

University of Nevada, Reno

The Role of Preemption in the Federal Legalization of Marijuana

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by

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DEDICATION

First, I would like to thank Professor Robert Mikos of Vanderbilt University. He is one of the nation's leading authorities on marijuana law, particularly in the realm of preemption. I stumbled upon his name in my research and sent him an email as a shot in the dark. He took the time to respond and pointed me in the right direction. His guidance was absolutely invaluable, and I very much appreciate him taking the time to respond to a random undergraduate student at another university.

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ABSTRACT

This thesis analyzes the role of preemption in the federal legalization of marijuana. First, the paper reviews the history of drug enforcement in the United States. The legal framework of the Controlled Substances Act is surveyed and used as a point of reference for a historical perspective on marijuana regulation in the United States. The focus then shifts to an analysis of federal preemption that was used in *Ter Beek v City of Wyoming*, which was a case heard by the Michigan Supreme Court in 2013. Finally, the future of marijuana legalization at the federal level is analyzed by identifying potential paths to legalization. Some paths to legalization include the court system, by executive order, and by an act of Congress. Recommendations are then made on how to best move toward legalization.

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CHAPTER 1: INTRODUCTION

Marijuana regulation is a vast and complicated area of the legal system. There are countless legal issues that relate to marijuana including driving, banking, taxation, sentencing, research, and treaties to name a few. The massive number of topics under the umbrella of marijuana law is too broad for the scope of this thesis. Thousands of pages could be written, and have been written, about each of these different areas.

The core legal issue in the realm of marijuana, and debatably the largest, is the conflict between federal and state law. Many states have passed legislation in recent years to legalize recreational marijuana. As of April 2019, only 19 states consider marijuana to be fully illegal (Defense Information Systems Agency, 2019). If the recent state legalization is analyzed in a vacuum then there are no issues, but this is unrealistic. State law does not exist in a vacuum; it coexists with federal law, and is, by design, preempted by federal law.

This thesis will focus on the relationship between federal and state law, specifically on whether or not federal law preempts state law. In most instances, this is not a question; the existence of the Supremacy Clause of the Constitution makes preemption clear.

“This Constitution, and the 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...” (art. VI, sec. 2).

The power of the Supremacy Clause has been tried in numerous cases including *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824), and, more recently, *Printz v.*

United States (1997). Thousands of legal scholars have written about each of these cases. However, a newer argument has been made about an exception of the Supremacy Clause in the case of marijuana, and that argument will be the focus of this thesis. The argument was crafted by Professor Robert Mikos of Vanderbilt Law. He claims that because it is possible to comply with both laws, the Controlled Substances Act (hereinafter “CSA”) does not preempt states’ legalization efforts. This argument will be further explained and developed in this thesis.

CHAPTER 2: HISTORY

The history of marijuana regulation has a long history in the United States. Some popular associations with drug enforcement involve President Nixon coining the term “War on Drugs”, Nancy Reagan’s “Just Say No” campaign, and the Drug Abuse Resistance Education (D.A.R.E.) program. However, the war on drugs started much earlier than Nixon’s presidency and its duration has long outlasted Nixon’s time in office (Baum, para. 4). The effects of this campaign are wide-reaching and still felt today. To gain a better understanding of the modern implications, one must study the long history.

Pre-Controlled Substances Act

Drugs were once easily available to Americans. Marijuana and much “harder” drugs were used in medicines for decades and did not have to even be included in labels until 1906 with the passage of the Pure Food and Drug Act. Americans had ready access to products that were made from the same ingredients as cocaine and heroin (Hari, 9). Marijuana was commonly prescribed for a variety of ailments. Recreationally, the popularity of marijuana started increasing in the 1910s when refugees brought the drug across the border as they fled the Mexican Revolution (McNearney, para. 6). It later gained popularity with musicians, particularly jazz singers. As society continued to change, “American culture was looking for an outlet for its swelling tide of anxiety--a real, physical object it could destroy, in the hope that this would destroy its fear of a world that was changing more rapidly than their parents and grandparents could ever have imagined” (Hari, 9).

A good starting point for the history of the war on drugs is a man named Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics (hereinafter “FBN”). The FBN was officially founded in 1930, but the Bureau evolved out of the Prohibition Department. The Prohibition Department had been an abject failure; the war on alcohol was lost when Prohibition was repealed in 1933. Shortly after assuming his new position, Anslinger’s budget was cut drastically. To add to the disheartenment of his staff and his slashed budget, he realized that he did not have enough work to keep the department afloat. Anslinger needed something else. He knew that cocaine and heroin would not be enough to sustain his department. He began the hunt for a larger target, and he landed on marijuana. “He wrote to thirty scientific experts asking a series of questions about marijuana. Twenty-nine of them wrote back saying it would be wrong to ban it, and that it was being widely misinterpreted in the press. Anslinger decided to ignore them and quoted instead the one expert who believed it was a great evil that had to be eradicated” (Hari, 15). This was the first time the opinion of the majority of scientists was ignored on the issue of marijuana, but it would not be the last. Marijuana became Anslinger’s primary focus and the backbone of the FBN. Misinformation about marijuana was rampant, and Anslinger played a substantial role in the spread. One example was that marijuana induced insanity even though there was no evidence to support the claim. There is also the unfortunate role of race in marijuana enforcement and the emphasis of the effect of the drug on blacks. Race played an integral role in marijuana enforcement in the beginning, and its role has not diminished with time.

Harry Anslinger’s role was not only as the villain, but it is possible to understand where he was coming from. It is logical to want to destroy the addiction, but it was

dangerous to do so without thinking about the effect on the addict. “Harry Anslinger is our own darkest impulses, given a government department and a license to kill” (Hari, 32). Perhaps part of his ideology began as a good faith attempt to better the country. It is also important to note that he was not alone. Many others, including Congressman Stephen Porter, John Ehrlichman, and Congressman Robert Doughton, also laid the groundwork for the War on Drugs that would come years later.

The initiative continued gaining traction. By 1937, all states had passed laws prohibiting the use of marijuana (Walker & Galliher). Despite the states passing their own marijuana laws, marijuana was still not regulated federally. Heroin and opium, on the other hand, had become illegal with the passage of the Harrison Narcotics Act in 1914. One of the first federal regulations that was particularly relevant to marijuana was the Marihuana Tax Act of 1937. The language of the Marihuana Tax Act was drafted by Anslinger himself and was introduced by Congressman Doughton of North Carolina. Despite Anslinger’s antagonism of marijuana, this act only specifically included language about taxation of the substance. However, the act incorporated prohibitory taxes, and can essentially be regarded as regulation. “The act passed easily despite opposition from the American Medical Association” (Hawdon & Kleiman). The Marijuana Tax Act was eventually declared unconstitutional in *Leary v US*, 1969.

However, before the Marihuana Tax Act was deemed unconstitutional, the Boggs Act was signed into law in 1952. The Boggs Act implemented harsher drug laws and marked the first time that marijuana and other narcotics were included in the same piece of legislation. The punishments were as follows:

The provisions of the act mandated that those charged and convicted of a first offense involving cocaine, marijuana, or opiates receive two to five years in prison, second-time offenders were to be given five to 10 years, and third-time offenders were to receive 10 to 20 years... In addition to the mandatory sentences, all offenses were to carry a \$2,000 fine. (Hawdon & Kleiman, 96).

The increased punishments created by the Boggs Act had a huge impact on the overcrowding of the prison system. The act was also particularly problematic because second- and third-time offenders were not eligible for parole, while offenders of much more serious crimes like rape and murder were eligible for parole.

The Controlled Substances Act

The most relevant piece of federal legislation relevant to marijuana today was put in place more than 40 years ago, when the CSA was enacted. Marijuana officially became illegal under federal law in 1970 under the CSA. The legislation created five distinct classifications, called schedules, for drugs. Two characteristics are taken into account when scheduling drugs: medical use and potential for abuse (21 U.S.C. §§ 802 (32)(A), 2017). Individual drugs are then rated Schedule I-V.

Schedule I is unique in that it is the only schedule that is defined as having no accepted medical use. As for potential of abuse, the schedule number increases as the potential for abuse decreases. Schedule I is the strictest of the categories. By definition, drugs in this category have no medical purpose and the highest potential for abuse. Examples of drugs classified as Schedule I are heroin, LSD, peyote, ecstasy, and marijuana (21 U.S.C. §§ 813, 2017).

Schedule II drugs are still considered dangerous, but less so than Schedule I. They also “have recognized medical uses in the United States that Schedule I substances lack”

(Hodroff). Examples of Schedule II Drugs are cocaine, methamphetamine, methadone, and oxycodone. Schedule III is defined as “moderate to low potential for physical or psychological dependence” (21 U.S.C. §§ 813, 2017). Examples are anabolic steroids and testosterone. Schedule IV drugs have a low potential for abuse and a low risk of dependence. Xanax, Valium, and Soma are examples of Schedule IV drugs. Schedule V is the least strict of the schedules, and are generally used for “antidiarrheal, antitussive, and analgesic purposes” (21 U.S.C. §§ 813, 2017). They consist primarily on low quantities of certain narcotics and are the easiest to prescribe.

When the idea of these schedules was in formulation, the question of how marijuana would be scheduled arose. Marijuana was placed in Schedule I, but this was intended to be temporary. Nixon assembled a committee formally called the National Commission on Marihuana and Drug Abuse. The Commission was chaired by Raymond P. Shafer, and the group became known as the Shafer Commission. Politicians from both political parties were included in the makeup of the Commission, as were doctors, attorneys, and college presidents. At the end of their investigation, the Commission did not believe that Schedule I, the most severe classification, was an appropriate designation for cannabis. A 1972 report by the body reads, “Considering the range of social concerns in contemporary America, marihuana does not, in our considered judgement, rank very high. We would deemphasize marihuana as a problem” (United States Commission on Marihuana and Drug Use, 1972). The report came out one year after the CSA and recommended that the “temporary” scheduling of marijuana be changed. However, the problem of marijuana was not deemphasized, and marijuana remained in the most restrictive category of the CSA. It still remains in Schedule I, 49 years later.

This scheduling of marijuana has become problematic for many reasons, but one of the most apparent conflicts is that Schedule I drugs cannot receive federal funding for medicinal research. No marijuana research can be funded to test its medicinal properties, and because it has no medicinal properties, it cannot be researched. The lack of federally funded, and therefore federally recognized, marijuana research is cyclical. One exception to this absence of federal funding toward marijuana was the Compassionate Investigational New Drug Program (IND), which started in 1978. The program sent medical marijuana to a select group of patients across the country sponsored by the federal government. The program stopped accepting patients in 1992 and the group has dwindled since then. There are currently three surviving patients that still receive marijuana from the federal government, but the program has not expanded at all since 1992 (Federal IND Patients).

Rescheduling of drugs under the CSA is possible, but very difficult. The legislation itself includes two avenues for rescheduling: an act of the Attorney General, or a petition by an aggrieved party to the DEA/FDA based upon scientific claims (21 U.S.C. §§ 814, 2017). However, these options to reschedule are very difficult, and neither have found success thus far. Other avenues to rescheduling include an executive order by the President or an act of Congress. To this point, all attempts to reschedule marijuana have been futile.

The motives behind the CSA cannot be ignored while talking about the modern implications. President Richard Nixon is known for starting the war on drugs, but the initiative had far more sinister motivators than portrayed (Baum; Bender; Southerland & Steinberg). John Ehrlichman, who served as counsel to Nixon, said in an interview

decades later that the administration used drugs as a way to criminalize political enemies.

Ehrlichman said:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did. (qtd. in Baum).

The bill passed the Senate with a vote of 54-0. It was then signed into law by President Nixon on October 27, 1970 and became effective on May 1, 1971. The schedules have changed slightly over the years, but the following is a summary of the schedules, including the two defining characteristics and examples of each. It is worth noting that two of society's most popular drugs, alcohol and caffeine, are not scheduled at all.

Table 1: The Controlled Substances Act creates five schedules of drugs based on two criteria: medical use and potential abuse. The schedules range from Schedule I, the most restrictive, to Schedule V, the least restrictive.

	Medical Use	Potential of Abuse	Examples
Schedule I	No accepted medical use	High	Heroin, marijuana, LSD, peyote, MDMA/ecstasy
Schedule II	Accepted medical use	High	Adderall, cocaine, morphine, PCP
Schedule III	Accepted medical use	Moderate	Anabolic steroids, testosterone, Vicodin
Schedule IV	Accepted medical use	Low	Ambien, Xanax, Valium
Schedule V	Accepted medical use	Low	Codeine-based cough medicines

Post-Controlled Substances Act

The War on Drugs officially began shortly after the passing of the CSA when President Nixon gave a press conference on June 17, 1971. He declared drug use “public enemy number one” and claimed it necessary to “wage a new, all-out offensive” (Barber, 2016). He increased the funding, and therefore the size, of federal drug control agencies, and promoted tactics such as mandatory sentencing and no-knock warrants.

Presidents since Nixon have all had an impact, varying in size, on the War on Drugs. “Nixon’s invention of the war on drugs as a political tool was cynical, but every president since — Democrat and Republican alike — has found it equally useful for one reason or another” (Baum). Presidents Ford and Carter did not have big impacts on the war on drugs. However, the Reagan Administration certainly did. Ronald Reagan and his wife, First Lady Nancy Reagan made a public enemy of drug use in a Nixon-esque campaign. In a 1986 Address to the Nation, she famously said, “Say yes to your life. And when it comes to drugs and alcohol just say no” (“Just Say No”). President George Bush was openly very anti-drug as well, and he played a role in many of Reagan’s anti-drug initiatives while serving as his vice president. Under George H.W. Bush, the Compassionate Investigational New Drug program that was started under the Carter administration, stopped accepting new patients. Other anti-marijuana initiatives, such as D.A.R.E., the Office of the Drug Czar, and Green Merchant, also began under his administration. He stated in 1989 that “We need more jails, more prisons, more courts and more prosecutors” before pledging one billion dollars to the War on Drugs (Drug Policy Alliance). President Bill Clinton also had an interesting public image in the realm of marijuana, but his policy was much more supportive of marijuana than his

predecessors. He famously stated, “I experimented with marijuana a time or two, and I didn’t like it. I didn’t inhale it, and never tried it again” (Waxman, 2017). George W. Bush publicly avoided the question of whether or not he had ever tried marijuana, but there are many rumors that he was a cocaine user. President Obama was open about his marijuana use when he was younger, and a quick internet search will return many photos of him engaging in marijuana-related activities.

More impactful than President Obama’s personal views on the drug was the Cole Memorandum, which was published by the Department of Justice during his presidency. The memo was named for United States Deputy Attorney General James Cole, its original author. The Cole Memorandum included a list of priorities for United States Attorneys to follow and directed them to redirect their focus away from marijuana offenses in states where it has been legalized. This memorandum was a significant shift, as it marked the first time that a hands-off approach had been used by the federal government on the issue of marijuana.

The election of President Donald Trump in 2016 was not a good sign for the pro-marijuana movement. On the campaign trail in 2015, he said that he thought that Colorado’s legalization of marijuana was “bad” (Speights, 2019). He later came out in support of marijuana, at least medicinally. More mixed signals were sent when President Trump appointed Jeff Sessions as Attorney General. AG Sessions is incredibly anti-marijuana. He allegedly made a joke in the 1980s about the Ku Klux Klan and their use of marijuana. He is quoted as saying, “[I thought they were] okay until I found out they smoked pot” (Glover, 2017). While serving as Attorney General, he overturned policies that kept the DOJ from interfering with states with legal operations, including the Cole

Memorandum. Sessions did not take action on legal state actors, but he made a point to state that the DOJ could. AG Sessions resigned in November of 2018 at the request of President Trump amid unrelated scandals. Matthew Whitaker took over for Sessions as Acting Attorney General, but William Barr was named Attorney General in February of 2019. He had previously served as Attorney General under George H. W. Bush. He is the first person to serve a non-consecutive term as AG since 1850. In his confirmation hearing in January of 2019, he was asked about his views on marijuana. Senator Cory Booker asked him about the rescission of the Cole Memorandum, and Barr stated:

My approach to this would be not to upset settled expectations and the reliant interests that have arisen as a result of the Cole Memorandum. Investments have been made. There has been reliance on it. I don't think it's appropriate to upset those interests. However, I think that the current situation is untenable and really has to be addressed. It's almost like a backdoor nullification of federal law... We either should have a federal law that prohibits marijuana everywhere, which I would support myself because I think it's a mistake to back off on marijuana. However, if we want a federal approach, if we want states to have their own laws, let's get there, and get there the right way (CSPAN).

The role of Attorney General Barr is incredibly important as he is serving as AG during a pivotal time. He will serve for the rest of President Trump's term. He could also continue in the role should President Trump win reelection in 2020. Through this position, he could have a lasting impact on the legalization of marijuana.

The Role of Race

It would be remiss to discuss the War on Drugs and not examine the role that race played in it. The origins of the campaign were rooted in racism, but while strides have been made in the movement toward legalization, the role of racism has not absolved. A 2013 report by the American Civil Liberties Union, based on data from the Federal

Bureau of Investigation's Uniform Crime Reporting Program, found that African Americans are nearly four times more likely to be arrested for marijuana possession despite similar usage rates (ACLU, 2013). These numbers have not changed since legalization. In fact, some argue that the problem has worsened since legalization. There is a fortune to be made in the marijuana industry, but if the budding industry is comprised of almost entirely white people, it could be a step in the wrong direction for equality in the plane of marijuana. "As white people made money from marijuana, black people anguish in jail for smoking it" (Southerland & Steinberg). In a 2015 special, popular comedian John Mulaney brought attention to the racial disparity in the industry. He said, "Marijuana is legal in 18 or 19 states in some form or another. It's insane." An audience member cheered in response, but Mulaney responded immediately by saying, "Alright, don't 'whoo' if you're white. It's always been legal for us. Come on, sir. We don't go to jail for marijuana..." ("The Comeback Kid"). Comedy often makes light of important societal issues as a way of making them approachable. The important thing is not that a comedian made a joke about racism in the execution of marijuana laws, but rather that the joke was seeded in a kernel of truth. Extensive reform is necessary in the prosecution of drug crimes, but it is unfortunately outside the scope of this thesis.

CHAPTER 3: *TER BEEK V CITY OF WYOMING*

The argument of federal law not preempting state law because of the ability to comply with both simultaneously was used successfully in a case in Michigan. *Ter Beek v. City of Wyoming* originated in Kent Circuit Court, which ruled in favor of the city. Mr. Ter Beek appealed this decision and the case was accepted by the Michigan Court of Appeals. The Michigan Court of Appeals reversed the lower court's decision and ruled in favor of Mr. Ter Beek. The city appealed, and the case went to the Michigan Supreme Court. The case was heard on October 10, 2013 and the Court decided the case on February 6, 2014. The Supreme Court affirmed the decision of the Court of Appeals in a unanimous decision (7-0).

John Ter Beek was a citizen of Wyoming, Michigan who qualified for the Michigan Medical Marijuana Act. In addition to being a registered MMMA patient, he was also an attorney. He was in a unique position, because he himself had grounds to sue and he also had the legal knowledge to understand his right to sue. The city of Wyoming, on the other side, is a suburb of Grand Rapids, MI and has a population of roughly 72,000 as per the 2010 Census. Ter Beek filed the original charges in 2010

The case involved three separate areas of law: CSA (21 U.S.C. §§1-2252, 2017), the Michigan Medical Marihuana Act (hereinafter "MMMA") (MCL 333.26424 § 4(a)), and a city ordinance (City of Wyoming Code of Ordinances § 90-66). The CSA, as discussed previously, makes marijuana explicitly illegal. After the federal passage of the CSA, many states followed suit. However, Michigan broke from the federal government in 2008 when the MMMA was enacted. The MMMA allowed medicinal use of marijuana

to qualifying patients and guaranteed registered patients to not be subject to “arrest, prosecution, or penalty” as long as the stipulations in the statute were met.

The City of Wyoming, MI had enacted an ordinance that “prohibits and subjects any land uses that are contrary to federal law” (*Ter Beek v City of Wyoming*). Ter Beek was publicly opposed to the city ordinance before it was enacted. In an interview after the case was decided by the Supreme Court, Ter Beek said, “I told them if they enacted this ordinance, I would file a suit within a week and I had it in six days. I stick to my word” (Deiters, 2014). This case is interesting in the fact that a third layer was brought into the preemption debate. Under the concept of preemption, the city ordinance carries the least weight, and logically would be preempted by both the MMMA and the CSA. This ordinance in particular is interesting in the fact that it references federal law.

The Arguments

Ter Beek argued that the city ordinance should be declared void and that an injunction prohibiting its enforcement be issued. He believed the ordinance to be preempted by the MMMA. Ter Beek argued that because it was possible to comply with both state law and federal law at the same time, preemption does not apply. The topic of impossibility preemption came up in his argument. “Impossibility preemption requires more than the existence of a hypothetical or potential conflict. It results when state law requires what federal law forbids or vice versa” (*Ter Beek v City of Wyoming*). Because the MMMA simply allowed the use of marijuana and did not require it, individuals could comply with both laws. If the MMMA instead required all Michigan citizens to grow or use marijuana, it would have been in direct conflict with the CSA, and therefore would be

preempted by it. “A state law presents an obstacle to a federal law if the purpose of the federal law cannot otherwise be accomplished” (*Ter Beek v City of Wyoming*). The topic of anti-commandeering was also a part of Ter Beek’s argument. He argued that Congress does not have the authority to force states to incorporate federal regulation into their own state law.

The city’s argument utilized a similar kind of logic, but argues that it is irrelevant whether or not the city ordinance is preempted by the MMMA because the MMMA is preempted by the CSA. The city also stressed that the MMMA does not create an absolute right to grow and distribute marijuana.

The Decisions

In the first decision, the Circuit Court ruled that the CSA did preempt the MMMA and ruled in favor of the city. Ter Beek appealed and the case was accepted by the Court of Appeals. The Court of Appeals reversed the original decision, meaning the decision was in favor of Ter Beek. The case was then accepted by the Supreme Court of Michigan. The Supreme Court affirmed the decision of the Court of Appeals, and wrote in the opinion, “We do not find it impossible to comply with both the CSA and 4(a) of the MMMA” (*Ter Beek v City of Wyoming*). The Supreme Court’s opinion was unanimous (7-0).

Breakdown of the Court

The Michigan Supreme Court is composed of seven justices who serve terms of eight years. Justices are elected positions, but if a vacancy occurs, the governor makes an

appointment. Political affiliation plays an interesting role in the fact that parties are not listed on the ballot, but most are nominated by either the Democratic or Republican party. The justices on the bench at the time that *Ter Beek* was heard were Chief Justice Robert P. Young Jr., Justice Michael F. Cavanagh, Justice Stephen J. Markman, Justice Mary Beth Kelly, Justice Brian K. Zahra, Justice David F. Viviano, and Justice Bridget M. McCormack.

According to two researchers, the Court at the time was conservative-leaning (Bonica & Woodruff). Despite this assessment of the ideology scores, the Court ruled unanimously in favor of *Ter Beek*, and subsequently, in favor of states' rights regarding marijuana. The opinion was written by Justice McCormack. A 2012 study by Stanford researchers found the following of the Michigan Supreme Court:

A score above 0 indicated a more conservative-leaning ideology while scores below 0 were more liberal. The state Supreme Court of Michigan was given a campaign finance score (CFscore), which was calculated for judges in October 2012. At that time, Michigan received a score of 0.05. Based on the justices selected, Michigan was the 21st most conservative court. The study was based on data from campaign contributions by judges themselves, the partisan leaning of contributors to the judges, or—in the absence of elections—the ideology of the appointing body (Bonica & Woodruff).

Of the seven Justices on the Court at the time of *Ter Beek*, five were included in this study. Two, Justice McCormack and Justice Viviano, were not on the bench when the data was being collected, so this data is unavailable for them. The scores in the report are included in the table below.

Table 2: This table includes the campaign finance scores of the Michigan Supreme Court Justices that were on the Bench in 2012. Of the seven Justices that heard Ter Beek, five had campaign finance scores calculated for them. A score above zero indicates that a

Justice leans conservative, while negative scores indicate liberal-leaning Justices.

Name	Party	CF Scores
Chief Justice Robert Young	Republican	0.84
Justice Michael Cavanagh	Democrat	-0.75
Justice Stephen Markman	Republican	0.86
Justice Mary Beth Kelly	Republican	0.72
Justice Brian Zahra	Republican	0.53
Justice Bridget McCormack	Democrat	n/a
Justice David Viviano	Republican	n/a

Amicus Briefs

Professor Robert Mikos, one of the primary architects of this particular argument, wrote a brief amici curia on behalf of the Cato Institute, the Drug Policy Alliance, and Law Enforcement Against Prohibition. In the brief, he argued that because Congress cannot force Michigan to ban marijuana, the MMMA could not be preempted. The brief did not comment on the issues related to the city ordinance. Instead, it focused entirely on the relationship between the CSA and the MMMA. The Cannabis Attorneys of Mid-Michigan also wrote an amicus brief in support of Ter Beek.

The City of Wyoming also had amicus briefs written in support of their argument. The City of Livonia, another Michigan town that is about 150 miles away from Wyoming, wrote a brief supporting the city. The State Bar of Michigan Public

Corporations Law Section, the Michigan Municipal League, and the Prosecuting Attorneys Association of Michigan all wrote briefs in support of the city as well.

Impact

The *Ter Beek* opinion has been cited in 19 other cases since being published in 2014, three of which are of particular interest. A case in 2013 in Colorado cited the Appellate Court's decision in favor of Ter Beek and used it as precedent to support the CSA not preempting state law. The court ruled in *People v Crouse* (2013) that the Medical Marijuana amendment passed by Colorado was not federally preempted, and that as per the state amendment, police officers were required by law to return seized marijuana to the defendant, who was a qualifying patient. Another Michigan case, this one from 2019, also cites *Ter Beek*. In an unpublished opinion on *Eplee v City of Lansing*, the Court of Appeals of Michigan ruled that unemployment benefits counted as a "penalty." The court cited *Ter Beek* in saying "the immunity granted by the MMMA from penalties 'is to be given the broadest application'" (2019).

CHAPTER 4: THE FUTURE OF LEGALIZATION

The future of marijuana legalization is unclear, but the country is certainly trending toward it. There are essentially five paths to legalization, with some having much higher chances of happening. Embedded in the CSA itself are two possible ways to reschedule drugs. The first is an act of the Attorney General and the second is a petition by an aggrieved party to the DEA/FDA based upon scientific claims (Somerset). Neither of these avenues have found success thus far, and are unlikely in the near future. The other three pathways to legalization align with the three branches of government.

Through the Courts

Marijuana could become legal through the courts. As the majority of this thesis has been dedicated to the topic of marijuana in the courts, this topic will not be discussed further here. The Supreme Court of the United States could accept a case about marijuana at any time, but up to this point, the Court has stayed out of the issue. Many speculate that the Court has been purposefully denying marijuana cases. However, if the Supreme Court did rule on marijuana, it would not be the first time that such a divisive issue was decided by the country's highest court.

A similar argument to that used in *Ter Beek* was used in *Murphy, Governor of New Jersey, et al v National Collegiate Athletic Association*. *Murphy v NCAA* was heard by the United States Supreme Court in 2017. The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for states to sponsor or operate sports

gambling. However, PASPA does not make the act of sports gambling a federal crime itself; it simply prohibits states from participating in it. In the case, the state of New Jersey had merely allowed some casinos to take sports bets; it didn't require them to do so. This is the same argument that is used in *Ter Beek*.

The topic of abortion was also decided by the United States Supreme Court in *Roe v Wade* in 1973. The Court ruled in a 7-2 vote that a woman's right to abortion was covered by the privacy rights guaranteed by the Fourteenth. Although abortion and marijuana usage share few commonalities besides the high levels of controversy surrounding both, the Fourteenth Amendment could also be used for medical marijuana. Abortion is also an issue that was decided nationally and then had state and local laws enacted afterward. Marijuana could follow the steps that abortion took to legalization.

By an Executive Order

The fourth pathway to legalization is through an executive order made by the president. Taking the current occupant of the Oval Office into account, this avenue is unlikely. President Trump has gone back and forth on marijuana and has yet to take action on the issue. The possibility of the legality of marijuana being resolved by executive order may become more feasible, depending on the 2020 election. Attorney General Barr is also anti-marijuana but stated that he does not want to upset the expectations that were set by the Cole Memorandum.

By an Act of Congress

The fifth pathway to federal legalization would be through an act of Congress. This has also not found success up to this point. In order for an amendment to the CSA to be made, a piece of legislation would have to pass both bodies. Currently, the Senate has a Republican majority. Republicans have traditionally not supported marijuana legislation, but this trend is also changing. It would also be interesting to see how Republican senators from states that have legalized marijuana would vote. Alaska recently legalized recreational marijuana and has two Republican senators, Senators Lisa Murkowski and Dan Sullivan. Many marijuana lobbyists are hoping that these two would vote against most of their party to support the best interest of their state. Colorado also has Senator Cory Gardner, a Republican, whose vote could also go either way.

On the House side, Democrats gained a majority in 2018 midterm elections. This greatly increases the chances of a bill passing through the House, but this does not remedy the lack of support in the Senate. There are currently many pieces of legislation in Congress that are relevant to marijuana. H.R. 420, "Regulate Marijuana Like Alcohol," was introduced by Congressman Blumenauer of Oregon in January of 2019. It has four cosponsors and is currently in the House Agriculture Committee. The Marijuana Justice Act of 2019, H.R. 1456 was introduced by Congresswoman Barbara Lee of California and has 36 cosponsors. This bill is currently in the House Financial Services Committee. It is unclear if or when these bills will make it to the House floor, and how they will do if they ever make it to the Senate.

Through a Constitutional Amendment

Marijuana could become legal through a Constitutional Amendment, much like how alcohol did. The ratification of the 21st Amendment repealed the prohibition of alcohol that was established by the 18th Amendment (U.S. Constitution). There has been much comparison between marijuana and alcohol, and it makes sense that the two should be regulated similarly. Despite the 21st Amendment's ratification, states and municipalities still have the right to make stricter laws about alcohol purchase and consumption. There are dry counties throughout the country, and others regulate the purchase of alcohol more strictly. This model could be used in the realm of marijuana. If the drug was legalized federally, states and counties could still regulate it more strictly.

Looking Ahead

Taking all of this into account, advocates of marijuana should focus their efforts on upcoming elections. Many activists choose to focus on the national scale, but all levels of government can make impactful decisions deciding the future of marijuana. As seen in *Ter Beek*, even city ordinances can affect marijuana. The importance of presidential elections cannot be understated, but it should not overshadow the importance of other elected offices. The majority of the United State Senate is currently defined by three individuals. Every single seat in the Senate is vital in the progression of marijuana legalization. It should also be noted that party lines are simply predictive of votes, and that many other factors must be taken into account. Many Republicans are progressive on the issue of marijuana, particularly when they take the economic benefits into account.

The argument that federal law does not preempt state law in the realm of marijuana could find a lot of success in the future. The fact that the Michigan Supreme Court ruled that federal preemption does not apply here carries a lot of weight, and the argument is strong enough to make it further. The possibility to comply with both federal and state law simultaneously would be a huge selling point. It is also worth noting that while conservatives are typically anti-marijuana, they are typically pro-states' rights. By spinning this issue as something that should be left to the states, it could be more appealing to conservatives. The United States Supreme Court has been becoming more conservative, so it could be helpful to play to the values of conservatives (Liptak & Parlapiano).

References

- American Civil Liberties Union. *The War on Marijuana in Black and White*, 2013.
Retrieved from <https://www.aclu.org/report/report-war-marijuana-black-and-white>.
- Barber, C. (2016, October 20). Public Enemy Number One: A Pragmatic Approach to America's Drug Problem » Richard Nixon Foundation. Retrieved from <https://www.nixonfoundation.org/2016/06/26404/>.
- Baum, Dan. "Legalize It All." *Harper's Magazine*, Apr. 2016. Retrieved from harpers.org/archive/2016/04/legalize-it-all/.
- Bender, Steven W. "The Colors of Cannabis: Race and Marijuana," *U.C. Davis Law Review* vol. 50, no. 2 (December 2016): p. 689-706. *HeinOnline*.
- Bonica, A., & Woodruff, M. J. (2014, June 20). A Common-Space Measure of State Supreme Court Ideology. [PDF File] Retrieved from http://web.stanford.edu/~bonica/files/BW_ssc_ideology.pdf.
- City of Wyoming Code of Ordinances § 90-66 (2013).
- CSPAN. (2019, January 15). Attorney General Confirmation Hearing, Day 1 [Video File]. Retrieved from <https://www.c-span.org/video/?456626-1/attorney-general-nominee-william-barr-confirmation-hearing&start=14153>.
- Defense Information Systems Agency. (2019, April 25). Map of Marijuana Legality by State. Retrieved from <https://disa.com/map-of-marijuana-legality-by-state>.
- Deiters, B. (2014, February 06). Michigan Supreme Court strikes down Wyoming medical marijuana ordinance. Retrieved from <https://www.mlive.com/news/grand>

-rapids /2014/02/michigan_supreme_court_strikes.html.

Drug Policy Alliance. (2014, September 3). 25th Anniversary of President George H.W.

Bush's Infamous Oval Office Speech Escalating "War on Drugs". Retrieved from <http://www.drugpolicy.org/news/2014/09/friday-25th-anniversary-president-george-hw-bushs-infamous-oval-office-speech-escalatin>.

Federal IND Patients. (n.d.). Retrieved from <https://www.medicalcannabis.com/patients-care-givers/federal-ind-patients/>.

Glover, S. (2017, January 10). Allegations of racism against Sessions: A closer look.

Retrieved from <https://www.cnn.com/2016/11/18/politics/jeff-sessions-racism-allegations/>.

Hari, J. (2016). *Chasing the Scream: The First and Last Days of the War on Drugs*.

London: Bloomsbury.

Hawdon, J., & Kleiman, M. (2011). *Encyclopedia of Drug Policy*. Thousand Oaks:

SAGE Publications, Inc. Retrieved from <https://search.ebscohost.com/login.aspx?direct=true&db=e025xna&AN=474333&site=ehost-live&scope=site>.

Hodroff, M. B. "The Controlled Substances Act: Time to Reevaluate Marijuana,"

Whittier Law Review vol. 36, no. 1 (Fall 2014): p. 117-146. *HeinOnline*.

"Just Say No". (1986, September 14). Retrieved from <http://www.cnn.com/SPECIALS>

[/2004/reagan/stories/speech.archive/just.say.no.html](http://www.cnn.com/SPECIALS/2004/reagan/stories/speech.archive/just.say.no.html).

Liptak, A. & Parlapiano, A. (2018, June 28). Conservatives in Charge, the Supreme Court

Moved Right. Retrieved from <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>.

McNearney, A. (2018, April 20). The Complicated History of Cannabis in the US.

Retrieved from <https://www.history.com/news/marijuana-criminalization-reefer-madness-history-flashback>.

Michigan Medical Marihuana Act of 2008. Mich. Comp. Laws 333.26424 (2008).

Murphy v. NCAA 86 US 4282 (2018).

Roe v. Wade, 410 U.S. 113 (1973).

Southerland, V. M., and Johanna B. Steinberg. "Boehner Benefits from Weed.

Blacks Are in Prison for Using It." *The New York Times*, The New York Times, 19 Apr. 2018, Retrieved from www.nytimes.com/2018/04/19/opinion/boehner-marijuana-blacks-prison.html.

Speights, K. (2019, February 24). What's Trump Really Going to Do About Marijuana?

Retrieved from <https://www.fool.com/investing/2019/02/24/whats-trump-really-going-to-do-about-marijuana.aspx>.

Ter Beek v. City of Wyoming, 846 N.W.2d 531 (Mich. 2014).

The Comeback Kid. Directed by Rhys Thomas, performance by John Mulaney, Netflix, 2015. *Netflix*.

United States. Commission on Marihuana and Drug Abuse. (1972). *Marihuana: a signal of misunderstanding: first report. Appendix*.

U.S. Const. amend. XXI

Walker, A. and Galliher, J. F. (1976). *Social Problems*, 24(3), 367-376.

Waxman, Olivia B. "Presidents and Drugs-Bill Clinton Didn't Inhale 25 Years Ago."

Time, Time, 29 Mar. 2017, Retrieved from time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/.

21 U.S.C. §§ 1-2252 (2017).