viii} In short, it was clear hemp was freely used by many early Americans and played a significant role in their lives.

HISTORICAL MEDICAL USE OF MARIJUANA IN THE UNITED STATES

Americans have long used marijuana for medicinal purposes. During the early eighteenth-century Americans used marijuana for a variety of illnesses included neuralgia, gout, rheumatism, tetanus, convulsions, and uterine hemorrhage.^{ix} In 1854, the United States Pharmacopeia first listed Indian hemp as a variable potency of cannabis products.^x Later, drug companies such as Eli Lilly, Parke-Davis and Squibb manufactured pills with precise dosages that replaced the home elixirs. Mom-and-pop apothecaries were quickly becoming retail outlets for these mass-produced marijuana medicinal drugs.^{xi} By the mid 1840s discreet hashish dens operated in every major American City.^{xii} These dens were also known as "tea pads". Tea pads allowed a person to purchase marijuana cigarettes for twenty-five cents or less.^{xiii} The use of marijuana by doctors continued during the American Civil War as a means to combat such diseases as diarrhea and

dysentery.^{xiv} In short, there was no stigma associated with the use of marijuana, and no cause for alarm until the prohibition movement began to target marijuana.^{xv}

It was at this point, in the early twentieth century, that certain groups began to perceive marijuana as a social ill that needed to be address. Their solution was to use the federal government as their weapon to prohibit marijuana.

THE BEGINNING OF THE END

American marijuana prohibition had its roots in the Mexican Revolution of 1910, and racism. As the Mexican Revolution waged on, many Mexicans migrated to the American Southwest in an effort to escape the war, then later, they migrated for employment opportunities. The Bureau of Immigration cited 590,765 Mexicans immigrated to the United States from 1915 through 1930. A majority of the Mexicans were migrant workers, and two thirds remained in Texas, the other settling in the Western-Rocky Mountain region of the United States.^{xvi} Texas and California officials claimed marijuana incited Mexican immigrants to commit violent crimes with a “lust for blood”.^{xvii} Still, others from the Southwest claimed Mexicans rolled dried marijuana into cigarettes and distrusted the “killer weed” to unsuspecting schoolchildren.^{xviii} And yet, another story cited how a Mexican killed policemen and horses because of a drug-induced rage from marijuana. This prompted authorities in El Paso, Texas to create a law that prohibited Mexican laborers from using marijuana.^{xix} The white power structure in the Southwest clearly made the connection between Mexicans and marijuana. Very shortly the whites created laws that were directed towards Mexican immigrants and the drug.

But it seemed the people of the Southwest were not alone in their racially based connection of marijuana and Mexican immigrants. Evidence of racial prejudices and marijuana spread north and west from the Border States. In Montana, lawmakers in 1929 heard testimony of how Mexican migrant workers staged imaginary bullfights and other bizarre behaviors while under the influence of the “Mexican opium”.^{xx} Meanwhile a year earlier while urging lawmakers to pass new legislation to deal with marijuana, the Boise major stated,

“The Mexican beet field workers have introduced a new problem-the smoking in cigarettes or pipes of marihuana[sic] or grifo. Its use is as demoralizing as the use of narcotics. Smoking grifo is quite prevalent along the Oregon Short Line Railroad; and Idaho has no law to cope with the use and spread of this dangerous drug”

As each state passed laws with little or no debate about the prohibition of marijuana, lawmakers continued to make the Mexican migrant connection to the use of the drug. By 1930, twenty-four states prohibited marijuana use to some degree.^{xxi}

Also, Louisiana worked diligently to curb the marijuana traffic that came via ships through the docks of New Orleans and flowed North, up the Mississippi River. Law enforcement profiled certain groups in their drug campaigns such as foreigners, social misfits, and people of color.^{xxii} This caused many New Orleans newspapers to blame African-Americans, jazz musicians, and prostitutes for the “marijuana menace”.^{xxiii} This being the case, municipalities such as New Orleans, and states created a patchwork of different laws to address marijuana. No matter, some thought it was time for consistent national laws dealing with marijuana. One essential person that worked to make this happen was Harry S. Anslinger.

THE ROAD TO NATIONAL CONTROL

Harry Anslinger religiously sought to create a federal ban on marijuana with the emphasis upon racist's demagoguery, and achieved it through his political connections. President Hoover appointed Anslinger as director of the newly created Federal Bureau of Narcotics (FBN) in 1930. Prior to being appointed as the director of the FBN, Anslinger worked in the Prohibition division of the Department of Treasury. Anslinger was a committed alcohol prohibitionist^{xxiv} and had many ties to the prohibition movement that included groups such as the Women's Christian Temperance Union (WCTU), and many church groups.^{xxv} Anslinger further supported prohibition of marijuana by linking race and drug usage. This was apparent when Anslinger stated,

“There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”^{xxvi}

Anslinger successfully took advantage of the white public anxiety towards immigrants and minorities, along with his political alliances and expanded the role of the federal government in the prohibition of marijuana.

UNCLE SAM STEPS IN

In 1914, the federal government's attempted to curtail the use of drugs, such as opium or cocaine, with the Harrison Narcotic Act of 1914. The Harrison Narcotic Act was passed as a means to control drug use by minorities. Medical doctors testified before Congress making irrational racial connections between race and drugs. One such comment by Dr. Hamilton Wright stated, “Cocaine is the direct incentive to the crime of rape by the Negroes of the South and other sections of the

country”.^{xxvii} The Harrison Narcotics Act of 1914 passed based upon fear, and to control the marketing of drugs in small over the counter quantities, and larger quantities on a physician’s prescription.^{xxviii} In 1918, Congress strengthened the act after hearing testimony from city leaders that blamed the increase on African-American addicts who migrated to the cities.^{xxix} No matter, this act was used to arrest and convict doctors who prescribed drugs to addicts.^{xxx}

The Harrison Narcotic Act did not prohibit the selling or use of narcotics. The act required the practitioner of the drug to pay an occupational tax, ranging from \$1.00 to \$24.00 per year.^{xxxi} The drug tax applied to all drugs, no matter if imported or domesticated produced drugs were used. Still, the Harrison Narcotic Act served not only as a tax, but specified when the narcotic maybe prescribed.

Wording of section 4707a of the Harrison Narcotic Act stated,

“It shall be unlawful for any person...having in his or her possession any narcotic drugs...except in the original stamped packaged...The provisions of subsection a. shall not apply to any person having in his or her possession any narcotic drugs...which have been...issued for legitimate medical uses by a physician...”^{xxxii}

The law clearly made it a crime to prescribe a drug for any other reason than for “legitimated medical” uses. This being the case, the Federal government, Anslinger, and those of his political backing had the tool from the federal government to regulate drugs in the United States other than for medical purposes.

In 1922 Congress passed the Jones-Miller Act, also known as the Narcotic Drugs Import and Export Act. This law prohibited the importation of any narcotic not specifically found necessary for medical purposes. The law included harsh penalties which included five years in jail and a fine no more than \$20,000 for the

first offense.^{xxxiii} The Jones-Miller Act was similar to the Harrison Act as in section 174 stated that a if “...defendant had possession of the narcotic drug, such possession conviction unless the defendant explain the possession to the satisfaction of the jury.”^{xxxiv} The act allowed the government to show possession of the imported narcotic as being unlawful. The Jones-Miller Act gained traction in the juridical branch when the Supreme Court upheld it in 1925.^{xxxv} This being the case, it would seem the American public accepted the role of the Federal government in the regulation of drugs.

However, the Courts did not support all regulation of drugs. In 1925, the United States Supreme Court struck down the Harrison Narcotic Act. In *Linder v. United States*, Dr. Charles A. Linder from Spokane, Washington, was arrested for prescribing cocaine, opium, and morphine to Ida Casey to treat her for addiction, and not for a disease.^{xxxvi} The Court ruled unanimously the Harrison Narcotic Act was unconstitutional and overturned the doctor’s conviction. The ruling was based upon the federal government overstepping its power to regulate medicine. Justice James Clark McReynolds stated, “Obviously, direct control of medical practice in the states is beyond the power of the federal government.”^{xxxvii} This ruling brought an end the Harrison Narcotic Act. However, perceiving drugs as constant threat, Congress again passed more laws to prohibit drugs, including marijuana.

Congress, along with Anslinger support, passed two laws aimed at prohibiting marijuana. The first being the Uniform Narcotic Drug Act that sought to fuse the different state laws one national code. Anslinger supported the Uniform Narcotic Drug Act as a means to prevent marijuana use.^{xxxviii} The second law, was

the Marijuana Tax Act passed in 1937. The Marijuana Tax Act imposed a \$100 per ounce onto the consumer.^{xxxix} The federal government had the ultimate control as they could allow or refuse licenses or stamps for any reason. Although veiled as a revenue law, the sole purpose of the Marijuana Tax Act was to prohibit the possession and use of marijuana. The Marijuana Tax Act most notable achievements included incarcerating jazz musicians. Anslinger believed there to be an undeniable link between marijuana use and jazz musicians.^{xl} No matter, the courts did not support the act. In 1969 the Marijuana Tax Act was ruled unconstitutional because it violated the Fifth Amendment. Though the Marijuana Tax Act constitutionally failed, the Uniform Narcotic Drug Act was a success. The Narcotic Drug Act was passed in an era of unprecedented federal government growth. The Narcotic Drug Act passed in 1934, occurred at the height of the New Deal, and President Roosevelt new role of the federal government in people's lives. Along with Roosevelt and Anslinger's support, the Narcotic Drug Act was to stay. But Anslinger worked diligently to shame or paint those who opposed him as deviants.

THE FINAL PUSH

Although Anslinger was not completely successful on all legal fronts of outlawing marijuana, he sought to ensure the social acceptance of the drug would be unthinkable. Anslinger worked to create an image of individuals who used marijuana as unnatural and deviant. Anslinger had strong supporters in the marijuana prohibition campaign with the Hearst papers and magazines. Some headlines included "*Marijuana Makes fiends of Boys in 30 Days*"^{xli} Anslinger traveled

the nation speaking to Lions Clubs, the Elks, judges, and parent teacher organizations about the dangers of marijuana. Many times Anslinger proclaimed, "Marijuana is the most violent-causing drug in the history of mankind."^{xlii} But, Anslinger most successful propaganda were three films produced in 1936 with the assistance of the Bureau of Narcotics; *Reefer Madness*, *Devils Harvest*, and *Marijuana Weed with Roots in Hell*. These movies graphically portrayed youth run-amok because of marijuana. In the movie, *Marijuana Weed with Roots in Hell*, the trailer makes the statement as if the information is true. Finally, Anslinger consistently used race-baiting as one of the reasons for prohibiting marijuana. Anslinger successfully use of the media into scaring people into believing marijuana will destroy American culture. This being the case, the American people never questioned the reasoning of a federal drug enforcement program. However, when societal norms changed, and people viewed marijuana use on par with cigarettes, then Anslinger's demagoguery of the past did not hold sway.

Even after Anslinger retired from the FBN, the final victory in the federal regulation of marijuana and other drugs occurred was during the Nixon Administration. During the 60s the use of marijuana had increased, and many Americans saw it as threat. To address this issue, Congress passed the Controlled Substances Act which prohibited many drugs including marijuana. Then during a 1971 press conference, President Nixon stated, "America's public enemy number one in the United States is drug abuse...In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."^{xliii} This was the beginning of the War

on Drugs as Nixon established the Drug Enforcement Agency to enforce federal drug policy. In short, as Nixon spoke these words, the echoes of Anslinger could be heard.

TIMES HAVE CHANGED

Much has changed from the times of Harry Anslinger and his war on drugs, and especially America's perception of marijuana. The United States is not as racial divided, as in Anslinger's time. Jim Crow laws of the past are gone. African-Americans serve on the Supreme Court, and we have elected an African-American President. Therefore, Anslinger's race-bating statements about marijuana are thrown in the dustbin of history. Also, the American people do not view marijuana use as dangerous or negative as in the past. The National Organization for the Reform of Marijuana claims marijuana is the third most popular recreational drug in the United States.^{xliv} This change in attitude is also reflected in Gallup polling that showed 84% of Americans supported the legalization of marijuana in 2011. However, in 1969, when Gallop asked the same question, only 12% supported legalization of marijuana. ^{xlv} Across the board since Anslinger's time, Americans have changed their attitude in regards to marijuana. Even going so far as viewing the use of marijuana as a right. This being the case, in certain instances, Americans have used state referendums to legalized marijuana use; thus setting a Constitutional battle between the states rights and the federal government.

THE COURTS HAVE CHANGED TOO

More useful than the Uniform Narcotic Drug Act was the Supreme Court's interpretation of the Commerce Clause, as stated in Article one, section eight, clause three of the Constitution. The Commerce Clause authorizes Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."^{xlvi} The Commerce Clause has been used to justify the use of federal laws in matters that do not on their face implicate interstate trade or exchange. Early on, the Supreme Court ruled the power to regulate interstate commerce encompassed the power to halt price fixing in the Chicago meat industry.^{xlvii} In 1964, the Commerce Clause played an important role in the area of civil rights. The Supreme Court ruled Congress had the authority to regulate a business that served mostly interstate travelers such as the in *Heart of Atlanta Motel v. United States* civil rights case.^{xlviii} The Supreme Court also ruled the federal civil rights legislation could be used to regulate a restaurant. This was based upon civil rights violations of mostly local costumers at the restaurant. But, since the restaurant served food that had previously crossed state lines, Congress had the authority to regulate civil rights law.^{xliv} The Supreme Court supported a very broad interpretation of the Commerce Clause, to include many areas outside of commerce. This allowed the power of the federal government to grow, and expand into areas such as regulation of guns and the area of drugs. However recently, the Supreme Court has begun to change their view of the Commerce Clause.

An example of this was during the *New York v. United States (1992)* case. During this case, the Court struck down a federal law forcing states to develop legislation to dispose of all low-level radioactive waste generated within their

borders. If the state does not create legislation for the disposal of the radioactive waste, then the state would financially be responsible for the waste. The Court found Congress had authorization under the Commerce Clause, to regulate low-level radioactive waste, but Congress could not force states to perform the regulation rather than regulate the waste.¹ In short, Congress had no power to force the state to create certain laws. Likewise, Congress could not force state, or local police officers to enforce the marijuana provisions in the Control Substance Act.^{li} Even today, the Seattle Police Department has stated they will NOT participate in a drug investigation of kind that is not prohibited by state law.^{lii} This is critical point since; Washington State recently allowed the recreational use of marijuana.

In 1997, the Supreme Court struck down another broad use of the Commerce Clause by the Congress in the *Printz v. United States* case. The Brady Handgun Violence Prevention Act required state police officers conduct background checks on prospective handgun purchases within five days. The Supreme Court ruled this provision was an unconstitutional “commandeering” of state officers that was outside of Congress’s power and a violation of the Tenth Amendment.^{liii}

Finally, the Supreme Court curtailed the broad interpretation of the Commerce Clause in the *United States v. Lopez (1995)* case. This issue centered upon the 1990 Gun-Free School Zones Act, forbidding individuals from knowingly carrying a gun in a school zone. Congress created the law believing their authority to regulate handguns rested with the Commerce Clause. However, the majority of the Supreme Court disagreed and ruled to limit the Commerce Clause to economic activity. Congress does not have plenary police power. Possession of a gun in a

school zone is not an economic activity that affects interstate commerce.^{liv} The majority based their ruling upon the Tenth Amendment that limits the power of the federal government upon the states. Thus, the Supreme Court of late has started to curtail the broad interpretation of the Commerce Clause and limiting federal power.

2012 marked a watershed year in the issue of drug prohibition when Washington State and Colorado passed laws to regulate and allow recreational use of marijuana, as stated in the Tenth Amendment. These laws were passed via voter initiatives, where many Western states allow the people to create state laws through this process. It would seem these states are exercising their option to create laws not covered in the Constitution as the Tenth Amendment specifies any power not given to the federal government defaults to the states. The Supreme Court has ruled against the federal government because of government over-reach that were based upon the Tenth Amendment. The Tenth Amendment is one of the significant pieces of federalism whereby states may create their own driving laws, education standards, and even state minimum wages. No matter, the United States Constitution is also very clear about state laws that violate federal laws. Article VI, section two states, "This Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land". The courts have a long historical tradition of supporting the supremacy clause as first cited in *Ableman v. Booth* in 1858. Chief Justice Roger B. Taney, writing for the unanimous court, asserted the supremacy of federal courts on issues of federal law, stating "it certainly has not been conferred on them [the states] by the United States; and it is

equally clear it was not in the power of the State to confer it." Chief Justice Taney relied on the Constitution in that it is "the supreme law of the land, and the judges in every State shall be bound thereby."^{lv} This being the case, it appears there are two legal foundational principles that are on a collision course; the peoples' right to petition and create laws on a state level, and the power of the federal government in a federalist system. However, even if the federal government cited the supremacy clause to overrule state laws, is it practical for the federal government to enforce a national law when so many people are willing to break it?

THE REALITY OF IT...

Since the federal government has limited means to implement drug laws, it depends upon cooperation with the state and local law enforcement to uphold them. About 80% of the 500,000 drug offenders behind bars in the United States are in state and local prisons.^{lvi} Likewise, the DEA has fewer than 5,000 agents worldwide.^{lvii} This being the case, it is clear the federal government needs local support to enforce federal drug laws. This is evident in the Controlled Substance Act. Section 873 orders the attorney general to "cooperate with local, State, tribal and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances."^{lviii} This might be a reason for the Justice Department not to challenge state laws in the area of recreational use of marijuana, and therefore respecting state laws. However, the Department of Justice clearly stated the federal government reserved the right to intervene if the states did not enact appropriate regulations to protect federal interests, including guarding against the distribution of marijuana to minors.^{lix} This being the case, the federal

government understands the federal laws are meaningless without the support of the local law enforcement. However, even if the federal government had enough resources to enforce a federal law, how might this play out politically? Armed federal agents arresting people in a state where their actions are considered lawfully by a popular voted initiative.

CONCLUSION

American government is a reflection of the American people and their wants and needs. Some of the laws that were considered reasonable two hundred years ago are today considered barbaric and racist. Likewise, as with the issue of legalization of marijuana, the American people have changed their attitude about it, as was evident in Anslinger's time. For during Anslinger's time, he played upon race-baiting and people's fear so as not to question the use of marijuana. Also, the federal government used broad general powers, such as the Commerce Clause to enforce drugs laws. But over time, the Supreme Court has reigned in the broad interpretation of the Commerce Clause to include a more specific meaning. At the same time, people began to be more accepting of marijuana. So much so, two states have legalized the selling, and recreational use of marijuana.

Now, the federal government is faced with a dilemma; should they continue to enforce federal law? It seems their options are limited, as we are in an era where the Supreme Court is seeking to weaken the power of the federal government. This was witnessed with the limited interpretation of the Commerce Clause. This being the case, the federal government might seek a constitutional amendment to prohibit marijuana. However, history seems to be

against this route. Many amendments are proposed, but only 27 have been passed. Also, history has demonstrated the limited success in prohibition of another vice, alcohol.

Lastly, should the federal government fiercely enforce the drug policy, as the political blowback may be very negative? This option is limited, as the DEA does not have enough agents to work on a local level in an effort to enforce these laws. But, should Congress fully fund the DEA, the image might be very disturbing. As DEA agents arresting people for not breaking local laws would only build resentment for the federal government, but build support against the federal government. Even those who do not support the state initiatives might view the federal government's actions as "jack-booted" or thug-like upon states rights' and their citizens. This being the case, many of those on the political right would not support the federal drug laws. Meanwhile, some on the political left might find themselves on the same side of the issue with those on the right, as each side would battle the federal government reach of power.

Secondly, the only other option would be the Supreme Court creating a doctrine supporting the federal authority to enforce drug laws. The Supreme Court has in the past-created doctrines that supported federal government actions. As was the case with judicial review, clear and present danger, or the separate but equal doctrines to name a few. But, how use would these laws be unenforceable? It might be akin to President Jackson refusing to uphold Marshall ruling in favor of the Cherokee Indians.

Finally, the other option for the federal government is to cease the enforcement of the federal drug policy. Given the change in American attitudes about marijuana, this might be the most reasonable course. As the Supreme Court has moved to limiting the power of the federal government, the flip side would be grant more power to the States. Clearly the Constitution tilts towards the power of the States with Tenth Amendment. This way, the federal government would allow states to create their own drugs laws, much like with alcohol.

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ⁱⁱⁱ *Ibid.* 19.

^{iv} *Ibid.* 17.

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^{vi} *Ibid.* 18.

^{vii} *Ibid.* 16.

^{viii} *Ibid.* 18.

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^{xi} *Ibid.* 26.

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