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## Pacta Sunt Servanda State Legalization of Marijuana and Subnational Violations of International Treaties: A Historical Perspective

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# *Pacta Sunt Servanda*<sup>1</sup>

## State Legalization of Marijuana and Subnational Violations of International Treaties: A Historical Perspective

Brian M. Blumenfeld, J.D., M.A.\*

“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.” —James Madison, Federalist 42<sup>2</sup>

### *Abstract*

*In November 2012, voters in the states of Colorado and Washington passed ballot initiatives to legalize recreational marijuana industries. Since then, eight additional states and the District of Columbia have followed suit, and many more have seen legalization debates in their legislative halls and among their electorates. Over twenty bills recently introduced in Congress have sought to break federal marijuana laws away from prohibition. Although the national debate is indeed a vibrant one, it has neglected to address how legalization may be jeopardizing the compliance status of the United States under international drug treaties, and what the consequences may be if legalization means breach. For decision-making over marijuana policy to produce creditable outcomes, it must take into consideration the*

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1. Latin for “contracts should be adhered to.” *Pacta Sunt Servanda*, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS (3d ed. 2003). *Pacta Sunt Servanda* is a doctrine of international law ennobling the sanctity of treaties made between nations. See, e.g., Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S 331 (“‘PACTA SUNT SERVANDA’ [means that] [e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” (alteration in the original)).

2. THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

*factor of international relations. Subnational conduct implicating treaty commitments is in fact not without precedent in America, and one episode in particular—notable for its contributions to the nation’s constitutional origins—reveals how treaty noncompliance can degrade a nation’s diplomatic standing. This article examines both past and present controversies and uses the advantages of historical perspective to draw international drug law issues into the legalization debate.*<sup>3</sup>

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3. For Colorado and Washington ballot initiatives, see Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015). For additional legalization measures, see ALASKA STAT. § 17.38.010 (2018); CAL. BUS. & PROF. CODE § 26000 (West 2018); MASS. GEN. LAWS ch. 94G, § 7 (2018); NEV. REV. STAT. ANN. § 453D.020 (LexisNexis 2018); OR. REV. STAT. § 475B.005 (2018); VT. STAT. ANN. tit. 18 § 4230 (2018); Scott Thistle, *Recreational Marijuana is Now Legal in Maine—Sort of. Now the State has to Write the Rules.*, PORTLAND PRESS HERALD, <https://www.pressherald.com/2018/05/02/house-overturns-lepage-veto-on-recreational-marijuana-bill/> (last updated May 3, 2018). For nationwide debate, see, for example, ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 (2017). For bills introduced in the 115th Congress in the House, see, for example, H.R. 331, 714–15, 975, 1227, 1810, 1841, 2020, 2215, 2273, 2920, 115th Cong. (2017), and in the Senate, see, for example, S. Res. 777, 780, 1008, 1276, 1374, 1689, 115th Cong. (2017). For international relations issues missing in the discourse, see, for example, MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 192 (2017). Also note that international drug control treaties do not appear in any of the above ballot measures, proposed bills, leading scholarly articles on marijuana legalization, or in official federal and state papers. See, e.g., Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (Aug. 29, 2013) [hereinafter Cole Memo], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Chemerinsky et al., *supra* note 3; Sam Kamin, *Lessons Learned from the Governor’s Task Force to Implement Amendment 64*, 91 OR. L. REV. 1337 (2013); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5 (2013); COLO. AMENDMENT 64 IMPLEMENTATION TASK FORCE, TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO (2013), [https://www.colorado.gov/pacific/sites/default/files/A64TaskForce\\_FinalReport%5B1%5D\\_1.pdf](https://www.colorado.gov/pacific/sites/default/files/A64TaskForce_FinalReport%5B1%5D_1.pdf). The two parts of this article can also stand alone. If the reader is only interested in state violations of treaty obligations during the 1780s, see *infra* Part II. If the reader wishes to only learn of how marijuana legalization fits within the current international drug control regime, see *infra* Part III.

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## I. INTRODUCTION: THE MADISONIAN APPROACH

In March 1784, James Madison wrote a letter to Thomas Jefferson, who was then U.S. Ambassador to France, requesting that Jefferson ship back to Virginia every book he could find that “may throw light on the general Constitution . . . of the several confederacies which have existed. . . . The operations of our own must render all such lights of consequence.”<sup>4</sup> A year later Madison wanted more, this time asking for “treatises on the antient [sic] or modern federal republics, on the law of Nations, and the history natural and political of the New World.”<sup>5</sup> Jefferson obliged Madison in every request, and throughout the winter and spring months of 1786 Madison shut himself into his study at Montpelier to pore over the “literary cargo” that Jefferson corralled for him in Europe.<sup>6</sup>

Carefully dissecting the governments of history and the theories of history’s greatest political writers, Madison knew the task that lay before him and his coadjutants was nothing less than the crafting of a more perfect union out of a seaboard of disparate states. To help along the way, Madison took diligent notes on history’s confederations, citing their functions and their faults, confident that the more he knew of the successes and failures of times past, the better equipped he would be when facing the challenges of his own.<sup>7</sup>

Madison is certainly famous for his studies in history to prepare for the Constitutional Convention, and for his deployment of various historical exempla at Philadelphia, in the *Federalist Papers*, and against antifederalists in the Richmond ratification debates.<sup>8</sup> Yet even Madison-the-scholar cautioned

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4. Letter from James Madison to Thomas Jefferson (Mar. 16, 1784), in 8 *THE PAPERS OF JAMES MADISON* 6, 11 (Robert A. Rutland et al. eds., 1973).

5. Letter from James Madison to Thomas Jefferson (April 27, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON* 110, 111 (Julian P. Boyd ed., 1953).

6. See Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 4, at 472, 472; Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), in 9 *THE PAPERS OF THOMAS JEFFERSON* 332, 332–33 (Julian P. Boyd ed., 1954); see also DOUGLASS ADAIR, *James Madison, in FAME AND THE FOUNDING FATHERS* 176, 191–92 (Trevor Colbourn ed., 1974) (discussing Madison’s study of books received from Jefferson).

7. See JAMES MADISON, *Lessons of History: Of Ancient and Modern Confederacies*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 69 (Marvin Meyers ed., 1973). For comment on Madison’s study of ancient and modern confederacies, see, for example, ADAIR, *supra* note 6, at 191–92; JACK N. RAKOVE, *A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON* 39 (2017).

8. See, e.g., ADAIR, *supra* note 6, at 191–92; DOUGLASS ADAIR, “*That Politics May Be Reduced to a Science*”: *David Hume, James Madison, and the Tenth Federalist*, in *FAME AND THE FOUNDING FATHERS*, *supra*, note 6, at 132; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND*

against over-reverence of the past. Writing as Publius in Federalist fourteen, Madison shrewdly asked:

Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?<sup>9</sup>

Madison's historiographic duality sets a good example. Following its dictates, the point of the juxtaposition here is not to draw static lessons from history to be neatly applied to more or less relatable problems in the present. Instead, the point is to instantiate the Madisonian principle that knowing history is always an advantage when grappling with contemporary problems; and that any available precedent, however distinguishable in particulars or assailable as antimodel, will prove itself useful in myriad ways.

The founding generation, following the Revolutionary War, faced the dilemma of state actions clashing with the terms of the peace treaty.<sup>10</sup> Today, state legalization of marijuana is clashing with the terms of international drug control treaties.<sup>11</sup> Reviewing the historical record reveals certain diplomatic risks inescapably tied to questions of treaty noncompliance and provides instructive examples for how these risks and their consequences have unfolded in our nation's past.<sup>12</sup> Turning to the contemporary issues with this historical frame of reference highlights the potential costs from marijuana legalization that are external to strictly domestic policy considerations; and above all, underscores the imprudence of leaving international issues out of the legalization debate.<sup>13</sup>

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IDEAS IN THE MAKING OF THE CONSTITUTION 3, 42, 47 (1997); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 104–18 (1994); *THE FEDERALIST NOS. 18–20* (James Madison).

9. *THE FEDERALIST NO. 14* (James Madison), *supra* note 2, at 144.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Section II.D.

13. *See infra* Section III.E.

## II. THE TREATY OF PARIS &amp; THE ARTICLES OF CONFEDERATION

A. *The Terms of the Peace*

When the Treaty of Paris was signed by Great Britain and the United States on September 3, 1783, it not only concluded the Revolutionary War, it also initiated a diplomatic conflict between the former belligerents that would have lasting consequences for the infant United States.<sup>14</sup> Ratified by the Confederation Congress in January 1784, enforcement of the treaty proved problematic from the outset.<sup>15</sup> Political, legal and diplomatic contention over the substantive terms of the treaty—in the states, between the states and Congress, and at London’s Court of St. James—all contributed to the reform movement culminating in the Philadelphia Convention of 1787.<sup>16</sup>

The first article of the treaty, if not counted among the most memorable passages in American history, is certainly one of the most triumphant. After almost a decade of bloody conflict with their former sovereign, the newly minted American states finally received word that “[h]is Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof.”<sup>17</sup>

But recognition from Great Britain did not come free of charge. Aside from the military, economic, and humanitarian deprivations suffered during wartime, the United States also had to perform certain duties during peacetime.<sup>18</sup>

Three articles from the treaty stand out as most conciliatory:

- Article IV, though worded neutrally, was meant to ensure that American debtors repaid their loans to British and Tory creditors.<sup>19</sup>
- Article V stated that property confiscated from British subjects or Tories during the war should be either returned or compensated for, and that British subjects had at minimum twelve months to stay

14. See Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, Gr. Brit.- U.S., Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace]; *infra* Sections II.C–D.

15. Janelle Pavao, *Treaty of Paris*, REVOLUTIONARY-WAR.NET, <https://www.revolutionary-war.net/treaty-of-paris.html> (last visited Oct. 4, 2018).

16. See *infra* Sections II.C–D.

17. Treaty of Peace, *supra* note 14, at art. I.

18. See RICHARD B. MORRIS, THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE 436–39 (1965); *infra* notes 19–21 and accompanying text.

19. See Treaty of Peace, *supra* note 14, at art. IV.

within the United States to settle their affairs.<sup>20</sup>

- Article VI was meant to protect individuals on either side of the conflict from liability to prosecution or suit based on their conduct relating to the war.<sup>21</sup>

Though straightforward enough on their face, when it came time to put these obligations into practice, they proved an incorrigible source of conflict and confusion that busied domestic politicians and complicated the conducting of foreign affairs.<sup>22</sup> One reason for this can be gleaned from a more careful reading of the treaty itself. As with all legal documents (a treaty being a contract writ international), and perhaps most of all with diplomatic agreements, the precise language used is foundational to understanding how the policies engrossed will play out.<sup>23</sup>

Article V is worded so that Congress will “earnestly recommend” that the states execute the restoration and restitution of property provisions.<sup>24</sup> In articles IV and VI there is no such “recommend” clause, and instead the operative language is the imperative “shall.”<sup>25</sup> Does that mean that those articles are obligatory and article V is not? And on a more fundamental level, did the body ratifying the treaty—the United States in Congress Assembled—even have the authority to commit the states to, or enforce their compliance with, any obligations at all? Such ambiguities in treaty language, authority delegation, and enforcement capacity invited the ultimate question: would the parties perform?<sup>26</sup> As a constitutional matter for the Americans, the place to start looking for answers was the Articles of Confederation: What did they say about powers over foreign affairs, and how could the Confederation Congress operating under the constraints of its charter hope to uphold its end of the treaty?

20. *See Id.* at art. V.

21. *See Id.* at art. VI.

22. *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 939–40 (2010).

23. *See, e.g.*, *Schindler Elevator Corp. v. United States*, 563 U.S. 401, 407 (2011) (“Statutory construction must begin with the language employed by Congress . . .”) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)).

24. *See Treaty of Peace, supra* note 14, at art. V.

25. *Treaty of Peace, supra* note 14, at arts. IV, VI.; *see also* CHARLES R. RITCHESON, *AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES, 1783–1795*, at 50, 63 (1971) (commenting on the variation in language use).

26. *See Golove & Hulsebosch, supra* note 22, at 954 (“The resultant wording in the treaty, which alternated between the imperative and the permissive, reflected the commissioners’ concern that Congress would be unable to enforce its provisions directly.”).



*B. Powers Under the Articles of Confederation*

In American public memory, perhaps the only textual recollection of our first constitution comes from Article III, which branded the relationship between the states as “a firm league of friendship.”<sup>27</sup> The Articles of Confederation of course did more than that, addressing issues of governance over both domestic and foreign affairs, and establishing a Congress that orchestrated an ultimately successful, if at times fumbling, war effort.<sup>28</sup> But for purposes of understanding the diplomatic drama surrounding the implementation of the peace treaty, two provisions are seminal.

Article VI is written in the negative, prohibiting states from conducting foreign diplomacy on their own without congressional approval.<sup>29</sup> Article IX, in symmetrical contrast, positively grants these powers to Congress.<sup>30</sup> For example, “[C]ongress . . . shall have the *sole and exclusive right and power* of determining on peace and war . . . of sending and receiving ambassadors [and] *entering into treaties* and alliances.”<sup>31</sup>

Although the locus of the foreign affairs power is thus definitively delegated, the Articles were conspicuously missing the executive component of governance.<sup>32</sup> Nowhere is Congress granted the powers or machinery to enforce its own decrees, and therefore state compliance with congressional enactments was, in practice, voluntary.<sup>33</sup> James Madison, when diagnosing the ills of the Confederacy, titled this ailment a “want of sanction to the laws, and of coercion in the government of the confederacy.”<sup>34</sup> Madison elaborated on how “[a] sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution.”<sup>35</sup>

When Benjamin Franklin, John Adams, and John Jay were sent to Paris

27. ARTICLES OF CONFEDERATION OF 1781, art. III.

28. See, e.g., *id.* at arts. IV, VI. For fumbling war effort, see, for example, JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 275–84* (1979).

29. See ARTICLES OF CONFEDERATION OF 1781, art. VI (in relevant part).

30. See *id.* at art. IX.

31. *Id.* at art. IX, para. 1 (alteration in original) (emphasis added).

32. See *infra* notes 33–35 and accompanying text.

33. See, e.g., FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 47 (2d ed. 1997); *THE FEDERALIST* NOS. 15–16 (Alexander Hamilton).

34. MADISON, *Diagnosis of the American Confederacy: A Critical Case*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON*, *supra* note 7, at 82, 85.

35. *Id.*

in 1782 to conclude the peace, they confessed to their British counterparts that performance of treaty obligations was essentially the prerogative of the states.<sup>36</sup> Adams, perhaps overwrought amidst days of round-the-clock negotiations, blurted to British negotiators that “[w]e had no Power, . . . ‘and Congress had no Power, and therefore we must consider how [the treaty] would be reasoned upon in the several Legislatures of the separate States.’”<sup>37</sup>

The British did show signs of reluctance in doing business with representatives of a body possessing potentially illusory authorization.<sup>38</sup> But a deal was nonetheless struck, and when the aforementioned “recommend” clauses made their way into the treaty, they served as a formal reminder that Congress’s powers were as yet uncertain.

With the treaty ratified in early 1784, the leadership of Congress in foreign affairs was set to be tested in the laboratories of the several states. As the decade shook out, the new American nation—and perhaps more fatefully, the nations of Europe—witnessed a contest between the states and Congress over the function and viability of their “friendship.”<sup>39</sup>

### C. *Treaty Violations in Virginia & New York*

Although incidents were reported in all thirteen states, treaty violations were most pronounced, and therefore most intelligible, in Virginia and New York.<sup>40</sup> The politics of the former enflamed over the repayment of debts under Article IV of the peace treaty, the latter over compensation for property occupation under Article VI.<sup>41</sup> Each encapsulates the major obstacles to treaty enforcement faced by the new nation as it grasped toward acceptance into the international community.<sup>42</sup>

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36. See RITCHESON, *supra* note 25, at 35–37.

37. *Id.* at 35 (alteration in original).

38. See *id.* at 35–36.

39. Golove & Hulsebosch, *supra* note 22, at 934–35, 946–47.

40. For incidents of violations throughout the states, see John Jay, Report of Secretary John Jay, (Oct. 13, 1786), in 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 781, 784–97 (John C. Fitzpatrick ed., 1934). For singling out Virginia and New York, see, for example, RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789, at 197–98 (1987); ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, at 652 (2d ed. 1969); RITCHESON, *supra* note 25, at 77; Emory G. Evans, *Private Indebtedness and the Revolution in Virginia, 1776 to 1796*, 28 WM. & MARY Q. 349, 349 (1971).

41. NEVINS, *supra* note 40, at 648–50.

42. See, e.g., Golove & Hulsebosch, *supra* note 22, at 934–35.

## 1. Virginia

With its agrarian way of life fueled chiefly by systematic debt spending, Virginia's domestic economy became heavily leveraged on British credit during the second half of the eighteenth century.<sup>43</sup> On the eve of the Revolution, private debtors in Virginia owed more than £2,000,000 to British creditors, a sum that amounted to roughly half the private debt held throughout all of the other twelve colonies combined.<sup>44</sup> Under the colonial credit systems prevalent at the time, borrowers faced little difficulty in extending such debts year after year.<sup>45</sup> Competition among British merchants for American commerce was robust, and if one failed to extend credit, he did so at the risk of losing that account to another with looser lending standards.<sup>46</sup> When this was coupled with the careening demand for British luxuries trending at the time, especially among the Tidewater gentry, perpetual indebtedness naturally ensued and menacingly compounded.<sup>47</sup>

When war broke out, Virginians began to rethink their obligations to British creditors. Not altogether surprisingly, many debtors used the war as an excuse to relieve their burdens of repayment, and their representatives in the Virginia House of Delegates served as the means for securing their interests.<sup>48</sup>

The first direct form of relief came with passage of the Sequestration Act of 1777.<sup>49</sup> Under its debt provision, Virginians were able to "discharge" themselves of monies owed British creditors by making payments into the state loan office with paper money.<sup>50</sup> Because paper had consistently depreciated throughout the war years, debts were thereby paid off at pennies on

43. See *infra* notes 44–47 and accompanying text.

44. Evans, *Private Indebtedness*, *supra* note 40, at 349.

45. See, e.g., Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. 511, 524 (1962).

46. See *id.* at 521–23; see also Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176, 182–83 (1984) (describing "liberal extensions of credit").

47. See, e.g., RITCHESON, *supra* note 25, at 65; Evans, *supra* note 45, at 518–21.

48. See, e.g., ISAAC SAMUEL HARRELL, *LOYALISM IN VIRGINIA: CHAPTERS IN THE ECONOMIC HISTORY OF THE REVOLUTION* 129 (2nd ed. 1965); see also Evans, *Planter Indebtedness* *supra* note 45, at 532 (noting that, after hostilities began, "there was no possibility that the planters would seriously consider paying their debts to citizens of a country with whom they were at war").

49. See 9 WILLIAM WALLER HENING, *An Act for Sequestering British Property, Enabling Those Indebted to British Subject to Pay Off Such Debts, and Directing the Proceedings in Suits Where Such Subjects Are Parties*, in *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 377, 377–80 (1821).

50. *Id.* at 379–80.

the dollar.<sup>51</sup> When Thomas Jefferson, for example, made two payments into the loan office totaling £2,666 in paper money, he was issued a certificate for that amount even though it was only valued at roughly £90 sterling.<sup>52</sup> All told, Virginians paid off £273,554 of debt with paper money worth only £12,035 sterling.<sup>53</sup>

As hostilities dragged on, the House of Delegates took up a firmer stance against its wartime enemy. Measures passed in the May 1782 legislative session closed all Virginia courts to suits for recovery by British and Tory creditors.<sup>54</sup> And as access to judicial remedies became more closely tied to citizenship, Britons and Tories were also barred from entering the state or taking an oath of allegiance to become Virginians.<sup>55</sup>

The following year would see the signing of the Treaty of Paris, and the reaction in the fall session of the House of Delegates was equivocal at best. The state did reopen its borders to anyone other than U.S. citizens who defected to bear arms in service of the crown, and the legislature even paid statutory homage to the peace terms by providing that “nothing herein contained shall be construed so as to contravene the treaty of peace with Great Britain, lately concluded.”<sup>56</sup> Yet surging vigilantism obstructed actual debt collection, and out of the very same legislative session came a bill extending the closure of Virginia courts to British and Tory creditors for at least another year—a legal posture in naked violation of the treaty’s debt provision.<sup>57</sup>

51. See Evans, *Private Indebtedness*, *supra* note 40, at 353.

52. See Hobson, *supra* note 46, at 178.

53. RITCHESON, *supra* note 25, at 64.

54. See 11 WILLIAM WALLER HENING, *An Act to Repeal So Much of A Former Act As Suspends the Issuing of Executions upon Certain Judgements Until December, One Thousand Seven Hundred and Eighty-Three*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 75, 75–76 (1823).

55. 11 WILLIAM WALLER HENING, *An Act to Prohibit Intercourse with, and the Admission of British Subjects into This State*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 54 at 136, 136–38 (1821). An Act in the fall legislative session of 1782 closed a loophole in the above act that enabled Virginians to sue for recovery of debts originally owed British creditors. 11 WILLIAM WALLER HENING, *An Act to Amend an Act Intituled an Act to Repeal so Much of a Former Act as Suspends the Issuing of Executions on Certain Judgments Until December 1783*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 54 at 176, 176 (1821).

56. 11 WILLIAM WALLER HENING, *An Act Prohibiting the Migration of Certain Persons to This Commonwealth, and for Other Persons*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 54 at 324, 324–25 (1821).

57. 11 WILLIAM WALLER HENING, *An Act to Revive and Amend An Act, Intituled, An Act for Adjusting Claims for Property Impressed or Taken for Public Service*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 54 at 337, 337–38 (1821); see also Evans, *supra* note 40, at 356–58 (discussing debt-related legislation in Virginia immediately before

Once the Confederation Congress ratified the treaty in January 1784, the conflict in laws became their problem.<sup>58</sup> Congress sent resolutions to the several states in which it was indeed “earnestly recommended” that all laws be brought into compliance with the peace terms.<sup>59</sup> The nationally-minded James Madison—who in 1784 was back in the Virginia House of Delegates after being term-limited out of the Confederation Congress<sup>60</sup>—obligingly introduced a bill to repeal all laws incompatible with the treaty.<sup>61</sup> Madison’s bill, and others of his like it, were aggressively opposed by a coalition of legislators representing small farmer-debtors.<sup>62</sup> Led by the always formidable Patrick Henry, this opposition consistently and decisively defeated Madison’s proposals, and thereby managed to keep legal impediments to British debt collection on the Virginia statute books.<sup>63</sup> Not until December 12, 1787 would Virginia pass a bill repealing all laws conflicting with the treaty, and even this came with the condition that it would only go into effect once Virginia received official notice from Congress that Great Britain had upheld its end of the treaty bargain by evacuating the western forts and paying compensation for stolen slaves.<sup>64</sup>

No such notice was forthcoming, however, and so Virginia remained defiantly in violation of the treaty.<sup>65</sup> It would ultimately take ratification of the new Constitution in 1788, the opening of the federal courts in 1789, the signing of the Jay Treaty in 1794, and the Supreme Court ruling in *Ware v. Hylton* in 1796 before British creditors finally found themselves procedurally situated to call in their loans.<sup>66</sup>

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and after the peace treaty with Great Britain). On vigilantism, see HARRELL, *supra* note 48, at 140–41.

58. See HARRELL, *supra* note 48, at 144–46.

59. HARRELL, *supra* note 48, at 144.

60. For the term limit clause, see ARTICLES OF CONFEDERATION OF 1781, art. V. On Madison returning to Virginia after reaching his term limit, see RAKOVE, ORIGINAL, *supra* note 8, at 36–37.

61. HARRELL, *supra* note 48, at 144–46, 149.

62. See HARRELL, *supra* note 48, at 144–52, 180–82.

63. HARRELL, *supra* note 48, at 150–51; MARKS, *supra* note 33, at 13 n.16.

64. 12 WILLIAM WALLER HENING, *An Act to Repeal So Much of All and Every Act or Acts of Assembly as Prohibits the Recovery of British Debts*, in THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 528, 528 (1821).

65. See HARRELL, *supra* note 48, at 82 (“[T]he treaty of 1783 required American debtors to pay debts due prior to the war and placed moral obligations upon the states to restore loyalist property. Virginia was indignant, and, so long as the execution of the treaty depended upon the states, nothing was done to fulfill its provisions.”).

66. See *Ware v. Hylton*, 3 U.S. 199 (1796); MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789, at 281 (1950); MORRIS, FORGING, *supra* note 40, at 202; Evans, *supra* note 40, at 370–73.

## 2. New York

As is perhaps better known than any other date in American history, on July 4, 1776 the Second Continental Congress issued the Declaration of Independence, presenting the case for why “these United Colonies are, and of Right ought to be, Free and Independent States.”<sup>67</sup> Perhaps lesser known is that just the day before, on July 3, British General William Howe sailed into Staten Island, New York with an infantry force that quickly grew to nearly 30,000 strong.<sup>68</sup> Howe would go on to capture New York City and establish British military headquarters in Manhattan for the duration of the war, 1776–1783.<sup>69</sup>

After eight years of hostilities and occupation, when peace overtures finally sounded, New Yorkers were less than eager to accommodate their late enemies.<sup>70</sup> In March 1783 the state passed the Trespass Act, under which anyone who occupied patriot property during the war could be sued for damages and back rent.<sup>71</sup> Yet when the peace was formalized, article VI of the treaty stated:

“[T]here shall be no . . . prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property.”<sup>72</sup>

Predictably, this divergence generated litigation over which should prevail: New York statute or the Treaty of Paris?<sup>73</sup> The question itself presented transcendent issues of sovereignty and law, but the drama that unfolded could be attributed as much to the cast of characters as to the political ramifications.<sup>74</sup> In what became a legal showdown eagerly watched on either side of the Atlantic, New York City mayor and chief justice of the Mayor’s

67. THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

68. JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 51, 53 (Robert Faulkner & Paul Carrese eds. spec. ed. 2000).

69. *See id.* at 63–64, 295–97.

70. FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 64 (1982).

71. 1783 N.Y. Laws 62, <http://nysl.cloudapp.net/awweb/main.jsp?flag=browse&smd=2&awdid=1>.

72. Treaty of Peace, *supra* note 14, at art. VI.

73. The Rutgers Test Case: Commentary, *in* 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 282, 282–89, 300–01 (Julius Goebel Jr. ed., 1964).

74. *See id.* at 291–94, 300–01.

Court, James Duane, presided over the famous Trespass Act case of *Rutgers v. Waddington*.<sup>75</sup> The state's Attorney General Egbert Benson represented the plaintiff, and counsel retained by the defendant was founder and director of the Bank of New York, and recent battlefield hero at Yorktown, Alexander Hamilton.<sup>76</sup>

The facts of the case were undisputed by the parties. Plaintiff and patriot Elizabeth Rutgers owned a brewery in Manhattan that she evacuated in 1776 upon British capture of the city.<sup>77</sup> Defendant was Briton Joshua Waddington, agent for his uncle Benjamin Waddington, who had occupied and ran the brewery from 1778–1783, first under orders from the British Commissary-General then directly from the British Commander-in-Chief.<sup>78</sup> In a private cause of action initiated under the Trespass Act, Rutgers sued Waddington for rent payments covering the time of his occupation of the brewery.<sup>79</sup> Arguments for the plaintiff were straightforward enough: the Trespass Act permitted recovery of rent from British occupiers of patriot property during the war, and it explicitly rejected any defense claiming military authorization.<sup>80</sup> Because the facts of record matched the statutory elements, Waddington had to pay up.<sup>81</sup>

Arguments for the defendant, on the other hand, were both nuanced and sweeping. Citing the leading authorities of the day on the law of nations, Hamilton attempted to reinforce the explicit amnesty in article six of the Treaty of Paris by arguing that the law of nations presupposes all peace treaties to carry a general and absolute amnesty for all wartime participants.<sup>82</sup> Because New York was under British military control during the war, so Hamilton's logic ran, the amnesty afforded by both the treaty and the law of nations protected Waddington's occupation of the brewery from liability under a private cause of action.<sup>83</sup> Hamilton had ground to stand on in making this claim. The New York state constitution formally incorporated the

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75. *See Id.* at 300–01.

76. *Id.* at 291–94.

77. *Id.* at 289.

78. *Id.* at 289–90.

79. *Id.* at 290–91.

80. *See id.* at 294–96.

81. *Id.* at 302–03; John Lawrence, The Rutgers Test Case: Narrative, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 73, at 318, 318–20.

82. Alexander Hamilton, The Rutgers Briefs: Brief No. 5, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 73, at 360, 360–62.

83. *See* The Rutgers Test Case: Commentary, *supra* note 73, at 304–06.

common law, which included the law of nations and the laws of war.<sup>84</sup> More controversial, however, was Hamilton's attempt to support his position by claiming that in ratifying the Articles of Confederation, which included the power over foreign affairs, the state of New York had subjugated its legislative authority to treaties duly entered into by Congress.<sup>85</sup> In 1784 there was anything but consensus that the Confederation Congress could override state law.<sup>86</sup>

In case the court failed to accept his position on either categorical amnesty or the supremacy of confederal law, Hamilton deployed as his contingency the more politically palatable approach of an as-applied challenge to the Trespass Act based on rules of statutory construction.<sup>87</sup> In this Hamilton would ultimately give Mayor Duane his out. Even if you assume that the statute controls, Hamilton argued in his sixth brief, if the court is able to construe the statute so that its application in a given case would not offend the constitution of New York or common law rights of equity, then the court is bound to do so.<sup>88</sup> Because applying the Trespass Act against defendant Waddington would violate his common law right to *wartime* amnesty—as conferred by the state constitution's incorporation of the law of nations—then the court must find that the statute could not have been intended to apply in this specific instance.<sup>89</sup>

In writing the opinion of the court, Mayor Duane followed Hamilton's lead:

Upon the whole, this [Trespass Act] being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be un[r]easonable. The Court is therefore bound to conclude, that such a consequence was not foreseen by the Legislature, to explain it by equity, and to disregard it in that point *only*, where it would operate thus un[r]easonably.

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84. Alexander Hamilton, The Rutgers Briefs: Brief No. 6, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 73, at 362, 368–69.

85. Alexander Hamilton, The Rutgers Briefs: Brief No. 3, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 73, at 345, 350–52.

86. *See, e.g.*, MCDONALD, *supra* note 70, at 67.

87. *See* The Rutgers Test Case: Commentary, *supra* note 73, at 305.

88. Hamilton, *supra* note 84, at 380–81.

89. *Id.* at 382–92.



The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation . . . .<sup>90</sup>

But there in fact the matter did not end, for the court had one more fine distinction to draw. Waddington had occupied the brewery under the orders of the British Commissary-General (a civilian post) from 1778–1780, and under the orders of the British Commander-in-Chief (a military post) from 1780–1783.<sup>91</sup> The court found that the nature of the former occupation was indeed a civilian matter to which *wartime* amnesty did not attach.<sup>92</sup> So even though the statute’s application to Waddington was voided during his occupation of the brewery under *military* orders, he was nonetheless liable for trespass during his occupation under *civilian* orders.<sup>93</sup>

When taken out of its legalistic context and placed in its geopolitical one, the question the case presented swelled into whether or not a subnational American state could get away with violating the Treaty of Paris. Although the court acknowledged the gravity of the situation in its opening comments,<sup>94</sup> its rather technical ruling managed to please no one.<sup>95</sup> Mrs. Rutgers felt she was cheated out of rent.<sup>96</sup> Mr. Waddington felt he was punished for conduct that only unconstitutionally could be found culpable.<sup>97</sup> New York politicians and their fellow locally-minded patriots felt the state’s legislative sovereignty had been undermined.<sup>98</sup> Alexander Hamilton’s position—that the national interest as embodied in the treaty ought to take precedence over localist state statutes—was at best only partially vindicated, and even then only ambiguously so.<sup>99</sup> And perhaps most importantly, British

90. Judgment of the Mayor’s Court (Aug. 17, 1784), in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 73, at 392, 416–17 (alteration in original). In his statutory construction reasoning, Duane borrowed from Hamilton’s sixth brief. See Hamilton, *supra* note 84.

91. See The Rutgers Test Case: Commentary, *supra* note 73, at 289–90.

92. Judgment of the Mayor’s Court (Aug. 17, 1784), *supra* note 90, at 411–12.

93. *Id.*

94. Judgment of the Mayor’s Court (Aug. 17, 1784), *supra* note 90, at 393.

95. See The Rutgers Test Case: Commentary, *supra* note 73, at 310–12.

96. *Id.* at 310–11.

97. See, e.g., Letter from Alexander Hamilton to Thomas Jefferson (April 19, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON, 316, 316–18 (Harold C. Syrett, Ed., 1966); *supra* notes 82–86 and accompanying text.

98. See The Rutgers Test Case: Commentary, *supra* note 73, at 311–12.

99. *Id.*

observers still perceived the whole ordeal as violating the peace treaty.<sup>100</sup> So long as that view stuck among the British, their inclination to otherwise do business with the Americans was to collapse.<sup>101</sup>

#### D. Consequences

Amidst all the wrangling over implementation of the peace treaty, hitherto unmentioned has been the preamble, which in fact spells out the whole point of the agreement:

[T]o forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship which they [Great Britain and the United States] mutually wish to restore; and to establish such a beneficial and satisfactory intercourse between the two countries, upon the ground of reciprocal advantages and mutual convenience, as may promote and secure to both perpetual peace and harmony.<sup>102</sup>

Not only peace, but a resumption of prosperous relations, were the stated goals of the parties. This was certainly true for the Americans who could attribute their favorable balance-of-trade on the eve of the Revolution to their insider status as a unit of the British imperial-mercantilist system.<sup>103</sup> For the British, the goodwill in the preamble might very well have been mere lip service. Only two months before the treaty was signed, the Privy Council issued Orders on July 2, 1783 that effectively closed the British West Indies to American goods and shipping.<sup>104</sup> Trade restrictions imposed by Great Britain proved from then on to be a major point of contention between the two nations,<sup>105</sup> and they became diplomatically tied to violations

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100. See, e.g., Report of Secretary John Jay, *supra* note 40, at 784–86; see also Golove & Hulsebosch, *supra* note 22, at 934–35 (discussing how the confederation’s inability to prevent treaty violations by individual states, and its desire to integrate into the international community by showing itself capable of complying with the law of nations, motivated the writing of the Constitution). Years after the *Rutgers* case, the British still viewed the trespass act and its application in *Rutgers* as a violation of the Treaty of Peace. See Letter from George Hammond, British Minister to the U.S., to Thomas Jefferson (Mar. 5, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON, 196, 196 (Charles T. Cullen ed., 1990).

101. See *infra* Section II.D.

102. Treaty of Peace, *supra* note 14, at pmb1. (alteration in original).

103. See, e.g., MARKS, *supra* note 33, at 52–53.

104. RITCHESON, *supra* note 25, at viii.

105. See MARKS, *supra* note 33, at 52–95; MORRIS, PEACEMAKERS, *supra* note 18, at 433, 436–

of the peace treaty.<sup>106</sup>

Targeting the British West Indies for trade restriction served to undercut what was the most important market for the American economy at that time.<sup>107</sup> James Madison, writing about it to Richard Henry Lee, railed that “the Revolution has robbed us of our trade with the West Indies, the only one which yielded us a favorable balance . . . . In every point of view, indeed, the trade of this country is in a deplorable condition.”<sup>108</sup> Prospects, in other words, were not looking good for the Americans.

Meanwhile back in Westminster, the Shelburne ministry, sympathetic to American reconciliation, fell to the protectionist Fox-North coalition in April 1783.<sup>109</sup> At the same time, MP Lord Sheffield published his widely circulated pamphlet, *Observations on the Commerce of the American States*, which strongly swayed public opinion and effectively lobbied to uphold trade restrictions against the former colonies.<sup>110</sup> British creditors, stiffed by American debtors in breach of the treaty, were likewise exerting their political influence on policymakers at Whitehall.<sup>111</sup> All combined, this meant that by the mid-1780s British trade policy toward the United States had become firmly exclusionary.

Leading Americans agreed that at a minimum they had to reopen British West Indian markets if the fledgling nation was to have a chance at economic, and therefore existential, viability.<sup>112</sup> In February 1785 Congress acted

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106. See, e.g., RITCHESON, *supra* note 25, at 70–87.

107. The importance of the BWI markets to the American economy has been commented on by many leading scholars. See, e.g., MARKS, *supra* note 33, at 53–54; 2 CURTIS P. NETTELS, *THE EMERGENCE OF A NATIONAL ECONOMY, 1775–1815*, at 55 (1962); Charles W. Toth, *Anglo-American Diplomacy and the British West Indies (1783–1789)*, 32 *AMERICAS* 418, 420 (1976); Golove & Hulsebosch, *supra* note 22, at 956–57, 970.

108. Letter from James Madison to Richard Henry Lee (July 7, 1785), in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 4, at 314, 315, quoted in MARKS, *supra* note 33, at 66.

109. RITCHESON, *supra* note 25, at 4–6.

110. MARKS, *supra* note 33, at 55–56; see also Golove & Hulsebosch, *supra* note 22, at 956 (“American breaches of the treaty became a rallying point for British ministers who took a hard line against the United States.”).

111. Letter from John Adams to John Jay (May 5, 1786), in 2 *THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789* 660 (Washington, D.C., Blair & Rives 1837); see also Golove & Hulsebosch, *supra* note 22, at 956 (noting that public opinion toward the United States in Britain was hostile due in part to the injustices suffered by British creditors).

112. See, e.g., MORRIS, *FORGING*, *supra* note 40, at 205; RAKOVE, *BEGINNINGS*, *supra* note 28, at 342; Golove & Hulsebosch, *supra* note 22, at 970.

by appointing the doughty John Adams as U.S. Minister Plenipotentiary to the Court of St. James.<sup>113</sup> From the moment Adams assumed his post, his principal objective was clear: reverse British mercantilist policy and secure an advantageous trade agreement for his countrymen.<sup>114</sup> The new minister was soon to find out that obstacles, perhaps insurmountable, lay in his way.<sup>115</sup>

The unfavorable tone was set almost immediately. A suggestive letter received in March from the Duke of Dorset questioned the good faith of American treaty commitments.<sup>116</sup> Citing the interference British merchant-creditors faced from laws passed by individual states, Dorset asked, “what is the real nature of the Powers with which you are invested . . . towards forming a permanent system of commerce . . . which it may not be in the power of any one of the States to render totally fruitless & ineffectual?”<sup>117</sup>

It was an affronting but justifiable question, and when Adams removed to London that summer to submit a proposed treaty of commerce directly to British Foreign Minister Lord Carmarthen, his confidence was less than stout.<sup>118</sup> Writing to U.S. Foreign Secretary John Jay about “the laws of certain States impeding the course of law for the recovery of old debts &c.,” Adams grumbled, “it is in vain to expect . . . a treaty of commerce . . . or any other relief of any kind, until these laws are all repealed.”<sup>119</sup> Similar frustrations were vented in dispatches to Massachusetts Governor James Bowdoin: “[N]othing of any material consequence will ever be done, while there remains in force a law of any one State . . . inconsistent with the article of the treaty of peace respecting the tories.”<sup>120</sup>

113. Resolutions of Congress (Feb. 24, 1785), in 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 40, at 98, 98.

114. See RITCHESON, *supra* note 25, at 39–40; Toth, *supra* note 107, at 427.

115. See, e.g., RITCHESON, *supra* note 25, at 40–43.

116. See Letter from the Duke of Dorset to the American Commissioners (March 26, 1785), in 16 PAPERS OF JOHN ADAMS 577, 577 (Gregg L. Lint et al. eds., 2012).

117. *Id.*; see also RITCHESON, *supra* note 25, at 41–43 (commenting on the Dorset letter).

118. For submission of the proposed commercial treaty, see Letter from John Adams to the Marquis of Carmarthen (July 29, 1785), in 17 PAPERS OF JOHN ADAMS, *supra* note 116, at 280, 280–82 (Gregg L. Lint et al. eds., 2014). For reasons to have little confidence, see, for example, DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 214 (2003); see also Golove & Hulsebosch, *supra* note 22, at 970 (“Britain made it clear that it would not negotiate a commercial treaty until the United States adhered to the terms of the Treaty of Peace.”).

119. Letter from John Adams to John Jay (May 25, 1786), in 8 THE WORKS OF JOHN ADAMS 394, 394–95 (Charles Francis Adams ed., 1853).

120. Letter from John Adams to James Bowdoin (June 2, 1786), in 8 THE WORKS OF JOHN ADAMS, *supra* note 119, at 397, 397–98. Adding to Adams’s difficulties was the failure of the states to unite in commercial retaliation against Britain. See, e.g., MARKS, *supra* note 33, at 68–71;

Diplomatic relations between the two nations were to steadily sour. Toward the end of 1785 Adams pressed, perhaps a little too strongly, for Britain to evacuate the western forts pursuant to the peace treaty.<sup>121</sup> Britain's response to this perceived demand came from Foreign Minister Carmarthen in February 1786 and it was, as one British diplomatic historian put it, "a shower of ice water."<sup>122</sup> Not only was the answer in the negative regarding the forts, but it was also accompanied by a devastatingly methodic state-by-state review of treaty violations by the Americans.<sup>123</sup> Adams relayed the report back to Secretary Jay in Philadelphia, and it would take Jay a full six months to prepare his response to present to Congress.<sup>124</sup>

It was in this stormy diplomatic climate that Adams—now with Jefferson in London to lend his support—made one last ditch effort to push for a commercial agreement. They met with Lord Carmarthen in April, who despite castigating the states just two months prior, did request an updated commercial proposal; but he did so, as Adams deflatingly reported, only "after harping a little on the old string, the insufficiency of the powers of Congress to treat and compel compliance with treaties."<sup>125</sup> It was in fact mere etiquette when Carmarthen promised to lay the matter before the ministry, and Adams and Jefferson—the seasoned diplomats—knew that the cause was lost.<sup>126</sup> No commercial treaty, nor any further negotiations, would be forthcoming.<sup>127</sup>

The Americans seemed to be at the end of their tether as 1786 drew to a close. The economy was severely slumping, as anticipated, and efforts to improve commercial prospects by lifting British trade restrictions were coming up empty.<sup>128</sup> In October, Jay finally presented to Congress his findings

RITCHESON, *supra* note 25, at 18–45.

121. Adams used the word "require" in his Nov. 30, 1785 memorial to Secretary Carmarthen. See Report of Secretary John Jay, *supra* note 40, at 782; see also RITCHESON, *supra* note 25, at 84 (commenting on the effect of this choice of language by Adams).

122. RITCHESON, *supra* note 25, at 83.

123. *Id.*

124. Report of Secretary John Jay, *supra* note 40, at 781.

125. *Id.* at 601.

126. *Id.* For the etiquette of Carmarthen, see RITCHESON, *supra* note 25, at 44.

127. See, e.g., RITCHESON, *supra* note 25, at 44 (describing the request going "unanswered and even unacknowledged").

128. MARKS, *supra* note 33, at 28 ("The country was faced with a postwar depression, exacerbated by British trade restrictions . . ."); see also MORRIS, *supra* note 40, at 205 (noting that trade exclusions from Britain "contributed almost immediately . . . to the onset of an acute depression in the United States"). For a detailed breakdown of the economic troubles of the 1780s, and their relation to British trade restrictions, see NETTELS, *supra* note 107, at 45–64.

on Carmarthen's indictment, conceding that the British Foreign Minister was essentially right—the states had been violating the treaty, and before the Americans could hope for any diplomatic victories, something concrete had to be done to rehabilitate their good faith.<sup>129</sup>

The Confederation Congress tried its best by doing all that it was in its power to do: ask the states to comply.<sup>130</sup> In March, Congress resolved that all “acts or parts of acts as may be now existing in any of the states repugnant to the treaty of peace ought to be forthwith repealed.”<sup>131</sup> And on April 13, 1787, a formal circular letter authored by Jay, enclosing the latest resolution and reaching an almost sorrowful pitch, went out to the several states in which it was professed that “we regret that in some of the States too little attention appears to have been paid to the public faith pledged by that treaty.”<sup>132</sup> That because of this, “the good faith of the United States, pledged by that treaty has been drawn into question,” and therefore, “[i]t certainly is time that all doubts respecting the public faith be removed.”<sup>133</sup>

The very next month—May 1787—state delegates would convene in Philadelphia to discuss “revising” the Articles of Confederation.<sup>134</sup>

As is well known among founding-era historians, James Madison arrived at the Pennsylvania State House in 1787 with no lesser intention than that of The Lawgiver.<sup>135</sup> Conferring with his fellow Virginia delegates while restlessly waiting for the quorum needed to open proceedings, Madison

129. Report by Secretary John Jay, *supra* note 40, at 799–805. For the need to rehabilitate good faith, see *infra* notes 132–33 and accompanying text.

130. See, e.g., Golove & Hulsebosch, *supra* note 22, at 991 (“When at critical junctures the states simply refused to comply—as they did with the Treaty of Peace—Congress could do little more than remonstrate.”); *infra* notes 131–33 and accompanying text.

131. Resolutions of Congress (Mar. 21, 1787), in 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, FROM THE FIRST MEETING THEREOF TO THE DISSOLUTION OF THE CONFEDERATION, BY THE ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 294, 294–96 (William S. Hein & Co. 2005) (1821).

132. Circular Letter from John Jay to the States (Apr. 13, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 176, 177 (Roscoe R. Hill ed., 1936).

133. *Id.* at 176–84.

134. See Resolutions of Congress (Feb. 21, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 132, at 71, 74. For the argument that the authority for calling the convention actually came from the state legislatures, not Congress, and that the extent of the authority granted to the delegates encompassed not mere revision of the Articles, but general constitutional reform, see Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J.L. & PUB. POL’Y 61 (2017).

135. See, e.g., ADAIR, *supra* note 6, at 190–93; RAKOVE, ORIGINAL MEANINGS, *supra* note 8, at 36.

drafted the ambitious Virginia Plan.<sup>136</sup> Once introduced to the convention, the plan's fifteen articles set the initial agenda for debate and ultimately served as a blueprint for the outcome document.<sup>137</sup>

What motivated Madison's designs?<sup>138</sup> In his *Vices of the Political System of the United States*, drafted just prior to the convention, Madison laid out the most important reasons why constitutional reform was necessary for the survival of the union.<sup>139</sup> Listed there is the category of "Violations of the Law of Nations and of Treaties," where Madison lamented that, "not a year has passed without instances of them in some one or other of the States."<sup>140</sup> Although by no means the only contributing factor, the man history calls the Father of the Constitution saw treaty noncompliance as in desperate need of a constitutional corrective.<sup>141</sup>

When the final compromise settlement was signed in September 1787, it ordained and established a new national government with the authority to guarantee treaty compliance.<sup>142</sup> Not only was the federal judiciary empowered to hear "all Cases, in Law and Equity, arising under...Treaties made, or which shall be made," and not only was the federal executive sufficiently empowered to "take Care that the Laws be faithfully executed,"<sup>143</sup> but in case of any doubt, Article VI, Clause 2 of the United States Constitution reads:

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*

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136. RAKOVE, ORIGINAL MEANINGS, *supra* note 8, at 59; *see also* JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 62–63 (2002) (to similar effect). On Madison as drafter of the Virginia Plan, *see*, for example, John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 803 (1961).

137. JAMES MADISON, Record of the Convention (May 29, 1787), in THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 13 (Edward F. Larsen & Michael P. Winship eds., 2005). On the Virginia Plan setting the agenda and serving as a blueprint, *see id.*; RAKOVE, ORIGINAL MEANINGS, *supra* note 8, at 59–62; RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 136, at 60–79.

138. *See infra* notes 139–41 and accompanying text. For the importance of looking at the convention through a Madisonian lens, *see* RAKOVE, BEGINNINGS, *supra* note 28, at 379–80.

139. MADISON, *Vices*, *supra* note 35.

140. *Id.*

141. *See, e.g.*, RAKOVE, A POLITICIAN THINKING, *supra* note 7, at 46–47. For Father of the Constitution, *see*, for example, RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 136, at 61.

142. For the compromise nature of the Constitution, *see* RAKOVE, *supra* note 136, at 57–58.

143. U.S. CONST. art. III § 2; art. II, § 3.

*Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>144</sup>

### III. INTERNATIONAL DRUG CONTROL TREATIES & THE LEGALIZATION OF RECREATIONAL MARIJUANA

#### A. *The United Nations & the Narcotics Conventions*

Residing in Article II, Section 2 of the U.S. Constitution is the treaty clause, where the president is granted authority to enter into treaties “by and with the advice and consent of the Senate, . . . provided two thirds of the Senators present concur.”<sup>145</sup> All treaties so made are to be, indeed, “the supreme law of the land.”<sup>146</sup>

On June 26, 1945 in San Francisco, California, the United States became one of fifty countries to sign the United Nations Charter.<sup>147</sup> One month later, on July 28, the U.S. Senate ratified the treaty by screaming past the two-thirds vote requirement by a margin of 89–2.<sup>148</sup> On August 8, Presi-

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144. For the Supremacy Clause, see U.S. CONST. art. VI, cl. 2 (emphasis added). Drawing on an abundance of evidence in the primary record, leading historians studying the 1780s have long asserted that consequences flowing from the Confederation government’s inability to compel state compliance with the Treaty of Paris was one of the chief factors both irritating the movement to the 1787 Constitutional Convention and dictating its outcome. See, e.g., JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789* (1899); JENSEN, *supra* note 66; NEVINS, *supra* note 40; NETTELS, *supra* note 107; MARKS, *supra* note 33; MORRIS, *FORGING*, *supra* note 40; PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814* (1993); RAKOVE, *supra* note 28, at 341–46; RAKOVE, *supra* note 8; RITCHESON, *supra* note 25; Toth, *supra* note 107, at 428; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1127–32 (2000); Golove & Hulsebosch, *supra* note 22, at 934–35 (“Historians have long recognized that the weakness of the Articles of Confederation created complications for the new nation’s foreign relations and that the founders organized the Philadelphia Convention at least in part to remedy the difficulties that the new nation had encountered during the ‘critical period’ immediately following the Revolution. *Diplomatic frustrations resulting from state violations of the Treaty of Peace, in particular, helped create the atmosphere of crisis that motivated profederal forces to organize and write a constitution.*” (emphasis added) (footnote omitted)).

145. U.S. CONST. art. II, § 2, cl. 2.

146. U.S. CONST. art. VI, cl. 2.

147. U.N. Charter.

148. OFFICE OF THE HISTORIAN, BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, *THE FORMATION OF THE UNITED NATIONS, 1945* [hereinafter *THE FORMATION OF THE UNITED NATIONS*], <https://history.state.gov/milestones/1937-1945/un>. Henrik Shipstead (R-MN) and William Langer (R-ND) were the two dissenting senators. U.S. Senate, *Wild Bill*, SENATE.GOV, [https://www.senate.gov/artandhistory/history/minute/Wild\\_Bill.htm](https://www.senate.gov/artandhistory/history/minute/Wild_Bill.htm) (last visited Sept. 26, 2018).



dent Harry Truman affixed his signature, officially making the United States the first country to complete the ratification process.<sup>149</sup> The Charter went into effect in October 1945 when, under the requirements of Chapter XIX, China, France, Russia, Great Britain, the United States, and a majority of the remaining signatory nations completed ratification “in accordance with their respective constitutional processes.”<sup>150</sup>

The basic institutional framework of the U.N., as laid out in Chapter III, consists of six principal organs: (1) the General Assembly, (2) the Security Council, (3) the Economic and Social Council, (4) the Trusteeship Council (now defunct), (5) the Court of International Justice, and (6) the Secretariat.<sup>151</sup> Chapter X of the Charter defines the functions, powers, and procedures of the Economic and Social Council (ECOSOC), under whose jurisdiction falls drug policy.<sup>152</sup>

In 1958, the ECOSOC exercised its powers under Chapter X to call an international plenipotentiary conference on narcotic drugs in order to address concerns over worldwide drug production, trafficking, and abuse.<sup>153</sup> The stated legislative goal of the conference was “the adoption of a single convention on narcotic drugs to replace the existing multilateral treaties in the field” and “to make provision for the control of the production of raw materials of narcotic drugs.”<sup>154</sup>

The conference sat in New York City from January to March 1961, with seventy-three nations attending.<sup>155</sup> What emerged was the Single Convention on Narcotic Drugs of 1961—a multilateral treaty agreement setting forth obligations for nations in fighting the production, use, and trafficking of illicit substances around the globe. Upon adjournment of the conference,

149. History.com Editors, *Truman Signs United Nations Charter*, HISTORY, <https://www.history.com/this-day-in-history/truman-signs-united-nations-charter> (last updated Aug. 21, 2018).

150. U.N. Charter art. 110, ¶¶ 1, 3. For date of ratification, see THE FORMATION OF THE UNITED NATIONS, *supra* note 14.

151. U.N. Charter art. 7, ¶ 1.

152. U.N. Charter art. 62–66.

153. For authority under the Charter, see U.N. Charter, art. 62, ¶ 4. For authority granted by the General Assembly, see G.A. Res. 366 (IV) (Dec. 3, 1949). For the ECOSOC Resolution calling the conference, see Economic and Social Council Res. 689 (XXVI), § J (July 28, 1958) [hereinafter ECOSOC Res.]. For addressing concerns over worldwide drug production and abuse, see Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961 pmbL, Mar. 25, 1972, 976 U.N.T.S. 105 (entered into force Aug. 8, 1975) [hereinafter 1961 Single Convention].

154. ECOSOC Res., *supra* note 153.

155. U.N. OFFICE ON DRUGS AND CRIME, THE INTERNATIONAL DRUG CONTROL CONVENTIONS 8 (2013) (ebook).

the treaty was sent to the respective member states for ratification.<sup>156</sup> The U.S. Senate voted unanimously on May 8, 1967 to give its “advice and consent,”<sup>157</sup> and President Lyndon Johnson signed on May 15 to complete American ratification.<sup>158</sup>

The primary enforcement obligations of the treaty are found in two key provisions.

Article 4(1)(c) reads: “The Parties shall take such legislative and administrative measures as may be necessary . . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”<sup>159</sup>

Article 36(1)(a) underscores such commitments:

Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that [among others] cultivation, production, manufacture, . . . possession, [and] . . . sale . . . of drugs . . . shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.<sup>160</sup>

The treaty categorizes substances into schedules based on harmfulness and liability to abuse.<sup>161</sup> Marijuana is found in schedules I and IV, making it subject to the most prohibitive restrictions.<sup>162</sup>

The current international drug control regime, specifically pertaining to marijuana, is rounded out by two additional treaties. The 1971 Convention on Psychotropic Substances confines Tetrahydrocannabinol, or THC, the active ingredient in marijuana, strictly to medical research and in very limited circumstances to medical treatment.<sup>163</sup> The 1988 United Nations Conven-

156. 1961 Single Convention, *supra* note 153, at art. 4, ¶ 1(a), art. 40, ¶ 2.

157. S. Res. 106EX, 90th Cong. (1967), <https://www.congress.gov/treaty-document/90th-congress/7>.

158. Single Convention on Narcotic Drugs, May 25, 1967, 18 U.S.T. 1407.

159. 1961 Single Convention, *supra* note 153, at art. 4, ¶ 1(c).

160. *Id.* at art. 36, ¶ 1(a) (alterations in the original).

161. DAVE BEWLEY-TAYLOR, TOM BLICKMAN & MARTIN JELSMA, TRANSNATIONAL INSTITUTE, THE RISE AND DECLINE OF CANNABIS PROHIBITION: THE HISTORY OF CANNABIS IN THE UN DRUG CONTROL SYSTEM AND OPTIONS FOR REFORM 23, 25 (2014), [https://www.tni.org/files/download/rise\\_and\\_decline\\_web.pdf](https://www.tni.org/files/download/rise_and_decline_web.pdf).

162. *Id.* The treaty uses the term “cannabis” instead of marijuana. *Id.*

163. Convention on Psychotropic Substances art. 7(a), Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. For THC listed in Schedule I, see *id.* at 328. This 1971 Convention was amended to the 1961 Convention by the 1972 protocol. 1961 Single Convention, *supra* note 153.

tion Against Illicit Traffick in Narcotic Drugs and Psychotropic Substances stiffens the criminal sanctions signatory nations are required to impose for the cultivation, trafficking, and possession of marijuana and—perhaps most relevantly—tightens the discretionary latitude available for enforcement.<sup>164</sup>

Institutionally, the International Narcotics Control Board, or the INCB, was established as the “independent and quasi-judicial monitoring body” within the United Nations, charged with “implement[ing] . . . the . . . international drug control conventions.”<sup>165</sup> For over a half-century now, the INCB has played an integral role in overseeing treaty compliance and facilitating informative coordination among member nations and the ECOSOC in furtherance of treaty objectives.<sup>166</sup>

### B. *Legalization of Recreational Marijuana in the United States and the International Drug Control Regime*

Looking back over the history of the current international drug control regime, the United States stands out as the primary mover for calling the drug conventions, for the enactment of the prohibitionist policies committed to by all signatory nations, and for championing strict enforcement practices.<sup>167</sup> United States domestic law was quick to reflect this. In 1970 Congress passed the Controlled Substances Act (CSA), which made it a criminal offense for any person, anywhere in America, to knowingly manufacture, distribute, dispense, or possess any amount of marijuana.<sup>168</sup> The CSA specifically references U.S. obligations under the drug control treaties, thereby statutorily incorporating such international obligations into U.S. domestic

164. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, ¶ 1, 3, ¶¶ (1)(a)(ii), 5–6, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention]; see also BEWLEY-TAYLOR, BLICKMAN & JELSMA, *supra* note 161, at 29. For discussion of the relevance of the discretionary measure, see *infra* note 205 and accompanying text.

165. *Mandate and Functions*, INT’L NARCOTICS CONTROL BOARD, <https://www.incb.org/incb/en/about/mandate-functions.html> (last visited Sept. 27, 2018); see also 1961 Single Convention, *supra* note 153, at art. 9, ¶ 4.

166. See 1961 Single Convention, *supra* note 153, at art. 9, ¶ 5.

167. See BEWLEY-TAYLOR, BLICKMAN & JELSMA, *supra* note 161, at 17–18, 20; see also WELLS C. BENNETT & JOHN WALSH, MARIJUANA LEGALIZATION IS AN OPPORTUNITY TO MODERNIZE INTERNATIONAL DRUG TREATIES 18 (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/CEPMMJLegalizationv4.pdf> (“The United States was a—if not *the*—key protagonist in developing the 1961, 1971, and 1988 Conventions, as well as the 1972 protocol amending the 1961 Convention; the United States has for decades been widely and correctly viewed as the treaties’ chief champion and defender.”); Julie Ayling, *Conscription in the War on Drugs: Recent Reforms to the U.S. Drug Certification Process*, 16 INT’L J. DRUG POL’Y 376 (2005).

168. 21 U.S.C. §§ 841(a), 844(a) (2018).

law.<sup>169</sup>

For the first four decades after passage of the CSA, state laws covering recreational marijuana use largely paralleled federal prohibition; and it was in fact the states, not the feds, who conducted the vast majority of marijuana enforcement activity throughout the country.<sup>170</sup> Within the last five years, however, a sea change in drug policy has dramatically reshaped the recreational marijuana landscape. On presidential election night 2012, voters in the states of Colorado and Washington, undeterred by continued federal prohibition, passed ballot initiatives to take the globally unprecedented step of establishing state-licensed, regulated, and taxed industries for the commercial cultivation, manufacture, and sale of marijuana.<sup>171</sup>

Legally sanctioned recreational drug activity put the international drug control regime in an obvious predicament, and in June 2013 INCB President, Raymond Yans, responded to these historic state votes by proclaiming that “initiatives to normalize and regulate the consumption of drugs for non-medical use . . . would be *in grave contravention of the drug control conventions*.”<sup>172</sup> The INCB as a whole took an official hardline position when, in its 2013 annual report, it denounced the Colorado and Washington initiatives as “not in conformity with the international drug control treaties.”<sup>173</sup>

Since then, legalization trends in the United States have only continued to grow, with seven additional states now permitting recreational marijuana

169. 21 U.S.C. §§ 801(7), 801a(1)–(2), 811(d)(1) (2018). The recent jurisprudential and scholarly excitement over the Supreme Court case of *Medellin v. Texas*, 552 U.S. 491 (2008), addressing the self-executing treaty doctrine, is not relevant to the issues here because the CSA explicitly implements the drug conventions and therefore self-execution or non-self-execution is a moot distinction. Furthermore, the now-famous claim in footnote three of that case—denying that even self-executing treaties presumptively create private causes of action—does not pertain to general treaty enforcement by government entities. *Id.* at 506 n.3; see also Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 70–76 (2012) (discussing the case decision and its implications for domestic enforcement of treaties).

170. Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. J. SOC. POL’Y & L. 77, 94 n.71 (2017).

171. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 88–89 (2015). For the globally unprecedented step, see for example Sam Kamin, *Lessons Learned from the Governor’s Task Force to Implement Amendment 64*, 91 OR. L. REV. 1337, 1340 (2013).

172. Press Release, Int’l Narcotics Control Bd., Statement by the President of the Int’l Narcotics Control Bd., Raymond Yans, at the Special Event of the Fifty-Sixth Session of the Comm’n on Narcotic Drugs, U.N. Doc. UNIS/NAR/1173 (June 28, 2013) (emphasis added).

173. See INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2013, ¶ 713, U.N. Doc. E/INCB/2013/1, U.N. Sales No.E.14.XI.1 (2014), [https://www.incb.org/documents/Publications/AnnualReports/AR2013/English/AR\\_2013\\_E.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2013/English/AR_2013_E.pdf).

industries.<sup>174</sup> Prominently included among them is California, which alone boasts the seventh largest economy in the world.<sup>175</sup> All told, this puts over sixty-eight million Americans in jurisdictions where the commercial cultivation, manufacture, sale, possession, and use of recreational marijuana is permitted under state law.<sup>176</sup>

For states that are now years into their legalization experiments, the industry is booming.<sup>177</sup> In 2017 it took Colorado, for example, only eight months to crack the one billion dollar mark for marijuana sales,<sup>178</sup> and ten months for the state to collect over 205 million dollars in tax revenue.<sup>179</sup> The question then begs to be asked: What does all of this mean for the compliance status of the United States under its international drug treaty commitments?

### C. Treaty Interpretation

The abovementioned operative articles of the drug treaties do, in fact, leave room for debate.<sup>180</sup> Most glaringly, article thirty-six of the 1961 Convention provides that a member nation's obligations are "[s]ubject to its con-

174. See ALASKA STAT. § 17.38.010 (2018); CAL. BUS. & PROF. CODE § 26000 (West 2018); MASS. GEN. LAWS ch. 94G, § 7 (2018); NEV. REV. STAT. ANN. § 453D.020 (LexisNexis 2018); OR. REV. STAT. § 475B.005 (2018); VT. STAT. ANN. tit. 18 § 4230 (2018). Washington, D.C. has also legalized recreational marijuana, D.C. CODE § 48-904.01 (2018), and voters in Michigan recently voted in favor of legalizing marijuana. Kathleen Gray, *Legal Marijuana in Michigan: What you need to know*, DETROIT FREE PRESS (Nov. 7, 2018), <https://www.freep.com/story/news/marijuana/2018/11/07/michigan-marijuana-results-election-legalization/1835297002/>.

175. DAVE BEWLEY-TAYLOR ET AL., TRANSNATIONAL INSTITUTE, CANNABIS REGULATION AND THE UN DRUG TREATIES: STRATEGIES FOR REFORM 6 (2016), [https://www.tni.org/files/publication-downloads/cannabis\\_regulation\\_and\\_the\\_un\\_drug\\_treaties\\_june\\_2016\\_web\\_0.pdf](https://www.tni.org/files/publication-downloads/cannabis_regulation_and_the_un_drug_treaties_june_2016_web_0.pdf).

176. U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/rest/dnldController/deliver?\\_ts=556235903573](https://factfinder.census.gov/rest/dnldController/deliver?_ts=556235903573) (last visited Sept. 28, 2018) (adding together the populations of states that have legalized recreational marijuana, plus Washington, D.C.).

177. See Andrew DePietro, *Here's How Much Money States are Raking in from Legal Marijuana Sales*, FORBES (May 4, 2018), <https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/#5b7fec9f181>.

178. See Alicia Wallace, *Colorado's 2017 Marijuana Sales Reach \$1 Billion in Just Eight Months*, THE CANNABIST (Oct. 11, 2017), <http://www.thecannabist.co/2017/10/11/colorado-marijuana-sales-august-2017-tax-data/89751/>.

179. COLO. DEP'T OF REVENUE, STATE OF COLORADO: MARIJUANA TAXES, LICENSE, AND FEE REVENUE FEBRUARY 2014 TO DATE (2018), <https://www.colorado.gov/pacific/sites/default/files/0818%20Calendar%20PUBLISH%20Report.pdf>.

180. See *supra* notes 159–60 and accompanying text.

stitutional limitations.”<sup>181</sup> Placing this qualification in the context of marijuana legalization, it would mean that if the U.S. Constitution barred federal enforcement of certain marijuana activity within the states, then the United States could potentially be excused for a treaty violation committed at the state level.<sup>182</sup> Because the American system of federalism, as established by the Constitution, does set parameters for the relationship between the powers of the federal government and the sovereignty of the states, the question naturally arises over whether or not the federal government has the authority to prohibit purely *intrastate* marijuana activity.<sup>183</sup>

Conveniently, this question was presented to the U.S. Supreme Court in 2005. In the case of *Gonzalez v. Raich*, the Court applied long-standing commerce clause jurisprudence to rule that the *interstate* commerce powers under Article I, Section 8 of the Constitution, when combined with the Necessary and Proper Clause, authorized Congress to prohibit *intrastate* marijuana activity.<sup>184</sup> Writing for the Court, Justice John Paul Stevens reasoned that because such *intrastate* marijuana activity occurs, or could occur, on a scale that is large enough to substantially affect the *interstate* drug market, then Congress may invoke its *interstate* commerce power to reach such *intrastate* activity.<sup>185</sup> Looking at it inversely, the Court also found that Congress had a rational basis for believing that if they could not prohibit *intrastate* marijuana activity, then they would not be able to effectively prohibit *interstate* commerce in marijuana—that, in other words, is what made it “necessary.”<sup>186</sup>

As a result of *Gonzalez*, the constitutional authority of the federal government to enforce marijuana prohibition in all fifty states is well-settled American law.<sup>187</sup> What might otherwise be described as the “constitutional limitations” escape clause in the drug treaties is therefore not applicable to the American system of federalism.<sup>188</sup> Corroborating that this was the cor-

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181. 1961 Single Convention, *supra* note 153, at art. 36, ¶ 1(a).

182. See 1961 Single Convention, *supra* note 153, at art. 36; *infra* notes 183–88.

183. See U.S. CONST. art. I, § 8, amend. X; Blumenfeld, *supra* note 170, at 79–80.

184. See *Gonzales v. Raich*, 545 U.S. 1, 22, 32–33 (2005).

185. *Id.* at 17–19.

186. *Id.* at 22.

187. See Saby Ghoshray, *From Wheat to Marijuana: Revisiting the Federalism Debate Post-Gonzales v. Raich*, 58 WAYNE L. REV. 63, 64–66 (2012).

188. Another influential Supreme Court decision, *Missouri v. Holland*, 252 U.S. 416 (1920), likewise supports this conclusion. In addressing a state challenge to the Migratory Bird Treaty Act of 1918, Justice Oliver Wendell Holmes, Jr. ruled in *Holland* that so long as the constitution does not prohibit action by the federal government (e.g. in Article I, Section 9, or in the Bill of Rights), then

rect legal outcome, the official U.N. “Commentary” on this provision of the 1961 Convention reads: “The question arises whether a federal State is relieved from obligations . . . if it is unable to enact the required penal legislation on account of lack of authority under its federal constitution to do so. This question should be answered in the negative.”<sup>189</sup>

Two additional questions of interpretation derived from the text of the treaties remain to be addressed. Article four of the 1961 Convention deals with methodology, requiring nations to fulfill their treaty obligations by taking both legislative *and* administrative measures.<sup>190</sup> Satisfaction of the first method can be demonstrated easily. As previously mentioned, the federal government has definitively exercised its legislative powers to prohibit marijuana as a matter of law.<sup>191</sup> The Controlled Substances Act of 1970 makes marijuana possession everywhere in the country a serious criminal offense that subjects violators to hefty fines and lengthy jail sentences.<sup>192</sup> In case of any doubt, the CSA also explicitly incorporates into domestic federal law the U.S. obligations under the drug control treaties.<sup>193</sup> This law is still on the books and can still be used by the federal government to prosecute marijuana activity—a power that continues to be recognized by and reserved to federal law enforcement.<sup>194</sup> As a result of the CSA, the “legislative measures” requirement under the drug treaties is comfortably satisfied.

The administrative posture of the United States, on the other hand, presents a thornier question. The first step in answering it is to consider how the federal executive has responded since states began legalizing their own recreational marijuana industries. The initial move came in August 2013

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legislation duly enacted pursuant to treaties duly entered are subject to neither the Constitution’s traditional enumerated powers limitations nor Tenth Amendment federalism guarantees. *Id.* at 432–34. For the argument that *Holland* should be overturned as bad law, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 433–50 (1998). For a response refuting Professor Bradley’s argument, see Golove, *supra* note 14, at 1278–1313.

189. U.N. SECRETARY-GENERAL, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, at 429, U.N. Sales No. E.73.XI.1 (1973).

190. 1961 Single Convention, *supra* note 153, at art. 4. Further confirmation that a federal structure of government does not relieve a party from its treaty obligations came directly from the INCB in December 2017. See Alert, Int’l Narcotics Control Bd., Application of the International Drug Control Treaties in Countries with Federal Structures (Dec. 2017), [https://www.incb.org/documents/News/Alerts/Alert\\_on\\_Convention\\_Implementation\\_December\\_2017.pdf](https://www.incb.org/documents/News/Alerts/Alert_on_Convention_Implementation_December_2017.pdf).

191. See Ghoshray, *supra* note 187.

192. 21 U.S.C. §§ 801(7), 801a, 841(a)–(b), 844(a) (2018). A slight exception, burdensome to utilize, exists for medical research. See *id.* § 821.

193. *Supra* note 169 and accompanying text.

194. BENNETT & WALSH, *supra* note 167, at 3; See Ghoshray, *supra* note 187; *supra* note 192 and accompanying text.

when the U.S. Department of Justice (DOJ) released a “Memorandum for All United States Attorneys,” providing “Guidance Regarding Marijuana Enforcement.”<sup>195</sup> Known popularly as the Cole Memo, after its author Deputy Attorney General James M. Cole, the guidance contextualized state legalization initiatives by looking at them through the lens of federal prosecutorial discretion.<sup>196</sup> To that end, the Cole Memo set as the policy of the DOJ that so long as commercial marijuana industries authorized by state law do not implicate eight specified federal drug enforcement priorities, then “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”<sup>197</sup> While acknowledging the importance of setting certain limits to marijuana legalization, and while not forgetting to steadfastly reserve the DOJ’s right to enforce the CSA as a legal matter, the Cole Memo carved out a *de facto* administrative sphere of tolerance for the commercial production, sale, possession, and use of marijuana.<sup>198</sup> This sphere of tolerance was the precise location within which state marijuana industries began operating, and expanding.<sup>199</sup>

Concerned about the permissibility of this situation under international law, the Senate Judiciary Committee questioned Deputy Attorney General Cole in a September 2013 congressional hearing “as to whether the policy announced in the August 29, 2013 Cole Memorandum violates the United States’ treaty obligations.”<sup>200</sup> Submitting written testimony following the hearing, the Justice Department brusquely responded with the view that the Cole Memo “does not violate the United States’ treaty obligations. Marijuana continues to be a schedule I controlled substance under federal law, and the Department of Justice is continuing to enforce federal drug laws.”<sup>201</sup>

In 2014, Assistant Secretary of State William Brownfield gave prepared

195. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (Aug. 29, 2013) [hereinafter Cole Memo], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

196. *See id.* at 1–2.

197. *Id.* at 3.

198. *See, e.g.*, BENNETT & WALSH, *supra* note 167, at 3, 17, 20; BEWLEY-TAYLOR ET AL., *supra* note 175, at 14.

199. *See supra* notes 174–79 and accompanying text; *see also* John Hudak, *Colorado’s Rollout of Legal Marijuana is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 653 (2015).

200. *Conflicts Between State and Federal Marijuana Laws: Hearing Before S. Comm. on the Judiciary*, 113th Cong. 4 (2013) (responses of James M. Cole, Deputy Att’y Gen. of the United States, to questions for the record).

201. *Id.*



remarks to the Center for Strategic and International Studies in which he elaborated on the federal government's analysis of how the legalization movement fits within the strictures of international law.<sup>202</sup> Borrowing from the toolbox of constitutional interpretation, Brownfield stressed that the drug control treaties are "living documents" that therefore permit "flexible interpretation" when being implemented.<sup>203</sup> As these are the most extensive comments to come from the federal government to date, they deserve a close look.

The Secretary tellingly admitted that "the conventions explicitly and expressly hold national governments responsible for the conduct, if you will, of the entire nation, including provincial, state, municipal, or local governments that form part of the larger nation."<sup>204</sup> He then went on to recount a closed meeting held at Vienna where U.S. federal officials presented their case to the INCB:

And our argument went: it was the right of the United States government to determine how best to use its limited and in some cases scarce law enforcement and criminal justice resources to best accomplish the objectives of the conventions. And therefore we said we were in compliance with the conventions. . . . [T]he INCB in its annual report for 2013 begged to differ, reached a different conclusion, and . . . assessed that the argument by the United States government was not sound.<sup>205</sup>

In thus responding to the "flexible interpretation" analysis proffered by the United States, the INCB landed on a more textual approach, and their strongest argument would seem to lean not only on violations of the "administrative measures" requirement in the 1961 Convention,<sup>206</sup> but perhaps even more so on the provision in the 1988 Convention that directly addresses the issue of prosecutorial discretion:

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202. See William R. Brownfield, Assistant U.S. Sec'y of State for Int'l Narcotics & Law Enf't Affairs, Remarks at the Center for Strategic & International Studies Conference: Focus on the International Drug Policy Debate (Mar. 31, 2014) [hereinafter Remarks of Sec'y Brownfield], <https://www.csis.org/events/focus-international-drug-policy-debate>.

203. *Id.*; see also BENNETT & WALSH, *supra* note 167, at 8–9 (commenting on Sec'y Brownfield's remarks).

204. Remarks of Sec'y Brownfield, *supra* note 202 (minutes 13:43–14:02).

205. *Id.* (minutes 16:37–17:38).

206. 1961 Single Convention, *supra* note 153, at art. 4.

The Parties shall endeavor to ensure that any *discretionary* legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to *maximize the effectiveness of law enforcement measures* in respect of those offences and with due regard to the need to deter the commission of such offences.<sup>207</sup>

Seeing that United States' administrative-discretionary measures have thus far failed to deter numerous subnational actors from engaging in commercialized recreational marijuana activity, and instead have created a sphere of tolerance for its growth, the United States will remain vulnerable to censure from members of the international community.<sup>208</sup>

#### *D. Where Do the Issues Currently Stand?*

It has now been over five years since passage of the Colorado and Washington initiatives, providing time for U.S. treaty partners and the INCB to observe recreational marijuana industries in practice and ruminate over the niceties of international law.<sup>209</sup> In fact, these issues were playing out as a background to the much anticipated 2016 UNGASS—the U.N. General Assembly Special Session on the world drug problem. In preparation for this high-profile event, INCB President Werner Sipp outlined his major concerns in a speech before the U.N. Commission on Narcotic Drugs:

Recent years have seen legislative developments that permit the non-medical use of controlled substances, notably cannabis. The Board is concerned about these developments because they are not in compliance with the treaties that require that cannabis should be used exclusively for medical or scientific purposes. These legislations [sic] challenged not only the international consensus expressed in the conventions, but also international cooperation and the principle of shared responsibility upon which the international drug con-

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207. 1988 Convention, *supra* note 164, art. 3, ¶ 6 (emphases added).

208. See, e.g., GLOB. DRUG POLICY OBSERVATORY ET AL., INTERNATIONAL LAW AND DRUG POLICY REFORM: REPORT OF A GDPO/ICHRDP/TNI/WOLA EXPERT SEMINAR 21 (2015) [hereinafter REPORT OF EXPERT SEMINAR], [https://www.tni.org/files/publication-downloads/expert\\_seminar\\_report\\_-\\_international\\_law\\_drug\\_policy\\_reform.pdf](https://www.tni.org/files/publication-downloads/expert_seminar_report_-_international_law_drug_policy_reform.pdf) (“[Secretary Brownfield’s] position was deemed by most participants to be legally unpersuasive and problematic from the point of view of respect for international law, reciprocity, and adherence to treaties in other areas.” (alteration in original)); see also *infra* notes 216–22 and accompanying text.

209. See COLO. CONST. art. XVIII, § 16; Wash. Rev. Code § 69.50.325 (2018).

trol system and international rule of law are founded.<sup>210</sup>

The integrity and legal standing of the drug control treaties were, in the end, reaffirmed by the nations participating in the 2016 UNGASS.<sup>211</sup> Remarkably, however, legalization of recreational marijuana was not even broached during the proceedings.<sup>212</sup> In a briefing paper collaborated on by a number of international drug law and policy scholars, the role played by marijuana during the UNGASS was equated to the proverbial “‘elephant in the room[,]’ . . . obviously present, but studiously ignored.”<sup>213</sup> Giving their own specialist take on the issue, the authors nonetheless found that “[t]here is no doubt that recent policy developments with regard to cannabis regulation have moved beyond the legal latitude of the treaties.”<sup>214</sup> And in directly addressing the doctrine of “flexible interpretation,” their conclusion was clear: “that the extant treaty framework possesses sufficient flexibility to allow for regulated cannabis markets. . . . is strained by any reasonable understanding of the treaties and their overtly prohibitionist object and purpose—and appears to reflect political expediency rather than convincing legal reasoning.”<sup>215</sup>

The INCB concurred with this assessment when, in March 2017, it issued its official annual report for the preceding year. Harping a little on the old string (to poach the words of John Adams), the report disclosed that:

In its discussions with the Government of the United States, the Board has continued to reiterate that the legislative and administrative measures taken by several states in the country to legalize and regulate the sale of cannabis for non-medical purposes cannot be

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210. Werner Sipp, President, Int’l Narcotics Control Bd., Address at the Fifty-Ninth Session of the Commission on Narcotic Drugs 3 (Mar. 14, 2016), available at [http://www.incb.org/documents/Speeches/Speeches2016/Speech\\_CND\\_opening\\_UNGASS\\_special\\_segment\\_final\\_check\\_against\\_delivery.pdf](http://www.incb.org/documents/Speeches/Speeches2016/Speech_CND_opening_UNGASS_special_segment_final_check_against_delivery.pdf) (emphasis omitted).

211. INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2016, ¶¶ 319–26, U.N. Doc. E/INCB/2016/1, U.N. Sales No. E.17.XI.1 (2016) [hereinafter 2016 INCB REPORT], [https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016\\_E\\_ebook.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ebook.pdf).

212. BEWLEY-TAYLOR ET AL., *supra* note 175, at 6–7.

213. *Id.* at 6 (alteration in original).

214. *Id.* at 7.

215. *Id.* at 14 (footnote omitted). For similar conclusions by prominent international drug policy experts, see BENNETT & WALSH, *supra* note 167, at 14; MARTIN JELSMA, UNGASS 2016: PROSPECTS FOR TREATY REFORM AND UN SYSTEM-WIDE COHERENCE ON DRUG POLICY 18–19 (2015), [https://www.tni.org/files/download/treaty\\_reform\\_drug\\_policy\\_ungass2016.pdf](https://www.tni.org/files/download/treaty_reform_drug_policy_ungass2016.pdf). For comment on the political expediency of legalization, see *infra* note 239.

reconciled with the legal obligation contained in article 4, paragraph (c), of the 1961 Convention to limit exclusively to medical and scientific purposes the production, manufacture, export, import and distribution of, trade in and use and possession of drugs.<sup>216</sup>

The INCB further emphasized that it was the obligation of national governments “to ensure the full implementation, *within the entirety of their territory*, of the provisions of the 1961 Convention applicable to the use of cannabis.”<sup>217</sup>

Domestic developments in early 2018 saw current U.S. Attorney General, Jeff Sessions, issue a new memorandum to DOJ attorneys (Sessions Memo) that officially rescinded the Cole Memo.<sup>218</sup> Citing “well-established general principles” of prosecutorial discretion, Sessions stated that “previous nationwide guidance specific to marijuana enforcement is *unnecessary*.”<sup>219</sup> Conspicuously, though, the memo did not direct federal prosecutors to enforce the CSA in states that have legalized recreational marijuana.<sup>220</sup> If anything, by characterizing the Cole Memo as “unnecessary” for purposes of exercising discretion, Sessions has written off the Cole Memo priorities as redundant.<sup>221</sup> The appearance of the Sessions Memo nevertheless meddles with federal-state relations over marijuana legalization, chilling (to what degree is yet unknown) the previously expressed tolerance of the DOJ.<sup>222</sup>

Reaction from states with functioning recreational marijuana industries has remained defiant. In Colorado, for example, the state agency charged with governing the marijuana industry, the Marijuana Enforcement Division, issued a bulletin on January 5 in response to the Sessions Memo: “This is a renewed opportunity for the licensed [marijuana] community in our state to display the effectiveness of the commercial regulated system for tracking, testing and taxing marijuana . . . . We will continue to do our job as the vot-

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216. 2016 INCB REPORT, *supra* note 211, ¶ 198. The most recent statements by the INCB on these issues, reiterating the same position, are from its 120th session held in November of 2017. *See* Press Release, United Nations Info. Serv., INCB Concludes its 120th Session with Call from President to Take a Human-Rights Approach to Treating Drug Disorders, U.N. Press Release UNIS/NAR/1337 (Nov. 17, 2017).

217. 2016 INCB REPORT, *supra* note 211, ¶ 200 (emphasis added).

218. Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep’t of Justice, on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018) [hereinafter Sessions Memo], <https://www.justice.gov/opa/press-release/file/1022196/download>.

219. *Id.* (emphasis added).

220. *See id.*

221. *See id.*

222. *See Id.*

ers of Colorado and the General Assembly have directed.”<sup>223</sup>

California is likewise committed to its marijuana industry. The California Bureau of Cannabis Control issued a statement only hours after the release of the Sessions Memo, announcing that it will “continue to move forward with the state’s regulatory processes covering both medicinal and adult-use cannabis consistent with the will of California’s voters, while defending our state’s laws to the fullest extent.”<sup>224</sup>

Although very few Americans are even aware of it, such subnational marijuana activity continues to place the country as a whole in an increasingly precarious legal position under the drug control treaties. As recently as March 2018, the international body charged with oversight of the treaties has continued to vehemently reject the permissibility of legalization.<sup>225</sup> Just what might the results of this discrepancy mean for both the reputation of the United States in its foreign dealings and for the global legitimacy of international law?

#### *E. Consequences*

Exactly how the consequences of marijuana legalization will play out on the international stage is a live issue that ultimately remains to be seen.<sup>226</sup> Although some nations are proving sympathetic to marijuana legalization as a matter of policy preference,<sup>227</sup> the issue of treaty breach continues to linger.<sup>228</sup> Certain world leaders, notably those in Russia and Asia, remain

223. Industry-Wide Bulletin 18-01 from James Burack, Dir., Colo. Dep’t of Revenue, Marijuana Enf’t Div., to Marijuana Industry Stakeholders (Jan. 5, 2018) (alteration in original), <https://www.colorado.gov/pacific/sites/default/files/Final%20IB%2018-01%20Industry%20Bulletin%20MED%20and%20Sessions%20Decision%20to%20Rescind%20the%20Cole%20Memo%2001052018%20%281%29.pdf>.

224. Press Release, Bureau of Cannabis Control, Statement from BCC Chief Lori Ajax Regarding Federal Government Plans to Rescind the Cole Memo (Jan. 4, 2018), <https://cannabis.ca.gov/2018/01/04/statement-from-bcc-chief-lori-ajax-regarding-federal-government-plans-to-rescind-the-cole-memo/>.

225. See, e.g., *supra* notes 172, 205, 210, 216–17 and accompanying text. For denunciation of recreational legalization in the INCB’s March 2018 official annual report, see Int’l Narcotics Control Bd., Report of the International Narcotics Control Board for 2017, ¶¶ 179–81, U.N. Doc. E/INCB/2017/1, U.N. Sales No. E.18.XI.1 (Mar. 1, 2018), [https://www.incb.org/documents/Publications/AnnualReports/AR2017/Annual\\_Report/E\\_2017\\_AR\\_ebook.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2017/Annual_Report/E_2017_AR_ebook.pdf).

226. See generally BEWLEY-TAYLOR ET AL., *supra* note 175 (tracking the history of UNGASS and the various policy trends and events).

227. See, e.g., *id.* at 6 (citing as examples the nations of Uruguay, Canada, Guatemala, Italy, Mexico, and Morocco).

228. See REPORT OF EXPERT SEMINAR, *supra* note 208, at 25–27 (discussing the possible legal

staunch supporters of strict marijuana prohibition.<sup>229</sup> The European Union, while recognizing allowance for certain non-criminal justice approaches to marijuana use, has stated that licensing and regulating recreational industries exceeds treaty flexibility.<sup>230</sup> So long as there are nations of the world who view marijuana legalization within the United States as violating the drug treaties, then the United States risks certain reputational, reciprocal, and institutional consequences—not unlike those, it might be mentioned, that it has faced elsewhere in its history.<sup>231</sup>

Traditionally, a nation's reputation for making good faith treaty commitments rests on its track record of treaty compliance.<sup>232</sup> If a nation be-

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remedies other states could take against a breaching country).

229. See, e.g., *id.* at 37 (“Cuba and Venezuela are basically siding with Russia in a reaffirmation of a repressive prohibitionist doctrine . . . . [M]ost Asian countries are still fully committed to defending the status quo in its most repressive form.”); see also MARK K. OSBECK & HOWARD BROMBERG, *MARIJUANA LAW IN A NUTSHELL* 443 (2017) (“The recent trends towards liberalization of cannabis law should not obscure the fact that most of the world’s governments, at least officially, stand solidly behind the anti-cannabis strictures of the international treaties with no indication of imminent change.”). For a revealing account of the prevalence of prohibition-supporting nations, see Harold Trinkunas, Senior Fellow and Dir., Brookings Inst., Latin Am. Initiative, Remarks at the Brookings Institution Panel on UNGASS 2016 and Beyond: Seizing the Opportunity to Improve Drug Policy 3 (Apr. 7, 2016), available at [https://www.brookings.edu/wp-content/uploads/2016/03/20160407\\_drug\\_policy\\_ungass\\_transcript.pdf](https://www.brookings.edu/wp-content/uploads/2016/03/20160407_drug_policy_ungass_transcript.pdf) (“[C]ountries in Asia, particularly China, as well as Russia, very much are adhering to the [international drug control] regime as it currently stands.”); see also Vanda Felbab-Brown, Senior Fellow, Brookings Inst., Foreign Policy Program, Remarks at the Brookings Institution Panel on UNGASS 2016 and Beyond: Seizing the Opportunity to Improve Drug Policy 10 (Apr. 7, 2016), available at [https://www.brookings.edu/wp-content/uploads/2016/03/20160407\\_drug\\_policy\\_ungass\\_transcript.pdf](https://www.brookings.edu/wp-content/uploads/2016/03/20160407_drug_policy_ungass_transcript.pdf) (“The division between those [countries] who are calling for reform . . . and those who are deeply committed to the existing . . . regime—China and East Asia, Russia, but also the Middle East—is very strong.” (alteration in original)); John Walsh, Senior Assoc. for Drug Policy & the Andes, Wash. Office on Latin Am., Remarks at the Brookings Institution Panel on UNGASS 2016 and Beyond: Seizing the Opportunity to Improve Drug Policy 6–7 (Apr. 7, 2016), available at [https://www.brookings.edu/wp-content/uploads/2016/03/20160407\\_drug\\_policy\\_ungass\\_transcript.pdf](https://www.brookings.edu/wp-content/uploads/2016/03/20160407_drug_policy_ungass_transcript.pdf) (“And the truth is that there are very vocal countries who are dissatisfied with the status quo, but there are relatively few, compared to the world at large . . .”).

230. BEWLEY-TAYLOR ET AL., *supra* note 175, at 7.

231. See, e.g., *supra* Section II.D. For an analysis of a similar situation of subnational acts resulting in violations of treaty commitments, see David A. Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?*, 37 FLETCHER F. WORLD AFF. 53, 53–56, 59–64, 68–71 (2013) (discussing state-level violations under the 1963 Convention on Consular Relations). Assessing all the potential consequences from treaty violations, and engaging with all that the international relations literature has to offer on the subject, is outside the scope of this paper. See *supra* notes 9–13 and accompanying text. For a helpful place to start such an inquiry, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989).

232. See, e.g., *supra* Section II.D; see also, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1845 n.85 (2002); *infra* notes 233–37 and accompany-

believes that the United States will shirk its treaty obligations, not due to some existential threat,<sup>233</sup> but because it has become politically convenient to do so, then the credibility of the United States to make and maintain treaty commitments will diminish commensurately.<sup>234</sup>

A helpful method for taking stock of reputation in diplomatic affairs is by analogy. As one leading international law scholar nicely put it:

The value of a good reputation for states can be compared to the value of a high bond rating. Just as a good rating increases investor confidence and, therefore, allows the firm to raise money more cheaply, a strong reputation increases the confidence of counterparties to an international agreement, allowing a state to extract more in exchange for its own promises.<sup>235</sup>

To borrow those terms, a low reputational rating comes along with the risk of deterring other nations from viewing the United States as a trustworthy treaty partner.<sup>236</sup> Especially in cases of multilateral agreements—such as the drug treaties—this reputational consequence could ripple out to influence any number of nations around the globe, and could therefore hamstring diplomatic missions of far greater import than drug policy.<sup>237</sup>

Similarly, there is the danger that a breach by the United States can be used as a bargaining chip against it in negotiations over, or performance of, other foreign policy agreements.<sup>238</sup> When the United States enters into a treaty with another nation, it presumably does so because U.S. interests will

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233. See Guzman, *supra* note 232, at 1862.

234. See *id.* at 1849–50 (“When entering into an international commitment, a country offers its reputation for living up to its commitments as a form of collateral. . . . [F]ailure to live up to one’s commitments harms one’s reputation and makes future commitments less credible.”); Koplow, *supra* note 231, at 69 (“[I]t is foolhardy to suppose that other parties will indefinitely continue with treaty compliance if they feel that the United States is taking advantage of them by unilateral avoidance of shared legal obligations.”).

235. See Guzman, *supra* note 232, at 1855 n.120.

236. See *id.* at 1829 n.16.

237. See Hathaway, McElroy & Solow, *supra* note 169, at 105 (“The United States is party to hundreds of Article II treaties, many of them covering topics of the gravest importance to the country, ranging from the economy, to criminal law enforcement, to national security.” (footnotes omitted)); see also Koplow, *supra* note 231, at 69 (stating that the United States’ “persistent flouting” of treaties “jeopardizes the entire fabric of international law”).

238. See BENNETT & WALSH, *supra* note 167, at 19 (stating that “the United States will have a tougher time objecting” when a “nation’s foreign ministry invokes the need to ‘tolera[te] different national approaches” during treaty negotiations).

be served by that other nation's performance of treaty obligations.<sup>239</sup> Seeing that there is no guaranteed supervising enforcement authority,<sup>240</sup> and barring a resort to coercion, then to secure its own interests, the United States would do well to induce performance by performing itself.<sup>241</sup> “[R]eciprocal performance of treaty obligations,” in other words, “depends in part on being able to credibly call out other nations for treaty failings—something which in turn depends on strictly performing our own obligations.”<sup>242</sup>

If the United States can “prosecutorial discretion” its way around the drug treaties, then another nation can just as easily try to “prosecutorial discretion” its way out of some other treaty the United States has an interest in holding it to.<sup>243</sup> In such a scenario, the bind the United States might find itself in could be minor, or not.<sup>244</sup> The ancient tenet of contract law, that when one party breaches an agreement all others are released from their obligations to perform, is perhaps nowhere truer and potentially more lethal than with regard to international treaties.<sup>245</sup>

Institutionally, the United States could be setting a corrosive precedent. When a nation wiggles out of treaty obligations, and especially when that nation is the most powerful and influential in the world, it tends toward the deterioration of global commitment to the principle of *opinio juris sive necessitatis*.<sup>246</sup> Every instance of treaty breach therefore goes to further un-

239. See, e.g., Hathaway, McElroy & Solow, *supra* note 169, at 55 (“[W]hen treaties provide reciprocal benefits, the United States clearly gains from the enforcement of the agreements by other parties to the treaty.”). It should also be noted that performance under a treaty can sometimes reflect the calculated interests of an actor *other than* the nation-as-a-whole who that actor represents. See, e.g., Guzman, *supra* note 232, at 1860 n.132. For example, if an administration calculates that the electoral benefits accruing from non-performance of treaty obligations outweigh the costs of damaging the nation's diplomatic reputation (in either real or electoral terms), then under a rational-choice theory of decision-making, the administration should opt to not perform the obligations of the treaty. See *id.* at 1860 & n.132. The result of such non-performance would be diplomatic costs borne by the nation-as-a-whole, with political benefits enjoyed only by the party in power. See *id.*

240. See Guzman, *supra* note 232, at 1849.

241. See BENNETT & WALSH, *supra* note 167, at 19 (stating that “the United States has a profound interest in ensuring that counterparties perform their treaty obligations” because the U.S. “confronts risks no other nation confronts”).

242. *Id.* at 20.

243. See Koplow, *supra* note 231, at 69; see also REPORT OF EXPERT SEMINAR, *supra* note 208, at 26 (“At some point, for example, the U.S. should expect its own ‘flexibility’ argument to be used against it in another context, or that a country will use the breach as a negotiating tool in an area unrelated to drugs e.g., the U.S.’s claim that Russia is in violation of the 1987 Nuclear Forces Treaty.”).

244. See *supra* note 231 and accompanying text.

245. See, e.g., Guzman, *supra* note 232, at 1873.

246. See, e.g., BENNETT & WALSH, *supra* note 167, at 25. *Opinio juris sive necessitatis* is a doc-



dermine the efficacy, and in turn the legitimacy, of international law itself.<sup>247</sup>

Although by no means uncontroversial, the majority view among international relations theorists is that powerful nations, such as the United States, have it in their best interest to promote institutions of international cooperation that operate according to the rule of law—thereby “lock[ing] in favorable arrangements that continue beyond the zenith of [their] power.”<sup>248</sup> To accept that premise is to logically concede that any act by the United States jeopardizing the legitimacy of such institutions is patently self-defeating.<sup>249</sup>

As inchoate as some of these consequences from marijuana legalization may currently be, the potential international relations fallout from them is real enough to warrant serious scrutiny.<sup>250</sup> Whether action should be taken, and if so in what form, are therefore important enough considerations to be included in any decision-making process.

A number of policy options do exist to choose from.<sup>251</sup> The United States could, for example, push to amend the treaties, gathering international support for removing marijuana from the list of prohibited substances or for drafting new language that allows for legalization with tight controls.<sup>252</sup> The

trine of international law denoting state action undertaken pursuant to an international legal obligation. See HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 56–57 (2014). For a discussion of this doctrine and for the English translation of the Latin in an international law context, see *id.* (“*opinio juris sive necessitatis*. An adequate translation of this term into English, in light of its application in law, requires rather more words than the economical Latin: it signifies ‘the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity.’”).

247. For a particularly impassioned account of this view, with examples, see Koplow, *supra* note 231, at 68–71; see also *supra* note 210 and accompanying text (noting the effect of noncompliance on “international cooperation” and “shared responsibility”).

248. G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 53–56 (2001) (alterations in original). For the majority view, see, for example, Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L. J. 487, 487–88 (1997). For comment on the importance of international legal institutions specifically in the context of consequences from marijuana legalization in the United States, see, for example, BENNETT & WALSH, *supra* note 167, at 5, 13, 18. For the classic critique of this view, see, for example, HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (7th ed. 2006).

249. See Koplow, *supra* note 231, at 69.

250. See, e.g., REPORT OF EXPERT SEMINAR, *supra* note 208, at 26 (“Many participants agreed that the consequences to the U.S. in particular are not insignificant . . . .”); see also BENNETT & WALSH, *supra* note 167, at 18 (“[W]e wouldn’t be surprised to hear protests from more prohibitionist countries about the United States’ treaty compliance, or to see other nations start pushing the limits of other no less important treaties to which the United States is party.”).

251. See *infra* notes 252–57 and accompanying text.

252. See BENNETT & WALSH, *supra* note 167, at 22–24; BEWLEY-TAYLOR, BLICKMAN & JELSMA,

United States could outright withdraw from the treaties, or withdraw and then “re-accede” with reservations as to marijuana.<sup>253</sup> The United States could admit it is in violation of the treaties, but justify that status with a declaration of principled non-compliance.<sup>254</sup> In perhaps the most “elegant” option, the United States could enter into an *inter se* agreement with other like-minded countries, modifying treaty obligations toward marijuana for the parties to the agreement without impacting the rights and responsibilities of the remaining parties.<sup>255</sup> The United States could always come down on state-level legalization by enforcing the CSA within those jurisdictions.<sup>256</sup> Or, the United States could hold the current line and allow the legalization and operation of recreational marijuana industries to move forward in spite of the drug treaties *lex lata*.<sup>257</sup>

Although not an exhaustive account of the potential consequences of legalization or the options available to address them, and irrespective of what such an inquiry might return, it should nevertheless be clear that the American people, state governments, and the federal government still have landmark decisions to make regarding the legal status of marijuana.<sup>258</sup> In a democracy like our own, deciphering the best policy choices, whatever they may turn out to be, requires informed deliberation.<sup>259</sup> Issues of international relations have been carelessly left out of the otherwise vibrant national marijuana debate.<sup>260</sup> Including them is now long past due.<sup>261</sup>

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*supra* note 161, at 63–64; BEWLEY-TAYLOR ET AL., *supra* note 175, at 9–10.

253. See BEWLEY-TAYLOR ET AL., *supra* note 175, at 12–13.

254. *Id.* at 14–15.

255. MARTIN JELSMA ET AL., BALANCING TREATY STABILITY AND CHANGE: *INTER SE* MODIFICATION OF THE UN DRUG CONTROL CONVENTIONS TO FACILITATE CANNABIS REGULATION 36 (2018), [https://www.wola.org/wp-content/uploads/2018/04/FINAL\\_Updated.pdf](https://www.wola.org/wp-content/uploads/2018/04/FINAL_Updated.pdf).

256. See BENNETT & WALSH, *supra* note 167, at 12.

257. See *supra* Section III.D. The Latin phrase *lex lata* translates to “[t]he law as it exists; enacted law.” *Lex Lata*, BLACK’S LAW DICTIONARY (10th ed. 2014).

258. The advent of the Sessions Memo immediately spurred new movement in Congress to once and for all resolve the federal-state tensions over legalization. Alexandra Oliveira & Alison Spann, *Republican Lawmakers Optimistic About Passing Cannabis Legislation in 2018*, THE HILL (Feb. 1, 2018), <https://thehill.com/video/lawmaker-interviews/371854-republican-lawmakers-optimistic-about-passing-cannabis-legislation>. Additional cosponsors on marijuana reform bills previously introduced in both houses have been piling up daily. See, e.g., Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017). Because major congressional action could be coming soon, the need to elbow international issues into the legalization debate is now more urgent than ever. See Oliveira & Spann, *supra* note 25.

259. See, e.g., BEWLEY-TAYLOR ET AL., *supra* note 175, at 16–17 (discussing “a number of ways in which this dialogue can be informed and encouraged”).

260. See, e.g., *id.* at 16 (“Decades of doubts, soft defections, legal hypocrisy, and policy experi-

## IV. CONCLUSION

When the founding fathers faced the dilemma of subnational actions clashing with the Treaty of Paris, they did so while operating under a system of national government established by the Articles of Confederation.<sup>262</sup> The position many of them took was that the states were in violation of the treaty, and formal congressional enactments reflecting this pleaded with the states to comply.<sup>263</sup> When the Confederation Congress surveyed the foreign affairs landscape, it saw its reputation damaged, its effectiveness in securing commercial treaties proportionately impaired, and the domestic economy crumbling at least partially as a result.<sup>264</sup> The situation had become dire, and in a significant degree it could be traced to the poor performance under the peace terms.<sup>265</sup> The subject matter of the founders' dilemma and the immediate consequences were therefore not only critical to the general welfare of the nation, but contributed to events that set the course of American history.

Marijuana policy, on the other hand, is not a particularly momentous issue on its own terms.<sup>266</sup> It is playing out in an America governed by the Constitution—an entirely different system than that of the Articles of Confederation.<sup>267</sup> The federal executive does not claim that the states are in violation of any treaties, and at times has even attempted to defend their actions as permitted under the international drug control regime.<sup>268</sup> Foreign powers have yet to show overt signs that their behavior on the international stage generally, or toward the United States specifically, has been seriously influenced by marijuana legalization.<sup>269</sup> And regardless of how these issues play out, fundamental alteration in the constitutional system or any epoch-defining historical event—such as unfolded in the late 1780s—is scarcely conceivable an outcome.

So why choose these two scenarios to juxtapose? Using the Madisonian Approach to a balanced and cautious treatment of the past, the scenarios ex-

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mentation have now reached the point where *de jure* legal regulation of the whole cannabis market is gaining political acceptability, even if it violates certain outdated elements of the UN conventions.”).

261. See, e.g., *id.* at 16–17; *supra* note 260 and accompanying text.

262. See *supra* Part II.

263. See *supra* Section II.D.

264. See *supra* Section II.D.

265. See *supra* Section II.D.

266. See *supra* Section III.D.

267. See *supra* notes 180–89 and accompanying text; Section III.C.

268. See *supra* Section III.C.

269. See *supra* Section III.D.

amined provide two telling examples—discrete yet akin—of how federated forms of government can face puzzling and consequential predicaments when entering into treaties.<sup>270</sup> The founders learned this through hard diplomacy, and it remains problematic to this day.<sup>271</sup> Thus far, every state initiative to legalize marijuana, every federal marijuana reform bill, and the discourse attending such measures, have all failed to look beyond domestic concerns.<sup>272</sup> Neglecting to even address the risks that legalization could pose to the nation's diplomatic standing is at best irresponsible policymaking.<sup>273</sup>

History helps to demonstrate how breaching any negotiated-for agreement always carries with it the potential to degrade good faith.<sup>274</sup> In international relations, legalistic arguments often count less than perceptions of treaty noncompliance, and, whether national or subnational, real or perceived, noncompliance can incur costs external to a strictly domestic policy debate.<sup>275</sup> When weighing the costs and benefits of marijuana legalization, such external costs must be factored into the equation if the product is to accurately represent best policy.<sup>276</sup>

To conclude by injecting personally, I do believe as a *purely domestic* policy issue that the legalization of recreational marijuana, which includes effective controls to encourage public health, generally discourage drug use, and prevent minors from accessing marijuana, is probably the right thing to do. But the point here is not to advocate any particular drug policy; instead, the point is to advocate looking at these issues with a perspective that goes well beyond simple domestic policy preferences. By expanding the horizons of this perspective to encompass history and international relations, we can only help, never hurt, in any sincere effort to do what is in the best interest of the American people and the nations of the world.

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270. See *supra* Parts II–III.

271. See *supra* Sections III.D–E.

272. See OSBECK & BROMBERG, *supra* note 22, at 192; *supra* notes 260–61 and accompanying text.

273. See *supra* Sections III.D–E.

274. See *supra* Section II.D.

275. See JELSMA ET AL., *supra* note 25, at 12.

276. See *supra* Section III.E.

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*Pacta Sunt Servanda*  
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