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### **THE CONTROLLED SUBSTANCES ACT: AN INTERNATIONAL PRIVATE DELEGATION THAT GOES TOO FAR**

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## INTRODUCTION

Under current Supreme Court precedent, Congress can delegate regulatory authority to federal agencies so long as it supplies an intelligible principle to guide and restrict their actions. Congress may also permit private entities to assist agency decision-making so long as the agency retains ultimate authority to accept, reject, or modify the private actor’s recommendations or proposals. But when can Congress grant regulatory authority to *international* organizations?

In recent years, scholars and courts have recognized that transfers of regulatory authority to international bodies raise significant delegation concerns. But the bounds of congressional authority in this context remain hazy. Twenty years ago, the notion that the Court might strike down an international delegation of regulatory power using nondelegation principles seemed farfetched. After all, not since the *Lochner* era has the Court struck down legislation on *any* type of nondelegation grounds. But nondelegation fantasies may soon become reality. In several recent cases, the Supreme Court has expressed willingness to flex a *Lochner*-era muscle and revisit nondelegation.

Here, we argue that a particular statute—section 811(d)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (commonly referred to as the “Controlled Substances Act” or CSA)—uniquely offends nondelegation principles and crosses the line. Examining the roots, power, and mechanics of this rather obscure delegation could prove instructive as to other delegations to international organizations.

## I. CONSTITUTIONAL LIMITS ON CONGRESS’S POWER TO DELEGATE REGULATORY AUTHORITY

This section briefly introduces the constitutional constraints on Congress’s authority to delegate regulatory authority. The most well-known constraint is the public nondelegation doctrine, which restricts Congress’s authority to delegate regulatory authority to other governmental actors—usually executive branch agencies. Slightly less-well-known is the private nondelegation doctrine, which applies when Congress seeks to transfer regulatory authority to entities that are not part of the government at all. “Private delegations” fall into at least two categories: domestic and international.<sup>1</sup> Section 811(d)(1) of the CSA, which we discuss in Part III, delegates authority to the United Nations Commission on Narcotic Drugs and the World Health Organization.<sup>2</sup> It is an example of an international private delegation.

### A. Public Nondelegation

The public nondelegation doctrine applies to grants of regulatory authority to public entities—usually executive branch agencies.<sup>3</sup> It derives from Article I, Section 1 of the Constitution, which vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.”<sup>4</sup> The Supreme Court has held that the Vesting Clause bars “Congress from delegating its legislative function to other branches of government . . . .”<sup>5</sup> Underlying this public nondelegation doctrine are separation of powers concerns, namely preventing one branch of the federal government from aggrandizing its own power beyond constitutional bounds or impinging powers reserved to the other branches.<sup>6</sup>

The public nondelegation doctrine is lax. Congress may grant regulatory authority to the executive branch so long as it provides an “intelligible

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1. See Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 732 (2007).

2. See 21 U.S.C. § 811(d)(1) (directing the Attorney General to place substances subject to control under certain international drug control treaties to which the United States is a party in the CSA “schedule he deems most appropriate to carry out such [treaty] obligations”).

3. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

4. James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CAL. L. REV. 539, 545 & n.35 (2017) (quoting U.S. CONST. art. I, § 1).

5. See *id.* at 545 & nn.35–36 (citing cases).

6. *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”).

principle” to guide executive decision-making.<sup>7</sup> Bounded by an intelligible principle established by Congress, agencies acting according to such delegations are said to be exercising the “executive power.”<sup>8</sup> Under this theory, Congress dictates substantive policy in the statutory scheme, and agency rules and regulations merely “fill up the details.”<sup>9</sup>

The Supreme Court has struck down a federal law under the public nondelegation doctrine only twice, both times at the tail end of the *Lochner* era.<sup>10</sup> First, in *Panama Refining Co. v. Ryan*, the Court relied on the nondelegation doctrine to strike down section 9(c) of the National Industrial Recovery Act (NIRA), which allowed the President to ban transportation of oil in interstate commerce exceeding amounts permitted by state law.<sup>11</sup> According to the Court, this provision violated the “intelligible principle” test because it granted the President “unlimited authority to determine the policy and to lay down the prohibition . . . as he may see fit.”<sup>12</sup>

Next, in *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court struck down a different section of the NIRA that allowed industry trade associations to propose codes of fair competition and authorized the President to enforce the codes so long as they did not promote monopolies.<sup>13</sup> Because NIRA provided “no standards for any trade, industry, or activity” and did not “undertake to prescribe rules of conduct to be applied to particular states of fact,” the Court held the code-making authority to be an unconstitutional delegation of legislative power.<sup>14</sup>

Although application of the nondelegation doctrine receded along with many other elements of *Lochner*-era jurisprudence, some have suggested it

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7. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”); see also *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457 (2001).

8. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. CONST. art. II, § 1, cl. 1) (emphasizing that while agency rulemakings sometimes resemble legislative power “they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power’”); see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (“Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of law.”).

9. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

10. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 283 (2021). Some see the public nondelegation doctrine as one of several vehicles the Court used to strike down progressive New Deal Legislation. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 959 (2000).

11. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

12. *Id.* at 415.

13. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

14. *Id.* at 541–42.

might be “on the cusp of making a comeback.”<sup>15</sup> Indeed, the votes were almost there in *Gundy v. United States*.<sup>16</sup> The Court in *Gundy* addressed whether a provision in the Sex Offender Registration and Notification Act (SORNA) that authorizes the Attorney General to specify when SORNA’s registration requirements applied to offenders convicted of sex offenses before SORNA’s enactment.<sup>17</sup> It upheld the delegation by a highly fractured vote, with the four Democratic appointees in the majority, three Republican appointees in the dissent, Justice Alito concurring, and Justice Kavanaugh abstaining.<sup>18</sup>

Notably, in his concurrence, Justice Alito expressed willingness to revisit the issue, stating that he would support an effort to reconsider the nondelegation doctrine if a majority were willing.<sup>19</sup> With Justices Kavanaugh and Barrett changing the makeup of the Court, in the right case, that time may now be here.

### B. Private Nondelegation

The private nondelegation doctrine has been called a “more muscular version of the [public] nondelegation doctrine.”<sup>20</sup> It is implicated whenever Congress transfers regulatory authority to non-governmental actors. While the Supreme Court has generally permitted Congress to delegate regulatory authority to other governmental entities under the lax public prong of the nondelegation doctrine, it has been far more skeptical of delegations to private entities.<sup>21</sup>

The private doctrine traces its origins back to *Schechter*. As discussed above, *Schechter* involved a challenge to a statute that purported to give the President authority to approve “codes of fair competition” proposed by industry groups.<sup>22</sup> The Court held that this transfer was unconstitutional under the public nondelegation doctrine because it gave the President

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15. G. Michael Parsons, *Contingent Design & the Court Reform Debate*, 23 U. PA. J. CONST. L. 795, 843 (2021).

16. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

17. *Id.* at 2122.

18. *Id.* at 2120.

19. *Id.* at 2131 (Alito, J., concurring).

20. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 472 (2011).

21. *Compare* Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring) (“[T]his Court has almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (internal quotation marks omitted), *with id.* at 62 (“By any measure, handing off regulatory power to a private entity is ‘legislative delegation in its most obnoxious form.’”) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

22. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

“unfettered discretion to make whatever laws he thinks may be needed.”<sup>23</sup> Along the way, however, the Court also took issue with the prospect of a private organization wielding legislative power, describing the concept as “unknown to our law and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress.”<sup>24</sup>

One year later, in *Carter v. Carter Coal*, the Court confronted such a delegation.<sup>25</sup> The statute at issue, the Bituminous Coal Conservation Act of 1935, allowed one group of coal producers to set binding regulations applicable to the entire industry.<sup>26</sup> The regulation of coal production, the Court held, was “necessarily a governmental function.”<sup>27</sup> Accordingly, Congress’s transfer of regulatory power to a private entity represented “legislative delegation in its most obnoxious form.”<sup>28</sup> Citing *Schechter* as well as two due process cases, the Court noted that the delegation was “so clearly arbitrary, and so clearly a denial of rights safeguarded by the Due Process Clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.”<sup>29</sup>

Thus, as a constitutional matter, the private nondelegation doctrine finds roots not in the Vesting Clause, but in the Due Process Clause.<sup>30</sup> Nevertheless, although distinct, the private nondelegation doctrine suffered the same fate as its public cousin. In a series of post-*Lochner* era cases following *Carter Coal*, the private nondelegation doctrine rapidly receded in a series of decisions that collectively permit private parties to participate in—but not dictate or control—the regulatory process.

First, in *Currin v. Wallace*, the Supreme Court upheld a regulatory scheme that authorized the Secretary of Agriculture to impose binding standards on tobacco sales in certain markets only if two-thirds of growers in the affected market approved the regulations.<sup>31</sup> The Court distinguished *Carter Coal*, reasoning that “[t]his is not a case where a group of producers may make the law and force it upon a minority. . . . Here it is Congress that exercises its legislative authority in making the regulation and in prescribing

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23. *Id.* at 537–38.

24. *Id.* at 537.

25. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

26. *Id.* at 278; 15 U.S.C. §§ 801–827 (repealed 1937).

27. *Carter*, 298 U.S. at 311.

28. *Id.*

29. *Id.* at 311–12 (citing *Schechter*, 295 U.S. at 537; *Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912); *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121–122 (1928)).

30. See Alexander “Sasha” Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2014 CATO SUP. CT. REV. 359, at 369–70 (describing private delegations as problematic because they arbitrarily deprive private citizens of liberty and property rights safeguarded by the Constitution and are therefore without due process of law).

31. *Currin v. Wallace*, 306 U.S. 1 (1939).

the conditions of its application.”<sup>32</sup> Accordingly, the Court held that the growers’ approval did not “involve any delegation of legislative authority.”<sup>33</sup>

Later that year in *United States v. Rock Royal Co-Operative, Inc.*, the Court examined a similar statute.<sup>34</sup> This one required milk-producer approval of marketing orders issued by the Secretary of Agriculture.<sup>35</sup> Citing *Currin*—and without mentioning *Carter Coal*—the Court permitted the delegation.<sup>36</sup>

The next term, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court allowed private entities to participate in the development of industry-binding regulations.<sup>37</sup> The statute there, the Bituminous Coal Conservation Act of 1937, provided for the regulation of the sale and distribution of coal by a government commission with coal-industry cooperation.<sup>38</sup> Coal producers serving on regional coal boards acted “as an aid” to the agency by proposing regulations setting coal prices, subject to the “pervasive surveillance and authority” of the government commission.<sup>39</sup> In contrast to *Carter Coal* and the prior version of the Bituminous Coal Conservation Act, the coal boards in *Adkins* functioned “subordinately” to the government agency, which had “authority and surveillance over the activities” of the boards.<sup>40</sup> According to the Court, this distinction made the constitutional difference: Because an arm of the government could modify the proposed regulations and determine the final prices, Congress had not “delegated its legislative authority to the industry.”<sup>41</sup> The scheme was “unquestionably valid.”<sup>42</sup>

Much like the public nondelegation doctrine, the private nondelegation doctrine has largely remained dormant since the late *Lochner* era, garnering just passing mentions over the years.<sup>43</sup> But while the Court hasn’t substantively revisited the private nondelegation doctrine in decades, *Carter Coal* remains the law of the land. Thus, when the D.C. Circuit confronted a

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32. *Id.* at 15–16.

33. *Id.* at 15.

34. *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939).

35. *Id.* at 546–48.

36. *Id.* at 574.

37. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 381 (1940).

38. *Id.* at 387–388; 15 U.S.C. §§ 828–852 (repealed 1966).

39. *Adkins*, 310 U.S. at 388.

40. *Id.* at 399.

41. *Id.*

42. *Id.*

43. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 424 (1944); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

statute that purported to delegate regulatory authority to a private entity in 2013, it did not hesitate to apply the doctrine.<sup>44</sup>

*Association of American Railroads v. Department of Transportation* involved a challenge to section 207 of the Passenger Rail Investment and Improvement Act, a statute in which Congress granted Amtrak and the Federal Railroad Administration (FRA)<sup>45</sup> authority to “jointly develop” metrics and standards to evaluate the quality of services of passenger railways.<sup>46</sup> Section 207(d) addressed disagreements between the FRA and Amtrak regarding the content of these metrics and standards, explaining that either party could petition the Surface Transportation Board to “appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.”<sup>47</sup> The Association of American Railroads (AAR) sued the Department of Transportation and the FRA, alleging that section 207 was unconstitutional. The AAR argued that section 207 violated the Fifth Amendment’s Due Process Clause by giving governmental power to an interested private party.<sup>48</sup> It also argued that section 207 violated the private nondelegation doctrine by placing legislative authority in a private entity.<sup>49</sup> The district court granted the government’s motion for summary judgment,<sup>50</sup> and the AAR appealed.<sup>51</sup>

The D.C. Circuit reversed, holding that section 207 violated the private nondelegation doctrine. Relying on *Carter Coal*, the court explained that “[f]ederal lawmakers cannot delegate regulatory authority to a private entity.”<sup>52</sup> Distinguishing between the legitimate delegations of regulatory authority to executive agencies and the unauthorized delegations of regulatory authority to private entities, the court emphasized that “[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority” because “the Constitution commits no executive power” to private entities.<sup>53</sup> Having framed the question as a private nondelegation doctrine problem, the court analyzed (1) “how much

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44. *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 673–77 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015).

45. The FRA is a federal agency within the U.S. Department of Transportation. OFF. OF THE FED. REG., NAT’L ARCHIVES & RECS. ADMIN., THE UNITED STATES GOVERNMENT MANUAL 285–86 (2014).

46. *Am. R.Rs.*, 721 F.3d at 668; Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907–67 (codified in scattered sections of 49 U.S.C.).

47. *Am. R.Rs.*, 721 F.3d at 673 (quoting § 207(d) of the PRIIA).

48. *Id.* at 670.

49. *Id.*

50. *Ass’n of Am. R.Rs. v. Dep’t of Transp.*, 865 F. Supp. 2d 22, 35 (D.D.C. 2012), *rev’d*, 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015).

51. *Am. R.Rs.*, 721 F.3d at 666.

52. *Id.* at 670.

53. *Id.* at 670–71.



involvement . . . a private entity [may] have in the administrative process before its advisory role trespasses into an unconstitutional delegation” and (2) whether Amtrak should be considered a public entity or private corporation.<sup>54</sup>

First, to determine how much involvement a private entity may have in the regulatory process before crossing the constitutional line, the court compared the regulatory power granted in section 207 to the level of control exercised by private parties in *Currin* and *Adkins*:

Like the private parties in *Currin*, Amtrak has an effective veto over regulations developed by the FRA. And like those in *Adkins*, Amtrak has a role in filling the content of regulations. But the similarities end there. The industries in *Currin* did not craft the regulations, while *Adkins* involved no private check on an agency’s regulatory authority. Even more damningly, the agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas Amtrak enjoys authority equal to the FRA.<sup>55</sup>

“[J]ust because two structural features raise no constitutional concerns independently,” the Court explained, “does not mean Congress may combine them in a single statute.”<sup>56</sup> Accordingly, the court concluded that the control given to Amtrak through section 207 was “close to the blatantly unconstitutional scheme in *Carter Coal*.”<sup>57</sup>

Second, the court evaluated whether Amtrak was a public or private entity. Several facts supported the government’s argument that Amtrak was a public entity:

- Amtrak’s Board of Directors included “the Secretary of Transportation, seven other presidential appointees, and the President of Amtrak” who was selected by the other members.
- Amtrak was subject to the Freedom of Information Act (FOIA).
- Finally, Amtrak was over 99% government owned.<sup>58</sup>

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54. *Id.* at 671, 674.

55. *Id.* at 671.

56. *Id.* at 673.

57. *Id.*

58. *Id.* at 674.

Other facts leaned in favor of treating Amtrak as a private entity:

- The statute creating Amtrak stated that it “shall be operated and managed as a for-profit corporation” and that it “is not a department, agency, or instrumentality of the United States Government.”
- Amtrak’s FOIA Handbook stated that it was a “private corporation operated for profit.”
- Amtrak had a “.com” website—not the “.gov” ordinarily associated with government sites.<sup>59</sup>

To resolve these facts pointing in both directions, the court evaluated Amtrak in light of the “functional purposes [served by] the public-private distinction”—democratic accountability and the belief that public entities, unlike private ones, act for the public good.<sup>60</sup> Despite the Supreme Court’s ruling in *Lebron v. National Railroad Passenger Corp.* that Amtrak was “part of the Government for purposes of the First Amendment,”<sup>61</sup> the D.C. Circuit Court concluded that “Amtrak is a private corporation with respect to Congress’s power to delegate regulatory authority.”<sup>62</sup> Key to this conclusion was the fact that Congress has declared that Amtrak “is not a department, agency, or instrumentality of the United States Government.”<sup>63</sup> As a result, the D.C. Circuit struck down the statute as “an unconstitutional delegation of regulatory power to a private party” without reaching the question of whether the statute violated due process.<sup>64</sup>

The Supreme Court granted certiorari and reversed.<sup>65</sup> The Supreme Court’s *Association of American Railroads* opinion emphasized Amtrak’s corporate structure over Congressional pronouncements in statute.<sup>66</sup> Given the government’s corporate control over Amtrak’s board and statutorily mandated supervision over Amtrak operations, the Supreme Court concluded that Amtrak was a public entity.<sup>67</sup> In addition, the Court emphasized that the statute obligated Amtrak to pursue several specific goals aside from private economic interests, that the government directed its day-to-day operations, and that its survival depended on federal support.<sup>68</sup> Rebalancing the facts, the Court concluded that for the purposes

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59. *Id.* at 675.

60. *Id.*

61. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

62. *Am. R.R.s.*, 721 F.3d at 677.

63. *Id.* at 675 (quoting 49 U.S.C. § 24301(a)(3)).

64. *Id.* at 674.

65. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43 (2015).

66. *Id.* at 51–52.

67. *Id.* at 53–54.

68. *Id.* at 53.

of private nondelegation, Amtrak is a public corporation.<sup>69</sup> And because the Court found Amtrak to be “a federal actor or instrumentality,” the private nondelegation doctrine did not apply.<sup>70</sup> Signing on with the majority, Justices Alito and Thomas each concurred separately to confirm the doctrine’s continued viability and potential revitalization in a future case.<sup>71</sup>

Indeed, a near miss occurred fairly recently. In *Texas v. Rettig*, the en banc Fifth Circuit rejected a private nondelegation challenge to HHS’s 2002 Certification Rule.<sup>72</sup> The Certification Rule clarified what it means for a managed-care organization’s capitation rate to be “actuarially sound.”<sup>73</sup> To qualify, the rate must (among other things) “[h]ave been certified . . . by actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board.”<sup>74</sup> The initial Fifth Circuit panel held that while the Rule permitted the organization to define a statutory term, HHS retained final reviewing authority to approve States’ contracts with managed care organizations.<sup>75</sup>

In an opinion dissenting from the denial of rehearing en banc, Judge Ho flagged three “[c]ritical features” of the Rule that, in his view, render it “uniquely offensive to the Constitution”:

1. It subdelegates substantive lawmaking power, rather than some minor factual determination or ministerial task;
2. [T]he subdelegation is authorized by an administrative agency [(HHS)], rather than by Congress; and
3. [T]he agency is subdelegating power to a private entity, rather than to another governmental entity that is at least minimally accountable to the public in some way.<sup>76</sup>

The Supreme Court may have rejected every nondelegation claim it has seen since 1935, Judge Ho explained, but none “involve[d] this toxic combination of constitutional abnormalities.”<sup>77</sup> Judicial acquiescence in the face of such an arrangement meant “allow[ing] the real work of lawmaking

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69. *Id.*

70. *Id.* at 55.

71. *See id.* at 56–66 (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring).

72. *Texas v. Rettig*, 993 F.3d 408 (5th Cir. 2021).

73. 42 U.S.C. § 1396b(m)(2)(A)(iii), (xiii).

74. 42 C.F.R. § 438.6(c)(1)(i)(A)–(C) (2002).

75. *Texas v. Rettig*, 987 F.3d 518, 530–33 (5th Cir. 2021), *cert. denied sub nom. Texas v. Comm’r of Internal Revenue*, 142 S. Ct. 1308 (2022).

76. *Texas v. Rettig*, 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

77. *Id.*

to be exercised by private interests colluding with agency bureaucrats, rather than by elected officials accountable to the American voter.”<sup>78</sup> If the nondelegation doctrine really is so toothless, he warned, “[t]he right to vote means nothing.”<sup>79</sup>

The state plaintiffs petitioned for certiorari. While litigation was pending, however, Congress repealed the tax underlying the states’ claimed injury and the Supreme Court denied the petition.<sup>80</sup> Once again, however, Justice Alito, this time joined by Justices Thomas and Gorsuch, wrote a concurring opinion emphasizing the significance of the private nondelegation issue and expressing interest for the Court to revisit the issue “in an appropriate case.”<sup>81</sup>

### C. *International Delegations*

The “international delegation” presents a third type of regulatory delegation that straddles the public and private delegations. Bradley and Kelley define an international delegation “as a grant of authority by two or more states to an international body to make decisions or take actions.”<sup>82</sup> Unlike public and private delegations, international delegations remain relatively untested at the Supreme Court. Nonetheless, in 2015, Justice Breyer predicted delegation issues would soon “arise with increasing frequency” in the context of transfers of regulatory power to international organizations.<sup>83</sup> Justice Breyer was right. The number of international governmental organizations is growing.<sup>84</sup> And these organizations “govern to an ever-greater extent the daily lives of citizens of interdependent nations” by promulgating regulations that bind member states.<sup>85</sup>

Indeed, international delegations have “already caused controversy.”<sup>86</sup> Consider, for example, section 15 of the Clean Diamond Trade Act (Act), which stated that the legislation would not take effect until the President certified that the World Trade Organization or United Nations Security Council had approved it.<sup>87</sup> President George W. Bush believed that

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78. *Id.* at 410–11.

79. *Id.*

80. *See Texas v. Comm’r of Internal Revenue*, 142 S. Ct. 1308 (2022).

81. *Id.* at 1309.

82. Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1, 3 (2008).

83. Rice, *supra* note 4, at 542 & n.17 (quoting STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 227 (2015)).

84. *Id.* at 542 & n.18 (quoting BREYER, *supra* note 83, at 197).

85. *Id.* at 542 & n.19 (quoting BREYER, *supra* note 83, at 197).

86. *Id.* at 542 (discussing examples).

87. Presidential Statement on Signing the Clean Diamond Trade Act, 2003, 39 WEEKLY COMP. PRES. DOC. 491 (Apr. 25, 2003).

predicating the Act’s effective date on permission from these organizations would “unconstitutionally delegate[] legislative power to international bodies.”<sup>88</sup> To avoid the constitutional issue, he construed the certification as wholly discretionary.<sup>89</sup>

Circuit courts have also expressed skepticism of international delegations. In *Natural Resources Defense Council v. Environmental Protection Agency*, the D.C. Circuit warned that “assigning lawmaking functions to international bodies” would “raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers.”<sup>90</sup> In short, the international delegation issue is likely to recur until the Supreme Court finally addresses its constitutionality once and for all.<sup>91</sup>

## II. CANNABIS, THE SINGLE CONVENTION, AND THE CSA: AN ARCHETYPAL INTERNATIONAL DELEGATION

While scholars and judges have flagged several problematic international delegations,<sup>92</sup> one of the most egregious examples has been on the books since 1970 and yet has escaped academic and judicial attention: section 811(d)(1) of the CSA.<sup>93</sup>

The primary purpose of the CSA was to consolidate several disparate drug-control laws existing at the time into a “comprehensive statute” to “strengthen law enforcement tools against the traffic in illicit drugs.”<sup>94</sup> But the statute also implements the Single Convention on Narcotic Drugs of 1961—a multi-lateral, non-self-executing United Nations treaty to which the United States is party.<sup>95</sup> The Single Convention contains a scheduling system similar to the CSA’s.<sup>96</sup> Once drugs are placed on one of those schedules through a process managed by the United Nations Commission on Drug Control and the World Health Organization, according to the terms

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88. *Id.*

89. *Id.*; see also Rice, *supra* note 4, at 542–43 (discussing Statement on Signing the Clean Diamond Trade Act).

90. Nat’l Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

91. BREYER, *supra* note 83, at 235.

92. See *supra* notes 81–89 and accompanying text.

93. 21 U.S.C. § 811(d)(1).

94. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

95. See § 811(d)(1) (implementing the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407 [hereinafter Single Convention]).

96. Nat’l Org. for Reform of Marijuana L. (NORML) v. DEA (*NORML II*), 559 F.2d 735, 739 (D.C. Cir. 1977) (explaining that, “[l]ike the CSA, the Single Convention establishes several classifications or ‘schedules’ of substances, to which varying regimes of control attach”); see Single Convention, *supra* note 95.

of the treaty, member states must regulate them in certain ways depending on their particular scheduling status.<sup>97</sup>

The CSA implements the Single Convention as a matter of United States law. In oversimplified terms, the CSA establishes two different procedures for regulating drugs. The first group of procedures, sections 811(a)–(c), applies to drugs *not* subject to the Single Convention.<sup>98</sup> These provisions require the DEA and FDA to gather and review available evidence in an intricate, public-facing formal rulemaking process under 21 U.S.C. § 811(a) before making a number of findings that dictate the nature of the “controls” (regulations) that will apply to a particular substance.<sup>99</sup>

A different section, section 811(d)(1), applies to drugs subject to control under the Single Convention.<sup>100</sup> When this section applies, the DEA must bypass rulemaking procedures and use a far simpler process, namely issuing an order placing the substance in the CSA schedule the DEA deems “most appropriate” to ensure U.S. compliance with its obligations under the treaty.<sup>101</sup> For substances subject to Schedule I of the Single Convention, that means, among other things, criminalizing the unauthorized possession, distribution, and manufacture of the drug at issue.<sup>102</sup>

In the remaining sections of this essay, we explain how this arrangement represents a problematic international private delegation. The history of cannabis regulation in the United States under the CSA and the Single Convention brings many of those problems into focus. Indeed, as we explain next, the federal government’s desire to pass a categorical criminal ban on cannabis possession played an integral role in both United States accession to the Single Convention in 1967 and the passage of the CSA in 1970.

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97. Single Convention, *supra* note 95, art. 3; *id.* art 4.

98. 21 U.S.C. § 811(a)–(c).

99. *See* § 811(a) (directing the Attorney General, who has since delegated his authority under the statute to the DEA, to schedule, deschedule, and reschedule drugs through formal rulemaking proceedings “on the record”); § 811(b) (providing that when the Attorney General decides to (or receives a request to) initiate scheduling, descheduling, or rescheduling proceedings, he must gather the relevant data, request a medical and scientific evaluation and a scheduling recommendation from the Secretary of Health and Human Services (HHS), and assess whether substantial evidence supports initiating formal rulemaking proceedings); § 811(c) (setting forth eight factors the DEA and the FDA (HHS’s delegee) must consider in assessing the initiation of formal rulemaking proceedings under 21 U.S.C. § 811 (a)–(b) and in making findings required under 21 U.S.C. § 812 to place a drug in a particular schedule).

100. § 811(d)(1).

101. *Id.*

102. *See, e.g.*, Schedules of Controlled Substances: Placement in Schedule V of Certain FDA-Approved Drugs Containing Cannabidiol; Corresponding Change to Permit Requirements, 83 Fed. Reg. 48950, 48951 (Sept. 28, 2018) (listing various restrictions signatories to the Single Convention must impose on substances subject to Schedule I controls under the treaty).

### A. *The Single Convention*

Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics, came out of retirement in 1967 to appear before the Senate Committee on Foreign Relations in support of United States accession to the Single Convention on Narcotic Drugs of 1961.<sup>103</sup> Noting that “[s]everal groups in the United States [were] loudly agitating . . . to legalize [marijuana] use,” Anslinger urged the Senate to use “treaty obligations to resist” their efforts:

Another important reason for becoming a party to the 1961 convention is the marihuana problem . . . . Several groups in the United States are loudly agitating to liberalize controls and, in fact, to legalize its use . . . . If the United States becomes a party to the 1961 convention we will be able to use our treaty obligations to resist legalized use of marihuana. This discussion is going on all over the country, in many universities, and in fringe groups, and it is rather disturbing.<sup>104</sup>

Anslinger had long argued that the treaty power was the key to federal marijuana control nationwide.<sup>105</sup> During his early years at the helm of the Federal Bureau of Narcotics, Anslinger was reluctant to pursue marijuana at all.<sup>106</sup> For starters, he didn’t think the drug was causing serious problems.<sup>107</sup> Also, the stuff “grew . . . like dandelions” and had “a few legitimate uses.”<sup>108</sup> But in later years, Anslinger insisted that federal control would require full prohibition.<sup>109</sup> In his view, a federal marijuana ban riddled with exceptions for medical uses would be an enforcement nightmare.<sup>110</sup>

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103. S. EXEC. REP. NO. 11, at 20 (1967) (statement of H.J. Anslinger).

104. *Id.*

105. See DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 223 (3d ed. 1999) (explaining that Anslinger’s Federal Bureau of Narcotics “claimed that only the treaty-making power of the federal government could sustain an antimarihuana statute”); *id.* at 224–25 (detailing Anslinger’s early attempts to convince the Department of State to suggest U.S. accession to a treaty requiring control of marijuana); Harry J. Anslinger, Comment, *The Implementation of Treaty Obligations in Regulating the Traffic in Narcotic Drugs*, 8 AM. U. L. REV. 112 (1959).

106. MUSTO, *supra* note 105, at 221–22 (discussing Anslinger’s reasons for “delay[ing] advocating a federal marihuana law”).

107. *Id.* at 222 (“To Anslinger, the danger of marihuana did not compare with that of heroin, and . . . in 1937 he warned his agents to keep their eyes on heroin; if an agent was making arrests for marihuana possession, he was told to get back to ‘the hard stuff.’”).

108. *Id.*

109. *Id.* at 227.

110. *Id.*

But federal legislation banning marijuana use directly was out of the question for another reason: the U.S. Constitution.<sup>111</sup> After meeting with experts in 1936, Anslinger wrote a confidential memorandum to another senior Treasury Department official named Stephen B. Gibbons, explaining that “under the taxing power and regulation of interstate commerce it would be almost hopeless to expect any kind of adequate control.”<sup>112</sup>

At the time, Anslinger was right. Such public health and safety measures were seen as quintessential exercises of the “police powers” reserved to the states under the Constitution,<sup>113</sup> and the Supreme Court’s post-*Lochner* era expansion of the Commerce Clause power had yet to arrive.<sup>114</sup> What Anslinger needed, then, was a way to override traditional state police powers. For that, he turned to a 1920 Supreme Court opinion authored by Justice Oliver Wendell Holmes, *Missouri v. Holland*.<sup>115</sup>

David Musto describes Anslinger’s idea in detail in Chapter 9 of his book *The American Disease: Origins of Narcotic Control*:

The Commissioner’s recommendation for the marihuana legislation was to follow the example of the Migratory Bird Act, which had been declared constitutional, although it intruded into the police powers of the states, because it had been enacted as a requirement of treaties with Canada and Mexico (*Missouri v. Holland*, 252 U.S. 416). Anslinger suggested a similar treaty requiring the control of marihuana. Once the treaty was ratified by the Senate, a federal marihuana law would not meet the constitutional blocks he felt sure it would face if it were based on federal tax or commerce powers.<sup>116</sup>

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111. *Id.* at 222 (stating that Anslinger “also doubted the possibility of a [federal criminal ban on marijuana] that would be constitutional”).

112. *Id.* at 224.

113. See *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) (noting that States retain “broad police powers” under Tenth Amendment to regulate “the administration of drugs by the health professions”); *Linder v. United States*, 268 U.S. 5, 18 (1925) (“[D]irect control of medical practice in the States is beyond the power of the Federal Government.”).

114. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

115. *Missouri v. Holland*, 252 U.S. 416 (1920). In *Holland*, the Supreme Court held that Congress has the authority to pass laws necessary and proper to effectuate ratified treaties. *Id.* at 434–35. As such, under *Holland*, the Treaty Clause provides an independent source for Congressional authority independent of the Commerce Clause. *Id.* at 434; see also U.S. CONST. art II, § 2, cl. 2. In a 2014 *Harvard Law Review Forum* essay, Senator Ted Cruz called the reasoning and implications of *Holland* “problematic,” and attempted to reconcile its holding with other jurisprudence. Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 118–19 (2014). But if *Holland* could not be reconciled, Cruz suggested *Holland* be overruled by a future Court, perhaps in *Bond v. United States*, where the question presented itself. *Id.* at 120–121 (citing *Bond v. United States*, 568 U.S. 1140 (2013) (mem.)). The Court majority in *Bond*, however, avoided the issue. *Bond v. United States*, 572 U.S. 844 (2014). Nonetheless, after *Bond*, *Holland* “rest[s] on shaky ground.” *United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022).

116. MUSTO, *supra* note 105, at 224.



In essence, by ratifying treaties with other nations that required national control of marijuana, Congress could supplant the traditional state police powers and enact prohibition both on a national and local level under the guise of carrying out treaty obligations.<sup>117</sup> Anslinger's confidential memo went on to explain that for this plan to work, the federal government would need to close off the legitimate channels of marijuana traffic ahead of time.<sup>118</sup> The pharmaceutical industry, for example, had a "medical need for marijuana," but Anslinger reported that it had already agreed to "eliminate it entirely."<sup>119</sup>

In June 1936, Anslinger traveled to Geneva to pitch the necessary marijuana control treaty to the Conference for the Suppression of the Illicit Traffic in Dangerous Drugs.<sup>120</sup> The other delegations balked, however, so Anslinger's proposal never made it into the final agreement.<sup>121</sup> Of the 27 nations in attendance, only the United States refused to sign the resulting convention.<sup>122</sup>

When Anslinger's treaty idea failed, the Treasury Department got to work on its fallback plan: indirect federal marijuana control through a transfer tax. The result was the Marihuana Tax Act of 1937, which remained in place until the Supreme Court declared it unconstitutional in 1969 in *United States v. Leary*.<sup>123</sup> Anslinger's appearance before the Senate Foreign Relations Committee to promote his treaty scheme again in 1967 (while *Leary* was making its way to the Supreme Court) was therefore well timed. It also worked: The Single Convention entered into force for the United States on June 24, 1967.<sup>124</sup>

The Single Convention is not self-executing. It depends instead on the subsequent implementation of legislation by signatory states to become binding as a matter of their domestic law. When the United States became a party in 1967, no additional federal legislation was necessary to implement the Single Convention's marijuana control requirements. The combination of the ill-fated Marihuana Tax Act and state marijuana laws "allow[ed] virtually no legitimate use of marijuana."<sup>125</sup> When the Supreme Court declared the Marijuana Tax Act unconstitutional in *Leary*,<sup>126</sup> however, the

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 225.

121. *Id.*

122. *Id.*

123. *See Leary v. United States*, 395 U.S. 6 (1969).

124. *See Single Convention*, *supra* note 95.

125. David Murray Van Atta, *Effects of the Single Convention on Narcotic Drugs Upon the Regulation of Marijuana*, 19 HASTINGS L.J. 848, 854 (1968).

126. *Leary*, 395 U.S. at 6.

stage was set for Congress to act on Anslinger's plan for legislation banning marijuana at the federal level under the treaty power.

Anslinger's concept became reality with the enactment of the CSA.<sup>127</sup> “[A] number of the provisions of [the CSA] reflect Congress’ intent to comply with the obligations imposed by the Single Convention.”<sup>128</sup> From then on, the United States was locked into a regime of stringent controls on the cultivation, manufacture, distribution, and even *mere possession* of marijuana—regardless of state laws to the contrary.<sup>129</sup>

### B. Drug Control Under the CSA

Congress enacted the CSA in 1970 to combat “drug abuse” and control “the legitimate and illegitimate traffic in controlled substances.”<sup>130</sup> To that end, it made two competing findings. First, many drugs “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.”<sup>131</sup> Second, “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”<sup>132</sup>

Before the CSA, the federal government had regulated drugs through a “patchwork” of federal laws.<sup>133</sup> The CSA consolidated these disparate laws into one “comprehensive statute” to “strengthen law enforcement tools against the traffic in illicit drugs.”<sup>134</sup>

The “cardinal feature” of the CSA’s effort to rationalize and consolidate federal drug control are its schedules.<sup>135</sup> The CSA sorts drugs among five schedules “based on their “accepted medical uses, the potential for abuse,

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127. See 21 U.S.C. § 801 et seq.

128. Control of *Papaver bracteatum*—Drug Enforcement Administration, 1 Op. O.L.C. 93, 95 (1977) (citing 21 U.S.C. §§ 801(7), 811(d), 812(b), 953(a)(1), 958(a)); see also S. REP. NO. 91-613, at 4 (1969) (“The United States has international commitments to help control the worldwide drug traffic. To honor these commitments, principally those established by the Single Convention on Narcotic Drugs of 1961, is clearly a Federal responsibility.”).

129. See Single Convention, *supra* note 95, art. 4; *id.* art. 36 (noting that signatory countries must impose criminal penalties for the “cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs”).

130. *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

131. 21 U.S.C. § 801(1).

132. § 801(2)

133. See MICHAEL R. SONNENREICH, ROBERT L. BOGOMOLNY & ROBERT J. GRAHAM, HANDBOOK OF FEDERAL NARCOTIC AND DANGEROUS DRUG LAWS, xiii–xvi (1969); ROBERT L. BOGOMOLNY, MICHAEL R. SONNENREICH & ANTHONY J. ROCCOGRANDI, A HANDBOOK ON THE 1970 FEDERAL DRUG ACT: SHIFTING THE PERSPECTIVE, 5–20 (1975) [hereinafter HANDBOOK].

134. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

135. Nat’l Org. for Reform of Marijuana L. (NORML) v. Ingersoll (*NORML I*), 497 F.2d 654, 656 (D.C. Cir. 1974); see also HANDBOOK, *supra* note 133, at 26–27.

and . . . effects on the body.”<sup>136</sup> Schedule I contains drugs without accepted medical uses in treatment in the United States—regardless of danger.<sup>137</sup> Schedules II through V rank others from most to least dangerous based on relative potential for abuse and physical/psychological dependence.<sup>138</sup> Controls and penalties track the schedules—the lower the number, the more restrictive the controls and the more severe the penalties.<sup>139</sup>

Congress set the initial schedules but provided a procedure for future scheduling and rescheduling.<sup>140</sup> Under § 811(a)(2), formal rulemaking procedures to transfer a drug between schedules may be initiated by the Attorney General “(1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.”<sup>141</sup> “Congress contemplated that the classification set forth in the Act as originally passed would be subject to continuing review by the executive officials . . . .”<sup>142</sup>

### C. Scheduling Process Under the Single Convention

The United Nations Commission on Narcotic Drugs (CND), the international body with authority over all matters pertaining to the aims of the international drug control conventions, controls drug scheduling under the Single Convention.<sup>143</sup> In making scheduling decisions, CND follows the procedures detailed in Article 3 of the Single Convention.<sup>144</sup> The process starts when a party or the WHO requests a change to the scope of control applicable to a particular drug, to the parties, to the Commission, and, when the notification is made by a party, to the WHO.<sup>145</sup>

The WHO then reviews the substance and available evidence and makes a scheduling recommendation to the CND.<sup>146</sup> The Commission then decides

136. *Raich*, 545 U.S. at 13.

137. See Notice of Denial of Petition, 66 Fed. Reg. 20038 (Apr. 18, 2001) (“Congress established only one schedule—schedule I—for drugs of abuse with ‘no currently accepted medical use in treatment in the United States’ and ‘lack of accepted safety for use . . . under medical supervision.’” (quoting 21 U.S.C. § 812(b)(1))).

138. See HANDBOOK, *supra* note 133, at 28.

139. See *id.* at 75; Nat’l Org. for Reform of Marijuana L. (NORML) v. DEA (*NORML II*), 559 F.2d 735, 737 (D.C. Cir. 1977).

140. 21 U.S.C. § 811 (setting forth procedures); § 812(c) (establishing initial schedules).

141. § 811(a)(2).

142. *NORML I*, 497 F.2d at 656.

143. See Single Convention, *supra* note 95, art. 8(a).

144. *Id.*; see also Allyn L. Taylor, *Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs*, 35 J.L. MED. & ETHICS 556, 562 (2007) (discussing the Article 3 process and the CND’s implementation of it).

145. Single Convention, *supra* note 95, art. 3(1), (2).

146. See Taylor, *supra* note 144 (“First, the Single Convention authorizes WHO to conduct a medical and scientific review of a substance and to make a scheduling recommendation to the Commission on Narcotic Drugs. Second, the CND has the final decision to schedule the substance, but

whether to accept or reject the WHO's scheduling recommendation by a simple majority vote of those of its voting members who are present at the time of decision.<sup>147</sup> It may add a substance to a schedule only if the WHO has recommended that it do so.<sup>148</sup>

The Secretary General then communicates the Commission's decision to all State Members of the United Nations, to non-member States Parties to the Conventions, to the WHO, and to the International Narcotics Control Board—the independent and quasi-judicial monitoring body responsible for implementing the treaty.<sup>149</sup>

Scheduling decisions are effective and binding on parties on the date they receive notice from the Secretary General.<sup>150</sup> They are subject to review by the Economic and Social Council upon the request of any Party filed within ninety days of receipt of notification of the decision.<sup>151</sup> The Council may confirm, alter, or reverse the Commission's decision of the Commission, and its decisions are final.<sup>152</sup>

As already mentioned, once the CND subjects a substance to control under the Single Convention, section 811(d)(1) of the CSA obligates DEA to place that same substance in the schedule of the CSA that it "deems most appropriate" to ensure U.S. compliance with its obligations under the treaty.<sup>153</sup> In doing so, the statute directs the DEA to disregard the findings and procedures that ordinarily apply to scheduling decisions under the statute:

If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.<sup>154</sup>

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may do so only in accordance with the schedule recommended by WHO. This two-part review and scheduling process affects the controls that will be placed on medicines in each country pursuant to the Single Convention.").

147. See RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL, at 14, U.N. Doc. E/5975/Rev.1, U.N. Sales No. E.83.I.10 (1983).

148. See Taylor, *supra* note 144.

149. Single Convention, *supra* note 95, art. 3(7).

150. *Id.* art. 3(7).

151. *Id.* art. 3(8)(a).

152. *Id.* art. 3(8)(c).

153. 21 U.S.C. § 811(d)(1).

154. *Id.*

*D. Section 811(d)(1) Unconstitutionally Delegates Legislative Authority to the CND and WHO*

Section 811(d)(1) unconstitutionally delegates legislative authority to the WHO and the CND to set binding codes of domestic criminal law. “Subsequent modification or amendment to these international treaties would, of course, become controlling as federal law” as well.<sup>155</sup>

The dynamic underlying section 811(d)(1) routinely plays itself out in the Federal Register. Thus, for example, when the United Nations added AH-7921 to the Single Convention in 2015, DEA promptly followed suit by placing AH-7921 in Schedule I.<sup>156</sup> Without the notice-and-comment process and without making any of the findings ordinarily required before a substance may be placed in Schedule I, it stated that the statute ties the agency’s hands:

Section 201(d)(1) of the CSA (21 U.S.C. 811(d)(1)) states that, if control of a substance is required “by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings and procedures required by section 201(a) and (b) (21 U.S.C. 811(a) and (b)) and section 202(b) (21 U.S.C. 812(b)) of the Act.” 21 U.S.C. 811(d)(1), 21 CFR 1308.46. If a substance is added to one of the schedules of the Single Convention on Narcotic Drugs, 1961, then, in accordance with article 3, paragraph 7 of the Convention, as a signatory Member State, the United States is obligated to control that substance under its national drug control legislation, the CSA.<sup>157</sup>

Where applicable, the agency routinely invokes section 811(d)(1) as mandating the domestic scheduling of a drug in some variation of the above passage.<sup>158</sup> When required to “carry out” treaty obligations under the Single Convention, DEA adds substances to the CSA schedules without using APA rulemaking procedures, thereby creating domestic criminal penalties for

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155. HANDBOOK, *supra* note 133, at 72.

156. Schedules of Controlled Substances: Placement of AH-7921 Into Schedule I, 81 Fed. Reg. 22023 (Apr. 14, 2016) (to be codified at 21 C.F.R. pt. 1308).

157. *Id.*

158. *See, e.g.*, Schedules of Controlled Substances: Placement of Isotonitazene in Schedule I, 86 Fed. Reg. 60761 (Nov. 4, 2021) (to be codified at 21 C.F.R. pt. 1308); Schedules of Controlled Substances: Placement of Crotonyl Fentanyl in Schedule I, 85 Fed. Reg. 62215 (Oct. 2, 2020) (to be codified at 21 C.F.R. pt. 1308).

unauthorized possession, use, or distribution.<sup>159</sup> In this way, the United Nations creates domestic criminal law; according to DEA, it is merely carrying out what the statute commands it to do.

This express, private international delegation to the United Nations in section 811(d)(1) bears many of the hallmarks Judge Ho found “uniquely offensive” to the Constitution in *Texas v. Rettig*.<sup>160</sup> First, it not only delegates substantive lawmaking power, but powers to create domestic criminal law. Indeed, as discussed in Section I.B., the private nondelegation doctrine finds its roots in Due Process principles as opposed to the Vesting Clause.<sup>161</sup> Scheduling decisions have serious criminal implications.<sup>162</sup> As a matter of due process, section 811(d)(1) appears to be far more problematic than the Certification Rule.

Second, section 811(d)(1) delegates lawmaking power to entities not accountable to the American people. Unlike the Certification Rule, which delegated lawmaking authority to private *domestic* organizations, section 811(d)(1) permits *foreign* organizations to control domestic criminal law. While the Actuarial Standards Board involved in *Texas v. Rettig* is not accountable to American voters, it is at least run by them.

Third, just as the Board’s authority under the Certification Rule often escaped HHS review entirely,<sup>163</sup> the United Nations’ authority to dictate U.S. criminal law under section 811(d)(1) is entirely beyond the DEA’s control.<sup>164</sup> The United Nations is no more beholden to the DEA than to American voters.

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159. *See id.*; *see, e.g.*, Schedules of Controlled Substances: Placement of Isotonitazene in Schedule I, 86 Fed. Reg. 60761 (administratively placing Isotonitazene in Schedule I to “carry out” obligations under Single Convention).

160. *Texas v. Rettig*, 993 F.3d 408, 410 (5th Cir. 2021) (Ho, J. dissenting from denial of reh’g en banc).

161. *See* discussion *supra* Section II.B.

162. *See, e.g.*, 21 U.S.C. § 841 (providing penalties for unauthorized manufacture, distribution, or dispensation).

163. *Rettig*, 993 F.3d at 413 (“Moreover, there is no agency review of the Board’s established ‘practice standards.’ If HHS disagrees with the Board’s standards regarding capitation rates, its only recourse is to amend or repeal the rule delegating power to the Board in the first place. HHS has thus semi-permanently subjugated its regulatory power to that of the Board.” (citing 42 C.F.R. § 438.6(c)(1)(i)(A)–(C) (2002))).

164. *See* 21 U.S.C. 811(d)(1) (mandating that when the U.N. subjects a substance to control under the Single Convention, DEA “shall” place that drug in the CSA schedule “most appropriate” to ensure U.S. compliance with the treaty, thus rendering the unauthorized handling of the substance a violation of the CSA subject to criminal penalties).

## CONCLUSION

Section 811(d)(1)'s private international delegation is as structurally undemocratic as it gets. Beyond this, the most problematic feature of section 811(d)(1) may be its denigration of federalism.

As explained above, a key reason for section 811(d)(1) was to leverage the constitutional treaty power to do something many thought Congress might lack power to do absent a treaty: ban marijuana possession nationwide. It was understood that using the Commerce Clause might face constitutional problems. In the area of federal drug control, the treaty power has provided extra muscle to override the traditional state authority over matters of public health and safety to criminalize cannabis possession at the federal level. Viewed in this light, section 811(d)(1) illustrates the core concern underlying all nondelegation doctrines, precisely, whether rooted in Vesting Clause principles or the Due Process Clause: that only an elected Congress, accountable to the American people and subject to the restrictions of the Constitution, can take away our liberty.

Some say *Gonzales v. Raich*,<sup>165</sup> along with the precedent it follows, *Wickard v. Filburn*,<sup>166</sup> is the “high-water mark” or “zenith” of Congress’s Commerce Clause powers.<sup>167</sup> In *Raich*, to conclude that the CSA properly regulated purely intrastate activities involving medical marijuana, the Court had to embrace a quasi-fiction—the *Wickard* aggregation principle—whereby the production of marijuana for personal medical use could have a “substantial effect” on the interstate marijuana market.<sup>168</sup> But the Commerce Clause is not the only structural limit the federal government pushed in enacting the CSA and upon which federal cannabis prohibition rests. We contend that section 811(d)(1) does not just reach the high-water mark of Congress’s ability to delegate substantive lawmaking power—it surpasses it. And with the Court’s current makeup, it may only be a matter of time before international delegations like section 811(d)(1) are reined in.

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165. *Gonzales v. Raich*, 545 U.S. 1 (2005).

166. *Wickard v. Filburn*, 317 U.S. 111 (1942).

167. See *Fla. ex rel. Att’y. Gen. v. U.S. Dep’t of Health & Hum. Servs.*, 648 F.3d 1235, 1291 & n.91 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

168. *Raich*, 545 U.S. at 17.