

December 2015

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Recommended Citation

John T. Parry, *The Political Theory of Treaties in the Restatements of Foreign Relations Law*, 2015 BYU L. Rev. 1581 (2016).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2015/iss6/8>

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The Political Theory of Treaties in the Restatements of Foreign Relations Law

*John T. Parry**

What is a treaty? What purposes does it serve? Who negotiates or ratifies it? What impact does it have on the powers, obligations, or laws of a signatory country? Treaties are legal documents, and these questions raise legal issues to which international and domestic law provide answers.¹ But these questions also raise basic issues about how states organize themselves internally, how they interact with each other, and how they conceptualize these processes. Thus, the act of making, complying with, or breaking a treaty is also a political act, and the significance of these political actions varies across time and space in ways that interact with theories about the nature of political life and political organization.

One ought to be able to trace, therefore, the links over time between the discourse of treaties and the discourse of political theory.² The ways in which prevailing political theories conceive of

* Jeffrey Bain Faculty Scholar and Professor of Law, Lewis & Clark Law School. My thanks to David Moore for inviting me to take part in this symposium and to the editors of the *BYU Law Review* for their close reading and helpful comments. Many of the arguments that I make in this article are tentative, and I welcome comments.

1. See, e.g., U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 2, cl. 1; *id.* art. VI, cl. 2; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Note that my use of the word “treaty” in this article displays some slippage. In the early parts of this article, “treaty” is a broad term that sometimes achieves near symmetry with “international agreement” or “promise.” By the end of the article, however, “treaty” has essentially the same meaning as it has in American constitutional law.

2. I use the term “political theory” to refer to more than the organized ideas articulated in the work of writers such as (to cite an intentionally disparate group of Euro-American theorists) Thomas Hobbes, John Locke, Karl Marx, Carl Schmitt, John Rawls, Michael Walzer, or Stephen Holmes. I intend also to include arguably less sophisticated attempts to sort out political life and political organization, including theories that can be inferred from political practices. Further, implicit in my claim of a relationship between political theory and treaties is the assertion that much of political life is about structuring individual and collective existence over time and in the face of uncertainty. Treaties, therefore, are central to political life because they represent a plan or hope for the future. Any theory of treaties is also, at least in part, a theory of politics, and any theory of politics must generate a corresponding theory of treaties.

treaties provide a useful vantage point for understanding treaty law but also for assessing the underlying goals and commitments of those theories. Similarly, the ways in which the law of treaties makes assumptions about political relationships provide a useful vantage point for evaluating, not only the law of treaties, but also the relative strength of various approaches to political life and organization. Thus, the effort to connect treaties and political theory demonstrates not just the impact of political theory on treaties but also the impact of treaties on political theory.

This Article provides three broad sketches of the connections between treaties and the larger goals or concerns of political theory over time. The first sketch considers treaties in early modern Europe. The second addresses the founding era of the United States. The third surveys the ways that the Restatements of Foreign Relations Law have addressed treaties and considers the extent to which the Restatements reflect the concerns that animated debates about treaties in the early modern and founding periods. Each Restatement has taken a slightly different approach to the legal status of treaties and to the relative powers of the branches of the federal government with respect to treaties. These differences also demonstrate distinct approaches to the interactions of international law and international society with forms of democratic government generally and with the U.S. political system specifically.

I. POLITICAL THEORY AND TREATIES IN EARLY MODERN EUROPE

“During the [European] Middle Ages, international or universal law merged with ecclesiastical law, and even positive treaty law was considered to have legal force only because treaties were confirmed by oath, which, ‘being a “sacrament,” subjected the obligation incurred to the jurisdiction of the Church.’”³ This way of thinking about the nature and role of treaties was part of a political discourse that de-emphasized the importance of states and stressed the sovereignty of God. In this strongly hierarchical view, “[t]he idea of final authority was natural to the Church, as God was the authority:

3. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604–05 (1997) (quoting ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 24 (1947)); *see also* MARK WESTON JANIS, *INTERNATIONAL LAW* 9 (5th ed. 2008) (“In earlier centuries, the obligatory force of treaties could be attributed to religious solemnities.”).

his status was expressed on earth through the rival claims of the pope and the Holy Roman Emperor to represent him.”⁴

Over time, however, “as both the pope and the Emperor lost power, the authority of other monarchs such as the kings of England and France increased to the point that . . . a multi-state system existed.”⁵ More than one state sought to claim for itself the mantle of hegemonic authority in Europe, even as authority effectively became localized in some parts of Europe, and papal claims receded with the political success of protestant faiths. The system that ultimately emerged was dominated by independent and nominally equal sovereign states.

Many commentators use the two treaties that constituted the Peace of Westphalia in 1648 and ended the Thirty Years War as a rough placeholder for the emergence of a sovereign state system.⁶ That assertion, however, is problematic for multiple reasons, including the fact that it has little to do with what the treaties actually purported to accomplish.

4. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT’L HIST. REV. 569, 571 (1999); see also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 19–23 (2004) (discussing religious authority, oaths, and the tensions among popes and other rulers in the medieval period).

5. Croxton, *supra* note 4, at 571. For a good discussion of the forces that drove those changes, with a stress on the importance of religious disputes, see DANIEL H. NEXON, THE STRUGGLE FOR POWER IN EARLY MODERN EUROPE: RELIGIOUS CONFLICT, DYNASTIC EMPIRES, AND INTERNATIONAL CHANGE (2009). Note that the shift in power from popes and emperors towards other monarchs did not mean that claims of religious authority immediately became irrelevant in the years before and after the Thirty Years War. See JACQUES-BENIGNE BOSSUET, POLITICS DRAWN FROM THE VERY WORDS OF HOLY SCRIPTURE 58 (Patrick Riley ed. & trans., Cambridge Univ. Press 1990) (1709) (“[P]rinces act as ministers of God, and his lieutenants on earth. . . . It is in this way that we have seen that the royal throne is not the throne of a man, but the throne of God himself. . . . It appears from all this that the person of kings is sacred, and that to attempt anything against them is a sacrilege.”); KING JAMES VI & I, *Basilicon Doron*, in POLITICAL WRITINGS 1, 20 (Johann P. Sommerville ed., 1994) (stating that “a lawfull good King” “acknowledgeth himselfe ordained for his people, hauing received from God a burthen of gouernment, whereof he must be countable”); KING JAMES VI & I, *The Trew Law of Free Monarchies*, in POLITICAL WRITINGS 62, 64 (Johann P. Sommerville ed., 1994) (“Kings are called Gods . . . because they sit vpon GOD his Throne in the earth, and haue the count of their administration to giue vnto him.”).

6. See, e.g., Koh, *supra* note 3, at 2607 (“In 1648, the Treaty of Westphalia ended the Thirty Years War by acknowledging the sovereign authority of various European princes. This event marked the advent of traditional international law, based on principles of territoriality and state autonomy.”).

Put in terms of this essay's focus, the political theory of the Peace of Westphalia does not presuppose a society of independent and equal sovereigns. To the contrary, it continues to reflect a system in which multiple strands of authority operated and overlapped to create numerous kinds of political relationships among emperor, kings, other rulers, religious leaders, cities, regions, and individuals.⁷ Nonetheless, that multifarious system had long been under strain because of, among other things, the continuing development of ideas about sovereignty.⁸ The Peace of Westphalia was later reconceived (and was capable of being reconceived) to fit within the political theory and conceptions of treaty law that became common sense well after 1648.⁹ Westphalia has thus become an origin story, in part because of what it actually accomplished, in part because of the actual political theory or understanding of political relationships that was at work, but in larger part because of the utility of that story for later generations of Europeans.

Notably, in the century or so before Westphalia, writers in political theory and international law provided important but also diverging blueprints for what became the new European political system. For example, Harold Koh has highlighted the efforts of Francisco Suárez, Alberico Gentili, and Hugo Grotius to separate international law from divine law and even, to some extent, from natural law (or at least from natural law conceived of as a reflection of divine will).¹⁰

7. For discussions of the difficulties of assigning the emergence of the European system of independent sovereign states to the Peace of Westphalia, see, for example, Croxton, *supra* note 4; Randall Lesaffer, *The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648*, 18 *GROTIANA* 71 (1997); NEXON, *supra* note 5, at 265–88.

8. See, e.g., Koh, *supra* note 3, at 2606 (noting the importance of Bodin's publication in 1576 of a "general theory of the state that gave rise to the modern concept of sovereignty as a driving force in international law"); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 83–85, 96 (1999) (discussing Grotius's theory of sovereignty).

9. See DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT* 9–12, 27–28 (2013); NEXON, *supra* note 5, at 286 ("[M]any of the arguments in favor of the Westphalian hypothesis depend on developments in eighteenth- and nineteenth-century European political practices.").

10. See Koh, *supra* note 3, at 2606 (stating that Suárez "introduced the notion of the customary practice of nations as an important supplementary source of rules in international law," Gentili "became 'perhaps the first writer to make a definite separation of international law from theology and ethics and to treat it as a branch of jurisprudence,'" and Grotius "was

In particular, Grotius posited a “minimalist” conception of natural law, which freed individuals and states to act in their own self-interest.¹¹ But, however minimalist Grotius’s conception of natural law may have been, he developed clear rules about the conduct of individuals and states. First, the natural law rules that bind individuals in the state of nature also govern the conduct of states and rulers.¹² Second, promises are important: “[T]he fulfilling of Covenants belongs to the Law of Nature.”¹³ Third, individuals have a natural law obligation to keep their contracts,¹⁴ and the same basic rule applies to states. Although Grotius’s discussion of treaties in *The Rights of War and Peace* is extensive, the gist of it is, as Hersch Lauterpacht summarized, that “the binding force of treaties is the basis of international law. They must be kept even in relation to pirates and tyrants, in peace or in war; they may be made, according to the Christian law and otherwise, with infidels, and faith must be kept even with them.”¹⁵

the first writer to express *jus gentium* not simply as natural law, derived from right reason, but as the consequence of volitional acts, generated by independent operation of the human will”) (citations omitted); see also 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 154* (1978) (“[T]here is no doubt that by the end of the sixteenth century, due to the progressive refinement of the underlying idea that the law of nations is simply an aspect of positive human law, the later Jesuit theorists were able to bequeath to Grotius and his successors a recognisable analysis of international law as a special code of positive law founded on the principles of natural justice.”) (citation omitted); TUCK, *supra* note 8, at 78–108 (providing detailed analysis of Grotius’s writings on political theory, natural law, and international law). For my assessment of Grotius, particularly with respect to the role and content of natural law, see John T. Parry, *What is the Grotian Tradition in International Law?*, 35 U. PA. J. INT’L L. 299, 363–66 (2013).

11. See Parry, *supra* note 10, at 359–60, 364–65, and sources cited therein.

12. See TUCK, *supra* note 8, at 84–85, 95–96.

13. 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 93 (Richard Tuck ed., 2005) (1625); see also *id.* (“And the Mother of Civil Law is that very Obligation which arises from Consent, which deriving its Force from the Law of Nature, Nature may be called as it were, the Great Grandmother of this Law also.”); 3 *id.*, *Prolegomena to the First Edition*, at 1749 (Richard Tuck trans.) (stating that “it is part of the *ius naturae* that we keep our promises” and that “the mother of civil law is the obligation which arises from agreement, and since that gets its force from natural law, nature can be termed the grandmother of civil law”).

14. 2 GROTIUS, *supra* note 13, at 704–05.

15. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 42 (1946) (citing numerous sections of *The Rights of War and Peace*); see also MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* 20 (2013) (describing *pacta sunt servanda* as “the *grund norm* of modern international law”).

Fourth, Grotius's stress on the importance of treaty promises includes the assertion that an unequal treaty, or a treaty that one party entered into out of fear, is just as legitimate as a treaty entered into by equal and willing parties. For Grotius, fear, coercion, and inequality had no impact on the binding quality of promises or on the shared obligations of the parties to keep their promises.¹⁶

Grotius also posited that humans are naturally self-interested and naturally sociable,¹⁷ and the obligation to keep promises mediates between these two natural instincts. Because states are conceptually the same as individuals under this highly structured framework, and because the creation of states derived, at least conceptually, from agreements among individuals,¹⁸ Grotius's theory is also a theory of political life and political relationships. For Grotius, states interacted according to the same impulses and natural law rules as individuals, which meant that treaties played an important and powerful role in international society¹⁹—not because of divine approval or the threat of divine justice, but because the natural order of human relations required that they do so. With some important modifications, Grotius's approach fit well with the state system that was continuing to emerge in Europe.²⁰

Writing in 1758, a century after Westphalia, Emer de Vattel followed Grotius to the extent that he derived initial rules of international law from the natural law rules that apply to

16. See 2 GROTIUS, *supra* note 13, at 712 (“[H]e who through Fear has promised any Thing, is obliged to perform it, because his Consent here was absolute, and not conditional, as in the Case of an Error.”); see also *id.* at 823–27 (discussing equal and unequal conventions).

17. For the relationship between self-interest and sociability in Grotius's writings, see Parry, *supra* note 10, at 328–30, 351–57.

18. See 1 GROTIUS, *supra* note 13, at 338.

19. See Koh, *supra* note 3, at 2606 (“Grotius posited the notion of what has become known as ‘international society,’ a community of those participating in the international legal order, whose fabric was interwoven with international law.”).

20. Grotius's views on sovereignty, for example, were complex and allowed for less (or more) than the unitary political authority of a state over specific territory. See LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN THE EUROPEAN EMPIRES, 1400–1900 132 (2010) (observing, in the context of the law of the sea, that “Grotius in fact suggested that degrees of sovereignty and multiple spatial relations of sovereignty were integral to empire”); see also Parry, *supra* note 10, at 344 n.214 (discussing debate over Grotius's approach to sovereignty in theory and practice). Benton suggests that Grotius's views “would have been very familiar . . . to late medieval commentators.” BENTON, *supra*, at 133.

individuals.²¹ Vattel wrote that a state is “a moral person,” and “nations or sovereign states are to be considered as so many free persons living together in the state of nature” such that “the *law of nations* is originally no other than the *law of nature applied* to nations.”²² And, again similar to individuals in the state of nature, every state is “free and independent of all the others,” and “a perfect equality prevails in their rights and obligations.”²³ One of the essential components of this system was binding treaties. As had Grotius, Vattel began with the promises of individuals: “he who has made a promise to any one, has conferred upon him a real right to require the thing promised,” and only by keeping promises can people live together in “tranquillity,” “happiness,” and “security.”²⁴ What holds for individuals also holds for states:

This obligation is then as necessary, as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties.²⁵

A state that violates a treaty “violates at the same time the law of nations.”²⁶

Yet, Vattel’s conception of treaties departed in important respects from that of Grotius. Individuals and states were both “persons,” but Vattel stressed the “very different obligations and rights” that result

21. For Vattel’s explanation of his differences with Grotius over natural law, see EMER DE VATTEL, *THE LAW OF NATIONS* 7–8 (Béla Kaposy & Richard Whatmore eds., 2008). For additional discussion of their differences, see *infra* notes 27–32 and accompanying text. See also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 112–21 (2005) (providing a good overview of Vattel and his differences from earlier writers).

22. VATTEL, *supra* note 21, at 67–68. Critically, as the quotation indicates, Vattel contended that the law of nature was simply the starting point for the law of nations. See *id.* at 14–17, 76–78 (discussing the voluntary, conventional, and customary law of nations and distinguishing them from the necessary law of nations).

23. *Id.* at 71, 75.

24. *Id.* at 342.

25. *Id.* at 343; see also *id.* at 387 (“The faith of treaties,—that firm and sincere resolution,—that invariable constancy in fulfilling our engagements,—of which we make profession in a treaty, is therefore to be held sacred and inviolable between the nations of the earth, whose safety and repose it secures . . .”).

26. *Id.* at 387.

from applying natural law to their distinct circumstances.²⁷ The nature of states, and the importance of their formal equality and sovereignty, led Vattel to impose greater natural law restrictions than had Grotius on the use of unequal treaties.²⁸ He also stressed the importance of “balance of power” in Europe.²⁹ Further, to the extent treaties acquire their binding force from natural law, the constraint imposed comes only from “the law of conscience”; a “free and independent” state is in most instances accountable only to itself.³⁰

Vattel’s system of equality among nations in a state of nature, bound in conscience by natural law and the positive law of nations, evidences a theory of political organization founded on independent sovereign authority but which seeks for stability and which accommodates self-interest while encouraging cooperation. Treaties, in this scheme, are critical, but their reach is confined by principles of justice, which includes “the justice which provides for state freedom.”³¹ Under this scheme, states have significantly greater room to maneuver within their treaty obligations than they do under Grotius’s system. Further, while the state and the individual are both moral persons, the state ultimately has an entirely different status that allows it to act independently of natural law constraints.³²

Well before Grotius and Vattel, another writer articulated a different approach to political relationships and treaties. Niccolò

27. *Id.* at 68–69; *see also id.* at 10–12 (making the same point).

28. *See id.* at 349–55. For a useful discussion, *see* KOSKENNIEMI, *supra* note 21, at 117–18.

29. VATTEL, *supra* note 21, at 353; *see also id.* at 496–99 (stressing the importance to Europe of “balance” or “equilibrium”).

30. *Id.* at 71; *see also id.* (“Nations being free and independent,—though the conduct of one of them be illegal and condemnable by the laws of conscience, the others are bound to acquiesce in it, when it does not infringe upon their perfect rights. The liberty of that nation would not remain entire, if the others were to arrogate to themselves the right of inspecting and regulating her actions;—an assumption on their part, that would be contrary to the law of nature, which declares every nation free and independent of all the others.”).

31. KOSKENNIEMI, *supra* note 21, at 117 n.198. Koskenniemi suggests that, under Vattel’s approach, “the risk arises that the State remains bound only if that is what it wills.” *Id.* at 117; *see also* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547, 550–53 (2012) (discussing Vattel’s approach to international law, with stress on his conception of voluntary law and the limits of treaties).

32. This concept of the state was also consistent with a form of *raison d’état*, both domestically in the form of the police power and the art of governing, and internationally in the relations among European states. *See generally* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978 (Michel Senellart et al. eds., Graham Burchell trans., 2007).

Machiavelli declared in *The Prince* that, although “[e]veryone knows how praiseworthy it is for a ruler to keep his promises,” “[n]evertheless, experience shows that in our times the rulers who have done great things are those who have set little store by keeping their word, being skilful rather in cunningly confusing men.”³³ He explained that “there are two ways of contending: one by using laws, the other, force. The first is appropriate for men, the second for animals; but because the former is often ineffective, one must have recourse to the latter.”³⁴ Thus, Machiavelli asserted,

[A] prudent ruler cannot keep his word, nor should he, when such fidelity would damage him, and when the reasons that made him promise are no longer relevant. This advice would not be sound if all men were all upright; but because they are treacherous and would not keep their promises to you, you should not consider yourself bound to keep your promises to them.³⁵

Writing in the *Discourses on Livy*, Machiavelli was more measured, stating,

I believe furthermore that agreements made by force will never be observed either by a prince or by a republic; I believe that when the fear of losing the state arises, both kinds of government will break faith with you and will treat you with ingratitude in order to avoid losing it.³⁶

Further, “it is not shameful to avoid keeping those promises you were constrained to make by force; for promises exacted by force that regard the state are always broken when the force is removed, and they are broken without shame on the part of the one who breaks them.”³⁷

The passage from *The Prince* is, of course, familiar as a key textual example of Machiavellianism, *raison d'état*, or, sometimes,

33. NICCOLÒ MACHIAVELLI, *THE PRINCE* 61 (Quentin Skinner & Russell Price eds., 1988) (1532).

34. *Id.*

35. *Id.* at 61–62.

36. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 145 (Julia Conaway Bondanella & Peter Bondanella trans., 1997) (1531).

37. *Id.* at 351; *see also id.* (“Not only are promises exacted by force never kept between princes, when the force is removed, but no other promises are observed when the causes for them are removed.”).

realism, when that word is used as an epithet.³⁸ The denial of any obligation to abide by a treaty is not a strong foundation for a theory of politics in which treaty commitments, let alone an international law based on keeping treaty promises, play a strong role. Despite some overlap in their views on treaty promises, therefore, Machiavelli and Vattel situated those views in very different approaches to politics. And, in fact, these passages from Machiavelli's writings go well beyond what Vattel was willing to countenance from "free and independent" sovereigns who, though bound only in conscience by natural law to keep their promises, were charged with maintaining stability and balance of power.

At the same time, however, Machiavelli recognized the importance and, arguably, even the moral superiority of keeping promises despite his insistence that an effective ruler must feel free to break them.³⁹ Note, too, that the discussion in the *Discourses* focuses on situations in which the survival of the state was at issue and on treaty promises extracted by force. Whatever one's ultimate views about such situations, they present difficult questions for any government or theorist. Further, Machiavelli asserted that a republic was more likely to keep its treaty promises than was a prince,⁴⁰ and there is no doubt that Machiavelli had a clear preference for republican government.⁴¹

38. See Lauterpacht, *supra* note 15, at 24–25 (using Machiavelli's purported views as an example of "the typical realistic approach of contempt towards the 'little breed' of man"). Whether it is fair, however, to equate Machiavelli's thought with the state- and governance-centered complexities of *raison d'état* (which itself is not synonymous with realism), is far from clear. See Foucault, *supra* note 32, at 242–45.

39. Commentators have debated exactly what Machiavelli thought about the virtues—such as keeping promises—that other writers of his era had insisted upon for rulers. See, e.g., J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 156–57, 172 (1975); 1 Quentin Skinner, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE* 134–37 (1978).

40. Machiavelli, *DISCOURSES*, *supra* note 36, at 146. In part, the reason Machiavelli gave was that republics take longer to reach a decision, but he also asserted that "the people commit less serious errors than the prince" and are therefore more trustworthy. *Id.* at 146–47. Thus, "it is possible to cite examples where the smallest advantage has caused a prince to break his word, but where even an enormous advantage has not caused a republic to break its word." *Id.* at 146.

41. See Pocock, *supra* note 39, at 196–203 (arguing Machiavelli linked an aristocratic republic with stability but favored "the participation of the many in citizenship" because stability was ultimately impossible and a broad-based, militarized "active *virtù*" created a better republic); Skinner, *supra* note 39, at 159 (asserting Machiavelli "is in fact a consistent

Machiavelli's political theory assumes fluidity and danger in relations among states, such that the political viability of the state is always at risk. In this kind of perpetual crisis, the short term view dominates. To achieve stability or security, political leaders must do what is necessary; they must take the initiative, attack first, and be willing to break rules and promises. Sovereignty is less a theory or a foundation than it is an ongoing contest. Countries or cities should assume that they must fend for themselves, that they should expect trouble, and that they ultimately will fail and lose their political independence.⁴²

Thus, the question Machiavelli addressed was whether a focus on the political context of a treaty promise leads to different results than an approach that equates the moral and legal obligations of states and natural persons. Grotius claimed there was no difference. Vattel saw some difference, perhaps of degree. Machiavelli—writing much earlier—saw a difference of kind. While a private person might have to keep promises, Machiavelli denied that it was honorable for a political leader, charged with preserving or enhancing the security of

and even a fervent partisan of popular government” and that “his general attitude in the *Discourses* towards any form of monarchical government is one of marked hostility”). Commentators disagree, however, about many aspects of Machiavelli's republicanism and its legacy. See, e.g., Paul A. Rahe, *Machiavelli's Liberal Republican Legacy, in MACHIAVELLI'S LIBERAL REPUBLICAN LEGACY* xix, xxi (Paul A. Rahe ed., 2006) (“The contributors to this book . . . are united as well in regarding Pocock's depiction of Machiavelli's understanding of republicanism as highly misleading . . . [and] are convinced that Machiavelli's republican legacy is . . . quite complex.”); VICKIE B. SULLIVAN, *MACHIAVELLI, HOBBS, AND THE FORMATION OF LIBERAL REPUBLICANISM IN ENGLAND* 22–26 (2004) (arguing Pocock and Skinner incorrectly portray Machiavelli as transmitting a form of classical republicanism that was inconsistent with liberalism).

42. See POCOCC, *supra* note 39, at 156–57, 165–66, 177, 184–85; SKINNER, *supra* note 39, at 113–15, 125–26, 134–37, 156–57; SULLIVAN, *supra* note 41, at 35–37, 78–79. Arguably, then, Machiavelli was a dystopian theorist—but perhaps, depending on one's perspective, the same could be said of Grotius and Vattel. Grotius developed his insistence on the sanctity of treaties, even if unequal, to serve the purposes of Dutch colonialism. See Parry, *supra* note 10, at 337–41. Thus, the idea that forms “the basis of international law,” see Lauterpacht, *supra* note 15, at 42, is also an instrument of repression and exploitation. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 67–82 (2004) (focusing on treaties, particularly unequal treaties in the context of colonialism and positivist approaches to international law); see also ARMITAGE, *supra* note 9, at 125 (discussing Vattel's approval of colonization in North America); TUCK, *supra* note 8, at 195 (same). Machiavelli's approach might make far more sense, at least descriptively, than would the approaches of Grotius or Vattel to those at the other end of colonialism and unequal treaties.

the republic, to impose any burden on or forego any advantage to the state simply because of a treaty promise. For all three, their conception of the state was directly linked to their ideas about political life and the nature of treaties.

As is no doubt obvious to readers, the views of Grotius, Vattel, and Machiavelli have been influential, and they continue to resonate in contemporary debates about international law and international relations.⁴³

II. POLITICAL THEORIES OF TREATIES IN THE AMERICAN FOUNDING ERA

Vattel recognized that a state's internal organization is relevant to the law of treaties:

[A]ll rulers of states have not a power to make public treaties by their own authority alone: some are obliged to take the advice of a senate, or of the representatives of the nation. It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state.⁴⁴

This passage hints at the complications created by republican, democratic, or federal forms of political organization. The years during and after the founding of the United States make plain the

43. See, e.g., MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 2–6, 36–37 (2008) (using Grotius and Machiavelli to organize a discussion about competing views on compliance with international law, and assigning Vattel a more ambiguous role); see also Parry, *supra* note 10, at 306–23; *infra* note 49. There are, of course, other important writers from the early modern period whom I do not discuss. For example, Pufendorf distinguished among moral theology, natural law, and civil law. See SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN* 7 (James Tully ed., 1991) (1673). He asserted there is no independent law of nations; it is either natural law or the civil law of particular countries. See SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, bk. II, ch. III, XXIII, at 149–50 (Carew trans. 1729) (1672). Like Grotius, he wrote that natural law requires “keeping faith” with contracts and promises, including treaties. See *id.* at 152; *id.* bk. III, ch. IV, II, at 252–53. Unlike Grotius, and like Vattel (and consistent on this issue with Machiavelli), he made an exception for contracts and treaties made because of fear, where the other party to the obligation was the cause of the fear. See *id.* ch. VI, X, at 277–78; *id.* bk. VIII, ch. VIII, I, at 854. For more discussion of Pufendorf, particularly in relation to Grotius (and Hobbes), see TUCK, *supra* note 8, at 140–65.

44. VATTEL, *supra* note 21, at 338–39.

issues that democratic political theory creates for the adoption and implementation of treaties.

The federal government under the Articles of Confederation lacked the power to force states to comply with treaties, including the 1783 Treaty of Paris between Great Britain and the United States.⁴⁵ This federalism issue about the legal status and practical enforceability of treaties helped crystallize the efforts to amend the Articles and later to develop an entirely new system of government.⁴⁶ Going further, to many participants in founding-era political debates, “a core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations.”⁴⁷ Participants in these debates often were familiar with writers such as Grotius and Vattel.⁴⁸ Through more circuitous and contested routes, many were also influenced by Machiavelli’s analysis of republics and of politics in general.⁴⁹

45. See John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. 1209, 1218 (2009).

46. See *id.* at 1218–19 (discussing efforts to amend the Articles); 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, 934–35 (2010); David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. (forthcoming 2016) (manuscript at 5, 54–55) (on file with author).

47. Golove & Hulsebosch, *supra* note 46, at 935. Golove and Hulsebosch present this statement in a more sweeping sense, as an accurate description of what the Constitution was for. See *id.* Although I agree this was one of the Constitution’s purposes at a general level, my use of the quotation suggests all was not as monolithic as they would wish. For another useful overview of this period, see David L. Sloss et al., *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 9–12 (David L. Sloss et al. eds., 2011).

48. See, e.g., Richardson, *supra* note 31, at 548, 560, 570–71 (noting the writers on international law who were important to the founding generation).

49. See, e.g., HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER (1989); JOHN LAMBERTON HARPER, AMERICAN MACHIAVELLI: ALEXANDER HAMILTON AND THE ORIGINS OF U.S. FOREIGN POLICY (2004); MACHIAVELLI’S LIBERAL REPUBLICAN LEGACY, *supra* note 41, at 189–278 (chapters on Adams, Jefferson, Madison, and Hamilton); POCOCK, *supra* note 39, at 506–48; see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 32–36 (1969) (tracing influence of Machiavelli’s analysis of corruption and renewal). I will not attempt to argue that one or another person or position at any specific point in U.S. history necessary reflects Grotian, Vattelian, or Machiavellian thought. It is enough for my argument that, one way or another, the views of these writers were known, available, and used.

The delegates to the Constitutional Convention of 1787 had little trouble with the role of treaties in a federal system: treaties would be part of the supreme law of the land that overrode state law, and most delegates agreed treaties would be self-executing in the sense that they could be judicially enforceable federal law.⁵⁰ But, other than assigning the making of treaties to the President with the advice and consent of the Senate and giving the federal courts potential jurisdiction over treaty cases, the delegates did little to sort out how treaties would operate within the separation of powers—that is, within a republican form of government in which the people and the states would have distinct roles, and in which the types of power (executive, legislative, and judicial) were divided.⁵¹

The ratification process revealed the Constitutional Convention's failure to work out the separation of powers issues raised by treaties. "Many Antifederalists believed the treaty power threatened individual liberty and risked tyranny, particularly because the Senate and President, neither of which would be popularly or directly elected, would be able to make treaties that would have the force of law."⁵² Treaties, in other words, would be a source of law that was entirely under the control of the least democratic parts of the federal government: the President, selected by electors; the Senate, selected by state legislators;⁵³ and the Judiciary, selected by the President and confirmed by the Senate.

Many Antifederalists raised questions about the role of the House of Representatives, particularly with respect to commercial treaties, because they believed the Commerce Clause guaranteed the House of Representatives a role in the implementation of commercial treaties.⁵⁴ And, of course, the House was the only part of the federal government that would be elected in something approaching a democratic manner. Many Federalists resisted the Antifederalist claims and denied a role for the House, while others, including James Madison, admitted the practical power that the

50. See Parry, *supra* note 45, at 1225–27.

51. See *id.* at 1227; Sloss et al., *supra* note 47, at 13.

52. Parry, *supra* note 45, at 1228.

53. See U.S. CONST., art. 1, § 3, cl.1. Voters in each state did not have the ability to elect senators directly until adoption of the Seventeenth Amendment in 1913. See U.S. CONST. amend. XVII.

54. See, e.g., Parry, *supra* note 45, at 1230–31.

House would have and even suggested that it would have a necessary role in implementing some treaties.⁵⁵

By the end of ratification, participants on both sides appear to have concluded that treaties would trump state law under the Supremacy Clause and would at least sometimes be enforceable in judicial proceedings regardless of state law. On other issues, such as the role of the House of Representatives and the interaction between treaties and federal law, no consensus emerges Numerous participants agreed that some treaties could not function as law by themselves, with the result that legislation—and thus House participation—would be necessary.⁵⁶

During the first thirty years of government under the new Constitution—still within the lifetimes of many members of the founding generation—the lack of consensus about the law of treaties became fodder for important and bitterly divisive political debates. For example, the Neutrality Controversy generated dissension about the balance of executive and legislative power, the status of international law, and the extent to which the new nation was bound by international law obligations.⁵⁷

The debate in the House of Representatives over the validity and implementation of the Jay Treaty of 1794 provided a showcase for the lack of consensus about treaties. Indeed, “lack of consensus” hardly captures the nature of the pamphlet war over the

55. *See id.* at 1262–63.

56. *Id.* at 1263–64.

57. Brian Richardson argues persuasively that the debate of President Washington’s cabinet over neutrality rejected Vattel’s lenient approach to the force of international law and the obligations of treaties (advocated by Hamilton), in favor of the more binding approaches of Grotius and Pufendorf (advocated by Jefferson). *See* Richardson, *supra* note 31, at 556–59. In the Pacificus-Helvidius debates over neutrality, Hamilton and Madison agreed that treaties were often self-executing in the sense that they would operate as law without legislative implementation. But, where Hamilton also stressed the power that a treaty could give to the President, Madison stressed the legislative nature of treaty making (although he emphasized the role of the Senate and did not advocate a role for the House). *See* Parry, *supra* note 45, at 1273–75; *see also* HARPER, *supra* note 49, at 120 (comparing Pacificus and Machiavelli); MANSFIELD, *supra* note 49, at 275–78 (noting the importance of this debate for theories of executive power and associating Hamilton’s views with Machiavelli); Daniel J. Hulsebosch, *The Founders’ Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 217 (2008) (stressing the extent to which the Neutrality Controversy displayed concurrent foreign affairs authority). For the impact of the Neutrality Controversy on the debate over the legal status of customary international law, *see* Golove & Hulsebosch, *supra* note 46, at 1028–37, and Sloss et al., *supra* note 47, at 26–27.

constitutional validity of the treaty that preceded the House debate.⁵⁸ Notably, Hamilton, writing as Camillus, claimed that the provisions of a treaty override the legislative power by repealing earlier conflicting federal statutes and obliging Congress to implement the treaty.⁵⁹ The ensuing debate in the House was wide-ranging and extensive.⁶⁰ Boiled down, the Federalist position, which tended to follow in Hamilton's earlier steps, "sought, in the context of treaties, to fortify the framers' goal of insulating compliance with international legal obligations from direct popular control."⁶¹ By contrast, Republicans resisted

the ability of the President, in league with the more insulated Senate, to go forward without regard to the House's objections to the treaty The greater democracy they sought was thus not the right to violate treaties, but to veto bargains that the peoples' representatives believed were inconsistent with their values and against their interests.⁶²

Ultimately, the House of Representatives adopted a resolution by the comfortable margin of 57-35 that disclaimed a role in making treaties but insisted (1) that treaties on topics within the legislative powers of Congress could go into effect only if Congress enacted legislation, and (2) that the House had the authority to debate the merits of the treaty when deciding whether to implement it.⁶³ Having taken that stand, the House voted 51-48 to authorize funds to implement the Jay Treaty.⁶⁴

58. See Golove & Hulsebosch, *supra* note 46, at 1044-48 (discussing Republican attacks on specific provisions of the treaty and claims that treaties could not address subjects within the legislative powers of Congress).

59. See Parry, *supra* note 45, at 1278-79. It is interesting that Camillus was an important figure in Machiavelli's discussion of the Roman republic. See HARPER, *supra* note 49, at 163-66.

60. For extensive discussion, see Golove & Hulsebosch, *supra* note 46, at 1048-61, and Parry, *supra* note 45, at 1280-93.

61. Golove & Hulsebosch, *supra* note 46, at 1054. Golove and Hulsebosch also contend this position was consistent with "the original foreign affairs Constitution." See *id.* Given the lack of consensus about treaties that emerged during ratification, I believe their assertion is too strong.

62. *Id.* at 1060-61.

63. See Parry, *supra* note 45, at 1289.

64. See *id.* at 1290. For contrasting assertions about the significance of these votes, compare Golove & Hulsebosch, *supra* note 46, at 1059-61, with Parry, *supra* note 45, at 1291-94.

In 1800, the House again debated the treaty power when it considered whether to censure President Adams for his role in the extradition of Jonathan Robbins. This time, the issue was the power of the President to implement a treaty, and the debate is best known for Congressman John Marshall's speech, which argued that not all treaty provisions are enforceable in judicial proceedings, that some treaty provisions can be implemented by the President alone, and that some treaty provisions require legislative implementation.⁶⁵ Critically, Marshall also claimed that "if Congress fails in its duty to implement a treaty, then as a matter of necessity the President must execute it to avoid defaulting on an obligation to another nation."⁶⁶ Although the Federalists prevailed and prevented the censure, the impact of Marshall's speech with respect to these issues is difficult to determine. Details of the Republican responses to Marshall have not survived. Still, there is no reason to believe they agreed with Marshall that the President could implement treaty provisions that ordinarily would require legislative implementation simply because Congress had not acted.⁶⁷

Congress returned to these issues in 1815 and 1816, when it debated the extent to which it had to implement the 1815 commercial convention with Great Britain. After a fierce debate, the House approved a resolution that repealed all portions of federal statutes that were inconsistent with the new treaty, over Federalist objections that the treaty, as supreme law of the land, already had accomplished that result.⁶⁸ The Senate rejected the House resolution, apparently because of "opposition to the House's claims that treaties can neither override statutes nor go into immediate effect without House participation if they overlap with enumerated legislative powers."⁶⁹ The resulting legislation did not explicitly repeal any statutory provisions; "it merely 'enacted and declared' that such legislation should be 'deemed and taken to be of no force or effect.'"⁷⁰

65. See Parry, *supra* note 45, at 1297–1301.

66. *Id.* at 1301.

67. See *id.* at 1302–03.

68. See *id.* at 1305–11.

69. *Id.* at 1313.

70. *Id.* at 1315 (quoting An Act Concerning the Convention to regulate the Commerce Between the territories of the United States and His Britannic Majesty, ch. 22, 3 Stat. 255 (1816)).

The 1816 legislation retreated from the Jay Treaty resolution of 1796. But, the Federalist position of 1796 also lost adherents. Members of Congress moved toward a more moderate position that suggested the foundations for a consensus about the nature of treaties as law within a democratic republic. This moderate position “had two critical components: admitting that not all treaties operate as law by themselves, and advancing the last-in-time rule as a way to balance the legislative and treaty powers.”⁷¹

By the end of these debates, thoughtful Senators and Representatives had almost fully articulated the doctrine that some treaties were self-executing and could be put into effect by the President or courts, while others required implementing legislation. This view tended to claim a larger role for treaties than many republicans desired, and the last-in-time rule operated as a necessary corollary to the idea of self-execution . . . [T]he last-in-time rule as it emerged from these debates was the thoughtful resolution of a difficult theoretical and political issue. Its function was to ensure that the House would have an important albeit more limited constitutional role in overseeing the implementation and operation of treaties.⁷²

Congress, in short, was able over time to set up a framework to resolve some of the tensions about the interactions between treaties and the American version of republican democracy. The Supreme Court’s subsequent foundational opinions on the last-in-time rule and the distinction between self-executing and non-self-executing treaties tracked the results of these political debates.⁷³ The debates also help to explain and support the development of congressional-executive agreements in areas that involve foreign relations but are also subject to Congress’s legislative authority.⁷⁴

71. *Id.* at 1316.

72. *Id.*; *see also id.* (“[Federalist] proponents of the last-in-time rule admitted that the treaty power was not superior to legislative power, that Congress was not bound by treaties, and that it could override them.”).

73. *See id.* at 1320–28 (discussing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), *The Head Money Cases*, 112 U.S. 580 (1884), and *Whitney v. Robertson*, 124 U.S. 190 (1888)).

74. *See id.* at 1332; *see also* CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 76 (2d ed. 2015) (noting among the reasons for the rise of congressional-executive agreements that “there was increasing overlap between international agreements and Congress’s regulatory authority, prompting a shift from having treaties approved by a supermajority of the Senate to having them approved by a majority of the full Congress”);

These specific doctrinal developments are significant. But, the political debates that produced these doctrines also required members of Congress to address the question of how to accommodate, on the one hand, the international obligations of the United States with, on the other hand, its internal structure of federalism and separation of powers. As they did so, their ideas about federalism and separation of powers changed. Treaties, therefore, were at the center of and played an important role in shaping founding-era political theory.

More conventionally, these debates, accommodations, and doctrines also suggested a theory of how treaties might operate in such a system. That is to say, the political theory of American republican democracy also shaped the theory and law of treaties. Seen from the perspective of founding era political theory, treaties create binding legal obligations with other countries and also, under the Constitution, have the status of domestic law. Yet they are necessarily a product of executive authority and, therefore, risk playing a role in the centralization of power not only at the federal level but also in the person of the President (and to some extent in the Senate within the legislative branch). Thus, a treaty cannot be allowed to have greater status than other forms of federal law, a conclusion that supported adoption of the last-in-time rule. Further, Congress, and particularly the House of Representatives, is jealous (and, arguably, intended to be jealous) of its legislative authority, and it will occasionally resist executive encroachment on that authority (sometimes properly so). The operation of these checks and balances means that treaties will sometimes have legal force but incomplete implementation, and they can be cast aside (at least as a matter of domestic law) by the passage of formally equal legislation.

III. TREATIES AND THE RESTATEMENTS: TRACES OF THEORIES

In the years between the founding era and World War II, the Supreme Court's interactions with treaties fit into the framework discussed above. The Court applied the last-in-time rule, accepted and applied treaties as law, but also acknowledged that some treaty

Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1286–1302 (2008) (providing a history of executive agreements and congressional-executive agreements).

provisions would not be self-executing.⁷⁵ Other issues, however, also emerged. “[T]he Court began to hint at theories of deference that gave weight to the political branches’ views.”⁷⁶ The Court also recognized the President’s power to make international agreements, sometimes with congressional authorization, but without the advice and consent process necessary to make a treaty. These agreements, the Court determined, are binding on the United States and preempt state law.⁷⁷ The positivist approach to international law—which rejected the equivalence of individuals and states that Grotius had championed but Machiavelli had denied, and which forced reconsideration of whether, how, and to what extent international law had binding force—gained increasing acceptance.⁷⁸ Also worth noting is the adoption of the Seventeenth Amendment in 1913, which weakened claims that treaties lack democratic legitimacy by providing for direct popular election of Senators rather than appointment by state legislatures.⁷⁹ Finally, the power and influence of the United States expanded, especially beginning in the late nineteenth century, and the United States became a colonial power outside its borders after the Spanish-American War.⁸⁰

The post-World War II period, which saw the emergence of the United States as a “super” power, produced “a profound sense of

75. See Duncan B. Hollis, *Treaties in the Supreme Court, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 47, at 55, 73–76, 79 (noting the adoption of the last-in-time rule and stating “the Court continued to regard treaties as law” even as it “explor[ed] the possibilities of non-self-execution”); Sloss et al., *supra* note 47, at 23 (“[F]or the most part, the Court dealt with treaties as law, to be interpreted by courts in good faith and applied to decide issues presented in litigation.”); Michael P. Van Alstine, *Treaties in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 47, at 191, 193 (suggesting “continuity” with earlier periods).

76. Hollis, *supra* note 75, at 56; see also Van Alstine, *supra* note 75, at 217–18 (noting the continued development of this idea).

77. See Van Alstine, *supra* note 75, at 218–23 (discussing the approval of these agreements and recognition of their force in Supreme Court case law).

78. See Hollis, *supra* note 75, at 62–65.

79. See U.S. CONST. amend. XVII.

80. This paragraph’s suggestion of measured change does not mean that all was continuity in the field of foreign relations law. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999) (contending “the first four decades of the twentieth century” witnessed “a vertical and horizontal centralization of foreign relations powers in the Federal Executive. A shorthand rendering of this transformation . . . was the triumph of ‘executive discretion’ in the constitutional regime of foreign relations”).

change, accented by undertones of continuity” in the Supreme Court’s approach to treaties.⁸¹ According to Paul Stephan, the Court was more willing to consider differences among treaties and displayed caution about using treaties to restrain federal sovereign authority; it also gave greater deference to executive branch interpretations of treaty language.⁸²

These post-war changes coincided with an explosion in international law-making through multi-lateral conventions. Indeed, concerns about these conventions, particularly their human rights provisions, prompted a congressional backlash. In 1953, the Senate came within one vote of recommending the Bricker Amendment, which

provided that any provision of a treaty or other international agreement that conflicted with the Constitution would have no force or effect, that treaties could become effective as ‘internal law’ in the United States only through legislation that would be valid in the absence of the treaty, and that Congress would have power to regulate all executive and other agreements with foreign nations and organizations.⁸³

These proposals resurrected some of the extreme Republican positions from the Jay Treaty debate and rejected the compromise position toward treaties that had emerged by the end of the founding era (although, of course, in quite a different context). To defeat the amendment, the Eisenhower administration “agreed not to accede to the emerging human rights conventions” and adopted “the core commitment of Bricker to prevent the use of international

81. Paul B. Stephan, *Treaties in the Supreme Court, 1946-2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 47, at 317, 318–19. For the assertion that these changes were more general, see White, *supra* note 80, at 8 (stating that by 1945, “the constitutional distinction between treaties and executive agreements was robbed of its significance, the states were virtually eliminated as overseers in the realm of foreign affairs, and the Federal Executive, rather than federal or state courts, was established as the authoritative source of foreign sovereign immunities”).

82. See Stephan, *supra* note 81, at 320, 335. For discussions of federal court deference to executive branch interpretations of treaties, see Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 BYU L. REV. 1467 (2016), and Jean Galbraith, *What Should Restatement (Fourth) Say about Treaty Interpretation?*, 2015 BYU L. REV. 1499 (2016).

83. Hathaway, *supra* note 74, at 1302.

human rights agreements to effect internal changes.”⁸⁴ When the United States began ratifying human rights conventions in the late 1980s, “it paid fealty to the ‘ghost of Senator Bricker’ by eviscerating the agreements with reservations, understandings, and declarations that rendered them unenforceable.”⁸⁵

The rest of this part will consider the *Restatement (Second) of Foreign Relations Law of the United States*, the *Restatement (Third)*, and the current drafts of the *Restatement (Fourth)*. In the course of examining their provisions, comments, and reporters’ notes on the topic of treaties, this part will argue that these materials describe somewhat different approaches to the nature of international law and the problems posed by the intersections of international law with the U.S. political system. Those approaches, in turn, reflect or generate fragmentary political theories. The *Restatement (Second)* is overwhelmingly pragmatic; the *Restatement (Third)* elevates internationalism over democratic processes; and the drafts of the *Restatement (Fourth)* focus on governance in ways that could produce interesting and significant consequences.

A. *The Restatement (Second): Balance and Caution*⁸⁶

In 1955, the American Law Institute (ALI) approved a project to draft a restatement of foreign relations law.⁸⁷ From the beginning, ALI members were concerned about the political issues that such a project could raise, particularly in light of the recent Bricker Amendment controversy.⁸⁸ Nor could they have been anything other than conscious of the enhanced role that the United States played on

84. *Id.* at 1303–04; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 410–13 (2000) (discussing the Bricker debates).

85. Hathaway, *supra* note 74, at 1304 (citing Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995)).

86. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1965). Although the *Restatement (Second)* was the ALI’s first treatment of foreign relations law, it was designated the *Restatement (Second)* because it was part of the ALI’s second series of Restatements. *See* Stephen C. McCaffrey, *The Restatement’s Treatment of Sources and Evidence of International Law*, in COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 2 n.5 (1992).

87. *See* David Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change*, ch. 13, ms 5 (Dec. 2014) (unpublished manuscript on file with author).

88. *See id.* ms 5–6.

the post-war world stage. Herbert Weschler's introduction to the final product reflects the ALI's balancing act. On the one hand, he invoked the internationalist ideal of "the maintenance and development of law in the governance of international relationships" while, on the other hand, hinting that the new Restatement confirmed American exceptionalism and preeminence, for it "bears witness to the values of a free society . . . [and] may demonstrate those values in a wider sphere."⁸⁹

The specific provisions of the *Restatement (Second)* reflect, in large part, a commitment to international law, subject to the founding-era compromise.⁹⁰ But, they also demonstrate awareness of the Bricker debates and a concern for state interests, flexibility, and, arguably, the post-war status of the United States.

For example, the *Restatement (Second)* follows Grotius and Vattel (and, of course, subsequent writers) when, in the introductory note to Part III on international agreements, it makes a strong conceptual analogy between treaties and private contracts even as it notes that the private law of contracts may not provide useful doctrinal analogies.⁹¹ Following the Grotian view of treaties that was important to the founding generation,⁹² the note and a subsequent section also affirm the premise that treaty promises must be kept.⁹³ Indeed, although the *Restatement (Second)* contemplates a few scenarios in which it would be legitimate to suspend or terminate a treaty, it comes nowhere close to the Vattelian suggestion (let alone the Machiavellian assertion) that treaty compliance is voluntary.⁹⁴

The *Restatement (Second)* also provides that, under international law, an international agreement may be made on any topic, so long

89. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES intro. at vii, x (AM. LAW INST. 1965).

90. See *supra* notes 68–71 and accompanying text.

91. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. n.1 (AM. LAW INST. 1965).

92. See, e.g., *supra* note 57 (discussing the cabinet debate over the neutrality controversy).

93. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. n.1 & § 138 (AM. LAW INST. 1965).

94. See *id.* §§ 153, 155–159. Section 153, which provides that a "substantial change of circumstances" can justify suspension or termination, is the most interesting. Note that it only applies if, as a matter of treaty interpretation, "the parties would not have intended the [treaty] obligations to be applicable under the changed circumstances." *Id.* § 153(1).

as the agreement is consistent with United Nations obligations and “basic standards of international conduct.”⁹⁵ Yet with respect to the United States, that power narrows. The United States may make international agreements only if “the matter is of international concern” and “does not contravene any of the limitations of the Constitution applicable to all powers of the United States.”⁹⁶ The nature of this power in general reflects federal exclusivity in international relations,⁹⁷ and the second limitation reflects the supremacy of the Constitution over statutes and treaties.⁹⁸ The first limitation, by contrast, reflects federalism and separation of powers concerns that treaties could be used “for the regulation of matters bearing no relation to international affairs.”⁹⁹ Still, the scope of the authority to make treaties derives from the treaty power itself and is not limited by the specific enumerated powers vested in Congress by Article I.¹⁰⁰ Thus, the *Restatement (Second)* largely confirms federal power, even though it also contains seeds of a revisionist approach that reflects the Bricker debates and hearkens back to the Jay Treaty debate.

In addition to confirming federal power, the *Restatement (Second)* further endorsed executive power when it provided that executive agreements made pursuant to the President’s

95. *Id.* § 116.

96. *Id.* § 117.

97. *See id.* § 117 cmt. c (“[A]uthority essential to the conduct of foreign relations (the authority to enter into international agreements) is expressly denied the several states without the consent of Congress.”).

98. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957) (indicating that the Constitution is superior to treaties). Note, however, that the Restatement comments suggest the purpose of this limitation was primarily structural; the reference in Comment *d* to the Bill of Rights seems almost an afterthought. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117 cmts. c, d (AM. LAW INST. 1965).

99. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117 cmt. b (AM. LAW INST. 1965); *see* BRADLEY, *supra* note 74, at 63–64 (suggesting the sources of this limitation are a 1929 statement by future Chief Justice Charles Evans Hughes, and a 1955 statement by Secretary of State John Foster Dulles opposing efforts to revive the Bricker Amendment). *Compare De Geofroy v. Riggs*, 133 U.S. 258, 266–67 (1890) (“[T]he treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations [I]t is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.”).

100. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 118 (AM. LAW INST. 1965); *see also id.* cmts. a, b.

constitutional authority are binding and preemptive, although it also respected the role of Congress and the overlapping powers of the President and Congress by providing that executive agreements do not displace federal legislation.¹⁰¹ The *Restatement (Second)* also recognized established practice by providing for the validity and force of congressional-executive agreements.¹⁰² And on the question of terminating an agreement, the authority lies entirely with the president.¹⁰³

Turning to the domestic status and implementation of treaties, the *Restatement (Second)* takes a curious view.¹⁰⁴ If a treaty “manifests an intention that it shall become effective as domestic law of the United States,” then it is self-executing, overrides earlier federal statutes, and preempts state law.¹⁰⁵ But if it does not manifest such an intention, then it is not self-executing; neither does it override federal statutes nor preempt state law.¹⁰⁶ Oddly, then, a ratified treaty, which has the status of supreme law of the land, has essentially no domestic legal force if it is not self-executing.¹⁰⁷ Here the separation of powers concern that drove the early debates about self-execution takes on a federalism dimension that presumably reflects the Bricker debates and the compromises that resulted from them.¹⁰⁸ The *Restatement (Second)* also provides that a treaty cannot be self-executing if “it involves governmental action that under the Constitution can be taken only by the Congress”¹⁰⁹—a position that

101. *Id.* §§ 121, 144. *See also id.* §§ 119, 142 (discussing executive agreements pursuant to treaty).

102. *Id.* §§ 120, 143.

103. *Id.* § 163.

104. For detailed discussion of the *Restatement (Second)*'s provisions on self-execution, see Sloss, *supra* note 87, at ms 9–15.

105. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) (AM. LAW INST. 1965).

106. *See id.* § 141(2).

107. *See id.* § 141 cmt. a (noting that although a treaty is binding as a matter of international law, it has “immediate domestic effect as the supreme law of the land . . . only if it is self-executing”).

108. *See supra* notes 83–85; David Sloss, *Taming Madison's Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. REV. 1692, 1712–14 (2016).

109. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(3) (AM. LAW INST. 1965).

rejects extreme Federalist positions but also rejects Republican claims about the Commerce Clause.¹¹⁰

Elsewhere, the *Restatement (Second)* takes a defensive tone as it defends treaty self-execution. Section 154 insists that self-execution is simply an issue of treaty interpretation, to be decided by the federal courts. The reporters' notes make a mild effort to justify the doctrine of self-execution by rebutting the claim that self-execution damages the interests of the United States.¹¹¹ The notes are more forceful when they assert the utility of self-execution for most-favored-nation clauses.¹¹²

The authors of the *Restatement (Second)* had little trouble endorsing the Senate's inclusion of reservations and understandings in its resolution of advice and consent to a treaty.¹¹³ Perhaps reflecting historical practice as much or more than the Bricker controversy,¹¹⁴ the *Restatement (Second)* expresses no constitutional concerns about reservations and understandings and goes on to declare that they also function as domestic law¹¹⁵—subject to mild concern about “the extent to which the Senate . . . may ‘legislate by reservation’ without the concurrence of the House of Representatives.”¹¹⁶

110. *See id.* § 141 cmt. f (suggesting appropriations are an area in which only congress can act and expressly denying that “the making of a self-executing treaty dealing with foreign commerce is precluded”).

111. *See id.* § 154 reporters' note 1. Note 1 observes that self-execution does not exist in several other countries, such as Germany and the United Kingdom, and it also notes the claim that self-execution would damage the United States *vis-à-vis* these other countries. But, the note concludes, these disadvantages do not really exist because in most of these countries, “there exists a cabinet form of government in which executive and legislative powers are merged,” and implementing legislation is often “introduced as a part of the ratification process.” *Id.*

112. *See id.* § 154 reporters' note 3.

113. *See id.* § 133(1)–(2). The *Restatement (Second)* even provides that the record of the Senate's consideration of the treaty can give rise to reservations or understandings. *See id.* § 133(3).

114. For the assertion that historical practice supports the use of reservations and understandings, see Bradley & Goldsmith, *supra* note 84, at 404–10.

115. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 134, 135 (AM. LAW INST. 1965). For the argument in favor of the general validity of reservations, understandings, and declarations (with some limitations), see Bradley & Goldsmith, *supra* note 84, at 439–56.

116. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 reporters' note (AM. LAW INST. 1965) (discussing the Niagara Power case,

With respect to treaty interpretation, the authors of the *Restatement (Second)* drew attention to the International Law Commission's work on what would eventually become the Vienna Convention on the Law of Treaties¹¹⁷ and provided its own set of “[c]riteria for [i]nterpretation” as a matter of international law.¹¹⁸ With respect to U.S. law, the *Restatement (Second)* provides that the judiciary has “exclusive authority to interpret an international agreement to which the United States is a party,”¹¹⁹ but it also asserts, in keeping with the developing practice as well as with the increasing importance of the President to international relations (from the international as well as U.S. perspective), that a federal court “gives great weight to an interpretation made by the executive branch.”¹²⁰ Sections 149 and 150, read together, support the argument that this deference applies only to executive interpretations “asserted [on behalf of] the United States in the conduct of its foreign relations,” as opposed to interpretations that arise in the course of litigation. To the extent that is a permissible interpretation, the *Restatement (Second)* does not explain how to navigate the boundary.

The *Restatement (Second)* presents itself as a straightforward articulation of foreign relations law principles. Yet to be straightforward in the post-World War II period required a balance because those principles were in flux. Executive power continued to increase, particularly in foreign relations, even as the Senate in particular and Congress more generally sometimes chafed at or were suspicious of that power and the uses to which it might be put. The *Restatement (Second)* recognizes executive authority but tries as well to retain a meaningful role for Congress. In addition, the ALI's sensitivity to the issues raised by the Bricker debates reveals the strength of federalism concerns.

With respect to separation of powers, therefore, the tensions that revealed themselves in the founding era continued to play out, but with some movement toward the Federalist view—or at least the

Power Auth. of N.Y. v. Federal Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957), *vacated as moot*, 355 U.S. 64 (1957)).

117. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, intro. note 2 (AM. LAW INST. 1965).

118. See *id.* § 147.

119. *Id.* § 150.

120. *Id.* § 152.

Federalism of Congressman Marshall—on the scope of executive power.¹²¹ The emergence of federalism as a treaty issue, by contrast, was more of a departure from earlier understandings, but it was also a response to changed circumstances: the emergence of the United States as a super power, the rapid development of international law and international institutions, and the implications of these changes for the power of the federal government within the domestic federal system. Leaving aside the desirability of the *Restatement (Second)*'s solutions to these issues, these shifts from earlier understandings were not a cause for concern. A democratic political system that incorporates federalism and separation of powers will likely revisit longstanding tensions and foundational debates with some frequency, particularly with respect to control over foreign affairs.

Overall, the political theory of the *Restatement (Second)* is pragmatic. Continuity, or at least stability, appears to have been a primary goal. This pragmatism, moreover, had an ideological point. As the first effort to corral the issues surrounding treaties and foreign relations generally, the *Restatement (Second)* brought these topics into greater view, asserted the existence and legitimacy of an important field in American law, and insisted on the importance of U.S. engagement with international law and international society. In light of the federalism and separation of powers debates surrounding treaties and international law at the time, achieving all of these goals was a significant accomplishment.

B. *The Restatement (Third): Internationalism*¹²²

If the *Restatement (Second)* was pragmatic and cautious, the *Restatement (Third)* took a different, more assertive tone. “The student of international law,” declared one commentator, “is struck by the confidence and simplicity with which a number of the rules in the Restatement (Third) are stated.”¹²³ At times, argumentative is a

121. Marshall's view of executive authority in foreign relations had, of course, been endorsed by the Supreme Court in *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’”).

122. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1986).

123. McCaffrey, *supra* note 86, at 5.

better description than confidence for the tone of the materials that comprise the *Restatement (Third)*. When discussing the *Restatement (Third)*, therefore, it is worth remembering that the reporters' notes do not receive ALI approval (unlike the sections and comments),¹²⁴ and their tone may reflect some of the intense debate and controversy that arose during the drafting process.¹²⁵

In addition, if the *Restatement (Second)* stands in the shadow of the rise of the United States as a superpower on the one hand, and the Bricker debates on the other hand, then the *Restatement (Third)* is in part a self-conscious effort to undo the results of the Bricker debates while also thwarting the Reagan administration. The *Restatement (Third)* takes a strong position on the deep divide (represented roughly at the time by actual and claimed differences between the Carter and Reagan administrations) on the question whether United States foreign policy should seek to advance human rights and international law (*e.g.*, Carter) or should simply pursue national interests (*e.g.*, Reagan). Thus, the introduction declares that the *Restatement (Third)* is “a reaffirmation: relations between nations are not anarchic; they are governed by law. In conducting the foreign relations of the United States, [federal officials] are not at large in a political process; they are under law.”¹²⁶

The introductory note to Part I, Chapter I goes on to stress “the international community of states,” the status of international law as “law like other law,” and the fact that international law is “essential” to the “decentralized” “international political system”; it

124. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at XI (AM. LAW INST. 1986).

125. See McCaffrey, *supra* note 86, at 7. For further discussion of the controversies associated with drafting the *Restatement (Third)*, as well as the tone and status of the reporters' notes, see *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 ASIL Proceedings 180 (1987). See also Leila Nadya Sadat, *The Proposed Restatement Fourth of the Foreign Relations Law of the United States: Treaties—Some Serious Procedural and Substantive Concerns*, 2015 BYU L. REV. 1673 (2016) (providing a more neutral account and arguing for the success of the *Restatement (Third)*).

126. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES intro. at 5 (AM. LAW INST. 1986). *But see* Richard A. Falk, *Conceptual Foundations*, 14 YALE J. INT'L L. 439, 443 (1989) (calling the intention behind this statement “laudable” but also criticizing it as an overly schematic either-or formulation and suggesting “a world of sovereign states is necessarily a species of anarchy,” such that the important inquiry is “[t]he operation of rules, reciprocal tolerances, and regimes takes place, more or less effectively, within a setting of anarchy”).

expressly rejects interest-based accounts of international law.¹²⁷ With respect to treaties, the introductory note is equally emphatic: “In our day, treaties have become the principal vehicle for making law for the international system,” and “the basic principle that makes international agreements . . . binding is the principle of customary law that agreements must be observed”¹²⁸ (a point made black letter law in Section 321). Human rights receive an emphasis much different from their relatively unimportant treatment in the *Restatement (Second)*: “International law . . . deals not only with the conduct of states and international organizations and with relations among them, but increasingly also with relations of states with juridical and natural persons, including those in the state’s own territory.”¹²⁹ This statement also suggests the rearrangement of foreign relations power away from the executive, towards division among the branches—including the judiciary—and greater protection of individuals.¹³⁰

The reporters’ note goes on to place the *Restatement (Third)* within a venerable international law tradition: “The classic writers—Grotius, Pufendorf, Vattel—are still ‘most highly qualified publicists’ . . . , and their writings are living literature of international law”¹³¹ Indeed, there is little doubt that the *Restatement (Third)* is self-consciously part of the “Grotian tradition in international law.”¹³² The document’s internationalist rhetoric provides significant support for this claim. The assertion that treaty agreements must be observed, present in the *Restatement (Second)* as

127. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, intro. note (AM. LAW INST. 1986). In the face of such claims, Richard Falk suggested that the drafters of the Third Restatement were not competent to discuss “the nature of the sovereign state; the character of international society as a whole; the interplay of law and politics in the interpenetrated settings of governmental decisions and of international society in general.” Falk, *supra* note 126, at 445.

128. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, intro. n. at 18 (AM. LAW INST. 1986).

129. *Id.* at 19. In addition to this language, several sections of the *Restatement (Third)* directly address human rights. *See id.* §§ 701–703, 711. These provisions appear in Part VII of the *Restatement (Third)*, under the title “Protection of Persons (Natural and Juridical).”

130. *See id.* intro. at 4.

131. *Id.* pt. I, ch. 1, intro. note, reporters’ note 1, at 21.

132. *See* Lauterpacht, *supra* note 15. For the assertion that the Grotian tradition is an “invented tradition” constructed to serve the interests of post-World War II internationalism, *see* Parry, *supra* note 10, at 366–68.

well, provides some additional evidence, as do the comments to Section 102, which also follow the *Restatement (Second)* in comparing traditional treaties to private contracts.¹³³ Richard Falk's observation that the *Restatement (Third)* is "notable for its move beyond a strict positivism of states" toward "an enlarged sense of the international legal order" is also consistent with this claim.¹³⁴

The introductory notes to Chapter 2 provide a general assessment of how international law interacts with U.S. law. First, "[i]nternational law is, and is given effect as, law in the United States";¹³⁵ it has this status "without the need for any action by Congress or the President";¹³⁶ and in the post-*Erie* era it is "a kind of federal law" that is supreme over state law and binding on the states.¹³⁷ But for all that, international law "is subject to the Constitution, and is also subject to 'repeal' by other law of the

133. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. f (AM. LAW INST. 1986) (noting that treaties ordinarily make law in the way that a contract does, between the parties, but that multilateral agreements "are increasingly used for general legislation, whether to make new law, as in human rights . . . , or for codifying and developing customary law, as in the Vienna Convention on the Law of Treaties"); see also *id.* pt. III, intro. note at 147 (making the same comparison).

134. Falk, *supra* note 126, at 449.

135. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 2, intro. n. at 40 (AM. LAW INST. 1986).

136. *Id.* at 41.

137. *Id.* at 42. This assertion, of course, has proven controversial. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not federal law unless the federal political branches adopt it as such), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998) (asserting that "the hornbook rule—international law, as applied in the United States, must be federal law—makes obvious sense"), and Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002) (arguing that customary international law is not automatically federal common law but can be incorporated into it), and Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1501 (2011) ("[N]ot all of customary international law binds . . . the federal Executive as a matter of U.S. domestic law [However, it] binds State actors and thus preempts State law"). See also Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate's Advice and Consent*, 2015 BYU L. REV. 1525 (2016) (demonstrating that recent presidents have required domestic agencies to comply with treaties that have not been approved by the Senate but which represent customary international law principles).

United States.”¹³⁸ The discussion of treaties notes the difference between self-executing and non-self-executing treaties, stresses the status of treaties as law under the Supremacy Clause while withholding discussion of non-self-execution until the actual sections, and observes that “cases arising under treaties are within the Judicial Power of the United States.”¹³⁹ All of this serves to underscore the *Restatement (Third)*’s emphasis on the status of international law as enforceable law that is essential to international relations.

Section 111(1) is equally forceful, declaring that “[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States.”¹⁴⁰ The comments make clear that executive agreements and congressional-executive agreements are included in the term “international agreements” and are therefore also supreme preemptive federal law.¹⁴¹ Only in Section 111(3) does the *Restatement (Third)* observe that “a ‘non-self-executing’ agreement will not be given effect [by courts] as law in the absence of necessary implementation.”¹⁴² Then, Section 111(4) defines the circumstances under which a treaty is non-self-executing: when the “agreement manifests an intention” not to be “effective as domestic law without . . . implementing legislation,” when the Senate’s consent or a congressional resolution require implementing legislation, or when the Constitution requires legislation.¹⁴³ The first and third limitations are consistent with the *Restatement (Second)*, although the syntax of the *Restatement (Third)* suggests a preference for self-execution instead of the *Restatement (Second)*’s neutrality. The second limitation was new; it reflected the U.S. practice of using reservations and understanding to limit the enforceability of human rights treaties in the years after the *Restatement (Second)* was adopted.¹⁴⁴ A later discussion, however,

138. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 2, intro. note (AM. LAW INST. 1987).

139. *Id.* at 41.

140. *Id.* § 111(1).

141. *See id.* § 111 cmt. d; *see also id.* § 303 (discussing the President’s authority to make treaties and other international agreements); Sadat, *supra* note 123, at 1682 (praising this aspect of § 111(1)).

142. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (AM. LAW INST. 1986).

143. *Id.* § 111(4).

144. *See supra* note 85 and accompanying text.

asserts that reservations or understandings are effective and limiting only if consistent with Section 313, which roughly condenses the Vienna Convention rules on reservations.¹⁴⁵

Compared to the *Restatement (Second)*, the exact status of a non-self-executing treaty in the *Restatement (Third)* is not clear. Is it supreme and preemptive law, or not (as in the *Restatement (Second)*)? Section 111(1) appears to speak for all international agreements;¹⁴⁶ the syntax of Section 111(3) indicates that its limitation is directed to courts only;¹⁴⁷ and Comment *h* states that the self-execution inquiry “is a question distinct from whether the treaty creates private rights or remedies.”¹⁴⁸ Perhaps, then, all treaties are supreme and preemptive, but non-self-executing treaties are not enforceable in federal court, even if they create rights and remedies (which perhaps are enforceable in some other fashion?).¹⁴⁹ This position risks creating a situation in which treaties are supreme in theory and irrelevant in practice. The *Restatement (Third)*, therefore, appears to strengthen the status of non-self-executing treaties by weakening the *Restatement (Second)*’s flat assertion that such treaties are neither supreme nor preemptive, but it remains unclear what non-self-executing treaties actually accomplish.¹⁵⁰

145. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (AM. LAW INST. 1965) (“If a treaty is ratified or acceded to by the United States with a reservation effective under the principles stated in § 313, the reservation is part of the treaty and is law of the United States.”); see also *id.* § 313 cmt. b (noting the source of § 313’s limitations in the Vienna Convention).

146. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (AM. LAW INST. 1986).

147. *Id.* § 111(3).

148. *Id.* § 111 cmt. h.

149. Compare *id.* § 115 cmt. e (suggesting that “[e]ven a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy”), with *id.* § 312 cmt. k (stating “the date an agreement enters into force” is “the earliest date on which it can become the law of the land to the extent it is self-executing under the rules stated in § 111”). See also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES, at xxv (AM. LAW INST., Discussion Draft 2015) (“Although there was some language in the prior Restatement that might be read to suggest that a non-self-executing treaty provision lacked any status as domestic law—see, for example, § 115, Comment *e*, and § 312, Comment *k*, of the Restatement Third—those statements were ambiguous, and the dominant approach of the Restatement Third was to address self-execution in the context of judicial enforcement.”).

150. Uncertainty about the *Restatement (Third)* and the status of non-self-executing treaties also emerges from the Supreme Court’s decision in *Medellín v. Texas*, 552 U.S. 491

The reporters' notes to Section 111 add another layer of complexity. Note 5 asserts that if the President does not request legislation to implement a treaty and Congress does not act, then courts should apply a strong presumption that the treaty is self-executing.¹⁵¹ This position reflects Congressman Marshall's claim in the Robbins debate that the President can implement a treaty if Congress fails to do so.¹⁵² Even more, this assertion puts an interesting twist on the idea that self-execution depends on intention. Failure to implement supports a presumption that the intent was self-execution because proof of intent comes not from establishing a state of mind but instead from the proxy of inaction.

Note 5 goes on to provide guidance on what kinds of treaties are likely to be self-executing, asserting that a treaty is self-executing if it "can be readily given effect by executive or judicial bodies, federal or State."¹⁵³ Here, too, the idea of intention is less a fact about a personal or institutional state of mind than it is a conclusion derived from a different analysis altogether (an analysis of the treaty's text). Also important is how easily the note and the comments accept another of Marshall's assertions in the Robbins debates—that treaties may be self-executing for the executive branch as well as for the courts.¹⁵⁴ While this may be an obvious (if potentially dangerous) proposition, the *Restatement (Second)* did not mention it.

Note 5 also evidences a need to justify self-execution more extensively than the tepid effort of the *Restatement (Second)*: "Self-

(2008), which cited the *Restatement (Third)* selectively. See BRADLEY, *supra* note 74, at 48 (noting the uncertainty over *Medellín*); John T. Parry, *A Primer on Treaties and § 1983 After Medellín v. Texas*, 13 LEWIS & CLARK L. REV. 35, 61, 67–68 (2009) (critiquing the Court's use of the *Restatement (Third)*). For more comprehensive analysis of self-execution doctrine, its complexities, and the ways that the Restatements address it, see Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639 (2016); Sloss, *Taming Madison's Monster*, *supra* note 108; Carlos M. Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, 2015 BYU L. REV. 1747 (2016). Although they take different views on aspects of self-execution doctrine, all three criticize the importance that the Restatements place on "intent" when addressing the issue of self-execution.

151. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (AM. LAW INST. 1986).

152. See *supra* note 66 and accompanying text.

153. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (AM. LAW INST. 1986).

154. See also *id.* § 111 cmt. c ("[T]he President has the obligation and the necessary authority to take care that [international agreements] be faithfully executed.").

executing treaties were contemplated by the Constitution and have been common. They avoid delay in carrying out the obligations of the United States.”¹⁵⁵ The note goes on to observe, approvingly, that self-executing treaties “eliminate the need for participation by the House of Representatives (which the Framers of the Constitution had excluded from the treaty process), and for going to the Senate a second time . . . after the Senate had already consented to the treaty by two-thirds vote.”¹⁵⁶ Finally, Note 5 recognizes that treaty negotiators are sometimes sensitive to claims about House authority, but subsequent notes cast doubt on the idea that the House has any meaningful authority in this context at all. For example, Reporters’ Note 6 quarrels with Section 111(3)(c) and Comment *i* when it suggests, “There is no definitive authority for the rule . . . that agreements on some subjects cannot be self-executing.”¹⁵⁷ The note argues there is no convincing textual justification in the Constitution but also recognizes that the limitation is “generally assumed,”¹⁵⁸ suggesting, perhaps, that the issue was not worth fighting over at the time.

The title of Reporters’ Note 7 is “[o]bligation of Congress to implement international agreement.”¹⁵⁹ It recognizes that “[t]he House of Representatives, in particular, has asserted a right to consider anew whether to appropriate such money or to enact such legislation,” but the note claims, entirely incorrectly, that “these assertions were rejected early in our history, and repeatedly thereafter, as an improper attempt to give the House of Representatives an effective part in the Treaty Power contrary to the clear intention of the Framers.”¹⁶⁰ Note 7 does admit, however, that “there may be no way to enforce the obligation” to implement a treaty.¹⁶¹

In short, Section 111 makes relatively modest changes from the *Restatement (Second)*, and it accepts that non-self-executing treaties have no legal force in at least some contexts. But the reporters’ notes

155. *Id.* § 111 reporters’ note 5.

156. *Id.*

157. *Id.* § 111 reporters’ note 6.

158. *Id.*

159. *Id.* § 111 reporters’ note 7; *see also id.* § 111 cmt. j (asserting Congress has constitutional authority to implement a valid international agreement).

160. *Id.* § 111 reporters’ note 7. For a sustained refutation of this assertion, see Parry, *supra* note 45, at 1273–1316.

161. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters’ note 7 (AM. LAW INST. 1986).

push back with a more radical tone, reminiscent of the positions of Hamilton and other hard-line Federalists, as well as the less hard-line Federalism of Marshall. For the most part, these positions had been rejected by the end of the founding era in favor of the moderate compromise. Still, these positions are consistent with the internationalist rhetoric of the *Restatement (Third)*'s various introductory notes. Given the primacy of international law as a structure for the conduct of nations and of international relations, together with the assumption that international law is substantively progressive, the drafters may have concluded that objections derived from separation of powers and insistence on certain kinds of democratic action were hindrances at best and regressive forces at worst.

A similar grudging attitude toward Congress appears in Section 115, which endorses the last-in-time rule. A federal statute will override a treaty, but only "if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled."¹⁶² To some extent, this is simply an expression of the idea that repeals by implication are disfavored, and it is also consistent with Section 114's restatement of the *Charming Betsy* canon.¹⁶³ Yet Section 115 clearly places the burden on Congress to establish that legislation overrides a treaty. By contrast, no such limitations appear on the ability of a treaty to override a statute; under Section 115(2), the treaty prevails if it is "inconsistent" with a statute.¹⁶⁴ Thus, although the *Restatement (Third)* endorses the equality under U.S. law of federal statutes and treaties,¹⁶⁵ its one-way presumption suggests a different conclusion.¹⁶⁶

And, again, the reporters' notes push much further and question the validity of the last-in-time rule. As to the equality of treaties and

162. *Id.* § 115(1)(a).

163. *See id.* § 115 cmt. a (making both points).

164. Neither § 115 nor its comments define "inconsistent." *See also id.* cmt. e (raising concerns about lightly determining that an executive agreement overrides a statute but expressing no concerns about displacing statutes).

165. *Id.* § 115 cmt. a; *see also id.* § 115 reporters' note 1.

166. The grudging attitude is not directed at Congress alone. Reporters' Note 3 reluctantly admits that "[t]here is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States, notwithstanding that international law and agreements are law of the United States and that it is the President's duty under the Constitution to 'take care that the Laws be faithfully executed.'" *See id.* § 115 reporters' note 3.

statutes, Note 1 observes that “[s]ome have questioned that inference as unwarranted.”¹⁶⁷ Note 1 also suggests a distinction between bilateral and multilateral treaties on this issue:

[I]t has been urged that the doctrine should not apply to inconsistency between a statute and general international law established by a general multilateral treaty. For that case at least, there have been suggestions that the United States might better adopt the jurisprudence of some European countries, which gives effect to an international agreement even in the face of subsequent legislation.¹⁶⁸

Having planted the seed, Note 1 goes on to admit that last-in-time doctrine “is established, and a distinction between bilateral and multilateral agreements has not taken root.”¹⁶⁹ One can almost hear the whispered “yet” at the end of the sentence.

The introductory note to Part III, on international agreements, continues the internationalist tone when it stresses the growth of international agreements and multilateral treaties, which have “assumed a larger place in the life of the international community of states and in international law.”¹⁷⁰ The introductory note takes account of the Vienna Convention on the Law of Treaties and accepts it “as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention.”¹⁷¹

Section 302(2) addresses the permissible scope of international agreements under U.S. law, and it departs from the *Restatement (Second)*: the United States may make an international agreement so long as it does not “contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the

167. *Id.* § 115 reporters’ note 1.

168. *Id.*

169. *Id.*

170. *Id.* at 144.

171. *Id.* at 145. The State Department continues to take the same position. See <http://www.state.gov/s/1/treaty/faqs/70139.htm> (last visited June 10, 2015) (“The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”). For a discussion of the relationship between the Vienna Convention and the Restatements, see Galbraith, *supra* note 82.

United States.”¹⁷² Comment *c* makes clear the rejection of the *Restatement (Second)*’s requirement that international agreements deal with “matters of international concern.”¹⁷³ Comments *d* and *e* observe that there are no federalism or separation of powers limitations on the ability to make international agreements.¹⁷⁴ The corollary to Section 302 is Section 303’s assertion of a broad presidential power to make treaties, congressional-executive agreements on “any matter that falls within the powers of Congress and of the President under the Constitution,” and executive agreements “dealing with any matter that falls within his independent powers under the Constitution.”¹⁷⁵ The comments reinforce the breadth of presidential power, first, by observing that the President’s treaty power is not limited by the enumerated powers of Congress and, second, by citing Article II’s Vesting Clause and Hamilton’s *Pacificus* pamphlets as support.¹⁷⁶

When it comes to the institutional structure for interpreting international agreements, the *Restatement (Third)* is close to the

172. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) (AM. LAW INST. 1986); *see also id.* § 301 (defining an “international agreement” as “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law,” with no mention of subject matter limitations).

173. *Id.* § 302 cmt. c; *see also* BRADLEY, *supra* note 74, at 64 (suggesting the change was made to eliminate the risk that the “international concern” requirement would prevent human rights treaties on the ground that they regulate internal matters). Note that the *Restatement (Second)* took the position that human rights treaties addressed a topic of international concern.

174. *See id.* § 302 cmts. d, e.

175. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (AM. LAW INST. 1986).

176. *See id.* § 303 cmts. c, g. And yet again, the reporters’ notes push farther. While Note 9 admits “the special role of the House of Representatives in raising of revenue” as a basis for congressional-executive agreements relating to “[t]ariffs and other trade matters,” Note 7 suggests a much broader power: “the authority to make a Congressional-executive agreement may be broader than the sum of the respective powers of Congress and the President; that in international matters the President and Congress together have all the powers of the United States inherent in its sovereignty and nationhood, and they can therefore make any international agreement on any subject.” *Id.* § 303, reporters’ notes 7, 9. Although these statements find a place for Congress (so long as it translates into more overall authority to make international law), Note 12 advocates for presidential power, declaring that executive power to make agreements includes matters that fall within concurrent authority of the President and Congress. *See id.* § 303 reporters’ note 2 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

Second. The President interprets international agreements for the purpose of foreign relations; courts have final authority to interpret international agreements in judicial proceedings; but courts will “give great weight to an interpretation made by the Executive Branch.”¹⁷⁷ The *Restatement (Third)* maintains the ambiguity about which executive interpretations receive great weight, although the reporters’ notes resolve that issue in favor of the judiciary for interpretations made in the course of litigation.¹⁷⁸

Finally, the *Restatement (Third)* differs slightly from the *Second* with respect to the validity and termination of treaties. Section 331(2)(a) follows the Vienna Convention by providing that a treaty is void if made by force or threat of force in violation of the UN Charter or if it conflicts with a peremptory norm of international law.¹⁷⁹ This section is simultaneously consistent with the Grotian tradition (although not with Grotius himself¹⁸⁰) and with Machiavelli (on this issue¹⁸¹). And, in addition to accepting that changed circumstances can be the basis for treaty termination (and differing from the *Restatement (Second)* in concluding that this is an issue of termination, not interpretation),¹⁸² the *Restatement (Third)* also accepts presidential power to terminate because of a violation or “supervening events”¹⁸³ while suggesting that Congress “might perhaps claim a voice in the termination of a treaty where termination might create serious danger of war.”¹⁸⁴

177. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 (AM. LAW INST. 1986).

178. *See id.* § 326 reporters’ note 2 (“Courts are more likely to defer to an Executive interpretation previously made in diplomatic negotiation with other countries, on the ground that the United States should speak with one voice, than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved.”).

179. *See id.* § 331(2)(a); *see also id.* § 331, cmt. d (distinguishing “consent achieved by force that was privileged under the Charter, for example, if the victim of aggression, acting in self-defense under Article 51 of the Charter, defeats and imposes a treaty upon the aggressor”).

180. *See supra* note 16 and accompanying text.

181. *See supra* note 37 and accompanying text.

182. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 336 & cmt. a (AM. LAW INST. 1986).

183. *Id.* § 339(b).

184. *Id.* § 339 cmt. a; *see also id.* (suggesting the Senate could give its advice and consent “on condition that the President shall not terminate the treaty without the consent of Congress or of the Senate”). The *Restatement (Third)*’s inclusion of Congress (whether or not

What is the political theory of treaties in the *Restatement (Third)*? To some extent, the answer depends on how seriously one takes the reporters' notes, for their internationalist vision is plainly impatient with the structural arrangements of a federal republic and the inefficiencies, messy compromises, and reactionary risks of democratic politics. Even without the reporters' notes, the *Restatement (Third)* remains an internationalist document, with the result that it focuses on international society and an international rule of law (both Grotian positions, at least according to Hersch Lauterpacht¹⁸⁵). It seeks to check and perhaps diminish national sovereignty by subordinating it to binding international law that inserts itself into domestic law. Within domestic political frameworks, it looks with greater favor on executive (and to some extent judicial) power than it does on legislative power.

Treaties and, especially, international conventions are a key tool for advancing these goals. Thus, treaty law must function in a way that allows treaties to fulfill that purpose, or, failing that, in a way that hinders those goals as little as possible. As a result, the *Restatement (Second)*'s post-Bricker effort to balance is gone, but the effort to exorcise Bricker's ghost leads the *Restatement (Third)* away from the founding era compromises as well.¹⁸⁶ Hamiltonian Federalism gains significant strength.

The political theory of the *Restatement (Third)* also includes an explicit embrace of international human rights. Its elevation of international law over domestic law and politics aids this goal. If international law is enforceable domestic law, then so are international human rights, and, like other rights, they should operate as trumps over ordinary laws and policies. Of course, the *Restatement (Third)* stops short of this position for treaties because it has to recognize the reality of reservations, understandings, and declarations. Yet this accommodation should not obscure a deeper point. To the extent the *Restatement (Third)* embraces executive authority as the means to the internationalist end (and to the extent

reluctant) comes closer than the *Restatement (Second)* to historical practice. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788–801 (2014).

185. See Lauterpacht, *supra* note 15; see also Koh, *supra* note 3, at 2606 (claiming the foundational importance of Grotius's conception of international society).

186. Cf. Ernest A. Young, *Treaties as "Part of our Law,"* 88 TEX. L. REV. 91, 94 (2009) (criticizing internationalists for privileging international law).

that the executive branch will have institutional advantages over the judiciary), it also creates risks.

First, the welter of international law and relations agendas might undermine or stall the advancement of individual rights and values associated with them, such as transparency.¹⁸⁷ Second, a strong executive may have little interest in pursuing a human rights agenda and might prefer to use international law in a manner consistent with national interests. Third, domestic institutions may not give in quietly to the internationalist agenda. The result could be—and arguably has been—the occasional endorsement of human rights at the diplomatic level while consigning their enforcement to the domestic politics that the *Restatement (Third)* disdains.¹⁸⁸

The *Restatement (Third)* thus risks working at cross-purposes, particularly with respect to the making and implementation of treaties. That risk, in turn, represents the continued and perhaps necessary difficulties of political theories that approach international relations from a legal perspective, that conceive of treaties as, in part, a lever to advance domestic policy goals, and that are impatient with internal structural issues.

C. *The Draft Restatement (Fourth): Governance*¹⁸⁹

After the excesses (however well-intentioned) of the *Restatement (Third)*, and particularly the tone of its reporters' notes, the project to draft a *Restatement (Fourth) of Foreign Relations Law* is liberating. It marks the *Restatement (Third)*, although nominally still in effect, as a document in time and increasingly of the past. The *Restatement (Third)* is history; the *Restatement (Fourth)* will take over the task of suggesting the future. Although doctrinal sources are much more

187. Cf. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 174–84 (2006) (arguing that globalization exacerbates a trend toward centralizing domestic power in the executive branch, primarily at the expense of Congress, and that this process corresponds with an increase in secrecy and control of information as well as a “democratic deficit”).

188. The stakes in the prolonged academic and judicial battles over self-execution doctrine under or despite the *Restatement (Third)* bring this point home.

189. With respect to treaties, the *Restatement (Fourth)* project so far has produced, in order, three preliminary drafts, a discussion draft, and a fourth preliminary draft. Unless otherwise noted, this section addresses the provisions of the fourth preliminary draft, *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES* (AM. LAW INST., Preliminary Draft No. 4, 2015).

numerous now than when the ALI began its foreign relations project sixty years ago, many of the actual doctrinal rules remain in flux. The controversies surrounding doctrinal development have fostered an immense increase in the breadth and depth of foreign relations law scholarship. Drawing on these materials, the new Restatement inevitably will suggest new possibilities for foreign relations law.

As they embarked on this project, therefore, the reporters confronted the question of how ambitious they should be. Initially, the answer appears to be, not very. And with good reason. The *Restatement (Third)* was ambitious, but the final product reflected the tensions and, in some instances, the failures of that ambition.¹⁹⁰ Yet if one rejects the *Restatement (Third)* as a model, then it becomes possible to see the *Restatement (Fourth)* reporters as ambitious in a different way.

Instead of the cautious pragmatism of the *Restatement (Second)* or the ideological assertiveness of the *Restatement (Third)*, the drafts of the *Restatement (Fourth)* present foreign relations law as something normal. For the draft *Restatement (Fourth)*, international law is law, and it interacts with the U.S. legal system in myriad ways. There is no need for caution, but also no need for affirmations of faith and headlong embraces. Instead, the drafts engage professionally with the tricky legal issues that go along with determining how (not whether) international law functions as law, particularly as it interacts with a dualist liberal presidential democracy. They also recognize that foreign relations and international law are part of larger domestic and global frameworks of institutions and practices.

The problems that the *Restatement (Fourth)* intends to address, in short, are problems of governance,¹⁹¹ not ideology. For example,

190. See *supra* note 125. The draft *Restatement (Fourth)*'s Reporters' Memorandum on the Definition of Foreign Relations Law (Dec. 2013) contains muted criticism of the *Restatement (Third)*, particularly with respect to its assertions about international law. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION reporters' memorandum (AM. LAW INST., Council Draft No. 1, 2013).

191. A World Bank web page on the Middle East and North Africa provides a useful definition of "governance":

Conceptually, governance (as opposed to "good" governance) can be defined as the rule of the rulers, typically within a given set of rules. One might conclude that governance is the process – by which authority is conferred on rulers, by which they make the rules, and by which those rules are enforced and modified. Thus,

the draft materials on treaties do not discuss, whether to condemn (as in the *Restatement (Third)*) or to praise, the rational choice (or realist) approach to international law, for example as recently espoused by Jack Goldsmith and Eric Posner.¹⁹² The draft

understanding governance requires an identification of both the rulers and the rules, as well as the various processes by which they are selected, defined, and linked together and with the society generally.

Nonetheless, within this concept of governance, the obvious second question is: What is good governance? Again, the debate on the quality of governance has been clouded by a slew of slightly differing definitions and understanding of what is actually meant by the term. Typically, it is defined in terms of the mechanisms thought to be needed to promote it. For example, in various places, good governance has been associated with democracy and good civil rights, with transparency, with the rule of law, and with efficient public services.

What is Governance?, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html> (last visited Sept. 20, 2015); *see also* MICHAEL BARNETT & RAYMOND DUVALL, *Power in Global Governance*, in *POWER AND GLOBAL GOVERNANCE* 1, 2 (Michael Barnett & Raymond Duvall eds., 2005) (“Governance involves the rules, structures, and institutions that guide, regulate, and control social life Scholars and policymakers regularly address questions of who governs, how institutions might be designed to check the potential abuse of power, and how individual autonomy and liberty can be preserved.”).

Governance also has an international component. As Barnett & Duvall explain, “global governance” is a technocratic, somewhat chastened successor to internationalism. It reflects the goal that

states and peoples [will] be able to cooperate on economic, environmental, security, and political issues, settle their disputes in a nonviolent manner, and advance their common interests and values. Absent an adequate supply of global governance, states are likely to retreat behind protective barriers and re-create the conditions for enduring conflict. Global governance, then, is thought to bring out the best in the international community and rescue it from its worst instincts.

Id. at 1. Governance, global governance, and the associated idea of globalization have also spurred an extensive and insightful critical literature. *See, e.g., id.*, at 2 (arguing governance implicates “fundamental elements of power”); *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE* (Gráinne de Búrca et al. eds., 2014); *see also* FOUCAULT, *supra* note 32.

In this Article, I use the word “governance” to indicate an effort to combine the rule of law and transparency with a more technocratic concern for the frameworks within which political, legal, and bureaucratic actors make decisions and develop policies.

192. *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 7–10, 14–17, 180 (2005) (describing their use of rational choice theory as an instrumental approach and distinguishing traditional “realism” from their research agenda). For criticism of this approach, *see*, for example, O’CONNELL, *supra* note 43; JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015); and Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 *TEX. L. REV.* 1265, 1270 (2006) (“The vision of international law that Goldsmith and Posner espouse, though newly dressed up in the trappings of rational choice theory and econometric analysis, is at bottom just the same old realist vision.”).

Restatement (Fourth), like its predecessors, undoubtedly sees international obligations, once made, as legally binding as a matter of domestic law. The concerns of realism nonetheless coexist with the draft *Restatement (Fourth)* as political reasons for entering into or complying with international obligations (which, to the extent this is an accurate characterization, may be more of an accommodation for realism than one finds in the *Restatement (Third)*).¹⁹³ Further, to the extent the draft *Restatement (Fourth)* has a governance focus, it arguably sidesteps the debate over realism by, instead, recognizing and making room for international law as a blend of hard and soft law in its own right and as it operates within domestic law.¹⁹⁴ Interestingly, the draft *Restatement (Fourth)*'s governance focus and arguable coexistence with realism likely will produce a document that is friendlier to the structure and practices of democracy than was the *Restatement (Third)*.¹⁹⁵

Because the material on treaties is incomplete, the rest of this discussion will necessarily be tentative.¹⁹⁶ But the difference in tone from the *Restatement (Third)* emerges immediately. For example,

193. See *infra* notes 247–49 and accompanying text (suggesting further aspects of this observation).

194. Cf. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000). Goldsmith & Posner compare and contrast their views with the institutionalism of scholars such as Abbott & Snidal. See GOLDSMITH & POSNER, *supra* note 192, at 16–17, 83–106.

195. Cf. *supra* note 191 (noting that governance concerns typically include democracy and transparency). This Article does not analyze other parts of the *Restatement (Fourth)* project (let alone the predecessor sections of those projects in the *Restatement (Second)* and *Restatement (Third)*). Still, some of the other *Restatement (Fourth)* materials are consistent with a governance approach. The reporters have taken pains to point out that, unlike the *Restatement (Third)*, they are trying to delineate clearly “the distinction between domestic policy and practice, on the one hand, and international law, on the other.” RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION reporters' memorandum at xv (AM. LAW INST., Council Draft No. 1, 2013); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: SOVEREIGN IMMUNITY reporters' memorandum at xxiii (AM. LAW INST., Tentative Draft No. 1, 2015) (“Our general approach to the topic is the same as that taken by the Restatement Third, although we have endeavored to draw a clearer distinction between domestic and international law . . .”). They have also stressed their effort to be “straightforward” and “fair” in their accounts of U.S. law. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION reporters' memorandum at xv (AM. LAW INST., Preliminary Draft No. 2, 2014).

196. I intend my discussion to be much more descriptive and analytical than normative. For what it is worth, I disagree with aspects of the draft *Restatement (Fourth)*, but my overall reaction is favorable.

Sections 102 and 104 focus on international law, and although they assert positions that are roughly consistent with the *Restatement (Third)*, they do so without rhetoric.¹⁹⁷ Section 102(1) asserts the capacity of “[e]very state, including the United States . . . to conclude international agreements,”¹⁹⁸ which “includes, but is not limited to, a ‘treaty’ as that term is understood in U.S. domestic law.”¹⁹⁹ Section 102(3) links with Section 101(3) to stress that domestic law is not a justification for “failure to perform an international agreement”—unless the rule at issue is “domestic law of fundamental importance concerning competence to conclude international agreements.”²⁰⁰ Section 104 addresses the circumstances under which an international agreement “enters into force as an international obligation for a state.”²⁰¹ For both sections, the comments and reporters’ notes make clear the conscious effort by the reporters to invoke provisions of the Vienna Convention on the Law of Treaties. By linking itself with the Vienna Convention, the draft also links itself, at least initially, to the basic framework for enabling the treaty and convention-based aspects of global governance projects. More generally, these materials also provide a useful overview of international standards and aspects of U.S. law. And in stark contrast with the *Restatement (Third)*, the reporters do all of this without sweeping assertions about the structure of the international community or about the nature of international law or its status in the U.S. legal system.

Section 106, on treaty interpretation, is a mix of international and domestic law. Perhaps most significantly, the comments and reporters’ notes assert the status of the Vienna Convention as

197. For both sections, the reporters have chosen to address international agreements in general, but they stress that these sections do not address “the domestic status of international agreements other than Article II treaties.” See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 102 n.† (AM. LAW INST., Preliminary Draft No. 4, 2015); *id.* § 104 n.†.

198. *Id.* § 102.

199. *Id.* § 102 cmt. a.

200. *Id.* § 102(3). For discussion of § 101, see *infra* notes 211–12 and accompanying text.

201. *Id.* § 104(1). It appears that there will also be a § 104A that states international law on “reservations and other conditions,” which will provide a bridge from § 104 to § 105 (on U.S. law with respect to reservations). See *id.* at xvii.

customary international law.²⁰² According to the reporters, the first four sections of Section 106 directly reflect the provisions of Articles 31 and 32 of the Vienna Convention. As Comment *c* obliquely explains, the decision to rely on the Vienna Convention is a gentle nudge to the federal courts: “The Supreme Court has rarely cited the Vienna Convention when interpreting treaties, but it has generally applied criteria that are consistent with those set forth in the Vienna Convention.”²⁰³ Taken together Sections 102, 104, and 106(1)-(4) indicate that the draft *Restatement (Fourth)* is consistent with, even if not necessarily advocating for, the general project of global governance.²⁰⁴

The comments and notes to Section 106 also address U.S. law and practice. For example, Comment *g* notes—but does not explicitly endorse in full—the use by U.S. courts of domestic legal materials as an aid to treaty interpretation.²⁰⁵ Although use of these materials “runs the risk of establishing a meaning of the treaty for one state that is not shared by other states parties,” they “may be particularly relevant” in some circumstances, including the issue of self-execution.²⁰⁶ This passage is consistent with the Discussion Draft’s discussion of self-execution, although I believe it is flawed in its over-endorsement of the intent theory for determining whether a treaty is self-executing.²⁰⁷ Even so, the discussion of this issue is clear, informative, and useful.

Section 106(5) turns explicitly to U.S. law. It provides that, although “Courts of the United States have final authority to interpret a treaty for purposes of applying it as law in the United

202. *Id.* § 106, cmt. a & reporters’ notes 1, 9; *see also supra* note 171 (noting the State Department takes the same general position about the status of the Vienna Convention).

203. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. c (AM. LAW INST., Preliminary Draft No. 4, 2015); *see also id.* reporters’ note 2 (making the same point and noting that some courts of appeals have explicitly relied on the Vienna Convention).

204. *Cf. Sadat, supra* note 125, at 1687 (observing that the proposal for a fourth restatement “was premised on the need for increased international cooperation and crisis management due to the pressures of globalization” but expressing concern, based on the provisions so far, that “its impact, if not its objective, . . . will arguably undercut [those] goals”).

205. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. g (AM. LAW INST., Preliminary Draft No. 4, 2015).

206. *Id.*; *see also id.* § 106, reporters’ note 7.

207. *See supra* note 150.

States, . . . they will ordinarily give great weight to an interpretation by the executive branch.”²⁰⁸ Comment *b* provides some additional explanation for this “traditional” statement by the Supreme Court, but Reporters’ Note 8 provides a more complicated picture when it observes that the Court “at times has declined to follow the interpretation of the executive branch, sometimes without citing the ‘great weight’ standard.”²⁰⁹ One could read these comments as a deliberate step away from endorsement of a practice that the reporters feel compelled to recognize.²¹⁰

The rest of the draft provisions deal directly with U.S. law rather than international law, but they continue the focus on governance. Section 101 is a confident but straightforward assertion of familiar black letter law: treaties “made under the authority of the United States” are the supreme law of the land; cases arising under treaties are within the judicial power granted to federal courts; treaties are binding on state courts; and the domestic implementation of treaties has nothing to do with the binding nature of a treaty as a matter of international law.²¹¹ The comments are brief, explanatory, and to the point, and the reporters’ note simply points out how this draft section intersects with the provisions of the *Restatement (Third)*.²¹²

Section 103 restates U.S. law on approval of treaties.²¹³ Here, the comments provide a concise and helpful explanation of negotiation, advice and consent, and ratification. They briefly explain the power of the President and the role of the Senate, and the reporters’ notes take up these issues in greater detail. And here the goals of the draft *Restatement (Fourth)* are on full display. Unlike the sketchy reporters’ notes of the *Restatement (Second)*, or the argumentative and sometimes destabilizing reporters’ notes of the *Restatement (Third)*, the reporters’ notes in the draft *Restatement (Fourth)*

208. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(5) (AM. LAW INST., Preliminary Draft No. 4, 2015).

209. *Id.* § 106 reporters’ note 8.

210. See Cohen, *supra* note 82 (arguing the Court no longer gives as much deference to the executive branch as it once did); Galbraith, *supra* note 82 (arguing for less deference).

211. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 101 (AM. LAW INST., Preliminary Draft No. 4, 2015).

212. *But see* Sadat, *supra* note 125, at 1680–88 (objecting to the failure to discuss other international agreements along with treaties).

213. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 103 (AM. LAW INST., Preliminary Draft No. 4, 2015).

present what is clear, explain it when necessary or helpful, and then discuss issues that are complex or ambiguous. Conceptions of good governance typically rely on transparency and clearly-defined political structures.

The discussion of the President's power to negotiate treaties provides an example of the overall approach. Although the President's power to negotiate treaties is exclusive, Reporters' Notes 2 and 3 carefully explain the power that the Senate and Congress as a whole retain to participate in, remain informed of, and sometimes affect those negotiations.²¹⁴ At each level, the reader gains greater depth of understanding of how governmental institutions in the United States go about the business of creating treaties within and beyond the reach of legal doctrine. This discussion indicates that Congress—the most democratic part of the federal government—often takes an important role beyond the Senate's advice and consent responsibilities with respect to the creation of treaties. The reporters' notes do not endorse these practices, but their straightforward description nonetheless tends toward legitimation.

Section 105, following the discussion of international law on a treaty's entry into force, addresses the impact in U.S. law of reservations, understandings, and declarations (RUDs).²¹⁵ Consistent with the second and third Restatements, as well as with longstanding practice, the draft accepts the legitimacy of RUDs. The comments frame this as a question of Senate authority pursuant to its advice and consent power. But Section 105 also seeks to place reasonable limits on the use of RUDs. It provides that RUDs must "relate to the treaty" (as well as be consistent with the Constitution),²¹⁶ and the comments discuss the limits on RUDs that may be imposed by specific treaties or by the terms of the Vienna Convention.²¹⁷ The

214. *See id.* § 103 reporters' notes 2, 3.

215. As noted above, a future § 104A will discuss international law on this issue. *See supra* note 201.

216. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 105(1) (AM. LAW INST., Preliminary Draft No. 4, 2015).

217. *Id.* § 105 cmt. c. Reporters' Note 6 discusses the specific issue of declarations about self-execution or non-self-execution, and it refers to a more extensive discussion in § 110 (the yet to be released revision of the section on self-execution). The note correctly observes that this practice has become more common and cites the Supreme Court's apparent acceptance of it. It also discusses and dismisses the relevance of *Power Auth. of N.Y. v. Fed. Power Comm'n*,

draft's express recognition of these limits further confirms its goal of situating U.S. law within global practice where possible.

The comments and reporters' notes for Section 105 frame the issue of RUDs as one in which the President and Senate are in conflict, with the result that the President may refuse to ratify a treaty based on disagreement with certain reservations. The notes would be stronger if they mentioned that the executive branch sometimes proposes RUDs either before or after negotiating with members of the Senate, and that in at least some instances it appears that the President might even prefer to ratify a treaty or convention to which the Senate has given only conditional consent.²¹⁸

Section 107 is a stand-alone provision which declares that a treaty cannot violate individual constitutional rights.²¹⁹ No longer is this topic lumped in with other issues about the scope of the treaty power. Again, the comments and reporters' notes provide helpful detail and assist the reader in understanding the basic aspects of this issue and the contours of its ambiguities. Reporters' Note 3 has an interesting discussion of the extent to which treaty provisions could create the compelling interest necessary to satisfy the strict scrutiny test that determines whether some constitutional rights have been violated.²²⁰ Placed as it is, Section 107 provides an immediate check on the power to make and implement treaties. Much has changed in the law of constitutional rights since the *Restatement (Second)*. Not as much has changed since the *Third*, but the emphasis of the draft *Restatement (Fourth)* is different. There is no need to advocate, even intermittently, for treaty supremacy. The draft *Restatement (Fourth)*, instead, deals calmly with the intersection of treaties and constitutional rights and, in keeping with mainstream domestic doctrine, the Constitution prevails (even if, as Reporters' Note 4 observes, potentially difficult issues remain about the validity of the treaty and U.S. obligations under it).²²¹

247 F.2d 538 (D.C. Cir. 1957), *vacated as moot*, 355 U.S. 64 (1957). *See supra* note 116 (noting the *Restatement (Second)*'s discussion of the case).

218. *Cf. supra* note 214 and accompanying text (noting the usefulness of such an explanation for treaty negotiation).

219. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 107 (AM. LAW INST., Preliminary Draft No. 4, 2015).

220. *See id.* § 107 reporters' note 3.

221. The Discussion Draft deleted a comment from Preliminary Draft No. 3 that expressly stated a treaty would remain valid as an international obligation even if it called for

Section 108 is another short provision. It builds on Section 101 to declare that treaties are supreme over state and local law, and that courts will apply a self-executing treaty provision if there is a conflict between the treaty and a state or local law.²²² And again, one finds greater clarity about how different parts of the government—here, different levels within a federal system—will interact with a treaty. Because of federal supremacy, states are bound by treaties, and the issue of self-execution, appearing for the first time, comes into play only when trying to resolve conflicts between treaties and state or local law. The clear implication is that a non-self-executing treaty provision remains the supreme law of the land, which is a significant difference from the *Restatement (Second)* and possibly from the *Restatement (Third)*.²²³ Reporters' Note 3 supports that implication when it observes that, although state courts are not obligated to apply a non-self-executing treaty or treaty provision, “[s]tate and local courts may be able to promote compliance with a non-self-executing treaty obligation through their application of State or local law.”²²⁴

violation of constitutional rights. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 103 cmt. d (AM. LAW INST., Preliminary Draft No. 3, 2014). That issue now appears in Reporters' Note 4 with slightly different language (it now states that the United States “likely would remain obligated” under such a treaty). See RESTATEMENT (FOURTH): TREATIES OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 103 reporters' note 4 (AM. LAW INST., Discussion Draft 2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 107 reporters' note 4 (AM. LAW INST., Preliminary Draft No. 4, 2015).

222. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 4 (AM. LAW INST., Preliminary Draft No. 4, 2015).

223. See *supra* notes 140–50. Here again, a comment in Preliminary Draft No. 3, on the question whether there is a presumption against preemption (and suggesting there is no presumption), see RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 104 cmt. d (AM. LAW INST., Preliminary Draft No. 3, 2014), has been moved to the reporters' notes. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 104 reporters' note 2 (AM. LAW INST., Discussion Draft 2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015). For the argument in favor of a presumption against preemption of state law by treaties, see David H. Moore, *Treaties and the Presumption against Preemption*, 2015 BYU L. REV. 1556 (2016).

224. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 104 reporters' note 3, at 19 (AM. LAW INST., Discussion Draft, 2015). For discussions of this dynamic, see Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29 (2007); Nancy Alexander, Comment, *Saved by the*

Section 109 addresses the last-in-time rule. It backs away from the *Restatement (Third)*'s imbalanced approach in favor of a simple set of rules: courts should interpret federal statutes to avoid conflicts with treaties; if there is a conflict, the last-in-time rule applies; and the international law obligation remains even if trumped by a statute for purposes of U.S. law.²²⁵ The comments and reporters' notes make clear the pedigree of the rule in Supreme Court case law. Although they make no effort to undermine it (unlike the reporters' notes in the *Restatement (Third)*), they also make no attempt to explain or justify its existence. It simply is the rule. On this topic, the reporters would do better to attempt a justification for the rule as well. For example, they could cite the discussion of the last-in-time rule in the 1815–16 congressional debates that also addressed self-execution and the powers of Congress to implement (or impede) treaties.²²⁶

Interestingly, Reporters' Note 2 discusses a presumption against conflict when interpreting a statute,²²⁷ although it does not provide a clear rule to describe the strength of this presumption, and it does not endorse the *Restatement (Third)* approach that required evidence that the purpose of the statute was to override a treaty obligation. On this point, the draft *Restatement (Fourth)* brings statutes and treaties closer to the equality that they find in Supreme Court opinions (equality, but with rules of construction to avoid conflict). Note 2 goes on, however, to extend the presumption against conflict to non-self-executing treaties:

Because this canon of construction is based in part on the assumption that Congress does not lightly violate the international obligations established by a treaty, it presumably applies to potential conflicts with both self-executing and non-self-executing treaties. After all, the distinction between self-executing and non-self-executing treaties concerns only domestic enforceability and

States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon's Rescue, 15 LEWIS & CLARK L. REV. 819 (2011).

225. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 109 (AM. LAW INST., Preliminary Draft No. 4, 2015).

226. See Parry, *supra* note 45, at 1305–16; see also Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

227. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 109 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

does not typically affect the international obligations of the United States under a treaty.²²⁸

This note plainly reinforces the clear implication from Section 108 that, unlike the *Restatement (Second)* and possibly unlike the *Restatement (Third)*, a non-self-executing treaty is supreme law of the land.

Despite the importance of the previous sections, the legal issues relating to the distinction between self-executing and non-self-executing treaties may be even more significant. The reporters discussed self-execution in Section 106 of Preliminary Draft No. 3 and the Discussion Draft, but that section does not appear in Preliminary Draft No. 4 (although a place has been held for it as Section 110). Presumably in response to comments and criticism, the reporters are still working on a revision.²²⁹ In the meantime, the language from the Discussion Draft provides plenty of fodder for analysis.

Former Section 106 provides a simple and logical analysis of self-execution (which was a change from the first effort to address self-execution in Preliminary Draft No. 2). First, a self-executing treaty provision is enforceable by the judiciary, while compliance with a non-self-executing provision “may be achieved through judicial application of preexisting or newly enacted law, or through executive, administrative, or other action outside the courts.”²³⁰ Second, the decision whether a provision is self-executing turns on the intent or understanding of the “U.S. treatymakers” or on a statement in the Senate’s resolution of advice and consent.²³¹ Third, a treaty provision is non-self-executing if the Constitution requires implementing legislation.²³²

The comments in the Discussion Draft flesh out this analysis. As had the *Restatement (Third)*, Comment *b* notes that self-execution is distinct from whether the treaty creates private rights and

228. *Id.* (internal citation omitted).

229. *See id.* at xv.

230. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(1) (AM. LAW INST., Discussion Draft 2015).

231. *Id.* § 106(2).

232. *Id.* § 106(3). As should be clear from the text, I appreciate the Reporters’ ability to navigate this issue whether or not I agree with all of their analysis. *Cf. supra* note 150.

remedies.²³³ It also repeats the assertion that the executive branch may be able to enforce a treaty even if the courts cannot—an issue that raises interesting questions and potential concerns that subsequent drafts presumably will address.²³⁴ Comment *d* provides that the text and purpose of the treaty play a large role in determining the intent of the treaty makers.²³⁵ Comment *e* stresses that there is no presumption against or in favor of self-execution, which resolves a concern that has existed since the Supreme Court's discussion of self-execution in *Medellín v. Texas*.²³⁶ Comment *f* provides further information about Senate statements in the advice and consent resolution, and it suggests that courts should defer to these statements whether the statements are in favor of self-execution or against it.²³⁷

The reporters' notes for Section 106 in the Discussion Draft are longer and more argumentative than the notes to the other draft sections in Preliminary Draft No. 4, and they underscore the importance of self-execution. Unlike the *Restatement (Third)*'s notes, however, the argument is not with existing doctrine; nor is it an effort to establish a normative position. Instead, the scholarly debate that began in the late 1990s, the subsequent decision in *Medellín*, and the often-critical scholarly commentary that *Medellín* has inspired, all forced the reporters to wade into the fray and provide some guideposts.

Reporters' Note 1 recognizes the constitutional and policy arguments in favor of self-execution, but it downplays the

233. See *id.* § 106 cmt. b. Exactly what this distinction means in practice is sometimes unclear. See Parry, *supra* note 150, at 63–71.

234. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106, cmt. b (AM. LAW INST., Discussion Draft 2015); see also *id.* § 106 reporters' note 1 at 31; *id.* § 106 reporters' note 6 at 45–46. For discussion of this issue, see *supra* notes 65–67 (discussing the congressional debate over the extradition of Jonathan Robbins); see also Jensen, *supra* note 137.

235. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. d (AM. LAW INST., Discussion Draft 2015).

236. *Id.* § 106 cmt. e; see *Medellín v. Texas*, 552 U.S. 491 (2008); BRADLEY, *supra* note 74, at 47 (discussing this issue); Parry, *supra* note 150, at 60 (also discussing this issue); see also Sloss, *supra* note 108, at 1741–44 (suggesting the more fruitful question is whether presumptions are context-specific); Vázquez, *supra* note 150 (arguing there is sometimes a presumption in favor of self-execution).

237. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. f (AM. LAW INST., Discussion Draft 2015).

importance of judicial enforcement in light of the many other avenues that may exist for enforcement. It also highlights the “political, legal, and administrative considerations that sometimes make it preferable that a treaty not become law in the United States until it is implemented by Congress.”²³⁸ Note 1 goes on to discuss *Medellín* in an interesting way by describing the Court’s reasoning as a kind of field guide for issues that courts should consider when deciding the self-execution question.²³⁹ Note 2 then expressly discusses factors that courts should address, drawn from numerous cases (with *Medellín* playing essentially a supporting role). The views of the executive branch on this issue, according to Note 2, have great importance.²⁴⁰

Medellín comes in for rougher treatment in Reporters’ Notes 3 and 6. First, Note 3, when discussing whether there is a presumption in favor of or against self-execution, asserts that *Medellín* did not change the law and that “[t]he unusual circumstances of *Medellín* . . . further counsels against generalizing too much from the Court’s finding there of non-self-execution.”²⁴¹ Then, Note 6 undermines the *Medellín* majority’s suggestion that non-self-executing treaty provisions are not supreme law of the land; it characterizes this part of the opinion as “ambiguous on this issue” while also suggesting the case should be read narrowly because “the Court was focused in that case only on whether the relevant treaties were judicially enforceable.”²⁴² For the reporters, *Medellín* is, at best, just another case, and it should not receive special consideration beyond its specific context.

Reporters’ Note 5 is also interesting. Addressing the question of when Congress has exclusive power to legislate, the note finds no clear

238. *Id.* § 106 reporters’ note 1 at 31; *see also id.* § 106, cmt. b. Reporters’ Note 6 revisits this issue as well. *Id.* § 106 reporters’ note 6, at 45–46.

239. *Id.* § 106 reporters’ note 1, at 34–35.

240. *See id.* § 106 reporters’ note 2.

241. *Id.* § 106 reporters’ note 3.

242. *Id.* § 106 reporters’ note 6, at 45; *see also* Vázquez, *supra* note 150, at 1747 (noting the draft’s treatment of *Medellín* avoids “the blind alleys down which [that decision] might have led them” and “rightly recognize[s] that some of the views expressed in the opinion are untenable”). *Cf.* John T. Parry, *Rewriting the Roberts Court’s Law of Treaties*, 88 TEX. L. REV. 65, 67–69 (2010) (suggesting supporters of the *Medellín* decision have had to “rewrite” it so that it can make sense), <http://www.texaslrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSecAlso65.pdf>.

guidance but observes, first, that most congressional powers are not exclusive and, second, that these issues play out in complicated ways in practice.²⁴³ By the end of the note, self-executing treaties come away with greater ability to impact congressional prerogatives than the *Restatement (Third)* contemplated. Here, one finds a hint of the *Restatement (Third)*'s impatience with the messiness of the democratic give and take, but the analysis turns more on "U.S. treaty practice," "structural considerations[,] and customary practice."²⁴⁴

Finally, Reporters' Note 7 criticizes the *Restatement (Third)* for suggesting a non-self-executing treaty is not the supreme law of the land, and it faults the earlier Restatement's reporters' notes for suggesting that failure to implement a treaty indicates that the treaty is self-executing.²⁴⁵ That is to say, the flaw of the *Restatement (Third)* was, first, attempting to push for judicial enforcement as the norm for treaties (and perhaps simply failing to recognize other enforcement options) and, second, being ambiguous on a key issue of enforcement. So far, at least, ambiguity is not the flaw of the draft *Restatement (Fourth)*, perhaps because ambiguity translates into a failure to provide clear structures for governance.

Overall, the draft *Restatement (Fourth)* shies away from an overt or immediately recognizable political theory of treaties. With a new draft of the self-execution section on the horizon and several critical issues remaining—including executive power to implement treaties and the law relating to other kinds of international agreements—a more active theory may yet emerge. For now, however, the preference for clarity and structure over theory underscores the draft *Restatement (Fourth)*'s governance agenda. In the process, the draft provisions tend overall toward a meaningful role for Congress even as they also confirm strong executive power. More generally, the political branches appear to gain power while the judiciary loses some ground (albeit with important caveats).

Yet the absence of overt theorizing, or perhaps simply the decision not to be as aggressive on that front as the *Restatement (Third)*, does not mean that the *Restatement (Fourth)*'s Discussion Draft for treaties has no political theory. Governance is about

243. See RESTATEMENT (FOURTH): TREATIES § 106 reporters' note 5 at 42–44 (AM. LAW INST., Discussion Draft 2015).

244. *Id.*

245. See *id.* § 106 reporters' note 7 at 46–47.

structures within which accountable political institutions play their defined roles and administrators exercise their sound discretion to fulfill policy objectives, with legal rules and courts providing an important set of constraints.²⁴⁶ Legal doctrines work best under this approach when they are relatively clear and result in discernable expectations and incentives, or when they mark out general structures or parameters within which institutions may operate, possibly differentiate, and perhaps innovate. From the domestic perspective, international law fits best within this model either when it creates clear and discrete rules that will function as law, or when it provides outlines for exercises of discretion and political choice that are largely outside the realm of the courts.

When the new Restatement provisions mark off what is judicially enforceable from what is not, or when they define what is part of foreign relations law and what is not, they create legal and non-legal spaces that together will shape the doctrines and practices of foreign relations law.²⁴⁷ Although the current draft is by no means a realist document, its precision and governance focus, if carried through to the final version, will define large areas in which discretionary policy decisions will meet with few hard legal constraints.²⁴⁸ The *Restatement (Third)*, by contrast, was uncomfortable with this approach to international law and relations.

Unlike the *Restatement (Third)*, the drafts of the *Fourth* do not opine on whether there is an international society out there (whether or not it is anarchical) or whether foreign relations play out in a Machiavellian or Hobbesian space. The drafts assume some level of global governance but appear agnostic about its strength and scope. But whatever the nature of and relationship among international society and international relations, the *Restatement (Fourth)* inevitably will contribute to the scope and definition of that

246. See *supra* note 191 (defining governance).

247. See FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW: UNRULY LAW 1, 9 (2013) (arguing for the importance of understanding the importance of “non-law” that “stands opposed to or outside the reach of legal norms” in categories such as “the before, the after, the below, the above, the against and the despite”).

248. Cf. *supra* note 191. Indeed, it is possible to define the draft, not as realist, but rather, in its governance focus, as reflecting *raison d'état* in its more complex and arguably positive sense. See *supra* notes 32, 38.

relationship and to the breadth or narrowness of the role that domestic and international law play within it.²⁴⁹

CONCLUSION

The goal of this article has been to suggest ways in which the law of treaties has interacted with European and North American political theory over the past 400 years. Theories from early modern Europe continue to be relevant for framing many aspects of treaty law and political theory. The U.S. founding era became an important site for the interplay of these theories. In future decades, commentators may see the American Law Institute's three projects on foreign relations law—situated during the period in which the U.S. emerged, sometimes stumbled, and was increasingly challenged as a dominant (sometimes, the dominant) force in world affairs—as a similar moment.

The impacts that result from the intersection between the Restatements and political theories, and the significance of those impacts, are undoubtedly both important and subject to debate. But to have that debate at all, these issues must first, as this article attempts to demonstrate, be an object of study.

249. Arguably, a governance approach will result in superior substantive results, including in those areas marked by discretionary policy decisions rather than legal doctrine. This Article takes no position on whether the *Restatement (Fourth)* or one of its predecessors would best contribute to superior substantive results.

