ON THE MEDICINAL–RECREATIONAL DISTINCTION IN CANNABIS LAW

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I. INTRODUCTION

I begin by thanking the editors of the *Denver University Law Review* for inviting me to present my research at their timely symposium "Marijuana at the Crossroads."[1] As a legal scholar, I find it both exhilarating and frustrating to work in an area of law that is undergoing unprecedented yet long overdue and painstakingly slow change. The U.S. War on Drugs, especially the war on cannabis, has long raised serious questions of liberty, equality, justice, efficiency, federalism, and foreign policy. In the constitutional domain alone, this war implicates interests arising under the First, Fourth, Fifth, Sixth, Eighth, Tenth, Fourteenth, Fifteenth, and Twenty-first Amendments.[2] On the occasion of this symposium, I wish to offer a short essay[3] on a single though important aspect of the quickly changing landscape of American law in this area, the distinction between medicinal and recreational uses of cannabis.

To be sure, the line between these uses is often blurred. While some uses of cannabis are essentially medicinal, that is, and others essentially recreational, many uses have strong elements of both. Yet, like the distinction between law and morality,[4] medicinal and recreational uses must be understood as distinct for some practical purposes. In the sixteen states and the District of Columbia where cannabis has been approved for medicinal use,[5] the distinction between medicinal and recreational

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1. January 27, 2012, University of Denver, Sturm College of Law.

2. I have written on some of these issues elsewhere. *See* M.D. Carcieri, *Gonzales v. Raich: An Opening for Rational Drug Law Reform*, 1 TENN. J.L. & POL'Y 307 (2005); M.D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PENN. J. CONST. L. 1131 (2007) [hereinafter Carcieri, *Gonzales v. Raich*]; M.D. Carcieri, *Rawls and Reparations*, 15 MICH. J. RACE & L. 267 (2010) [hereinafter Carcieri, *Rawls*]; M.D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303 (2011) [hereinafter Carcieri, *Obama*]; and M.D. Carcieri, *California's Proposition 19: Selective Prohibition and Equal Basic Liberties*, 46 U.S.F. L. REV. 479 (2012) [hereinafter Carcieri, *California's Proposition 19*].

3. In the spirit of a short essay, and to avoid redundancy, I shall not provide extensive argument on all aspects of the topics I touch upon, and invite the interested reader to see where I have developed them in my previous work.

4. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597 (1958).

5. *See, e.g.*, Chris Roberts, *Rolling Paper: Looking at the Current State of Safe Access*, SF WKLY. (July 20, 2011), http://www.sfweekly.com/2011-07-20/culture/medical-marijuana-safe-access-update-chris-roberts/; Dana Mattioli, *High Hopes at Miracle-Gro in Medical Marijuana Field*, WALL STREET J., June 14, 2011, http://online.wsj.com/article/SB10001424052702304665904576383832249741032.html.

use has concrete legal significance. In those states, whether adults caught by police with small amounts of cannabis can avoid arrest and criminal charges will often turn on whether they can produce a physician's authentic note approving use of cannabis for medicinal purposes. Under federal law and the law of other states, by contrast, the distinction between medicinal and recreational use is legally meaningless. All cannabis use is a crime under such laws, although punishment for conviction varies.

Yet what about constitutional law—is the medicinal–recreational distinction significant there? I have two answers. As an *empirical* matter of Supreme Court case law, I submit that the distinction is less significant than one might have assumed. I shall illustrate this by showing how the medicinal–recreational distinction shows up under Commerce Clause and Fourteenth Amendment analysis. As a *normative* matter of how citizens should vote on upcoming state ballot initiatives seeking to replace cannabis prohibition with regimes of regulation and taxation, I submit that the distinction should be no barrier to support for such measures. The bottom line is that since government, for good reasons, does not require that even dangerous, highly addictive drugs like alcohol or tobacco be consumed solely for medicinal purposes, the equal liberty principle at the core of our Constitution forbids it to do so with a less dangerous, less addictive substance like cannabis.

II. THE EMPIRICAL DOMAIN OF U.S. CONSTITUTIONAL LAW

A. Commerce Clause

As of this writing, in consolidated landmark rulings, the Supreme Court has recently upheld the constitutionality of the individual mandate at the heart of the 2010 Patient Protection and Affordable Care Act.[6] Although the majority rejected Congress's authority to impose the mandate under its commerce power, and upheld it only under the taxing power, these cases have kept the Commerce Clause on the front pages of major newspapers for several months. As it happens, the last major decision in this area was *Gonzales v. Raich*.[7] In *Raich*, the Court affirmed Congress's commerce power to enact, and oversee strict enforcement of the federal Controlled Substances Act (CSA),[8] particularly its complete ban on any use of any amount of cannabis for any purpose, even by adults and even in the privacy of their homes.[9]

By the time the Court heard *Raich*, it had developed a two-part rule to test the limits of Congress's commerce power. First, the activity targeted by Congress must be commerce, or at least economic activity. If

6. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
7. 545 U.S. 1 (2005).
8. *See id.* at 33.
9. *Id.* at 42.

that initial requirement is satisfied, then Congress may regulate the activity so long as it has a rational basis to conclude that, in the aggregate, the activity exerts a substantial effect on interstate commerce.[10] For our purposes, the key point is that the threshold inquiry is only whether the activity targeted is economic, *regardless of whether such activity is done for a medicinal or recreational purpose*.[11] From a Commerce Clause perspective, then, medicinal and recreational uses are identical insofar as the activity targeted by federal law—consumption of cannabis—is the same regardless of whether it takes place for medicinal or recreational purposes.[12]

B. Fourteenth Amendment

While it has addressed other aspects of cannabis law,[13] the Supreme Court has never specified the standard of review—the level of scrutiny—that laws imposing cannabis prohibition must survive upon challenge under the Fourteenth Amendment. Lower federal and state supreme courts addressing the issue have held that such laws are subject to mere rational basis scrutiny, which they generally survive.[14] On a correct read-

10. *See* United States v. Lopez, 514 U.S. 549, 557–560 (1995); United States v. Morrison, 529 U.S. 598 (2000).

11. Such a limited inquiry suggests why States under their police power, not Congress under its commerce power, should presumptively be allowed to legislate in this area where the activity in question is not interstate commerce.

12. In his controlling opinion, Justice Stevens concedes that the medicinal–recreational distinction is meaningless from a commerce clause perspective, and that both types of use are on the same side of the boundary between what Congress can and cannot reach under its commerce power. *See Raich*, 545 U.S. at 25–29. I agree with him on these points, but disagree about which side of the line they are both on. Beyond the problems with stretching the word "commerce" of Art. I, § 8, cl. 3 to be synonymous with the broader term "economic," at least some human activity must be non-economic. Otherwise, not only can Congress regulate any activity it wants, which is flatly inconsistent with the commerce clause's grant of power to regulate only that which is commerce, but we are also left with a very impoverished view of society, one in which there is never any distinction, for example, between marital sex and prostitution. In this spirit, the private adult use of cannabis, whether for medicinal or recreational purposes, cannot simply be reduced to economic activity—done either to maximize one's chances of financial gain or to minimize one's chances of financial loss. I submit that it is rather generally done, under either category, simply to feel better.

Justice Stevens relied heavily on the analogy between *Raich* and *Wickard v. Filburn*, 317 U.S. 111 (1942), a New Deal era case in which Congress's power to regulate a farmer's production and consumption of wheat was upheld under the Commerce Clause. Yet not only is *Wickard* inapposite insofar as Congress was in that case truly *regulating* an interstate market with the Agricultural Adjustment Act, while the Controlled Substances Act involved in *Raich* is an attempt to *destroy* an interstate market using federal criminal law, but Justice Stevens cherry picks *Wickard* out of a range of relevant precedents. He ignores the force of later cases like *Lopez* and *Morrison* as well as of earlier landmark cases like *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Even so staunch a Federalist as John Marshall saw the need to draw clear lines between what Congress can and cannot reach under the Commerce Clause. I thus agree that while key constitutional words like "commerce" must have some breathing room, they must also have limits. Otherwise, quite simply, a written Constitution is a sham. As Marshall saw and explained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this is not an option. *See generally* Carcieri, *Gonzales v. Raich*, *supra* note 2.

13. Besides *Raich*, see United States v. Oakland Cannabis Buyers' Coop., 582 U.S. 483 (2001), which held that there is no medical necessity exception to the Controlled Substances Act.

14. *See, e.g.*, Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007); United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982); NORML v. Bell, 488 F. Supp. 123, 134 (D.D.C. 1980); State v. Sunderland, 168 P.3d 526, 539 (Haw. 2007) (Moon, C.J., concurring and dissenting); State v.

ing of the Court's leading, relevant Fourteenth Amendment case law, however, I have argued that such laws are properly subject to strict scrutiny.[15] I have justified this partly on grounds that the racist origins and racially disparate impact of cannabis prohibition establishes a suspect classification,[16] but primarily because laws imposing cannabis prohibition burden the fundamental right of bodily autonomy (i.e., presumptive control over the boundaries and contents of our bodies).[17]

Strict scrutiny, of course, is an ends–means analysis. The medicinal–recreational distinction might thus be relevant as government tries to show that the ends and means of cannabis prohibition are constitutionally adequate. Yet the key point for our purposes is that before ends and means can be assessed, the applicable *level* of ends–means scrutiny must be established, and at this crucial, threshold stage of inquiry, the distinction is irrelevant. Whether cannabis is used medicinally or recreationally, that is, cannabis prohibition burdens the fundamental right to control the contents and boundaries of one's body, triggering strict scrutiny on that account.

The United States government might be able to provide reasons for prohibition of private adult cannabis use that would survive the rigor of strict scrutiny. However, judging from the longstanding quality of propaganda on the Drug Enforcement Administration and Office of National Drug Control Policy websites, this seems doubtful. Indeed, it is not clear that such prohibition can even pass rational basis scrutiny. Thus, beyond Congress's dubious commerce authority to make private adult cannabis use a federal crime, even state cannabis prohibition, with the legitimacy flowing from the police power, is on weak ground under a faithful reading of Fourteenth Amendment case law. My point, however, is that the medicinal–recreational use distinction is irrelevant to the crucial, threshold Fourteenth Amendment question of the applicable level of scrutiny.

III. THE NORMATIVE DOMAIN OF FUTURE STATE BALLOT INITIATIVES

Yet there is more. As interesting as the U.S. constitutional law of cannabis may be, the Supreme Court is not where the action is on reform in this area. Indeed, the action is not even in the federal government, as Congress has long been intransigent on this issue,[18] and the Obama Ad-

Maalan, 950 P.2d 178, 183–184 (Haw. 1998); Seeley v. State, 940 P.2d 604, 612 (Wash. 1997); State v. Smith, 610 P.2d 869, 874 (Wash. 1980).

15. *See generally* Carcieri, *Obama*, *supra* note 2. Laws banning heroin, cocaine, and methamphetamine might pass strict scrutiny. My point is that, on a correct reading of the case law, strict scrutiny would apply to them, too.

16. See Carcieri, *Obama*, *supra* note 2, at 324–326, since those pages in my Akron article present my (brief) case that cannabis prohibition embodies a suspect classification for Fourteenth Amendment purposes.

17. *See id.* at 311–323.

18. Congress has, for example, long refused even to instruct the DEA not to harass sick patients in states with medical cannabis laws. *See, e.g.*, *Hinchey Encouraged by Record House Support*

ministration, in full re-election mode, has recently increased harassment of cannabis dispensaries in California and Colorado.[19] Fortunately, we are not doomed to wait for any of the three branches of the national government to be the catalyst for rational reform in this area. In 2012, cannabis law-reform momentum is with the States, where voters on upcoming measures seeking to replace cannabis prohibition with regimes of taxation and regulation[20] are not bound by the technical rules of ends–means analysis under the Fourteenth Amendment.

Turning to the normative question, regardless of whether government could satisfy strict scrutiny of cannabis in court, this should still not matter for voters contemplating upcoming revisions of California's Proposition 19.[21] The reason is that where the law, for reasons well and widely understood,[22] merely regulates the consumption of dangerous drugs like alcohol and tobacco, the prohibition of less dangerous substances like cannabis violates the core principle of constitutional democracy on which we all depend, the principle of equal basic liberties.[23] In a free society, 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. Civil liberty is thus fused with equality, yielding the equal liberty principle. A core command of this principle, embodied in the Rawlsian idea of "justice as regularity,"[24] is that "similar cases be treated similarly. Men could not regulate their actions by means of rules if this precept were not followed."[25]

In this light, as well as the insignificance of the medicinal–recreational distinction under U.S. constitutional law, I submit that this

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for Medical Marijuana; Vows to Keep Fighting for Amendment, STATES NEWS SERVICE, July 25, 2007.

19. *See* Henry K. Lee, *Judge Won't Block Federal Crackdown on Medical Pot,* SAN FRANCISCO CHRONICLE, Dec. 1, 2011, http://www.sfgate.com/bayarea/article/Judge-won-t-halt-federal-medical-pot-crackdown-2339891.php; Felisa Cardona, *25 Colorado Medical Marijuana Dispensaries Told to Move Away from Schools or Close*, DENVER POST, Mar. 23, 2012, http://www.denverpost.com/breakingnews/ci_20240930/25-dispensaries-told-move-away-from-schools-or.

20. Notwithstanding misleading opinion/editorial commentary in top California newspapers, Proposition 19 received 46% of the vote in 2010. *See generally* Carcieri, *California's Proposition 19*, *supra* note 2. At this writing, revisions of Proposition 19 have qualified for placement on the 2012 ballot in Colorado and Washington, yet the parallel campaign in California is in disarray. *See* Joe Mozingo, *Effort to Put Marijuana Legalization Measure on Ballot Is in Disarray*, LOS ANGELES TIMES, Mar. 10, 2012, http://articles.latimes.com/2012/mar/10/local/la-me-pot-initiatives-20120310.

21. Proposition 19 would have changed California cannabis law from a regime of prohibition to one of regulation and taxation. *See* Carcieri, *California's Proposition 19*, *supra* note 2, at 480 n.8. Colorado and Washington have now qualified initiatives modeled on Proposition 19 for their November 2012 ballots. *See* Mozingo, *supra* note 20.

22. Not only did the U.S. repeal alcohol prohibition as a policy, economic and constitutional failure, *see* U.S. CONST. amend. XXI, but in a free society, adults must presumptively be allowed to decide what goes in their bodies.

23. *See* Carcieri, *Rawls*, *supra* note 2, at 53, 171-227; Carcieri, *California's Proposition 19*, *supra* note 2, at 484-491.

24. Carcieri, *Rawls*, *supra* note 2, at 208.

25. *Id.* at 209; *see also* Carcieri, *Obama*, *supra* note 2, at 323–324.

distinction should be no barrier to voting for state ballot initiatives seeking to replace cannabis prohibition with regimes of taxation and regulation. Beyond the CSA's dubious legitimacy under the Commerce Clause, and even beyond doubts that federal or state cannabis prohibition could survive rational basis scrutiny (never mind the strict scrutiny that would properly apply), the inconsistency of merely regulating dangerous, addictive drugs like alcohol and tobacco while prohibiting and thus criminalizing less dangerous, less addictive drugs like cannabis deeply violates the equal liberty principle.

Measures like Proposition 215[26] in 1996 effectively used medicinal use as a wedge issue, a way to lay the foundation for measures like Proposition 19, fourteen years later. Yet because prohibition of private adult recreational use is just as suspect from the perspective of equal basic liberties as prohibition of private adult medicinal use, voters can support upcoming measures like those in Washington and Colorado with a clear conscience, knowing that they are voting to remove a profound, longstanding injustice in their law.

26. Cal. Health & Safety Code § 11362.5 (West Supp. 2012); *see* Carcieri, *Gonzales v. Raich*, *supra* note 2, at 1132.