Effects of the Single Convention on Narcotic Drugs upon the Regulation of Marijuana

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AFTER THE SINGLE CONVENTION ON NARCOTIC DRUGS UPON THE REGULATION OF MARIJUANA

Another important reason for becoming a party to the 1961 convention is the marihuana problem. . . . Several groups in the United States are loudly agitating to liberalize controls and, in fact, to legalize its use.

. . . If the United States becomes a party to the 1961 convention we will be able to use our treaty obligations to resist legalized use of marihuana. This discussion is going on all over the country, in many universities, and in fringe groups, and it is rather disturbing.*

On June 24, 1967, the United States became a party to the Single Convention on Narcotic Drugs, 1961.1 This multilateral, international treaty includes the substance cannabis for the first time as a subject of international drug control.2 Cannabis is the plant from which marijuana is produced.3 The ratification of this treaty may have significant effect upon federal and state marijuana control. The regulative provisions and general obligations of the Single Convention impose no obligations not currently satisfied in the United States by the broad coverage of existing federal and state laws.4


2 CONVENTION ON NARCOTIC DRUGS, 1961, S. EXEC. REP. NO. 11, 90th Cong., 1st Sess. 11 (1967) (statement of James P. Hendrick, Special Assistant to the Secretary of the Treasury (for Enforcement)).

3 “Cannabinol, the resin of the cannabis plant [Cannabis sativa (Indian Hemp)] which is responsible for its potency as an intoxicating drug, is found in the flowering tops of the female plant [Cannabis indica]. It is extracted from cultivated plants in relatively pure form, known as charas in India, and used for smoking and eating. Hashish is a powdered and sifted form of this resin. A less potent preparation is made from the cut tops of the uncultivated female plant and contains a relatively low content of resin, which is known as bhang and used either for drinking as a tea, or as a smoking mixture. Marihuana is a Mexican name for the equivalent of bhang.” D. MAURER & V. VOGEL, NARCOTICS AND NARCOTIC ADDICTION 92-94 (1954) [hereinafter cited as MAURER & VOGEL]. See also Taylor, The Pleasant Assassin: The Story of Marihuana, in THE MARIHUANA PAPERS 7-10 (D. Solomon ed. 1966).

4 CONVENTION ON NARCOTIC DRUGS, 1961, supra note 2, at 12.

“No new Federal legislation for the implementation of the Convention has been contemplated in view of the broad coverage existing under present Federal and State laws. If, however, those laws should be found inadequate to enable fulfillment of this Government’s obligations under the Convention, new Federal legislation will be considered.” Letter from Charles I. Bevans, Assistant Legal Adviser, Department of State, to the Author, November 2, 1967, on file in Hastings Law Library.
The Single Convention’s obligations do, however, establish a base from which the federal government could extend its regulative controls into an area considered formerly to be solely within the jurisdiction of the states. The significance of this instrument to those concerned with marijuana control and possible reduction or termination of restrictions on this substance is made apparent by examination of the nature of the obligations created by the treaty and the nature and scope of the federal treaty-making power.

The Single Convention on Narcotic Drugs

The Single Convention on Narcotic Drugs is the culmination of over 60 years of effort on the international level to control traffic and usage of narcotic and dangerous drugs. The Single Convention is a synthesis of several prior international agreements on narcotic drug control. However, the Single Convention is in some areas less extensive in coverage than the previous, superseded agreements, while in other respects it is more extensive. The extension of international drug control by the Single Convention to cannabis is of fundamental concern to this discussion.

The objective of the Single Convention is to establish a universal instrument of international cooperation and control, limiting drug traffic and use to medical and scientific purposes. This is to be

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5 See notes 60-64 infra and accompanying text.

6 Bevans, *International Conventions in the Field of Narcotic Drugs*, 37 Temp. L.Q. 41 (1963). The Single Convention was the result of some 13 years' effort by the United Nations Economic and Social Council to consolidate operation and effect of the various prior international agreements on narcotics control. In January 1961, a conference was convened in New York City to study the Third Draft of the Single Convention put forward by the Economic and Social Council's Commission on Narcotic Drugs. After considerable revision, the Single Convention was opened for signature on March 30, 1961. *Id.* at 53-54; *see Convention on Narcotic Drugs, 1961*, S. Exec. Doc. G, 90th Cong., 1st Sess. at v (1967) (letter of submittal from Nicholas deB. Katzenbach, Under Secretary of State, to the President, February 15, 1967).

7 The Single Convention lists the prior treaties it partly or completely supersedes at article 44. For a good discussion of the prior treaties, see Bevans, *supra* note 6.

8 The Single Convention contains no provision for a "closed-list" of nations authorized to produce opium as was provided in the 1936 and 1953 treaties. *Convention on Narcotic Drugs, 1961*, *supra* note 2, at 7; Bevans, *supra* note 6, at 54. Under articles 49 and 50 of the Single Convention, parties may reserve the right to suspend immediate implementation of certain of the provisions of the treaty in their territory. *Convention on Narcotic Drugs, 1961*, *supra* note 2, at 10. U.S. accession was withheld for 6 years until it was decided that despite these less extensive factors the treaty was still a valuable document. *Convention on Narcotic Drugs, 1961*, S. Exec. Doc. G, *supra* note 6, at v.

9 The inclusion of provisions for treatment of addicts in article 38 of the Single Convention and the inclusion of cannabis and cocabush plants and derivatives as objects of international concern in article 2 of the Single Convention make the Single Convention more inclusive than the prior treaties. See Bevans, *supra* note 6, at 56; *Convention on Narcotic Drugs, supra* note 3, at 18.

10 The Single Convention, Preamble.
achieved by the restriction of drug manufacture and traffic to a system of quotas based on the medical and scientific needs of the parties.\textsuperscript{11}

The drugs and preparations are arranged into four schedules with different measures of control applicable to each schedule. Cannabis is included in schedule I as one of the drugs to which the general regulative provisions of the treaty are to apply.\textsuperscript{12} Cannabis is also included in schedule IV, a listing of the most dangerous drugs.\textsuperscript{13} For this schedule it is recommended that additional, special control measures should be adopted by the parties, extending, if necessary for the protection of public health and welfare, to prohibition of manufacture, traffic or use of the drugs, except for medical and scientific research.\textsuperscript{14} The criterion of being "particularly liable to abuse and to produce ill effects... not offset by substantial therapeutic advantages"\textsuperscript{15} apparently was the basis used for placing cannabis in this most stringently regulated category.\textsuperscript{16}

In addition, article 28 of the Single Convention pertains especially to the control of cannabis. Cultivation of the cannabis plant for the production of cannabis or cannabis resin is to be highly restricted,\textsuperscript{17} and misuse of and illicit traffic in the leaves of the cannabis plant are to be prevented by whatever measures necessary.\textsuperscript{18} The restrictions are not to apply to cultivation intended exclusively for industrial or horticultural purposes.\textsuperscript{19}

The responsibility for controlling international drug use and supply is placed in the International Control Board.\textsuperscript{20} Annual estimates of drug consumption\textsuperscript{21} and statistics concerning various phases

\textsuperscript{11} See notes 20-24 infra and accompanying text.
\textsuperscript{12} The Single Convention, art. 2, para. 1.
\textsuperscript{14} The Single Convention, art. 2, para. 5.
\textsuperscript{15} \textit{Id.}, art. 3, para. 5.
\textsuperscript{16} \textit{Id.}, Paragraph 5 of article 3 of the Single Convention provides for adding substances to schedule IV on this basis. A report to the Conference on the Convention stated: "The prohibition or regulation of the use of a drug representing a particularly high danger to the community should continue to be recommended by international organs concerned, but should not be mandatory." United Nations Economic and Social Council, Commission on Narcotic Drugs, The Question of Cannabis, E/CN.7/399 at 4 (1960); see MAURER & VOGEL 96 (cannabis medically an unimportant drug). \textit{But cf.} Walton, \textit{Therapeutic Application of Marihuana}, in \textit{THE MARIHUANA PAPERS} 394 (D. Solomon ed. 1966).
\textsuperscript{17} The Single Convention, art. 28, para. 1.
\textsuperscript{18} \textit{Id.}, para. 3.
\textsuperscript{19} \textit{Id.}, para. 2.
\textsuperscript{20} The International Control Board is to be established pursuant to articles 5, 9-15 of the Single Convention. It will replace the Permanent Central Narcotics Board and the Drug Supervisory Body of the prior international agreements on March 2, 1968, pursuant to article 45 of the Single Convention. \textit{CONVENTION ON NARCOTIC DRUGS, 1961, S. Exec. Doc. G}, supra note 6, at vi.
\textsuperscript{21} The Single Convention, art. 19: The parties are to furnish annual estimates in respect of the following matters: (1) quantities of drugs to be consumed for medical and scientific purposes; (2) quantities to be used in
of drug activity\textsuperscript{22} are to be furnished by the parties to the Control Board. The total quantity of each drug manufactured or imported by any country is not to exceed the sum of the following: (1) the quantity consumed for medical and scientific purposes; (2) the amount used to manufacture less harmful, non-regulated drugs; (3) the quantity exported; (4) the amount necessary to bring supply in stock to relevant estimate levels; and (5) the quantity acquired for special purposes.\textsuperscript{23} The Control Board is authorized to prohibit exports to a country whose manufacture and importation exceeds the established estimates.\textsuperscript{24}

The parties obligate themselves to take such legislative and administrative measures as may be necessary to give effect to and carry out the convention; to cooperate with other states in executing the provisions of the convention; and "to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution, trade in, use and possession of drugs."\textsuperscript{25}

The manufacture,\textsuperscript{26} trade and distribution,\textsuperscript{27} as well as importation and exportation\textsuperscript{28} of the regulated substances are to be controlled either by the licensing of private companies or by the restriction of these activities to state enterprises. Exports to other countries are prohibited, except those both in accordance with the exporting country's laws and within the quota limitations established pursuant to the Single Convention.\textsuperscript{29} Subject to their constitutional limitations, the parties are to ensure that acts contrary to the provisions of the Single Convention are to be punishable criminal offenses.\textsuperscript{30}

**Present Regulation of Marijuana**

The obligations set forth in the Single Convention are currently satisfied in the United States by the combination of federal and state regulations on the manufacture, traffic, and use of marijuana.\textsuperscript{31}

\begin{footnotesize}
\textsuperscript{22} Id., art. 20: The parties are to provide annual statistics in respect of the following matters: (1) production of drugs; (2) utilization of drugs for manufacture of less harmful substances; (3) consumption of drugs; (4) imports and exports of drugs; (5) seizure and disposal of drugs; and (6) stocks of drugs on hand.

\textsuperscript{23} Id., art. 21, para. 1.

\textsuperscript{24} Id., para. 4.

\textsuperscript{25} Id., art. 4 (emphasis added).

\textsuperscript{26} Id., art. 29.

\textsuperscript{27} Id., art. 30.

\textsuperscript{28} Id., art. 31.

\textsuperscript{29} Id., para. 1. See notes 20-24 supra and accompanying text for a discussion of the regulatory quota system.

\textsuperscript{30} Id., art. 36: "[C]ultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch in transit, transport, importation and exportation of drugs" are the activities explicitly listed by article 36 to be criminally punishable when not in accord with the Convention's provisions. Article 37 provides that drug substances and equipment used for commission of offenses referred to in article 36 are to be liable to seizure and confiscation.

\textsuperscript{31} See letter from Charles I. Bevans, note 4 supra.
\end{footnotesize}
Federal legislation for the regulation of drugs has been principally based upon the federal government's powers to levy taxes and regulate commerce. Penalties provisions in regulatory revenue and commerce measures in the drug field have been upheld as valid exercises of federal power. A regulatory tax scheme was imposed on marijuana in 1937. Importation of narcotics and marijuana has been greatly restricted by legislation pursuant to the federal power to regulate foreign commerce. Strict penalty provisions for possession of illegally imported marijuana are an important element of

32 U.S. Const. art. 1, § 8, cl. 1.
33 U.S. Const. art. 1, § 8, cl. 3.

The initial regulatory act in the drug field was the Harrison Anti-Narcotics Act of 1914, ch. 1, 38 Stat. 785 (1919), pertaining to opiates. The act was held to be a valid revenue measure, notwithstanding that its effect might be to accomplish another purpose as well as raise revenue, and that the supposed motivation for its enactment was to regulate drugs in a manner that could be accomplished by the police power of the states. United States v. Doremus, 249 U.S. 86, 93-94 (1919); accord, Alston v. United States, 274 U.S. 289, 294 (1927); Nigro v. United States, 276 U.S. 332, 335-54 (1928); see United States v. Contrades, 196 F. Supp. 803, 811-12 (D. Hawaii 1961).

Marijuana Tax Act of 1937, ch. 533, 50 Stat. 551. The present revenue provisions are in Int. Rev. Code or 1954, §§ 4741-46 (transfer tax), and 4751-57 (occupational tax). The present penalties for violation of revenue provisions are found in Int. Rev. Code of 1954, § 7237. Under this section, where no specific penalty is provided, an offense is to be punished by not less than 2 years or more than 10 years imprisonment and up to $20,000 fine; for a second offense, 5 to 10 years imprisonment and up to $20,000 fine; for a third and subsequent offense, 10 to 40 years imprisonment and up to $20,000 fine are to be assessed. Int. Rev. Code of 1954, § 7237(a). Sale or transfer of marijuana without the requisite written order, prohibited by Int. Rev. Code of 1954, § 4742(a), is to be punished by 5 to 20 years imprisonment and up to $20,000 fine; the penalties are increased to 10 to 40 years for subsequent offenses, or where the transferee is under 18 years old. Int. Rev. Code of 1954, § 7237(b).

"On its face the statute [Marijuana Tax Act of 1937] authorizes transactions between persons, such as importers, wholesalers, physicians, and others, who have paid certain occupational and transfer taxes. But in fact, since there is no accepted medical use of marijuana, only a handful of people are registered under the law, and for all practical purposes the drug is illegal. Unauthorized possession, which in this context means possession under almost any circumstances, is a criminal act under the Federal tax law." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 214 (1967) [hereinafter cited as President's Commission on Law Enforcement].

United States v. Sanchez, 340 U.S. 42 (1950), upheld the Marijuana Tax Act of 1937. The regulatory measures were held not to be invalid even though they regulated, discouraged or deterred the activities taxed; or because the revenue was negligible; or because the act affected activities Congress might not otherwise control. Id. at 44.

37 21 U.S.C. § 176a (1964). Importing or trafficking in imported marijuana contrary to law is punishable by 5 to 20 years imprisonment and up to $20,000 fine. Id. Possession of marijuana is deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury. Id; see Williams v. United States, 250 F.2d 451 (9th Cir. 1961).

38 U.S. Const. art. 1, § 8, cl. 3.
this legislation. Interstate transportation of marijuana upon which no tax has been paid is also illegal.  

In addition to the regulations based on the taxing and commerce powers, direct federal restrictions and prohibitions on narcotic drug manufacture and distribution have been founded on the power of Congress to enact legislation necessary to implement the obligations of executory treaties.

Narcotics and marijuana are regulated at the state level through the police power. The Uniform Narcotic Drug Act, in force in all states except California and Pennsylvania, makes unauthorized manufacture, possession, control, sale, prescription, administration, or compounding of any narcotic drug illegal. Marijuana is included as a narcotic drug in this act. Unauthorized transportation, addiction, or use are not included under the restrictions of the Uniform Act. Such activities are, however, subject to control under the state police power. In addition to the Uniform Act, some states provide for misdemeanor penalties for marijuana use. The California and Pennsylvania statutes are regarded to be at least as effective as the provisions of the Uniform Act.

Note 35 supra.  

INT. REV. CODE OF 1954, § 4755(b).  

For example, opium poppy growing, except under federal license limited to scientific and medical purposes, was forbidden by the Opium Control Act of 1942, 21 U.S.C. §§ 188-88n (1964). This act was held to be a constitutionally valid implementation of the obligation to control production of opium pursuant to 1912 and 1931 international opium conventions in Stutz v. Bureau of Narcotics, 56 F. Supp. 810, 812-13 (N.D. Cal. 1944), which is the first judicial application of the doctrine of Missouri v. Holland, 252 U.S. 416 (1920) (discussed note 64 infra), to legislation pursuant to treaties in the field of narcotic drug control. Anslinger, The Implementation of Treaty Obligations in Regulating the Traffic in Narcotic Drugs, 8 Am. U.L. Rev. 112, 113 (1959).

See notes 73-78 infra and accompanying text.  


UNIFORM NARCOTIC DRUG ACT § 2.  

UNIFORM NARCOTIC DRUG ACT § 1(14).  


E.g., N.J. STAT. ANN. 2A:170-8 (Supp. 1966) (persons using or under the influence of any narcotic drug defined under the Uniform Narcotic Drug Act, which includes marijuana, is a disorderly person); see State v. Reed, 34 N.J. 554, 170 A.2d 419 (1961).

CAL. HEALTH & SAFETY CODE §§ 11530-32.

PA. STAT. ANN. tit. 35, c. 6, §§ 780-1 to -81 (1964). Marijuana is defined as a narcotic drug under § 780-2(g)(3). Possession, sale and various types of trafficking in narcotics are prohibited under § 780-4(q); under § 780-4(r), unauthorized use of narcotics is prohibited.

MAURER & VOGEL, supra note 3, at 198.
California marijuana proscription is based on a prohibition of unauthorized marijuana cultivation or possession; violation is punishable as a felony by imprisonment for 1 to 10 years. Possession for unauthorized sale, transportation, unauthorized sale, and supplying marijuana to minors are more severely punished. Marijuana also comes within the general regulations on narcotics, such as illegal narcotics use, being under the influence of narcotics, or being in a room where narcotics are being used.

It is the combination of federal and state regulation that establishes an effective proscriptive system as to the recreational use of marijuana. Since the prohibitive enactments of the states allow virtually no legitimate use of marijuana, it is unreasonable to expect compliance with the federal regulations, as there is no lawful activity upon which the tax may be paid. Accordingly, the effect of the federal taxing and import restrictions as a regulative device would be weakened by the elimination of state marijuana proscriptions.

If the state proscriptions were revoked or drastically revised, additional federal measures would be necessary to maintain the current level of control on activities related to the use of marijuana. But in this regard, the United States Supreme Court has suggested that direct federal restrictions on narcotics and marijuana would be

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52 CAL. HEALTH & SAFETY CODE § 11530.
53 CAL. HEALTH & SAFETY CODE § 11530.5 (possession for sale, 2 to 10 years imprisonment; no parole or release until 2 years served); CAL. HEALTH & SAFETY CODE § 11531 (transportation or sale, 5 years to life imprisonment; no parole or release until 3 years served); CAL. HEALTH & SAFETY CODE § 11532 (sale to minors, 10 years to life imprisonment; no parole or release until 5 years served).
54 For Division 10 of the California Health & Safety Code on Narcotics, marijuana, its derivatives or compounds, is included under the definition for narcotics. CAL. HEALTH & SAFETY CODE § 11001.
55 CAL. HEALTH & SAFETY CODE § 11721 makes use or being under the influence of narcotics a misdemeanor offense. "The 'use' part of the statute is rarely enforced. Although the accused may be using the drug, if he possesses it he will be tried under the felony provisions of § 11530; if he does not possess the drug but is 'under its influence,' he will be tried under § 11721." Boyko & Rotberg, Constitutional Objections to California's Marihuana Possession Statute, 14 U.C.L.A.L. REV. 773, 785 n.63 (1967).
56 CAL. HEALTH & SAFETY CODE § 11556.
57 The term "recreational use" herein denotes the use of marijuana for religious and psychological, as well as pleasurable experiences.
58 See quotation from PRESIDENT'S COMMISSION ON LAW ENFORCEMENT 214, supra note 35.

"In conclusion it may be stated that a successful solution to the narcotic drug problem is dependent upon the enactment of efficient and adequate State laws authorizing the control of habit-forming narcotic drugs and the scientific treatment of persons enmeshed in the drug habit.

"Without such legislation the Federal anti-narcotic law cannot serve to, nor was it designed to, stop the illicit traffic in narcotic drugs and the evil of narcotic addiction."
an infringement on the residual powers of the states. Subsequent to this dicta, however, the scope of the power of the federal government to regulate interstate commerce has been greatly expanded, and might now serve as the basis for legislation directly prohibiting traffic in marijuana. However, the constitutional scope of such

60 Direct federal restrictions as to narcotics or marijuana are discussed as being outside the purview of congressional power in cases upholding narcotics and marijuana taxing regulations. In United States v. Sanchez, 340 U.S. 42, 44 (1950), the marijuana tax was not invalidated because it affected activities Congress "might not otherwise regulate." In Nigro v. United States, 276 U.S. 332, 341 (1928), the Court stated:

"In interpreting the [Revenue Act of Dec. 17, 1914 ch. 1, § 1, 38 Stat. 785], we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid, just as the Child Labor Act of Congress was held to be . . . ." See Alston v. United States, 274 U.S. 289, 294 (1927); United States v. Doremus, 249 U.S. 86, 93-94 (1919).

"The Federal decisions in which the constitutionality of this type of legislation [regulatory taxes] has been raised contain numerous statements expressly or tacitly holding or assuming that Congress would be without power to prohibit or regulate a purely intrastate transaction in narcotics not linked in some way with foreign or interstate commerce or taxation." United States v. Contrades, 196 F. Supp. 803, 811-12 (D. Hawaii 1961) (dictum) (footnote omitted).

61 Discussing the occasion for use of treaties instead of executive agreements where there is a possibility of affecting reserved powers of the states, Byrd comments:

"The question immediately arises . . . as to what powers are reserved to the states . . . . At one point in constitutional history, for example, the commerce power of Congress does not extend to the regulation of child labor, and such regulation is reserved to the states; [Hammer v. Dagenhart, 247 U.S. 251 (1918)] at another point in constitutional history the commerce power of Congress does extend so far [United States v. Darby, 312 U.S. 100 (1941)]. Some authorities argue that there should be nothing reserved to the states, that indeed the Founding Fathers intended this and that the Tenth Amendment comprised words signifying nothing, because all powers had been delegated [W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953)]. But all commentators agree that as a matter of legal fact, whatever the ideas of the Founders, some powers are still reserved to the states . . . . Thus, the definition of powers belonging to the federal government and to the states is always in flux, but by definition some powers are reserved to the states as long as an arrangement of constitutionally distributed powers exist; when all agree that no powers are reserved to the states, then all will agree that the United States has developed into a unitary form of government, at least from the viewpoint of supremacy." E. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 134 (1960) [hereinafter cited as BYRD].

62 The question of the proper relationship of the residual powers of the state governments to the congressional power to prohibit interstate shipment of articles whose use in the state of destination might reasonably be conceived to be "injurious to the public health, morals, or welfare" arose in United States v. Carolene Products Co., 304 U.S. 144, 147 (1938). Therein prohibition of interstate shipment of filled milk was seen not to be a "forbidden invasion of state power either because its motive or its consequence [was] to restrict the use of articles of commerce within the states of destination," or that the "exertion of the power to regulate interstate commerce . . .
direct federal regulation, and its effectiveness in conjunction with revenue and importation regulations as a substitute for state prescriptions, need not be considered. The problem of infringement on the residual powers of the state governments could be avoided by founding legislation directly regulating the use of marijuana on the obligations of the Single Convention. Federal measures based upon the treaty power are more clearly established as predominant over the residual powers of the states than are federal measures based upon powers expressly granted to Congress.

The Treaty-Making Power

The treaty-making power of the federal government is broad in scope and far-reaching in effect. Once a subject is established is attended by the same incidents which attend the police power of the states.”

Interstate transportation of marijuana upon which no tax has been paid is prohibited under current laws. Int. Rev. Code of 1954, § 4755; note 40 supra and accompanying text.

The obligations of the Single Convention to limit production, traffic and use of cannabis to medical and scientific purposes, as established by articles 4, 19-21, and possibly to prohibit the production, traffic, and use of cannabis if seen as necessary, as established in article 2, could be used as the foundation for direct federal laws. See notes 14, 18, 25-30, supra and accompanying text.

Missouri v. Holland, 252 U.S. 416 (1920), established that Congress might legislate as to treaty obligations on matters with which an act of Congress might not otherwise deal without invading powers reserved to the states. The case argued that the tenth amendment applies only to restrict federal contravention of prohibitory statements of the Constitution. Id. at 433. The treaty power was delegated to the federal government with nothing residual in the states. Id. at 432-435. Congress could pass all laws necessary and proper to execute this power of the federal government, not contrary to prohibitory words of the Constitution. A treaty may override the state power to control “the great body of private relations that usually fall within the control of the State . . . .” Id. at 434. This doctrine was applied to the field of narcotics treaties for the first time in Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (N.D. Cal. 1944). See note 41 supra. “In light of the Court's decision in State of Missouri v. Holland [252 U.S. 416 (1920)] . . . , the holding and dictum in the Stutz [56 F. Supp. 810 (N.D. Cal. 1944)] and Eramdjian [155 F. Supp. 914 (S.D. Cal. 1957)] cases, and the very strong undertakings on the part of the United States in the various treaties and conventions relating to the control of narcotic drugs, there appears to be more than a plausible ground today . . . for justifying congressional regulation of intrastate transactions in narcotics without tying the same to illegal importation or exportation, or the exercise of the taxing power, but the question is not entirely free from doubt . . . .” United States v. Contrades, 196 F. Supp. 803, 812 (D. Hawaii 1961) (dictum) (emphasis added). The Congressional statement of purpose for the enactment of the Narcotics Manufacturing Act of 1960, 21 U.S.C. §§ 501-09 (1964), illustrates reliance on fulfilling treaty obligations as a basis for legislation directly licensing and controlling manufacture of narcotics. 21 U.S.C. § 501(4)-(5) (1964).

U.S. Const. art. II, § 2, cl. 2 (the President shall have the power to make treaties with the advice and consent of the U.S. Senate). U.S. Const. art. VI, cl. 2 (all treaties made under the authority of the United States are the supreme law of the land).

as a matter of international negotiation between the United States and other nations, it is a concern within the scope of the treaty-making power. Concerns under the treaty power are not limited by the concept of residual state powers. Thus, the matter is within the exclusive purview of the states only until an assertion of the federal interest is made by international negotiation and the resultant treaty.

The courts have divided treaties into two classes: self-executing and executory. Self-executing treaties become internal law upon ratification and are considered the law of the land, equivalent to an act of Congress. An executory treaty contemplates future legislative action by the signatory parties. Before such a treaty becomes internal law, Congress must pass implementing legislation. However, Congress cannot be compelled to implement an executory treaty. Until implementing legislation is enacted, the negotiated international promise remains inchoate as to internal effect. However, Congress decides to implement a treaty, it has the power to make all necessary laws for carrying a treaty into execution. Congressional determination that such legislation is appropriately related to the discharge of this constitutional power is sufficient for finding

67 Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Geofroy v. Riggs, 133 U.S. 258, 266 (1890); In re Ross, 140 U.S. 453, 463 (1890); see Missouri v. Holland, 252 U.S. 416, 435 (1920).
68 Missouri v. Holland, 252 U.S. 416 (1920); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); see Geofroy v. Riggs, 133 U.S. 258, 266 (1890). For discussion of the relation of the treaty power to the residual powers of the states, see Byrd 98-110, 129-135. See also note 63 supra and accompanying text.
72 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); see COWLES 1.
74 Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); Sei Fujii v. State, 38 Cal. 2d 718, 722, 242 P.2d 617, 621 (1952); CRANDALL 162-63; see H. Steiner, Constitutional Limitations Upon the Treaty-making Power 29, June 1928 (unpublished thesis in the University of California Library, Berkeley, California) [hereinafter cited as Steiner Thesis]. The judicial criterion as to a treaty provision being self-executing is the appearance of the intention of the signatory parties to prescribe a rule that standing alone would be enforceable in the courts, manifested by the instrument's language. Sei Fujii v. State, 38 Cal. 2d 718, 721-22, 242 P.2d 617, 620 (1952); see CRANDALL 163.
75 Steiner Thesis 29; see BYRD 144.
76 Steiner Thesis 29.
such legislation constitutionally valid.\textsuperscript{78}

The relationship of treaties and the powers derived therefrom to the general constitutional scheme has been a source of controversy.\textsuperscript{79} The courts have yet to state that a treaty is invalid because it violates the Constitution.\textsuperscript{80} However, there have been dicta stating that upon finding treaty provisions violative of the Constitution, the court would declare such provisions of the instrument invalid.\textsuperscript{81} A few examples of the invalidation of congressional acts designed to implement treaties, resulting in non-effectuation of the particular treaty provisions, have been noted.\textsuperscript{82}

No specific provision is made in the Constitution for applying to the treaty power the limitations of guarantees of personal rights generally applied to the power of the federal government.\textsuperscript{83} It has been argued that even though these limitations as expressed apply to specific branches of the government, they were intended to apply to each branch not independently, but as a part of the total system of federal government.\textsuperscript{84} A further substantiation of the position that treaties contrary to constitutional prohibitions are void is found in \textit{Reid v. Covert}.\textsuperscript{85} The Court there stated that the provisions of the

\textsuperscript{78} Id.

"The competency of the United States to enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit forming drugs is not questioned. . . . And Congress is constitutionally empowered to enact whatever legislation is necessary and proper for carrying into execution the treaty making power of the United States. U.S. Const. Art. I, § 8.

. . . . The constitutionality of the measures thus chosen by Congress to give efficacy to the treaty stipulations of the Convention is not dependent upon the wisdom or success of the choice. . . . The power of Congress to enact such legislation as is necessary or proper to carry into execution powers vested by the Constitution in the United States, of which the treaty making power is one, includes the right to employ any legislative measures appropriately adapted to the effective exercise of those powers. Juilliard v. Greenman, 110 U.S. 421. . . . So long as a rationally sound basis exists for the congressional determination that particular legislation is appropriately related to the discharge of constitutional powers, the validity of such legislation is unassailable." Id.

\textsuperscript{79} BYRD 83-87; Note, \textit{Treaty Law of the United States}, 14 INT'L & COMP. L.Q. 602, 606 (1965). \textit{See generally, Cowles} 14-15, discussing this as a question of "depth" of treaty making power rather than of "scope".


\textsuperscript{81} See, e.g., Reid v. Covert, 354 U.S. 1, 5-8, 16 (1957); Wilson v. Girard, 354 U.S. 524, 530 (1957); Asakura v. City of Seattle, 265 U.S. 323, 341 (1924); Missouri v. Holland, 252 U.S. 416, 433 (1920); Geofoy v. Riggs, 133 U.S. 258, 267 (1890); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853). For a statement that the discussions in the above cases amount to more than mere dicta, see Cowles 285.


\textsuperscript{83} Steiner Thesis 12.

\textsuperscript{84} Id. at 13.

\textsuperscript{85} 354 U.S. 1 (1957).
Constitution were designed to apply to all branches of federal power, including the treaty-making power.\textsuperscript{86}

**Effects of the Treaty on Current Marijuana Problems**

Though the Single Convention is an executory treaty,\textsuperscript{87} no new legislation stemming from its obligations is foreseeable, with the current federal-state regulation system on marijuana in effect.\textsuperscript{88} The Single Convention "imposes no obligations not already being satisfied by the United States."\textsuperscript{89} The importance of the Single Convention develops upon consideration of possible future changes in state marijuana regulations,\textsuperscript{90} necessitating further federal legislation.\textsuperscript{91}

Recent criticism of the system proscribing the use of marijuana has engendered a controversy from which modifications of state regulatory policies might result.\textsuperscript{92} The ultimate outcome of this controversy can only be conjectured. The regulations on marijuana use tantamount to prohibition have been criticized as inappropriate to the nature of the substance\textsuperscript{93} and ineffective as a deterrent to illicit use.\textsuperscript{94}

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\textsuperscript{86} Id. at 16-19. *See generally* BYRD 89-98. The "inherent power" doctrine of United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936), placing treaties outside and above the Constitution is seen as effectively contained by *Ex parte* Quirin, 317 U.S. 1, 25-26 (1942), and Reid v. Covert, 354 U.S. 1, 5-6 (1957). *Byrd* 98.

\textsuperscript{87} *See note 74 supra* for criterion for finding a treaty self-executing or executory. Article 4 of the Single Convention illustrates the intent of the parties to enact implementing legislation to execute the provisions of the treaty. *Note 25 supra* and accompanying text; *see* Anslinger, *The Implementation of Treaty Obligations in Regulating the Traffic in Narcotic Drugs*, 8 AM. U.L. REV. 112, 116 (1959).

\textsuperscript{88} *Letter from Charles I. Bevans, supra note 4.*

\textsuperscript{89} *Convention on Narcotic Drugs, 1961, supra note 2, at 12.*

\textsuperscript{90} Because federal legislation subsequent to a treaty prevails over contrary treaty provisions, the treaty does not affect procedurally the changes possible in federal laws. *See*, e.g., The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871); Head Money Cases, 112 U.S. 580, 598-99 (1884) (affirmed in some 20 later cases: *Byrd* 82-83 n.7). Just as Congress may pass laws contrary to previous laws, Congress may enact laws contrary to existing treaties, albeit the international obligation goes unfulfilled. Steiner Thesis 29.

\textsuperscript{91} *See Letter from Charles I. Bevans, supra note 4; notes 59-61 supra* and accompanying text.


\textsuperscript{94} *Report of the Assembly Interim Comm. on Criminal Procedure on Narcotics Control, supra note 92, at 11.*
A policy similar to that for regulating the use of alcohol has been suggested.\textsuperscript{95} The harshness of the penalties imposed for violation of marijuana regulations, especially possession, has also been criticized.\textsuperscript{96} Proposals that penalties for mere possession be reduced to misdemeanor degree have been suggested as an alternative to complete elimination of proscriptive legislation.\textsuperscript{97} State marijuana proscriptions are also attacked as infringements on personal freedoms guaranteed by the Federal Constitution.\textsuperscript{98} These constitutional questions would not be avoided by basing similar federal proscriptions on the obligation to fulfill treaty obligations.\textsuperscript{99}

The outcome of the foregoing debate notwithstanding, Congress apparently has gained a more direct source of power to legislate in the field of marijuana regulation than it had prior to the ratification of the Single Convention. It will be Congress that decides whether the treaty's obligations are being fulfilled and whether implementing legislation is desirable.\textsuperscript{100} If found to be expedient, Congress could enact legislation extending federal regulation to intrastate transactions in marijuana\textsuperscript{101} that could include prohibition of use beyond scientific and medical research.\textsuperscript{102} Without repeal\textsuperscript{103} of the treaty or amendment of the treaty by international procedure,\textsuperscript{104} the obligations of the Single Convention—and the federal power resulting therefrom—will be an important element in the future of marijuana regulation.

Apparently, federal marijuana controls based upon the taxing and commerce powers are at the moment confined by constitutional limitations. But possible legislation based upon treaty obligations could be much wider in scope and effect, extending to intrastate matters.\textsuperscript{105} In this respect, at least, the Single Convention must be

\textsuperscript{95} See note 93, supra.
\textsuperscript{96} See Boyko & Rothberg, supra note 92; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 12 (1967); President's Commission on Law Enforcement, supra note 35, at 225.
\textsuperscript{99} See notes 79–86 supra and accompanying text.
\textsuperscript{100} See notes 73–78 supra and accompanying text.
\textsuperscript{101} See notes 61–64 supra and accompanying text.
\textsuperscript{102} See note 14 supra and accompanying text.
\textsuperscript{103} Byrd 144; Crandall 465 (act of Congress approved by the President may terminate operation of a prior treaty as a law binding on the courts).
\textsuperscript{104} Amendments to the Single Convention must be proposed by parties to the treaty. The texts and reasons for adoption are to be communicated to the Secretary-General who is to communicate them to the parties and the Economic and Social Council. The Council may decide either to call a conference to consider the proposed amendment, or ask the parties whether they accept the proposed amendment. With no rejection by any party within 18 months, the proposed amendment enters into force; if rejected by any party, the Council is to decide whether to call a conference to consider the matter. The Single Convention, art. 47, paras. 1–2.
\textsuperscript{105} See Cowles 11.
acknowledged as an enlargement of the federal power to regulate drugs. An extensive authority is accordingly placed in the federal government to prohibit the use of marijuana.

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