

December 2015

The Proposed Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties—Some Serious Procedural and Substantive Concerns

Leila Nadya Sadat

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [International Law Commons](#), and the [International Relations Commons](#)

Recommended Citation

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).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2015/iss6/10>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Proposed *Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties*—Some Serious Procedural and Substantive Concerns

*Leila Nadya Sadat**

INTRODUCTION

The drafting of a new *Restatement (Fourth) of the Foreign Relations Law* was proposed to the American Law Institute (ALI) in 2012, and the project is now well under way. Multiple preliminary drafts have been circulated on the topics of Jurisdiction, Sovereign Immunity, and Treaties, and discussion has begun amongst ALI Members about the black letter law and commentary they contain. Because the ultimate adoption of any provisions by the membership of the ALI will take time, however, and is certainly not a foregone conclusion, it remains useful to consider at this relatively early stage whether the project has been well-conceived, and is on the right track.

This Essay will consider the most recent *Discussion Draft* of April 2015 on the *Status of Treaties in United States Law*,¹ and not the tentative drafts on *Jurisdiction* and *Sovereign Immunity*. This brief examination of the Treaty Draft raises real questions about both the scope and execution of the *Restatement (Fourth)* project more generally. Particularly worrying is the reporters' decision not to begin the project with a comprehensive outline of the provisions they intend to cover, a process issue magnified by some substantive concerns raised by the content of the proposed Black Letter Law, Comments, and Reporters' Notes, many of which are addressed in other contributions to this *Symposium*. The present Essay focuses

* Henry H. Oorschelp Professor of Law; Director, Whitney R. Harris World Law Institute, Washington University School of Law; Special Adviser on Crimes Against Humanity to the ICC Prosecutor [sadat@wulaw.wustl.edu]. I would like to thank the J. Reuben Clark Law School at Brigham Young University for the invitation to participate in this Symposium and am grateful to my colleagues at Washington University School of Law for their helpful comments and input, particularly Susan Appleton, Stephen Legomsky, Greg Magarian, Adam Rosenzweig, and Peggie Smith. This essay represents the personal views of the author and does not represent the official views of any organ of the International Criminal Court.

1. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES §§ 101–106 (AM. LAW INST., April Discussion Draft 2015).

more upon the structure and probable impact of the project than the substance of the text, but does question certain substantive choices made by the drafters, as well as their overall normative approach. This Essay suggests that it would have been preferable for the reporters to develop an outline of the entire project before attempting to draft sections piecemeal. This would render the final project, and even sections completed along the way, both more complete and authoritative and would promote greater transparency about the project as a whole. It could also help in understanding the relationship between the *Restatements (Third)* and *(Fourth)* for the time period during which they will overlap. This Essay concludes, perhaps uncomfortably, that if the reporters are unable to do this, they should reconsider whether it is appropriate to be engaged in the project at all.

In terms of specific comments, this Essay questions the *Discussion Draft's* narrow scope, and suggests a return to the unitary structure of Section 111 of the *Restatement (Third)*, rather than the fragmented approach of the current initiative, which has separated Article II treaties from all other forms of international law. Because other contributions to this volume have taken up in detail the discussion of Section 106 (Self-Executing and Non-Self-Executing Treaty Provisions), this Essay does not address that issue, although many of the critiques raised in those contributions echo some of my own concerns.²

I. HISTORY AND ORIGIN OF THE *RESTATEMENT (FOURTH)* PROJECT

In 1987, the American Law Institute published the *Restatement (Third) of the Foreign Relations Law of the United States*.³ This two-volume work was the successor to the 1965 *Restatement*, and its Chief Reporter was the late Louis Henkin of Columbia University, who was assisted by Andreas Lowenfeld, Louis Sohn, and Detlev Vagts as additional Reporters.⁴ The *Restatement (Third)* is divided into nine Parts, some of which address questions of international law,

2. See, e.g., David Sloss, *Self-Execution in the Restatement (Fourth) on Treaties*, 2015 BYU L. REV. 1691 (2016) (arguing that the Reporters have endorsed a novel version of the doctrine of self-execution that finds little support in current law).

3. Because of a quirk in the labeling of ALI Restatements, the *first* Restatement of foreign relations law was actually labeled the second, and the fourth is therefore actually the third.

4. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* ix (AM. LAW INST. 1987).

others the relationship of international law to U.S. law, and still others address questions of U.S. domestic law, and more particularly U.S. Constitutional law. As Geoffrey Hazard, Director of the ALI at the time of the *Restatement (Third)*'s publication, noted, many questions of U.S. foreign relations law raise constitutional questions involving the independence of the judiciary, "the separation of powers between the legislative, executive, and judicial branches, the special constitutional role of the Senate with respect to treaties, and the federal structure of government."⁵ The Parts addressing international law questions cover the status of persons, including recognition of states and governments, succession of states and international organizations (Part II), the making and scope of international agreements (Part III), jurisdiction (which also includes immunities, international cooperation and foreign judgments and awards) (Part IV), the law of the sea (Part V), the law of the environment (Part VI), protection of natural and juridical persons, including human rights law and injury to aliens (Part VII), international economic relations, covering international trade and monetary law (Part VIII), and remedies for violations of international law (Part IX). As completed, the *Restatement (Third)* represents the opinion of the ALI as to "the law as it would be pronounced by a disinterested tribunal, whether of the United States or some other national state or an international tribunal."⁶

The *Restatement (Third)* took six years to draft in its entirety.⁷ It was generally well-received when it was published, although it was not without its critics.⁸ According to one observer, controversy centered largely around the "treatment of customary international law, expropriation, extraterritorial application of U.S. law, and the act of state doctrine."⁹ It was broken into five separate tentative drafts, and because it became very difficult to envisage what the final product would resemble, the ABA Section on International Law

5. *Id.* at x.

6. *Id.* at xi.

7. It was begun in 1978. See John B. Houck, Restatement of the Foreign Relations Law of the United States (*Revised*): *Issues and Resolutions*, 20 INT'L LAW. 1361, 1361 (1986). See generally Covey T. Oliver, *Foreword*, 25 VA. J. INT'L L. 1 (1984). Houck's essay is particularly helpful in describing the scope of the disagreements engendered by the draft documents and the process followed in resolving the disputes.

8. Oliver, *supra* note 7, at 1-5.

9. Houck, *supra* note 7, at 1363.

persuaded, with the help of other interested parties including the State Department, the ALI to publish a complete new composite draft in July 1985, which was open for comment until December 2nd. The final draft was brought to the ALI for a final vote by the Membership in July 1986.¹⁰

The interactive and broad consultations conceded to by the ALI and the reporters for the *Restatement (Third)* appear to have produced an effective compromise text that enjoyed wide support. A contemporaneous review in the *American Journal of International Law* praised the final product as an “extremely important and useful publication” that “should and will be consulted by lawyers in all parts of the world.”¹¹ Another reviewer opined that “the new Restatement . . . has quickly . . . established a position of paramount influence, not only on the application of international law by domestic organs of the United States, but also as a cognitive source of international law, in general.”¹²

Particularly helpful, from an international perspective, was the reference to comparative law sources in the reporters’ notes and comments, and their effort to effectively address the interplay of international law and domestic rules.¹³

The reviewers’ predictions were correct: the *Restatement (Third)* has been relied upon extensively by U.S., international, and foreign courts and experts wishing to know what the law is in a particular area of international law, or regarding the treatment of international law by the U.S. legal system. According to one author, as of 2010, the *Restatement* had been cited by the United States Supreme Court twenty-two times since it was published and has been cited with increasing frequency in recent years, especially in “landmark international law cases”¹⁴ like *Sosa*,¹⁵ *Sanchez Llamas*,¹⁶ *Boumediene*,¹⁷

10. *Id.* at 1364.

11. Rudolf Bernhardt et al., Book Review, 86 AM. J. INT’L L. 608, 609 (1992) (reviewing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987)).

12. Matthias Herdegan, Book Review, 39 AM. J. COMP. L. 207, 207 (1991) (reviewing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987)).

13. *Id.*

14. Oona Hathaway, Professor of Int’l Law, Yale Law School, Remarks at American Society of International Law Annual Meeting (Mar. 26, 2010), in 104 AM. SOC’Y INT’L L. PROC. 301, 312 (2010).

1673 *The Proposed Restatement (Fourth) of the Foreign Relations Law*

and *Medellín*.¹⁸ More recently the Court cited it in *Kiobel*,¹⁹ *Bond*,²⁰ and most recently in *Zivotofsky v. Kerry*.²¹

So why a new Restatement, given the authority and popularity of the existing two-volume work? The idea was floated by a handful of prominent scholars and then discussed more broadly as more individuals became involved. Paul Stephan, one of the Co-Reporters of the current project, criticized the *Restatement (Third)* in a major article published in 2003, in which he suggested that the *Restatement's* view on the status of international law as federal law was no longer appropriate in a post-September 11th world.²² It was debated at a panel convened by the American Society of International Law in 2010, during which some scholars proposed

15. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (using the *Restatement* as a baseline for human rights violations with regards to detention); *see also id.* at 761–62 (Breyer, J., concurring) (suggesting “that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity”).

16. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (AM. LAW INST. 1987))). *But see id. passim* (Breyer, J., dissenting) (arguing that treaties may create enforceable rights).

17. *Boumediene v. Bush*, 553 U.S. 723, 754 (2008) (quoting *Restatement* § 206 in order to establish a definition for sovereignty).

18. *Medellín v. Texas*, 552 U.S. 491, 522 (2008) (referencing § 481, comment b, at 595, of the *Restatement* to argue that foreign judgments awarding injunctive relief “are not generally entitled to enforcement”); *see also id.* at 558 (Breyer, J., dissenting) (arguing that the *Restatement* calls “for recognition of judgment rendered after fair hearing in a contested proceeding before a court with adjudicatory authority over the case”).

19. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670–78 (2013) (Breyer, J., concurring) (using *Restatement* §§ 402–404 to argue against the presumption against extraterritoriality).

20. *Bond v. United States*, 134 S. Ct. 2077, 2100 (2014) (Scalia, J., concurring) (disagreeing with the broad treaty powers under the *Restatement*); *see also id.* at 2103 (Thomas, J., concurring) (contesting the *Restatement's* failure to recognize the federal limit placed on the Treaty Power).

21. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084, 2087 (2015) (“Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government.” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (AM. LAW INST. 1987))).

22. Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L. L. 33, 60–62 (2003).

“updating” certain parts of the *Restatement*,²³ whereas others suggested that a new Restatement was premature. Oona Hathaway, who did not favor moving forward, noted that even though it was getting old, the *Restatement (Third)* was still widely cited and viewed as authoritative, and that any new Restatement would be obliging the ALI to “choose sides on contested points” given the highly unsettled state of the law.²⁴ Jide Nzelibe agreed with Hathaway, but for different reasons: as he noted, the need for “black letter” rules in public law, rather than “private law” fields seemed doubtful.²⁵ He agreed with Hathaway that there were “battle lines” and a lot of “splits” that would have to be openly acknowledged in the text and the commentary in order to note the areas of disagreement, as well as consensus.²⁶ Barry Carter and David Stewart argued for a narrow update in the area of jurisdiction, immunities and related issues, which they felt could be a project that could and should be taken up. Their paper suggests that the ALI approach this as a “project” which could have been taken up either as a set of principles or as an update to the *Restatement (Third)*.²⁷ It is perhaps worth noting that international commercial arbitration now has its own Restatement of the Law, which was published in 2015, to cover new advances in that field.²⁸

In 2012, picking up on Stewart and Carter’s suggestion, Professors Paul Stephan and Sarah Cleveland proposed that the ALI embark upon a new Restatement on Foreign Relations Law.²⁹ Unlike

23. David Stewart and Barry Carter proposed a “narrow” update; Oona Hathaway and Jide Nzelibe suggested that updating the *Restatement* was premature and “a very fraught enterprise.” Panel, *Updating the Restatement*, 104 AM. SOC’Y INT’L. L. PROC. 301, 313 (2010).

24. *Id.* at 312.

25. *Id.* at 313–14. Nzelibe has a point: most ALI Restatements cover classic private law areas—contracts, torts, agency, etc.—and it has never to the knowledge of this writer been suggested that the ALI take on constitutional law as the subject of a Restatement. Given that foreign relations law is a subset, in part, of U.S. Constitutional law, preparing a Restatement on the subject is perhaps inherently tendentious, given the often unsettled nature of the law. I am grateful to my colleague Greg Magarian for making this point as well.

26. *Id.* at 315.

27. *Id.* at 307.

28. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (AM. LAW INST., Tentative Draft No. 4, 2015).

29. Proposal from Lance Liebman, Dir. of Am. Law Inst., to Am. Law Inst. Council (2012) (on file with author) (submitting for council approval a proposal for a *Restatement (Fourth)* authored by Paul B. Stephan III and Sarah H. Cleveland) [hereinafter Stephan-Cleveland Proposal].

the Stewart-Carter proposal, which was relatively modest and based upon specific case law the authors felt warranted updating certain provisions of the *Restatement*, the Stephan-Cleveland proposal was broad in scope. They wrote that with the end of the Cold War and the advent of the Internet, we confront issues today that “either did not exist or were understood very differently at the time of the Third Restatement’s drafting.”³⁰ These issues, in their view, include “terrorism, global warming, failed states, pandemics, international systemic risk in financial institutions, and digital reproduction of valuable information”³¹ Moreover, they argued that the old understandings about international law were about “managing potential conflicts between states,” rather than “organizing collective international responses to common problems,” and observed that questions of international law are more pervasive nowadays with the advent of globalization than they used to be.³²

The Stephan-Cleveland proposal suggested that a new Restatement could avoid plunging into “polarized debates” by breaking the work into small bits and pieces that could, over time, presumably replace the opus of 1986.³³ The project was approved, and three areas of study and drafting were proposed for the first volley in this effort: “Domestic Effect of Treaties,” “Sovereign Immunity,” and “Jurisdiction.”

What the Cleveland-Stephan proposal did *not* say, other than the oblique reference to “polarized debates,” was that foreign relations law—and particularly the constitutional doctrine that informs U.S. foreign relations law—has become highly contested and partisan in the past two decades. Since the 1990s, distinguished scholars have argued vociferously about the status and force of customary international law, treaties, and executive agreements as a matter of U.S. law. Recall, for example, the debate between Larry Tribe and Bruce Ackerman regarding the constitutionality (or not) of NAFTA, a congressional-executive agreement,³⁴ and the revisionist view put forth by Curtis Bradley and Jack Goldsmith in *Customary*

30. *Id.* at 1.

31. *Id.*

32. *Id.*

33. *Id.* at 1–2.

34. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

International Law as Federal Common Law: A Critique of the Modern Position, arguing that it was unconstitutional for the federal courts to consider customary international law as federal law because the *Erie* case forbade it.³⁵ This latter assertion prompted forceful responses from Gerry Neuman,³⁶ Bill Dodge,³⁷ and Harold Koh,³⁸ among others.³⁹

Indeed, foreign affairs has become a polarized field, in which the split on the Supreme Court between so-called “liberal” and “conservative” Justices has played out in important cases such as *Sosa v. Alvarez-Machain*,⁴⁰ *Medellín v. Texas*,⁴¹ and *Kiobel v. Royal Dutch Petroleum Co.*⁴²

Medellín was perhaps the most stunning of the three cases above-cited, given that six members of the Court decided that the President of the United States could not order compliance with a decision of the International Court of Justice finding the United States in noncompliance of its international obligations under the Vienna Convention on Consular Relations because of the non-self-executing nature of the relevant treaties at issue (in the majority’s view). It continues to provoke scholarly debate,⁴³ particularly given the somewhat opaque reasoning of the Supreme Court and the majority’s failure to adequately examine the self-executing nature of the Vienna Convention on Consular Relations, the principal treaty at issue in the case.⁴⁴

35. 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); see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

36. Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

37. William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007).

38. Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

39. For a good analysis of the debate about the status of Article II versus Article I treaties, see John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1 (2011).

40. 542 U.S. 692 (2004).

41. 552 U.S. 491 (2008).

42. 133 S. Ct. 1659 (2013).

43. See, e.g., David J. Bederman, *Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008).

44. Sloss, *supra* note 2.

Read against this background, the effort to *restate* U.S. foreign relations law, particularly as regards the status of treaties in U.S. law, seems somewhat naïve, as the law appears to most observers to be highly contested and in flux. The American Law Institute does not produce Restatements very often. In fact, there are no “Restatement Fourths” published in any field to date. Moreover, the decision to take up the question of “Treaties” is highly fraught, for, unlike questions of jurisdiction and immunities, for which there have been many cases, there are few recent decisions on the question of treaties, and the question of a treaty’s status as U.S. law raises profound questions of constitutional law and federalist concerns. Had the “project” been limited to consideration of jurisdiction and immunities it might have been less objectionable. Or, conversely, had it taken up new subjects in international law not well-addressed in the *Restatement (Third)*, it would have had the advantage of providing clearer legal frameworks in some of the difficult areas of international law that have evolved since 1985. But it did neither. Instead, by taking on the status of treaties in U.S. law—particularly without regard to consideration of the status of customary international law, executive agreements and congressional-executive agreements at the same time—it ventured into one of the most fractious areas of U.S. foreign relations law. This seems problematic as a matter of process, and unlikely to lead to a positive result in terms of substance.

II. TWO SPECIFIC CRITIQUES OF THE *APRIL DISCUSSION DRAFT*

In reading the *April Discussion Draft*, one has the sense that it is an effort to take a few recent Supreme Court cases—such as *Medellin*—that have benefited the revisionist view and codify them quickly, rather than to comprehensively “restate” U.S. foreign relations law. Indeed, it leaves the reader completely at a loss regarding the status of customary international law and other forms of international agreements in the U.S. legal system, although presumably the *Restatement (Third)* would continue to apply to them. This is compounded by the fact that there is no stated explanation of *why* the reporters decided to separate the work on Article II treaties from all other forms of international agreements. It seems particularly odd given that the *Restatement (Third)* and the United States’ courts do not take this approach, meaning, in my view, that it is instead a policy preference of the reporters.

Recall that in the *Restatement (Third)*, there were just a few black letter law provisions addressing “international agreements” which did not distinguish between Article II treaties and other international agreements. Section 111(1) of the *Restatement (Third)* provides:

§ 111. *International Law and Agreements as Law of the United States*

International law and international agreements of the United States are law of the United States and supreme over the law of the several States.⁴⁵

This provision aligns U.S. foreign relations practice with international law, because regardless of the domestic manner in which a State chooses to ratify its international agreements, they are all “treaties” internationally, governed by the rules of the Vienna Convention on the Law of Treaties, and give rise to binding legal obligations on the international plane.

Conversely, Section 101(1) of the proposed *Restatement (Fourth)* provides:

§ 101. *Treaties as Law of the United States*

- (1) Treaties made under the authority of the United States are part of the supreme law of the land.
- (2) Cases arising under treaties fall within the judicial power of the federal courts, and treaties are binding on state judges.
- (3) Treaties create binding international legal obligations for the United States, and limitations on the domestic enforceability of treaties do not alter the United States’ obligation under international law to comply with relevant treaty provisions.⁴⁶

The comment to draft Section 101 states that “[u]nless otherwise indicated, the term ‘treaty’ in this Restatement concerns only ‘Article II treaties’—that is, international agreements entered into by the United States pursuant to the process specified in Article II of the Constitution.” What about other forms of international agreements? The comment states that they “will be addressed in

45. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (AM. LAW INST. 1987).

46. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 101 at 1 (AM. LAW INST., April Discussion Draft 2015).

another Section of this Restatement.” This is an improvement over the prior draft, which was completely silent on this question, but since the ALI has not yet approved taking up any other sections, and the reporters have yet to produce a comprehensive outline of the proposed *Restatement (Fourth)*, it is not clear how or when that might be accomplished.

As it stands, however, draft Section 101 would not apply to NAFTA nor to the General Agreement on Tariffs and Trade (the GATT)—two major international agreements adopted as executive agreements, not as Article II treaties. Presumably some other, as yet unwritten sections of the proposed Restatement will do so, and during the meeting that led to the papers in this volume, it was pointed out that many of the sections on Article II treaties could be applied to other forms of international agreements, *mutatis mutandis*, even though they have been deleted from draft Sections 101(1) and (2).

At the same time, this is not entirely reassuring. Congress has long treated the word “treaty” as meaning both executive agreements and Article II treaties, such as in the Tariff Act of 1897, which the Court recognized in *B. Altman & Co. v. United States*.⁴⁷ International law treats all kinds of agreements as “treaties,” and this has consistently been the case in federal courts as well. So why have the reporters taken a different view? Is it that they do not believe that non-Article II international agreements are within the ambit of the Supremacy Clause? Or have been unconstitutionally adopted? Why have they been eliminated from the scope of Section 101? The *April Discussion Draft* is silent, leaving one to speculate. This worry is not just a law professor’s hypothetical, but may have real-world implications. To take one recent example, the Joint Comprehensive Plan of Action negotiated between Iran and China, the European Union, France, Germany, Russia, the United States and the United Kingdom, entered into in Vienna on July 14, 2015, has been attacked (including by an author in this symposium) as unconstitutional because it was not entered into with the advice and consent of the Senate as an “Article II” treaty.⁴⁸ Other scholars have

47. 224 U.S. 583 (1912).

48. Michael Ramsey, *Is the Iran Deal Unconstitutional?*, ORIGINALISM BLOG (July 15, 2015), <http://originalismblog.typepad.com/the-originalism-blog/2015/07/is-the-iran-deal-unconstitutionalmichael-ramsey.html>.

disagreed, of course,⁴⁹ and Hathaway herself has suggested that treaties can be adopted under either Article II or Article I, without regard to the subject matter at issue.⁵⁰ Even assuming it to be constitutional as adopted, the drafters of the *Restatement (Fourth)* may be suggesting that it would not have the same status as U.S. law as it would have had if negotiated as an Article II treaty.⁵¹ For if it does not matter whether an international agreement is entered into using a process set forth in Article II rather than Article I of the U.S. Constitution, why limit Section 101's scope and application? At the very least, this difficult question of politics, policies, constitutional law, and foreign affairs has been largely avoided heretofore by the courts. For the proposed Restatement to suggest that a black letter rule can be developed in this area seems to prove too much.

Even if the omission of non-Article II treaties from Section 101 was not intended to cast doubt upon their ultimate constitutionality or their status as “the supreme law of the land,” omitting them from the ambit of Section 101 casts doubt upon their status as such, given that the coordinating reporters have not published a complete program of work for the *Restatement (Fourth)*. To complicate and confuse the effects of Article II treaties and international agreements domestically by segregating them out into different sections in this way seems odd given that the coordinating reporters have suggested that the overarching goal of the project is to help solve complex international problems. Indeed, the decision to separate Article II treaties from other forms of international agreements entered into by the United States seems likely to produce a fractured and complex product that will neither assist the non-specialist in the field nor

49. See Julian Ku, *Why the Iran Deal is Constitutional, But Could Still End up in U.S. Court*, OPINIO JURIS (July 31, 2015), <http://opiniojuris.org/2015/07/31/podcast-special-why-the-iran-deal-is-constitutional-but-could-still-end-up-in-u-s-court/>.

50. Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236 (2008).

51. They may not be suggesting this, but since they have offered no reason to depart from the unitary provision of Section 111 of the Third Restatement, we have to guess at why they have decided to sever out Article II treaties from other sources of international law. It is hard not to assume that it represents an intentional departure from what I call the Henkin “unitary model”—and it is worth noting that Henkin himself wrote that “it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.” LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 217 (2d ed. 1996) (footnote omitted). The Third Restatement also takes this view. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. c (AM. LAW INST. 1987).

1673 *The Proposed Restatement (Fourth) of the Foreign Relations Law*

promote the globalization agenda evoked by the coordinating reporters in the project description.

As is well known, there have been thousands of executive agreements and congressional-executive agreements entered into since the founding. A study in 1997 found that between 1980 and 1992, some 4510 new executive agreements were made against only 218 treaties that received the advice and consent of the Senate.⁵² A more recent study reports that from 1980 to 2000 the United States made 2744 congressional-executive agreements and only 375 treaties (under Article II).⁵³ They have also been treated by the federal courts as entirely interchangeable with Article II treaties, as shown by the *Belmont*,⁵⁴ *Pink*,⁵⁵ and *Dames & Moore*⁵⁶ decisions.⁵⁷ In *American Insurance Ass'n v. Garamendi*, the Court found that an executive agreement preempted contradictory state law.⁵⁸ It has become understood that executive agreements are appropriate vehicles for entering into international agreements outside the mechanism of Article II as a result of long-accepted and unbroken practice.⁵⁹ Of course, as noted earlier,⁶⁰ one of the most difficult questions has been when it may be constitutionally required to use the Article II process, rather than another vehicle; the courts have refused to answer this question virtually every time it has been raised: where the case has proceeded to the merits, the court found the executive agreement to be valid.⁶¹ This is perhaps why the *Restatement (Third)*

52. Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 143, 145 (1997).

53. Hathaway, *supra* note 50, at 1258–60.

54. *United States v. Belmont*, 301 U.S. 324 (1937).

55. *United States v. Pink*, 315 U.S. 203 (1942).

56. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

57. For a good discussion of the rise of the Executive Agreement as a source of “treaty” law in the United States, see Michael P. Van Alstine, *Treaties in the Supreme Court, 1901-1945*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 191 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

58. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416–17 (2003).

59. *Dames*, 453 U.S. at 657.

60. *See supra* notes 34–39 and accompanying text.

61. *E.g.*, *Dole v. Carter*, 444 F. Supp. 1065 (D. Kan. 1977). On appeal, however, the Tenth Circuit did not address the merits and instead overturned the district court’s finding that the subject matter was not a non-justiciable controversy. *Dole v. Carter*, 569 F.2d 1109, 1110–11 (10th Cir. 1977).

takes the view that they are interchangeable.⁶² Scholars, of course, have argued that the courts are wrong, as noted above.

Because the courts have never distinguished Article II treaties from other forms of international agreements entered into by the United States, many—if not most—of the cases referred to in the comments or reporters' notes to *Preliminary Draft No. 3* involve international agreements which are not Article II treaties. For example, there are long citations to *Reid v. Covert* in the comment to draft Section 103, regarding the proposition that a treaty may not trump individual constitutional rights.⁶³ It is the principal case cited; but as the reporters' notes make clear, the international agreements at issue in *Reid* were executive agreements, not Article II treaties. If *Reid* is deleted from the commentary to proposed Section 103 of the *Preliminary Draft*, there is not much to “restate,” and the section becomes a great deal weaker.

Section 104 of the *Preliminary Draft* is perhaps even more problematic: it says “Treaties” are supreme over state and local law, but it is silent about other international agreements (although cases involving other international agreements are cited, such as *Pink* and *Garamendi*, and the notes indicate that “[t]he Supreme Court has . . . applied the Supremacy Clause to displace the application of State and local laws that would conflict with sole executive agreements”).⁶⁴ This suggests that the black letter text of Section 104 should be changed. The comment to this Section, like the comment to Section 103, refers to the supremacy of executive agreements.⁶⁵ Moreover, the reporters' notes also refer to several cases involving *not* Article II treaties, but other international agreements, for the proposition that “treaty provisions” have been regularly enforced by state and lower federal courts over contrary state or local law.⁶⁶

In other words, one does not find a bifurcated world in the case law, in which Article II treaties stand clearly on one side of a

62. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (AM. LAW INST., 1987).

63. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 103 cmt. c at 10 (AM. LAW INST., Preliminary Draft No. 3, 2014).

64. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 104 reporters' note 1 at 18 (AM. LAW INST., April Discussion Draft 2015).

65. *Id.* § 104 cmt. c at 16 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)).

66. *Id.* § 104 reporters' note 1 at 17.

constitutional line subject to one regime and other international agreements stand clearly on the opposite side, subject to a different set of rules; rather, there is a unitary system of treatment of all international agreements under the Supremacy Clause of the United States Constitution. This is a felicitous result: under the Vienna Convention on the Law of Treaties,⁶⁷ States are not required to investigate the constitutional processes involved in other States' manifestations of consent to be bound on the international plane.

III. THE GLOBALIZATION PROBLEM POSED BY THE PROPOSED RESTATEMENT

I would like to conclude by returning to the transnationalist perspective evoked by the Stephan-Cleveland proposal. Recall that the premise of their project was that the world had changed since 1985 and, therefore, we needed better tools to address international problems arising from globalization. My critique of the *April Discussion Draft* thus far has largely been that it misleads the reader regarding the status of international law in U.S. courts by creating an artificial distinction between Article II treaties and everything else. I have suggested an easy fix: return to the unitary formulation of the *Restatement (Third)*.

My second major critique is that the proposed deconstruction and partial reconstruction of the *Restatement (Third)* is simply too complex to achieve the objectives of the reporters. The most effective way to make international law enforceable is to domesticate it. National legal systems are much more robust than international courts and tribunals in their ability to enforce and apply international legal norms.⁶⁸ To the extent that the proposed new Restatement makes it more difficult to incorporate and apply international law norms in U.S. courts, which seems likely to be its impact (if not its objective), it will arguably undercut the goals articulated in the proposal submitted to the American Law Institute, which was premised on the need for increased international cooperation and crisis management due to the pressures of globalization.

67. Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331; *see also* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. 303, 428–30 (Oct. 10).

68. Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

The *Preliminary Draft*, by separating Article II treaties from everything else—customary international law and executive agreements—implicitly makes it more difficult, not less, to understand and therefore to use international law in the U.S. legal system. The audience for this Restatement is not just U.S. lawyers, judges, academics and diplomats, but foreign lawyers, judges, academics, and diplomats seeking to understand U.S. practice. The *Restatement (Third)* has been influential not only in the United States, but also abroad (as the Stephan-Cleveland proposal observes)⁶⁹ and has often been cited by international courts and tribunals.⁷⁰ Producing a confusing or tendentious *Restatement (Fourth)* could constrain, rather than promote, the ability of the United States to participate in international agreements to manage international problems. If a nation is unable to state clearly that its international commitments are binding and enforceable within its borders, it will be less, not more likely, to be able to negotiate effectively in international fora.

69. Stephan-Cleveland Proposal, *supra* note 29, at 1.

70. *Australian Sec. Comm'n v Bank Leumi Le-Israel* [1995] FCA 1744 [para. 126] (Austl.) (citing § 402(1)(c) of the Third Restatement to support the notion that prescriptive jurisdiction may be exercised, with respect to conduct outside the United States, if the conduct has a “substantial effect” within the United States); *R v Truong*, [2002] VSCA 27 [para. 74] (Austl.) (explaining that while the doctrine of specialty is not explicitly stated in an extradition treaty the court will imply that such a principle applies, following §477 of the Third Restatement); *Pro Swing Inc. v. Elta Golf Inc.* [2006] 2 S.C.R. 612, para. 39 (Can.) (finding that contempt orders should not be enforceable in Canada pursuant to the approach outlined in § 481 of the Third Restatement); *R. v. Dorsay*, 2003 BCSC 1934, para. 24, (Can. B.C.) (Third Restatement is an authoritative work in obtaining evidence in or for use in foreign state); *R v. Bow St. Metro. Stipendiary Magistrate (Ex parte Pinochet Ugarte No. 1)*, [2000] 1 A.C. 61 (H.L.) [117] (appeal taken from Q.B.) (U.K.) (endorsing the Third Restatement view regarding the relationship between human rights violations and the act of state doctrine); *R v. Sec'y of State for Def.* [2010] UKSC 29 [para. 167] (appeal taken from E.W.C.A. Civ.) (U.K.) (citing the Third Restatement when discussing jurisdiction in general international law); *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, para. 51 (Van den Wyngaert, J., dissenting) (citing the Third Restatement on the question of jurisdiction); *Feldman v. Mexico*, ICSID Case No. ARB (AF)/99/1 (Dec. 16, 2002), 7 ICSID Rev. 341, 524 (2003) (relying upon the Third Restatement regarding a question of expropriation); *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 102 (relying upon the Restatement regarding a question of compensation in considering whether a regulation may be considered an expropriation).

IV. CONCLUSION

As the saying goes, “if it ain’t broke, don’t fix it,” and the first principle of any effort to undertake a *Restatement (Fourth) of the Foreign Relations Law* should be to do no harm. The *April Discussion Draft* on the status of Treaties violates both of these rules. Section 111 of the *Restatement (Third)* was clear and consistent with U.S. case law. Section 101 of the proposed *Restatement (Fourth)* is neither. As Section II, above, noted, the debate that accompanied the elaboration and publication of the *Restatement (Third)* was extensive and involved. Many government agencies weighed in with the ALI, requesting a comprehensive look at the entire proposed draft—as opposed to bits and pieces—and submitted extensive comments as well. The resulting product was a consensus document that has stood the test of time, and continues to be cited by the U.S. Supreme Court and international courts and tribunals. Admittedly, it does not address some of the contentious constitutional issues touched upon in the *Discussion Draft* for the *Restatement (Fourth)*, leaving some of those difficult questions to resolution by the courts, and leaving some of the inter-branch debates to be resolved by the political and judicial processes over time, and in specific situations. The attempt to “restate” some of these difficult areas of constitutional law in the *Discussion Draft* seems both artificial and unhelpful.

Of course, it is to be expected that any revision will provoke debate, and the debate itself is not a reason to shy away from the process of updating and revising if it is truly necessary. While there are not yet many comments posted to the ALI website concerning the *Discussion Draft*, it is starting to attract discussion—as this Symposium shows. Michael Mattler, Assistant Legal Adviser for Treaty Affairs with the U.S. Department of State, has already sent extensive comments to the reporters, expressing concerns with several of the proposed provisions, and debate amongst the participants in this symposium was extensive. It is clear that this part of the proposed *Restatement (Fourth)*, on the status of treaties as U.S. law, is likely to continue to provoke active—and sometimes tendentious—discussions; and it is to be hoped that the reporters—and the leadership of the ALI—will take note. As for this author, it is difficult to be supportive of this project as currently conceived. Proposing a chapter on the status of Article II treaties in U.S. law—without mention of the other sources of international law—seems

illogical. Surely the first step in undertaking a major work, such as the drafting of a new Restatement, is to prepare a comprehensive outline of the proposed volume envisaged. It is inconceivable that the membership of the ALI—and other concerned constituencies—could be expected to adopt, piecemeal, bits and pieces of a project whose final contours are yet unknown. One hopes that future drafts will include a proposed work plan, and set forth the rationale for proposing the structure adopted. For now, however, it looks like the reporters have simply decided to enter into the scholarly debate (and preferred one side of that debate) while minimizing the import of the case law. Hopefully, future revisions will correct this imbalance. Otherwise, this part of the *Restatement (Fourth)* project, at least, should be abandoned.