After Prohibition

AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY

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3. The Illegitimate War on Drugs

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In America we think it important that government and governmental powers be legitimate. Indeed, every Fourth of July we take great pride in tracing our heritage as a nation to our founding document, the Declaration of Independence. Eleven years after the Founders wrote that document, they wrote another, the Constitution of the United States of America, through which we reconstituted ourselves as a nation. The Constitution continues today as the basic law of the land, the ultimate source of whatever legitimacy government and its powers may have. If a power cannot be traced to the Constitution, or is exercised contrary to protections afforded by it, the power is illegitimate. In essence, legitimacy is just that simple.

Despite the intent of the Founders to institute legitimate government—to derive government's "*just* powers from the consent of the governed" and to limit the scope of that consent by the rights of individuals to life, liberty, and the pursuit of happiness—governments in America today, especially the federal government, exercise vast powers not remotely grounded in or permitted by the Constitution. In no case is that more true, perhaps, than with the massive "war on drugs" the federal government has been waging for more than 20 years now. Our cities have been devastated, our prisons have been filled, our institutions have been corrupted, and our rights have been trampled and lost, all in a futile effort to stop some of us from consuming substances that others of us think should not be consumed, substances that have been consumed by people from time immemorial.

Those consequences of the modern war on drugs will be discussed at length by others in this volume. My purpose here is rather different—and more simple. It is to show the constitutional illegitimacy of the drug war, not the devastation it has produced. More narrowly still, my purpose is to show not that the war is illegitimate

because it involves massive violations of our rights—the subject of another chapter in the volume—but because it is conducted without constitutional authority. In brief, I want to ask the drug warriors that most basic of constitutional questions: "Where in the Constitution do you find authority for what you are doing?" Given our Constitution, they will be hard-pressed to answer.

In the course of showing that the drug war is constitutionally illegitimate, I will address several basic questions of moral, political, and legal theory as they manifest themselves in the constitutional doctrine of enumerated powers and the federalism that flows from it. And that will take us in turn to some of the more embarrassing aspects of the drug war as it is waged against the people in their states, several of which have enacted medical marijuana measures in recent years. Indeed, no recent issue has more clearly brought to the surface the hypocrisy that surrounds those drug warriors who profess also to be federalists.

A Constitution of Delegated and Enumerated Powers

We are fortunate in this nation to have a set of founding documents to repair to when questions about legitimacy arise. Although the Constitution is our fundamental law, its often broad language is illuminated by the Declaration of Independence, in which the Founders set forth their philosophy of government—which informed the Constitution in large measure. The purpose of the Declaration, of course, was to declare our "separate and equal Station" and to justify that separation out of "a decent Respect to the Opinions of Mankind." The Founders did that by appealing, in the natural law tradition, to reason, to certain "self-evident" truths: that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." There, in a nutshell, is the moral order. We're all equal, as defined by our rights, which means that no one has rights superior to those of anyone else. We're born with those rights; we don't get them from government. And the rights with which we're born can be reduced to a single idea—freedom. In a free society, each of us is free to pursue happiness as he thinks best, by his own lights, provided only that he respect the equal rights of others to do the same. Thus, the Declaration makes no claim about what may make anyone happy. It implies only that, whatever it may be, we must respect the rights of others to pursue it, as they see fit, while we pursue our own.

Only after setting forth that fundamental moral order did the Founders turn to the question of government, which is instituted, they said, "to secure these rights," its just Powers derived "from the Consent of the Governed." Government is thus twice limited: by its ends, to secure our rights; and by its means, which require our consent if they are to be legitimate.[1]

All power originates, therefore, with the people, who give government whatever powers it has. We see that in the Constitution that was drafted some 11 years later, which begins, "We the people . . . do ordain and establish this Constitution." That principle is repeated in the very first sentence of Article I: "All legislative powers herein granted shall be vested in a Congress." By implication, not all powers were "herein granted," as the rest of the document makes clear, especially Article I, section 8. And in the final documentary evidence of the founding period, the Tenth Amendment, the principle is recapitulated, as if for emphasis: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In sum, the Constitution is a document of delegated, enumerated, and thus limited powers.

That the doctrine of enumerated powers was meant to be our principal protection against overweening government is no better illustrated than by our having gone for two years without a bill of rights—even if the Bill of Rights has come today to be our main defense. Indeed, delegates to the Constitutional Convention resisted proposals to add such a bill by noting that one was unnecessary: "Why declare that things shall not be done which there is no power to do?" asked Alexander Hamilton.[2] When it became clear that a bill of rights would be needed to ensure ratification, a second objection—that enumerating only certain rights would be construed as denying others—was addressed by the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[3] Thus, the Ninth and Tenth Amendments sum up, fittingly, the philosophy of the Declaration. The people have rights, both enumerated and

[1]I have discussed the theory of the Declaration more fully in Roger Pilon, "The Purpose and Limits of Government," Cato's Letters, no. 13 (Washington: Cato Institute, 1999).

[2]The Federalist no. 84 (Modern Library edition, 1937), p. 559.

[3]See Randy Barnett, *The Rights Retained by the People* (Fairfax, Va.: George Mason University Press, 1989).

unenumerated. The government's powers, by contrast, are strictly enumerated: if a power has not been delegated by the people and is thus not enumerated in the document, it is reserved to the states or to the people.[4]

Rewriting the Constitution

That conception of limited government, grounded in the doctrine of delegated and enumerated powers, held for the most part until the New Deal, when the Supreme Court, under extraordinary pressure from President Franklin Roosevelt, radically reinterpreted the Constitution. To appreciate the change that took place then—and why it is that someone like White House drug czar Barry McCaffrey can write today, without blushing, that "the Constitution of the United States articulates the obligation of the federal government to uphold the public good"[5]—it is necessary at least to outline that change. For the striking thing about McCaffrey's remark is not its inconsistency with the Constitution as understood today but its very consistency with the modern understanding. Most Americans today do believe that the federal government has vast—indeed, all but unlimited—power to "uphold the public good." Thus, when McCaffrey goes on to say that "drug abuse diminishes the potential of citizens for growth and development,"[6] they believe, with him, that that is sufficient ground for government's having authority to regulate such things. How, then, did we go from a government of enumerated powers to one with powers that are effectively unenumerated?

The answer begins, as most do, in the realm of ideas, which in time shape political events. With the rise of Progressivism toward the end of the 19th century, we started to change our conception of government fundamentally. No longer did we think of it as a "necessary evil," instituted for the limited purpose of securing our rights, as the Founders had thought of government. Instead, government came gradually to be seen as an engine of good, an institution to solve all manner of social and economic problems—through social engineering informed by "progressive" thought. In-

[4]See Roger Pilon, "The Forgotten Ninth and Tenth Amendments," *Cato Policy Report* 13, no. 5 (September/October 1991), p. 1.

[5]Barry R. McCaffrey, *The National Drug Control Strategy: 2000 Annual Report* (Washington: Office of National Drug Control Policy, 2000), p. 2.

[6]Ibid.

deed, the temperance movement, the precursor of the war on drugs, was rooted in just that kind of thinking. It is more than noteworthy, however, that, when the movement reached fruition in the form of national Prohibition, respect for constitutional limits on federal power was still such that it took an amendment to the Constitution to bring federal Prohibition about. No one thought, that is, that the Constitution authorized Congress, by mere statute, to prohibit the manufacture, sale, or transportation of alcoholic beverages. An amendment to the Constitution was required to give Congress that authority. Today, by contrast, we fight the drug war by statute alone.

On a wide range of issues, however, pre–New Deal progressives were regularly testing constitutional limits in the courts, and almost as regularly being rebuffed. As Madison had hoped, the courts were serving, for the most part, as the bulwark of our liberties. With the advent of the Depression, however, the political activism of the progressives expanded, moving from the states, where it had largely been focused, to the federal level. Thus, the new administration of Franklin Roosevelt prevailed on Congress to enact one program after another, only to have the Supreme Court find most to be unconstitutional because beyond the power of Congress to enact. Finally, in 1937, an exasperated Roosevelt threatened to pack the Court with six additional members. Not even Congress would go along with his Court-packing scheme. Nevertheless, the Court got the message, there followed the famous switch in time that saved nine, and the rest is history.

What happened, in brief, is this. Two clauses of the Constitution, the General Welfare and the Commerce Clauses, both of which had been written to be shields against overweening power, were turned by the 1937 Court into swords of power. The General Welfare Clause, as Madison, Jefferson, and others had argued, was meant to limit Congress's spending power—already limited to serving enumerated powers or ends—by restricting it to the *general* welfare, as opposed to the welfare of particular parties or sections.[7] When the

[7]As Madison put it: "Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. James Madison, "Report on Resolutions," in *Writings of James Madison*, vol. 6, ed. Gaillard Hunt (New York: Putnam's Sons, 1906)), p. 357.

New Deal Court was through with it, however, the clause afforded Congress an *independent* power to spend for the general welfare, unrestrained by any enumerated ends. And any restraint afforded by the word "general" was left to Congress to police—an altogether idle restraint, as history has demonstrated.[8] Similarly, the Commerce Clause was meant primarily to enable Congress to ensure the free flow of goods and services among the states in light of protectionist measures that had arisen in the states.[9] By the time the New Deal Court had finished with the clause, however, it afforded Congress the power to regulate anything that "affected" interstate commerce, which of course is everything, in principle.[10] By essentially rewriting those two clauses, therefore, the Court effectively eviscerated the doctrine of enumerated powers—the centerpiece of the Constitution—and the modern welfare state was born. The restraint afforded by enumeration was lost as Congress's modern redistributive and regulatory powers were effectively constitutionalized.

A Federal Program for Every Problem

What followed, of course, was the relentless expansion of federal redistributive and regulatory activities, aimed at addressing one "problem" after another—from retirement security, to health care, to foreign competition, to agricultural prices, to education, and on and on. Indeed, to listen to recent State of the Union Addresses, one imagines no problem too personal or too trivial not to be a fit subject for federal attention. The drug "problem" is a case in point. McCaffrey is right: Drug abuse does "diminish the potential of citizens for growth and development"—even if drug use enhances life for some, at least as they judge the matter. But alcohol and tobacco abuse can be said to diminish life as well—and dietary abuse too, for that matter. Yet what has any of that to do with the Constitution? Life is full of problems. But only a few were made the subject of federal concern, and they are enumerated in the document. Search the Con-

[8]*United States v. Butler*, 297 U.S. 1 (1936); *Helvering v. Davis*, 301 U.S. 616 (1937).

[9]"There is much evidence that the main point of [the Commerce Clause] grant . . . was not to empower Congress, but rather to disable the states. . . . The framers wanted commerce among the states to be free of state-originated mercantilist impositions." Donald H. Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Michigan Law Review* 84 (1986): 1091.

[10]*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

stitution as you might, you will not find retirement security, health care, education, or drug abuse included, even implicitly, among those concerns. There simply is no constitutional authority for the government to address those problems.

What that means, plainly, is that most of what the federal government does today is unconstitutional because it is done without constitutional authority. Startling as that conclusion may be to many, a number of legal scholars are at last saying it.[11] And even the Supreme Court is now revisiting, albeit at the margins, the principles it abandoned during the New Deal. Thus, for the first time in nearly 60 years, the Court in 1995 found a statute Congress had passed to be beyond its authority under the Commerce Clause.[12] In his opinion for the Court in the case, Chief Justice William Rehnquist began his argument with a ringing statement: "We start with first principles. The Constitution establishes a government of enumerated powers."[13] Not for years had something like that been said quite so plainly. To be sure, the question before the Court was limited: Does Congress have the power to prohibit the possession of guns near schools, or is that a matter for the states? But since that decision was handed down, several others have followed, including two in the just-concluded 1999 term that held that Congress is without authority under the Commerce Clause to create private causes of action to remedy gender-motivated violence[14] and is without authority as well to prohibit residential arsons.[15] Again, those are small steps in the Court's renewed federalism jurisprudence—so called primarily because it concerns cases in which the states have

[11]"The post–New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1231; "I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so." Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1987): 1388. In truth, however, it is not only now that we are discovering the unconstitutionality of the New Deal. Thirty years after the event, no less a figure than Rexford G. Tugwell, one of the principal architects of the New Deal, reflected on the point: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." "A Center Report: Rewriting the Constitution," *Center Magazine*, March 1968, p. 20.

[12]*United States v. Lopez*, 514 U.S. 549 (1995).

[13]Ibid. at 552.

[14]*United States v. Morrison*, 120 S.Ct. 1740 (2000).

[15]*Jones v. United States*, 120 S.Ct. 1904 (2000).

either concurrent or conflicting jurisdiction. But those cases are raising the fundamental issue of enumerated powers—and making it clear that Congress does not have power to address any problem it wishes.

In all candor, however, I doubt that the Court is ready today to take on the drug war—or Social Security, Medicare, or thousands of other things that Congress has no authority to be engaged in. Yet in all of this, the principles are the same. McCaffrey says that the Constitution "articulates the obligation of the federal government to uphold the public good." Where is that "articulated"? To be sure, the Preamble, which is precatory only, sets forth the general purposes of the Constitution, including "to promote the general Welfare." But the broad aspirations contained in the Preamble have never been thought to serve as specific sources of power—much less to have rendered enumeration pointless. Indeed, the Constitution was "sold" to an often skeptical founding generation on the ground that the powers delegated to the federal government were "few and defined," as Madison put it in the Federalist no. 45. That was the whole point of enumeration—to restrain government to a limited set of ends. If the Founders had wanted to give the federal government boundless power "to uphold the public good," they could have. They didn't. And they said why, explicitly and repeatedly.

An Unconstitutional War

Whatever authority the various federal drug statutes purport to have, in fact, comes not from any aspirational language of the Preamble but from the grants of power found in Article I, section 8, of the Constitution. Yet no federal "obligation"—or power, properly speaking—"to uphold the public good" is found there, of course. The closest to that are the grants implicit in the now fertile General Welfare and Commerce Clauses. But those clauses, again, were turned upside down by the New Deal Court, as today's Court is starting to say. Properly read, the General Welfare Clause, as noted above, restricts spending for enumerated ends; it does not expand those ends. Absent an independent power to spend for drug control, therefore, the General Welfare Clause adds nothing to Congress's power. Indeed, if that were not the proper reading of the General Welfare Clause, if Congress could spend to further "the general welfare," loosely understood, there would have been no point in enumerating Congress's other powers since Congress could do any-

thing it wanted, pursuant to the general welfare, under the Spending Clause.[16] No, the Founders did not carefully enumerate Congress's powers only to have rendered that effort pointless by the inclusion of an independent power to spend for the general welfare. Enumeration was meant to limit government, not to serve as a ruse for unlimited government.

Similarly, the Commerce Clause, through which so much modern drug law has been enacted, was written to enable Congress to regulate, or "make regular," commerce among the states—and, in particular, to enable Congress to override or address the state and foreign protectionism that was frustrating free trade when the clause was written. To be sure, that functional account of the clause has never been nailed down securely by a Court whose jurisprudence on the subject has often seemed rudderless. It is all but a commonplace, however, that that was the principal rationale for the clause—indeed, for the new Constitution—in the first place.[17] It was out of a pressing need to regularize the domestic and foreign commerce of the nation that was breaking down under government measures the Articles of Confederation permitted.

Since the New Deal, however, the Commerce Clause has been used increasingly as a general regulatory power, for purposes far removed from ensuring the free flow of goods and services. In the 1937 case that opened the regulatory floodgates,[18] for example, the Court upheld the National Labor Relations Act, which had been passed in the name of ensuring the free flow of commerce but was addressed not at state measures frustrating that flow but at private actions long permitted under common law principles. Arguably, in fact, the nationalization of private labor relations that followed has actually impeded the free flow of commerce by introducing economic inefficiencies and encouraging labor disruptions that other-

[16]"If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money? How few objects are there which money cannot accomplish! . . . Can it be conceived that the great and wise men who devised our Constitution . . . should have failed so egregiously . . . as to grant power which rendered restriction upon power practically unavailing?" William Drayton, 4 *Congressional Debates* (1828), pp. 1632–34.

[17]As Justice William Johnson put it in his concurrence in the first great Commerce Clause case, *Gibbons v. Ogden:* "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." 22 U.S. 1, 231 (1824).

[18]*NLRB v. Jones & Laughlin.*

wise would not occur, as evidence from the vast unorganized labor market suggests. And as the Court fashioned its boundless "affects" test, whereby Congress has power to regulate anything that affects interstate commerce, which in principle is everything, it became increasingly clear that Congress was using its commerce power as a virtual police power—the power to secure rights, the basic power of government, which the Constitution reserves to the states. Indeed, while the Court has often said that there is no general federal police power,[19] it has permitted Congress to exercise what for all intents amounts to a general police power. As noted above, the two Commerce Clause cases the Court recently decided—one involving gender-motivated violence, the other involving residential arson—were, for all practical purposes, police power cases involving powers entrusted to the states.

As a gesture of lingering constitutional respect, however, Congress never says, when it enacts such measures, and the Justice Department never says, when it defends them in court, that Congress acted pursuant to its general police power. It is said instead that Congress is regulating "commerce" or an activity "affecting" commerce—when we all know it is regulating gun possession or gender-motivated violence or arson or what have you. Fortunately, the Court is beginning to see through that legerdemain. But is it any different with the drug war? We all know that federal drug laws, for all their Commerce Clause rationales, are not regulating commerce in drugs with an eye toward ensuring its free flow, in light of state interference with that commerce—the very purpose of the commerce power. No, the drug laws are aimed instead at *prohibiting* drug commerce, just as the recently examined statutes were aimed at prohibiting gun possession near schools, gender-motivated violence, and arson. They are all police power measures parading as regulations of commerce. Under the Constitution as originally understood, there is absolutely no authority for them. Accordingly, they are all unconstitutional and hence, in a word, illegitimate.

Constitutional Limits on State Power

But what about the states? The federal government may have no enumerated power with which to wage a war on drugs, but states do have a general police power. The Court's recent revival of the

[19] "... the police power, which the founders denied the National Government and reposed in the States. ..." *United States v. Morrison*, 120 S.Ct. 1740, 1754 (2000).

doctrine of enumerated powers has limited federal power marginally; but it has also revived state autonomy and integrity, thus breathing new life into the federalist principles articulated in the Tenth Amendment. For as that amendment says, if a power has not been delegated to the federal government or prohibited to the states, it is reserved to the states or to the people. Since the federal government's powers are not plenary, that means that the states or the people retain all powers not enumerated in or prohibited by the Constitution. And the most basic of the states' powers, the police power, is used by states today to wage their own wars on drugs.[20]

Yet states too are limited in what they can do, and not simply by the limits found in the original Constitution. They are limited first by their own constitutions, which vary. And they are limited also by the Civil War Amendments, especially by the Fourteenth Amendment, which were ratified shortly after the Civil War concluded, precisely to limit what states might do to their own citizens. Prior to passage of those amendments, the Bill of Rights was held to apply only against the government created by the Constitution it amended, the federal government.[21] It was to correct that shortcoming—to give Americans a federal appeal against state violations of their rights—that the amendments were ratified.[22]

Thus, while states retained the general police power under both the original and the amended Constitution, the exercise of that power was subject to federal oversight once the Civil War Amendments were added. Section 1 of the Fourteenth Amendment, in particular, provides that no state shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. With that,

[20]As John Locke argued, the police power derives from the "Executive Power" that each of us enjoys in the state of nature to secure his rights. When we constitute ourselves and institute government, we yield that power up to the government, in most cases, to exercise on our behalf. It thus becomes the police power, the power to secure rights. John Locke, "Second Treatise of Government," in *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor, 1965), para. 13.

[21]*Barron v. Mayor & City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[22]For a much fuller discussion of the argument that follows, see Kimberly C. Shankman and Roger Pilon, "Reviving the Privileges or Immunities Clause to Redress the Balance among States, Individuals, and the Federal Government," Cato Institute Policy Analysis no. 326, November 23, 1998; reprinted in *Texas Review of Law & Politics* 3 (1998): 1–48.

individuals could bring suits in federal courts against state officials to protect their rights. In addition, section 5 of the amendment gives Congress the power to enforce those provisions by appropriate legislation.

Regrettably, despite the intentions of those who wrote and ratified the Fourteenth Amendment, the history of its use has been checkered, to say the least. In a nutshell, that history began in 1873, five years after the amendment was ratified, when the Supreme Court effectively eviscerated the Privileges or Immunities Clause in the infamous *Slaughterhouse Cases*.[23] Thereafter the Court tried for years to use the Due Process Clause to do what was meant to be done under the far more substantive Privileges or Immunities Clause. As that effort met increasing opposition from progressives during the first part of the 20th century, the Court during the New Deal largely abandoned its "substantive due process" jurisprudence, turning then to the Equal Protection Clause in a futile search for substantive guidance. As nearly everyone agrees, a very uneven body of law has emerged from all of this, and not surprisingly. For the Court has never systematically invoked and applied the well-grounded and ordered theory of rights that is necessary for principled adjudication under the Fourteenth Amendment. That is what the Privileges or Immunities Clause was meant to enable the Court to do.

The debate surrounding passage and ratification of the Fourteenth Amendment afforded just such a theory, for it indicated the intent of Congress and the ratifying conventions to constitutionalize, against the states, the protections guaranteed by the Bill of Rights and the common law and justified by the natural law that stood behind those sources. Indeed, all of that was included in the rich heritage of the phrase "privileges and immunities" and was meant to be secured by the Privileges or Immunities Clause. The clause was the principled anchor and substantive guide that was lost when a bitterly divided Court eviscerated it in the *Slaughterhouse Cases*.

Nevertheless, here too the current Court has begun, very tentatively, to revisit those issues. In a case decided in its 1998 term, for example, the Court explicitly revived the Privileges or Immunities Clause to limit state power, even if its application of the clause may

[23]*Butchers' Benevolent Association v. Crescent City Livestock Landing Slaughterhouse*, 83 U.S. (16 Wall) 36 (1873).

not have been entirely appropriate in that case.[24] And in its just-concluded 1999 term, the Court again limited a state when it found unenumerated parental rights under the Due Process Clause, rights that might more appropriately have been found under the Privileges or Immunities Clause.[25] Thus, the Court's federalism jurisprudence is beginning to limit not simply the federal government, under the doctrine of enumerated powers, but states as well, under the federal oversight authority afforded by the Fourteenth Amendment.

Now again, I doubt that the Court is ready or inclined to scrutinize state drug war efforts under the Fourteenth Amendment. Nevertheless, here too the principles are the same. In particular, the police power of the states is limited in a principled way. It is not a power to do anything in the name of securing rights. Rather, it is limited by the rights there are to be secured, which is why it is crucial that courts understand the underlying theory of rights when they adjudicate under the Fourteenth Amendment.

Thus, in the case at hand we confront the claim of some—including the state, acting on behalf of a majority, presumably[26]—to having a right to prevent others from producing, transporting, selling, buying, or using drugs; and a conflicting claim by those others to having a right to do those things, to pursue happiness as they think best, provided only that in doing so they not violate the rights of anyone. Obviously, as with alcohol, that second class of people excludes minors and, for different reasons, acting pilots, drivers, surgeons, oftentimes parents, and anyone else whose drug use, under the circumstances, would compromise the rights of third parties. That will involve some close calls, to be sure, and reasonable people may reasonably disagree about some of them. But it still leaves a substantial number of people in that second class. And it raises the fundamental question: By what right do those in the first class presume to restrict the freedom of those in the second class when the latter are restricting the freedom of no one? If the Declaration's promise of equal rights means anything, it means that we can interfere with others only when rights are threatened or have

[24]*Saenz v. Roe*, 526 U.S. 489 (1999). See Roger Pilon, "'Slaughterhouse Cases' Undone?" *National Law Journal*, May 31, 1999, p. A22.

[25]*Troxel et vir. v. Granville*, 120 S.Ct. 2054 (2000).

[26]For a discussion of why majoritarianism will not serve as a justificatory theory, see Roger Pilon, "Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy," *Cato Journal* 11 (1992/93): 383–84.

been violated. And here, the drug warriors are unable to show any such thing and hence any ground for resort to the police power of the state. Thus, far from being used to secure rights, the police power invoked by state drug warriors is being used to violate rights.

Were it properly applied, then, the Fourteenth Amendment should be available to individuals to keep states from violating their rights regarding drugs. Quite obviously, federalism principles do not operate that way today in the case of drugs. Not only does the federal government not protect citizens from their own state governments but the federal government actively cooperates with those governments in running roughshod over individual rights the Constitution was meant to protect. Bad enough that the federal government violates rights directly through its own anti-drug efforts. It also ignores its obligations under the Fourteenth Amendment to protect citizens from their own state governments—and even aids states in their unconstitutional activities. Thus does the corruption of constitutional principles ensue from the endless war on drugs.

Signs of Hope—and Hypocrisy

Despite that assault by both the federal government and the states, some states are at last beginning to recognize the rights of their citizens in the matter of drugs—or better, are being forced by their citizens, in most cases, to recognize at least a few of those rights. In the past few years, citizens in seven states plus the District of Columbia have passed ballot initiatives legalizing in various ways the prescription and use of marijuana for medicinal purposes.[27] In addition, three states have passed such laws by statute.[28] And a bit further back, between 1976 and 1982, 19 other states enacted medical marijuana laws of various kinds.[29]

At this writing, the legal status of such laws, due to the supremacy of federal law in most cases, is uncertain. After Proposition 215 passed in California in November 1996, the federal government brought suit, in what may turn out to be the leading case testing the

[27]The states are California (1996), Arizona (1996 and 1998), Alaska (1998), Oregon (1998), Washington (1998), Nevada (1998 and 2000), and Maine (1999).

[28]Louisiana (1991), Massachusetts (1996), and Hawaii (2000).

[29]Illinois (1976); New Mexico (1978); Alabama, Iowa, Montana, Texas, Virginia, West Virginia (all in 1979); Georgia, Minnesota, New York, Rhode Island, South Carolina (all in 1980); Connecticut, New Hampshire, New Jersey, Tennessee, Vermont (all in 1981); Wisconsin (1982).

matter,[30] to enjoin various cannabis buyers cooperatives from distributing marijuana. The trial court granted the injunction. But on appeal the U.S. Court of Appeals for the Ninth Circuit remanded the case, ordering that the injunction be modified to "take into account a legally cognizable defense that likely would pertain in the circumstances."[31] It may be some time before that case or one similar to it reaches the Supreme Court, if one does.

In the meantime, the behavior of federal officials in this matter, including elected officials, is not a little noteworthy. Within days of passage of the California and Arizona initiatives in 1996, Drug Czar McCaffrey convened a meeting of some 40 high-level government and private-sector drug warriors to plan a response to the initiatives and to plan, in particular, how to stop their spread. *Salon Magazine* has just published an on-line account of that meeting,[32] drawn from evidence discovered in an ongoing lawsuit brought by a group of California doctors and patient advocacy groups suing to enjoin restrictions imposed by the government following passage of the initiatives.[33] Especially revealing is a comment made by Paul S. Jelling, Robert Wood Johnson Foundation vice president, according to notes of the meeting taken at the time: "The other side would be salivating if they could hear [the] prospect of [the] Feds going against the will of the people."[34]

Indeed they would. But it's not just the will of the people that is at stake. It's also the principles of the nation. In testimony I gave in 1997 on the federalism implications of the medical marijuana initiative movement, before the Crime Subcommittee of the House Committee on the Judiciary, I noted the draconian response that eventually came from the McCaffrey meeting:

> In the February 11, 1997, Federal Register the Office of National Drug Control Policy announced that federal policy would be as follows: (1) physicians who recommend and

[30]*United States v. Oakland Cannabis Buyers Cooperative,* 2000 U.S. App. LEXIS 9963 (9th Cir., May 2000).

[31]*United States v. Oakland Cannabis Buyers Cooperative,* 190 F.3d 1109, 1114 (1999). See Marsha S. Cohen, "Policy Commentary: Breaking the Federal State Impasse over Medical Marijuana: A Proposal," *Hastings Women's Law Journal* 11 (Winter 2000): 59–74.

[32]Daniel Forbes, "Fighting 'Cheech & Chong' Medicine," http://www.salon.com/news/feature/2000/07/27/ondcp/index.html.

[33]*Conant v. McCaffrey,* 172 F.R.D. 681 (N.D. Cal. 1997).

[34]Quoted in Forbes, "Fighting 'Cheech & Chong' Medicine."

> prescribe medicinal marijuana to patients in conformity with state law and patients who use such marijuana will be prosecuted; (2) physicians who recommend and prescribe medicinal marijuana to patients in conformity with state law will be excluded from Medicare and Medicaid; and (3) physicians who recommend and prescribe medicinal marijuana to patients in conformity with state law will have their scheduled drug DEA registrations revoked.
>
> The announced federal policy also encourages state and local enforcement officials to arrest and prosecute physicians suspected of prescribing or recommending medicinal marijuana and to arrest and prosecute patients who use such marijuana. And in what can only be described as an act of zealous overkill, especially in light of last week's IRS hearings in the Senate, the policy also encourages the IRS to issue a revenue ruling disallowing any medical deduction for medical marijuana lawfully obtained under state law.
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> Clearly, this is a blatant effort by the federal government to impose a national policy on the people in the states in question, people who have already elected a contrary policy. Federal officials do not agree with the policy the people have elected; they mean to override it, local rule notwithstanding.[35]

Most striking to me at those hearings was the reaction of conservative legislators long in the forefront of the federalism movement, long among the strongest advocates for reining in Washington's power and returning it to the states and the people. That reaction could be described only as unbridled hostility toward a citizenry so presumptuous as to resist federal drug policy.

And the hypocrisy—let us call it by its proper name—has not ended. On July 12, 2000, for example, I was invited again to testify before the House Judiciary Committee, this time in support of a bill aimed at restricting appropriated funds from being spent by federal officials in efforts to influence state and local legislative processes, ballot measures, initiatives, and referenda—the very thing McCaffrey has been doing on the state medical marijuana front.[36] It seems that in the last election cycle an assistant U.S. attorney in Missouri

[35]Roger Pilon, "The Medical Marijuana Referenda Movement in America: Federalism Implications," Testimony before the Crime Subcommittee, House Committee on the Judiciary, October 1, 1997, http://www.cato.org/testimony/ct-rp100197.html.

[36]See generally Forbes, "Fighting 'Cheech & Chong' Medicine."

had used appropriated funds to engage in grassroots lobbying against a concealed-carry gun initiative then on the Missouri ballot, to the consternation of certain members of Congress, who wanted to put a stop to that kind of officious federal intermeddling in state and local affairs at taxpayer expense. I entirely agreed with the effort to stop such abuse and agreed to testify in support of the measure, provided I could extend my remarks to the identical problem involving state medical marijuana initiatives. That, unfortunately, was not acceptable.

And so the battle continues, not simply for the minds but for the hearts too of the American people. For in the realm of ideas, there simply are no credible arguments left for continuing this endless war on drugs, as the essays in this volume should make clear. From a consideration of both principle and policy, reason reveals that the war is wrong and counterproductive. It is now the visceral response that has to be confronted, the blind, irrational reaction to calls for ending the war that stop thought when thought is most needed, that ignore inconsistency and hypocrisy that is as plain as day. But that is the subject for another day. It is enough for the moment to know that the war on drugs, to its core, is illegitimate.