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Introduction: The Roles of the Restatements in U.S. Foreign Relations Law

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Introduction

The Roles of the Restatements in U.S. Foreign Relations Law

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That foreign relations law exists as a field owes a great deal to the American Law Institute's Restatements. This may seem strange to someone not immersed in U.S. legal culture. The Institute is a private organization that does not purport to speak with official authority, however august its members may be. Nor is it, strictly speaking, an academic enterprise, at least by U.S. standards. Its Restatements are not meant to be speculative or groundbreaking, but rather distillations of the best of contemporary legal practice in a particular area. Yet Restatements have enormous impact on the development of the law in the United States, nowhere more so than with respect to foreign relations.

Foreign relations law is no little thing. One can provisionally define the field as the legal institutions, rules, and norms that govern a state's engagement with foreign persons, transactions, and activity, counting the international legal system as "foreign." In Curtis Bradley's succinct formulation, "the term is used to encompass the domestic law of each nation that governs how that nation interacts with the rest of the world."[1] For the United States, constitutional transformation in the mid-twentieth century, based on changes in both the Supreme Court's doctrine and the practice of the executive and Congress, drew widespread attention to the role of law in managing these interactions.[2] The half-century since the end of the Warren Court has, if anything, seen an even more profound development of the law, accompanied by greater interest among lawmakers, public actors, civil society, and the legal academy.[3]

[1] Curtis A. Bradley, *What Is Foreign Relations Law?*, in The Oxford Handbook of Comparative Foreign Relations Law 3 (Curtis A. Bradley ed., 2019).

[2] See G. Edward White, *From the Third to the Fourth Restatement of Foreign Relations: The Rise and Potential Fall of Foreign Affairs Exceptionalism*, in this volume.

[3] The literature is vast. For an overview, see Sarah H. Cleveland, *The Plenary Powers Background of* Curtis-Wright, 70 Colo. L. Rev. 1127 (1999). For more recent work, some but not all triggered by the U.S. response to the 9/11 attacks, see Bruce A. Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006); Anthony J. Bellia Jr. & Bradford R. Clark, The Law of Nations and the United States Constitution (2017); Curtis A. Bradley,

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The issues are myriad. In a global economy, states impose conflicting regulatory demands, often motivated by opposing economic and political interests. The executive and Congress tussle over the authority to regulate, whether in trade (such as recent U.S. import barriers on steel and aluminum), the environment (such as the Paris Agreement, which the Obama administration signed and from which the Trump administration intends to withdraw), national security (such as the Joint Comprehensive Plan of Action with Iran, which the Obama administration crafted and the Trump administration has cast aside),[4] or the use of force (such as debates surrounding the 2001 Authorization of the Use of Military Force, which still serves today as the basis for U.S. military actions around the world).[5] The federal government and the States claim inconsistent prerogatives, for instance over the treatment of undocumented aliens and the right to sanction foreign regimes for human rights abuses. The power of the judiciary to resolve these disputes, especially but not only with respect to the elaboration and enforcement of the rights of persons against foreign and domestic state power, is contested and evolving. Foreign relations law comprises all this and more. The Restatements have done much to shape it.

The first (confusingly called Second) Restatement of the Foreign Relations Law of the United States brought widespread attention to the term "foreign relations law."[6] It appeared at a time when the Warren Court was opening up new vistas for judge-made public law. It staunchly defended the proposition that

International Law in the U.S. Legal System (2013); Jack L. Goldsmith, The Terror Presidency—Law and Judgment Inside the Bush Administration (2007); Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2007); Saikrishna Prakash, Imperial from the Beginning: The Constitution of the Original Executive (2015); Michael D. Ramsey, The Constitution's Text in Foreign Affairs (2007); The Constitution in Wartime: Beyond Alarmism and Complacency (Mark Tushnet ed., 2005); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 Va. J. Int'l L. 145 (2003); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971 (2004). For a contemporary historical perspective, see G. Edward White, Law in American History—Volume III: 1930–2000, at 444–509 (2019); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 Colo. L. Rev. 1109 (1999).

[4] On the Paris Agreement and Joint Comprehensive Plan of Action, see Harold Hongju Koh, *Could the President Unilaterally Terminate All International Agreements? Questioning Section 313*, in this volume.

[5] On the possibility of a future project addressing the international law of armed conflict or the separation of powers with respect to the use of force outside the country, see Bakhtiyar Tuzmukhamedov, *Constitutional Authority for the Transboundary Deployment of Armed Force*, in this volume; Ashley Deeks, *Sleeping Dogs: The Fourth Restatement and International Humanitarian Law*, in this volume.

[6] Restatement (Second) of the Foreign Relations Law of the United States (Am. Law Inst. 1965). The project got under way in 1955, and its preliminary draft received Institute approval in 1962. The naming convention then used by the Institute numbered the Restatements in relation to each other, conceiving of them as forming generations. Because it already had begun a Second Restatement in another field (torts, on which work commenced in 1952), the Institute titled this

foreign relations, no matter how imbued with discretion and prerogative, still must rest on law. Louis Henkin's great treatise, which appeared seven years later, confirmed that the legal regime that governs foreign relations is fundamentally constitutional law over which the Supreme Court holds sway.[7] Not long after, Henkin took over the drafting of what became the Third Restatement.[8] Prepared during a period of what to many seemed constitutional retrenchment and a loosening of judicial supervision over public life, it offered a robust defense of the proposition that, "In conducting the foreign relations of the United States, Presidents, members of Congress, and public officials are not at large in a political process; they are under law."[9] Moreover, it made clear that the judiciary, as much as the executive and Congress, creates and enforces this law.[10]

The Third Restatement became, by many measures, the most influential of all the Institute's projects. More than a thousand federal and State judicial decisions have cited it, the Supreme Court twenty-nine times, four times in the 2017, 2018, and 2019 terms alone. Practitioners rely on it constantly, and scholars have used it as the launch pad for intense controversies.[11] For foreigners, it is the principal source for understanding how law and foreign relations mix in the United States. And for those committed to judicial protection of individuals, especially the marginalized and downtrodden, in the modern world, it confirms and bolsters the duty of the courts to proclaim law in the service of justice.[12]

The Institute launched a partial revision in 2012. Not everyone agreed with this decision. Some feared that revisiting the Third Restatement would lead to a retreat from its core commitments to judicial development of the rule of

volume Restatement (Second), even though it had no predecessor. On the history of the term "foreign relations" before the Second Restatement, see Bradley, *supra* note 1, at 8–13.

[7] Louis Henkin, Foreign Affairs and the Constitution (1972).

[8] The project was initially titled The Restatement of the Foreign Relations Law of the United States (Revised) and was led by Professor Richard R. Baxter of Harvard Law School. Henkin replaced Baxter in 1979 upon the latter's election to the International Court of Justice. It was given its final title as Restatement (Third) in recognition of its place in a new generation of Restatements. In that form, the Institute approved it in 1986.

[9] Third Restatement intro. at 5.

[10] See 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 (2003).

[11] Compare, e.g., 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), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997). The debate has crept back into the courts, which have cited the provoking article seventeen times (including two Supreme Court opinions), the Koh response eleven times, and the Neuman response once.

[12] Third Restatement intro. at 4:

> In recent years, principally as a result of reinterpretations by the Supreme Court and adjustments by Congress, there has been some redistribution of power among the three

law in foreign relations and protection of individuals from state power. Others argued that the field was in flux and that any effort to codify it would frustrate its progressive evolution.[13] Proponents of the project contended that the transformation of the international environment and the U.S. role in it since the Third Restatement compelled the Institute to do something. Globalization had become a thing, the Cold War had ended (only to be succeeded by a multifaceted struggle against nonstate armed attacks), and the Supreme Court had rethought many of the suppositions underlying the jurisprudence of the Burger, as well as the Warren, Court. The Court in particular had revisited questions of structural constitutionalism that go to the heart of foreign relations law, namely, the constitutional separation of powers within the national (federal) government and the boundaries between federal and State authority.[14] The Third Restatement, the proponents argued, no longer fully reflected the present state of the law, whatever its heroic interventions had achieved.

The Institute responded by authorizing three significant, but limited, projects. The reporters addressed the U.S. approach to treaties, but not other forms of international agreements; U.S. views on jurisdiction, but not generally on separation of powers or federalism; and jurisdictional immunity of states, but not other immunities required or regulated by international law. These three drafts received final Institute approval in 2017 and, after integration into a single text, were published in 2018.[15] Even before publication of the final product, the drafts had an impact, eliciting U.S. twelve judicial citations, including two by the Supreme Court, and dozens of references in legal periodicals.[16]

> branches of government, and some increased protection for the rights of the individual, in matters relating to foreign relations as well as in other matters.
>
> See Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006).

[13] For ongoing concerns along these lines, see Jide Nzelibe, *Can the Fourth Restatement of Foreign Relations Law Foster Legal Stability?*, in this volume.

[14] Representative cases from the period before the start of the project include Medellín v. Texas, 552 U.S. 491 (2008) (separation of powers); Rasul v. Bush, 542 U.S. 466 (2004) (judicial review in national security cases); American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) (federal preemption of State law); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (preemption).

[15] Because of the initial division of the projects into three parts, there were a total of eleven preliminary drafts, eight Council drafts, and eight tentative drafts. The membership approved the tentative drafts at the May 2017 annual meeting, and the reporters then combined them into an integrated text.

[16] For all citations to the Fourth Restatement, including drafts as well as the final product, see Gamble v. United States, 139 S. Ct. 1960, 1975 n. 12 (2019); Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1659 (2018) (Thomas, J., dissenting); Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co., 137 S. Ct. 1312, 1321 (2017); United States v. Garcia Sota, 948 F.3d 356, 362 (D.C. Cir. 2020); In re del Valle Ruiz, 939 F.3d 520, 532 (2d Cir. 2019); United States v. Park, 938 F.3d 354, 366 (D.C. Cir. 2019); Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 1080 nn. 63 & 64 (7th Cir. 2019); United States v. Dávila-Reyes, 937 F.3d 57, 66–67, 70 (1st Cir. 2019) (Lipez, J., concurring); In re Sealed Case, 932 F.3d 915, 940 (D.C. Cir. 2019); United States v. Prado, 933 F.3d 121, 133 n. 6, 136 n. 7, 137 n.8 (2d Cir. 2019); Philipp v. Federal Republic of Germany, 894 F.3d 406, 416 (D.C. Cir. 2018); Doe v. Mattis, 889 F.3d 745, 755–57 (D.C. Cir. 2018),

Meanwhile the leadership of the Institute has indicated an intention to extend the project.[17] If this happens, the reporters most likely will consider some of the issues addressed by the Third Restatement but left out from the published Fourth Restatement, but certainly not all. We thus have arrived at a moment of both reflection and anticipation. There is a completed project that requires assessment, but also the prospect of future action that wants direction. And revision of the new Restatement aside, one cannot expect that foreign relations law will reach a stable equilibrium going forward, any more than it remained unchanged during the remarkable transformation of international relations over the last quarter-century. The field is dynamic, and we must try to anticipate the directions in which it might evolve.

I. The Fourth Restatement's Past

The American Law Institute's Restatements do not emerge *ex nihilo*. They reflect the times in which they are produced, at best crystallizing the essence of legal doctrine that reflects the beliefs and aspirations of a significant portion of the American legal community. By significant we do not necessarily mean representative: The American Law Institute comprises the U.S. legal élite and expresses the views of leading members of the profession, which need not be the same as those of the rank and file. The Restatements also become a platform for shaping

reissued, 928 F.3d 1, 11–13, 21, 23 (D.C. Cir. 2019); *id.* at 35 (Henderson, J., dissenting); Leidos, Inc. v. Hellenic Republic, 881 F.3d 213, 220 (D.C. Cir. 2018); Republic of Marshall Islands v. United States, 865 F.3d 1187, 1193 (9th Cir. 2017); De Csepel v. Republic of Hungary, 859 F.3d 1094, 1112 (D.C. Cir. 2017); Jerez v. Republic of Cuba, 775 F.3d 419, 423 (D.C. Cir. 2014); Simon v. Republic of Hungary, 2020 WL 1170485, at * 4 n. 3 (D.D.C. 2020); Fulmen Company v. Office of Foreign Assets Control, 2020 WL 1536341, at * 9 (D.D.C. 2020); Mulugeta v. Ademachew, 407 F. Supp. 3d 569, 583 (E.D. Va. 2019); Continental Transfert Technique, Limited v. Federal Government of Nigeria, 2019 WL 3562069, at * 14 (D.D.C. 2019); In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705, 381 F. Supp. 3d 37, 66 n. 15 (D.D.C. 2019); KT Corporation v. ABS Holdings, Ltd., 2018 WL 3435405, at * 5 (S.D.N.Y. 2018); Simon v. Republic of Hungary, 277 F. Supp. 3d 42, 50 n. 4 (D.D.C. 2017); Jiménez v. Palacios, 2019 WL 3526479, at * 13 n. 85 (Del. Ch. 2019); AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A., 160 A.D.3d 93, 104 n. 12, 73 N.Y.S.3d 1 3306 (App. Div. 2018); JPMorgan Chase Bank, N.A. v. Herman, 168 A.3d 514, 518 n. 5 (Conn. 2017). The British judiciary also noted its awareness of the project and called on lawyers to cite to it in the future. R on application of the Freedom and Justice Party v. Sec'y of State for Foreign and Commonwealth Affairs, [2018] EWCA Civ. 1719 ¶ 97:

> For completeness, the ALI is currently working in this field and the Restatement of the Law Fourth, Foreign Relations Law of the United States, approved by the ALI in 2017 awaits publication. It is not a point of criticism of the parties that we were not shown the published drafts of this Restatement but a signal to future readers of this judgment that there may be more up to date and valuable material from the ALI in future.

[17] In his introduction to the Fourth Restatement, ALI Director Richard Revesz says, "My hope is that, in the not-too-distant future, we will undertake a new project designed to complete the Restatement Fourth." FOURTH RESTATEMENT intro. at xvii.

developments in the law going forward as well serving as a foil for critics pushing for change.

Certainly the Restatements of the Foreign Relations Law of the United States have done this. The Second and Third Restatements provided invaluable technical knowledge to a general audience, but they also embraced and to some extent amplified the general approach of what G. Edward White calls "foreign affairs exceptionalism."[18] White traces the origins of this approach to a wish on the part of leading figures in the legal establishment to reconcile resistance to the growth of the federal government with legal support for the assumption by the United States of a leading role among the nations of the world. Then, in the years after World War II, the legal establishment wanted to provide the nation with a structure for the exercise of U.S. power and influence within the West as well as an unencumbered hand in dealing with its Cold War adversaries. White regards the Third Restatement as the apogee of that conception of foreign relations as a field governed by distinct constitutional rules.

White also traces the retreat away from exceptionalism as technological, economic, and political changes combined to blur the line between domestic matters and foreign affairs. The Third Restatement, grounded as it was on a conviction about the distinctiveness of the two domains, invited a reaction and revisionism. What had been taken for granted by most scholars became contested territory. Meanwhile, an emerging majority on the Supreme Court began to pull away from some of the arguments and holdings that the Third Restatement had embraced and in some cases sought to extend.

White sees the influence of this history in the Fourth Restatement. He depicts it as straddling a possible turn in the broad cultural understanding of the law of foreign relations. In his view, it neither leads a revisionist charge nor fights an irredentist struggle against any surrender in the commitment to exceptionalism, but it does expose a shifting of the foundations of the field. As he puts it,

> the Fourth Restatement can clearly be understood as signaling that although foreign affairs exceptionalism has not disappeared from cases and commentary, the broad support for it reflected in the Third Restatement can no longer be said to exist, and in some of its pivotal areas it might be said to be in jeopardy.[19]

White provides a historical context for the Fourth Restatement. He explains the presence of both continuity and the change in the Fourth Restatement, and indicates how it carries its particular historical burden. This anchors the remaining chapters in the volume, which engage directly particular claims made by the Fourth Restatement as well as considering more broadly the possible

[18] White, *supra* note 2.
[19] *Id.* at 58.

futures of the issues it addresses and those that the American Law Institute might confront going forward.

II. The Fourth Restatement's Present

The business of restating law invites controversy, both as to what gets in and what is left out. The Fourth Restatement is no exception. The contributors to this volume frame the ongoing debates that surround the project. Some of the controversies focus on claims made in the Restatement, while others stake out positions in matters yet to be addressed. We have organized their interventions thematically, largely following the project's organization. Thus we look first at treaties, the subject of the Restatement's Part III.[20] We then consider the allocation of federal and State authority in foreign relations law, an issue that runs through Part IV, Chapters 1–3, but receives only interstitial treatment there. We next explore the role of international law in limiting a state's exercise of jurisdiction. The last set of contemporary debates involves the construction of the kinds of immunity from jurisdiction that a foreign actor might receive in the United States. The Restatement's Part IV, Chapter 5, addresses the immunity of states from adjudicative and enforcement jurisdiction, but not that of international organizations and foreign officials, including diplomats.

With treaties, a fundamental issue is the manner and extent that a court may derive from a treaty in force a rule of decision to apply in a case before it. By most measures, the United States has entered in treaties (defined as international agreements to which the Senate consents to ratification) at a lesser rate recently.[21] The Obama administration saw relatively few Senate consents to ratification, and the Trump administration gives little indication that it wants new international legal commitments in that form.[22] Yet a large inventory of treaties remains in

[20] The reporters of the Fourth Restatement decided to follow as best as they could the numerical structure of the Third. A collateral benefit of this approach is to leave room for future additions, if the American Law Institute decides to extend the project. As a result, it begins with Part III, leaving future reporters to develop parts that (more or less) track what the Third Restatement covered in its first two parts.

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

[22] From 1981 through 2008 the Senate gave consent to ratification to an average of 16.36 treaties a year. It gave consent to 9 total in President Obama's first term, and 11 in his second, for an average of 2.5 over his time in office. Since President Trump's inauguration, the Senate has consented to the ratification of seven treaties, all submitted by the Obama administration. One, an amendment to the NATO Treaty to allow the accession of Montenegro, has come under a shadow due to remarks by President Trump raising the possibility of U.S. withdrawal from that organization. See Koh, *supra* note 4. The current administration has withdrawn from two Article II treaties, the Treaty of Amity, Economic Relations, Consular Relations with Iran and the multilateral Optional Protocol to the Vienna Convention on Diplomatic Relations. In both cases the consent to jurisdiction of the International Court of Justice was unacceptable to the United States in light of recent cases filed

force, presenting ongoing questions of interpretation and implementation. How should courts, as well as government officials and legislators, glean meaning from these agreements and participate in their enforcement?

For a semi-monist country like the United States, treaty interpretation and application present problems. On the one hand, uniformity across treaty parties seems a worthwhile goal. It would be odd if the same text created different legal obligations for some of the parties. On the other hand, because at least some treaties have direct effect in the U.S. domestic legal system, and others exercise a kind of gravitation pull on domestic law due to canons of construction informed by policy, one might expect rules for interpreting domestic law also to be relevant. But what happens when these interpretive principles push in opposite directions?

The response of the Fourth Restatement to this problem leans on the side of international uniformity. Its section on treaty interpretation emphasizes the principles articulated in the Vienna Convention on the Law of Treaties, an instrument to which the United States is not a party but which, in the view of the United States, captures the basic elements of the customary international law of treaty interpretation.[23] The Restatement acknowledges the competing concern of respecting domestic lawmaking, but seems to endorse the criticism that excessive reliance on statements generated in the course of the advise-and-consent process would put the United States out of step with international practice.[24] At the same time, it supports the U.S. practice of expressing exceptional treaty interpretations through the adoption of conditions in the course of ratification.[25] This endorsement necessarily is limited to domestic law, as U.S. treaty makers lack the authority to impose an interpretation on other parties.[26]

The Restatement also endorses the principle that the United States may enter into treaties that prescribe rules that Congress, in the absence of a treaty, could not adopt.[27] At the same time, it is carefully noncommittal as to the proposition that the structural constitutional limitations of federalism play no role in the making or application of treaties.[28] It similarly elides the controversy

under those treaties. The administration most recently terminated the Intermediate-Range Nuclear Forces Treaty with Russia.

[23] Fourth Restatement § 306 & cmt. *a*, reporters' note 1. For a prior article advocating this approach, see Jean Galbraith, *What Should the Restatement (Fourth) Say About Treaty Interpretation?*, 2015 B.Y.U. L. Rev. 1499.

[24] Fourth Restatement § 306 reporters' note 11.

[25] *Id.* § 305. See Edward T. Swaine, *Reserving*, 31 Yale J. Int'l L. 307 (2006).

[26] Fourth Restatement § 305 cmt. *e*. A reservation may alter the international obligations of the United States, but international law governs both the effectiveness and consequences of reservations.

[27] *Id.* § 312.

[28] *Id.* §§ 307 (discussing individual-rights constitutional constraints); 305 cmt. *b* (separation-of-powers limitations); 312 cmts. *b* & *c* (federal authority to prescribe through treaties exceeds that of Congress). For the debate on federalism constitutional limitations, compare Curtis A. Bradley, *The*

over another structural constitutional limitation, namely, whether the treaty provisions of Article II provide an exclusive means of concluding at least some international agreements.[29] This leaves open an extensive discussion over what one might call treaty exceptionalism, namely, the different status of treaty-making as a positive power of lawmaking under the Constitution. Whether this is an important conversation, or instead merely interesting, turns on whether the recent decline in treaty adoptions by the United States is transitory or structural.

The essays in this volume concentrate on the separation-of-power issues that international agreements pose. Article II treaties, the focus of the Fourth Restatement's Part III, dispense with the House of Representatives but depend on a supermajority of the Senate to provide consent as a condition to the president's subsequent ratification. Since the founding of the nation, however, presidents have also entered into international agreements either on their own constitutional authority or on the basis of legislation adopted by Congress. The coexistence of these mechanisms, one expressly provided by Article II of the Constitution and the other implied from the competences pricked out by Articles I and II, leads to many problems. Are the two mechanisms in any sense exclusive, in the sense that certain kinds of international agreements by the nature can be joined by the United States only by employing one, but not the other?[30] What kinds of powers do executed international agreements give the executive, and what kinds of controls may Congress retain over the executive authority established by an agreement? What role do the courts have in holding the executive to limits imposed by Congress in the course of implementing an agreement.

Harold Hongju Koh considers the question of exit from international agreements. The Trump administration came into office vowing to transform U.S. relations with the rest of the world, in particular by challenging the many commitments crafted by earlier presidents both during and after the Cold War. It has withdrawn from several treaties (of both the Article II kind and the others) and has threatened to pull out of still more. Koh proposes to revise how presidents can exit international agreements by construing Articles I and II as to require, roughly speaking, the same degree of congressional involvement in the

Treaty Power and American Federalism, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

[29] FOURTH RESTATEMENT § 310 cmt. *f* & reporters' note 11 (discussing constitutional requirement of legislation, but not addressing constitutional requirement of a treaty). The lack of a mandate to discuss nontreaty international agreements explains this gap. For the debate, compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799 (1995), with Laurence R. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

[30] See Curtis A. Bradley, *Article II Treaties and Signaling Theory*, in this volume.

exit process as was required to authorize U.S entry.[31] As to Article II treaties, this entails a criticism of the Fourth Restatement, which, he argues, too readily embraces the conventional wisdom of the last forty years about the president's authority unilaterally to terminate a treaty in the absence of any legislatively imposed limits. As to treaties derived from legislatively adopted authority, he proposes adoption of an interpretive template that would read into legislation bestowing competences a requirement that the undoing of any resulting international commitments requires symmetrical legislative participation.

Samuel Estreicher argues that Congress already has substantial control over executive authority under international agreements.[32] He sees a trend toward domestic implementation of treaties through legislation, rather than by regarding treaties as adopting rules that apply directly in the domestic legal system. He argues that all three branches need to do a better of job of crafting, adopting, and applying treaty-implementing statutes. He looks at cases where, in his view, Congress and the courts missed an opportunity to clarify the domestic significance of particular treaties, as well as one instance, the Refugee Act of 1980, where Congress built upon and extended the rights proclaimed in the international instrument.

Koh's second claim and Estreicher's argument open up issues that an extended Fourth Restatement is likely to address, namely, the relationship between international agreements of all sorts and domestic legislation. Jean Galbraith argues that the Restatement's focus on Article II treaties is unexceptionally conventional but misses the most important problem, namely, the role of international law as both a foundation of and a constraint on the modern administrative state.[33] She suggests that, rather than seeing international agreements as presenting exceptional separation-of-powers issues, we should use the lens of contemporary administrative law as a means of sorting out matters of executive prerogative, legislative control, and judicial oversight. In this sense, her chapter underscores White's speculation about a waning of foreign affairs exceptionalism.

Curtis A. Bradley steps back to consider a structural question, namely, what impact does the choice between Senate consent based on a supermajority vote and authorization grounded on a legislative act have on presidential interests and authority?[34] He assumes that we still observe constitutional limits on the choice, in the sense that, by well-established convention if not by a judicially enforceable rule, the executive must submit at least some kinds of treaties to the Senate for a supermajority vote of consent. He questions, however, what this choice means

[31] Koh, *supra* note 4.
[32] Samuel Estreicher, *Taking Treaty-Implementing Statutes Seriously*, in this volume.
[33] Jean Galbraith, *The Fourth Restatement's Treatment of International Law and Administrative Law*, in this volume.
[34] Bradley, *supra* note 30.

to the United States' international partners. He effectively disposes of one popular argument, that a treaty signals an administration's stronger commitment to an international project, by demonstrating all the ways that treaties can be undone. Like the other chapters on international agreements, Bradley documents the ways in which the law of U.S. international agreements rest on general bodies of domestic law, rather than distinctive international norms.

As White notes, the Third Restatement made ambitious and ultimately controversial claims about the status of international law as the domestic federal law of the United States. The Fourth Restatement did not confront those claims directly, as they fell outside the reporters' remit. This did not preclude them from addressing particular applications of those claims, to some extent opening space between its position and that of the Third Restatement.

Several chapters in this book address the status of international law in U.S. law head on. Given the enduring debate that the Third Restatement touched off, one should not be surprised that they do not agree. Gary Born delivers perhaps the most comprehensive defense of the position that the U.S. legal system should open itself up to the domestication of international law, pushing back against several decades of recent Supreme Court jurisprudence.[35] He would go further than even the Third Restatement in assimilating all private international law—conflicts of law, the law governing the choice of forum, the rules for recognition and enforcement of foreign judgments, the *forum non conveniens* doctrine, and the like—to federal common law. One of the authors of this introduction pushes in the opposite direction, defending and seeking to extend the judgments memorialized in the Fourth Restatement about the limited scope of federal common law.[36]

This debate turns on perceptions of the history of these doctrines and disagreement about the context that the history imposed, as well as functional arguments about the role of judicial discretion and concerns about various kinds of legal risk. One might see State legislatures and courts alternatively as incompetent when not predatory, or as subject to bracing market discipline of a sort from which the federal courts are largely free. One might draw either sweeping conclusions or make carefully limited interventions in the law.

In the latter category is the chapter authored by Anthony J. Bellia Jr. and Bradford R. Clark.[37] They provide a critique of one particular conclusion of the Third Restatement, namely, that the long-standing presumption that Congress does not intend to put the United States in violation of its international

[35] Gary Born, *International Law in American Courts*, in this volume. For a fuller exposition of his views, see Gary Born, International Law in American Courts (2020).

[36] Paul B. Stephan, *The Waning of the Federal Common Law of Foreign Relations*, in this volume.

[37] Anthony J. Bellia Jr. & Bradford R. Clark, *Restating* The Charming Betsy *as a Canon of Avoidance*, in this volume.

obligations extends to all duties imposed by international law, not just those to which the United States owes other states.[38] They argue that the doctrine, as developed by the Marshall Court and applied since by the Supreme Court, is one of constitutional avoidance, not of international law protection. As a result, it applies only to statutes that might lead the judiciary to intrude into the management of relations with other states, what they call the law of state-to-state relations. They do not deny the power of Congress to mandate such intrusions, but interpret the doctrine as seeking to raise the barrier to such acts. They express the hope that further work on the Fourth Restatement will clarify that point.

Chimène I. Keitner touches on an issue that did not have a substantial practical manifestation until after the Fourth Restatement went to press.[39] Congress, in the course of expanding the power of victims of terrorist acts to seek recourse in U.S. courts, has significantly revised the rules for *in personam* jurisdiction with respect to certain foreign states and foreign officials. These moves have made concrete a question that previously had lurked around the edges of certain litigation, namely, whether the Constitution limits in any way the power of Congress to invite suits against foreign states and their representatives in a manner that, if applied to other potential defendants, would raise significant questions of constitutional due process. Keitner sketches the case for imposing constitutional limits, in part to bolster international legal constraints on the assertion of judicial jurisdiction over foreign states.

Thomas H. Lee also considers the ongoing role of customary international law as a source of rules of decision that U.S. courts might apply.[40] He criticizes the Third Restatement for what he regards as an excessive and unfounded embrace of this body of law as federal common law, but argues that the Fourth Restatement goes too far in the other direction. He contends that federal courts can resort to customary international law in some contexts in a way that does not exceed the constitutional and jurisprudential limits on federal judicial power or otherwise upset the constitutional separation of powers.

John C. Harrison approaches the same problem from the perspective of constitutional theory. He observes that the best historical evidence indicates that the references to "the Laws of the United States" in the portions of the Constitution dealing with judicial power did not include judge-made law. He recognizes that the modern Supreme Court in a handful of cases has reached the contrary conclusion, but seeks to chart a course correction. In particular, he seeks to counter what he regards as excessive inferences drawn from the famous decision of *Erie*

[38] Third Restatement § 114.

[39] Chimène I. Keitner, *Personal Jurisdiction and Fifth Amendment Due Process Revisited*, in this volume.

[40] Thomas H. Lee, *Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements*, in this volume.

Railroad v. Tompkins.[41] He particular regards as unfounded the Supreme Court's mandate that a federal court always must apply the conflicts-of-law rules of the State in which it sits with respect to all nonfederal rules of decision.[42] He argues that development of conflicts rules by federal courts in their role of expounding general law can achieve many of the desirable outcomes of managing international litigation without the constitutional infirmity of federal common law.

On matters of jurisdiction, the Third Restatement famously made ambitious claims not only about the status of international law in U.S. courts but also about the existence of bodies of customary international law regulating transnational legal conflicts. Two in particular provoked pushback from both the U.S. government and foreign commentators—the claims that customary international law regulates assertions of national prescriptive jurisdiction through a "rule of reason" that relies on multifactored balancing applied on a case-by-case basis, and that customary international law regulates assertions of adjudicative jurisdiction even in instances where neither jurisdiction to prescribe nor jurisdiction to enforce is implicated. The Fourth Restatement, by contrast, avoids using claims about international law as a vehicle for reforming U.S. law. To a greater degree than the Third Restatement, it distinguishes the question of best practice from that of what international law requires. For example, it recognizes that in an interconnected world, with fundamental features such as the World Wide Web that were unimaginable to the framers of the Third Restatement, regulatory and policy conflicts based on overlapping assertions of prescriptive jurisdiction are prevalent and significant. It shifts the means for judicial mediation of these overlaps from the development of customary international law to the implementation of strategies of statutory interpretation.[43]

One might think that these techniques, customary international law creation and interpretation of domestic law, collapse into the same thing. Both give courts a role in avoiding conflicts between competing national regulatory regimes by raising the cost to lawmakers of enacting such conflicts. Focusing on interpretation of domestic law, rather than on pronouncing rules that presumably bind all states, has its advantages. It allows national courts to address their own sovereigns, rather than imputing to other states a legal standard that governs the world. This shift in focus makes the dispute-avoidance strategy less threatening to other states and may do a better job of inducing their restraint and cooperation. The cost, some argue, is to remove U.S. judges from international conversations that privileges judges of all nations over other lawmakers.

[41] 304 U.S. 64 (1938).

[42] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[43] Compare Fourth Restatement § 405 (ascribing reasonableness in exercise of prescriptive jurisdiction to international comity), with Third Restatement § 403 (ascribing reasonableness in exercise of prescriptive jurisdiction to customary international law).

Consider the controversial practice of "tag" jurisdiction. The Third Restatement indicated that assertion of judicial power over a person based on fleeting presence within the jurisdiction transgressed an emerging norm of customary international law.[44] Embarrassingly, the Supreme Court in 1990 held that service on a natural person temporarily present in a forum satisfies the standards of constitutional due process.[45] Rather than finding U.S. doctrine in conflict with international law, the Fourth Restatement accounts for current domestic doctrine and does not indicate whether international law requires anything else.[46] Instead it indicates that the law of foreign judgment recognition and enforcement, concededly not based on international legal obligation but nonetheless highly salient, provides a satisfactory response to excessive assertions of adjudicative jurisdiction.[47]

This shift in emphasis raises a broader question, on which views can differ. One can assume the desirability of the progressive development of rules of prescriptive jurisdiction to manage conflicts caused by competing demands by different sovereigns. Is the adoption of international rules necessarily the optimal response? If all sovereigns recognize and apply the same rules identically, then the answer surely is yes.

In a world where sovereigns advance competing claims about the content and limitations of international law, however, this conclusion may not follow. Given the opportunity to make a rule that purports to bind many or most other states, each state may assert claims that reflect its particular interests and culture.[48] Assigning a role to international law in managing prescriptive conflicts then might, perversely, increase international friction, as competing claims about the content of what is supposed to be a universally binding rule pile up. The alternative approach, of each state seeking within its domestic legal system to increase international harmony without insisting on exact equivalence or reciprocity from other states, might achieve greater progress.[49] One might respond, however, that softening the obligation to cooperate more likely will produce confusion and recriminations, not harmony.

Two of the chapters here champion the Third Restatement's approach to these issues. Hannah Buxbaum and Ralf Michaels argue that a general embrace of the

[44] Third Restatement § 421(2)(a) & cmt. *e* ("not generally acceptable under international law").

[45] Burnham v. Superior Court, 495 U.S. 604 (1990). Four Justices held that presence alone was sufficient; the concurring opinion of Justice Brennan, who supplied the fifth vote for the decision, focused on voluntariness and sought to leave the door open for exceptions.

[46] Fourth Restatement § 422 cmt. *c* & reporters' notes 5, 7.

[47] *Id.* § 484(f), cmt. *h* & reporters' note 7.

[48] Anthea Roberts, Is International Law International? (2017); Comparative International Law (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, & Mila Versteeg eds., 2018).

[49] William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015) (international comity as an alternative to binding international legal obligation).

"rule of reason" in the academic community and repeated references to the Third Restatement by the courts show that, however innovative the doctrine might have been in 1987, it has evolved into a rule of law.[50] Austen Parrish follows on with a similar defense of the Third Restatement's conclusion that customary international law limits the power of national courts to assert jurisdiction over persons, even when the courts do not purport to prescribe rules of decision for such disputes or impose material sanctions on the persons brought within their jurisdiction.[51]

William S. Dodge argues that the Third Restatement, as well as its contemporary defenders, failed to appreciate the useful distinction between an international legal obligation and a norm of international behavior that signals a cooperative, rather than law-abiding, disposition.[52] The concept of international comity, he argues, provides all of the needed rules of the road for international transactions and litigation without putting the Restatement's reporters in the role of imposing legal rules that many if not most states regard as desirable but not mandatory.

Pamela K. Bookman offers a forwarding-looking perspective on the problem of adjudicative jurisdiction. She explores the springing up of specialized courts for international litigation around the world, largely detached from traditional state judiciaries although rooted in the authority of particular states. These bodies inevitably will challenge traditional conceptions of prescriptive and adjudicative jurisdiction, requiring the international regime. She is agnostic as to the choice between customary international law and international comity, instead expressing confidence that the need for a new round of restating the law will be manifest sooner rather than later.

Donald Earl Childress III draws a comparison not between the Third and Fourth Restatements, but rather between the Fourth Restatement and the much earlier Second Restatement of the Conflict of Laws.[53] Both address the doctrine of *forum non conveniens*, a mechanism that allows a domestic court with jurisdiction over a civil suit to dismiss a case in favor of a foreign venue. Childress notes the growing significance of the doctrine in allocating jurisdiction among states, the failure of the Conflict Restatement to provide any useful guidance on the matter, and what he considers the limited success of the Fourth Restatement to channel what otherwise might be unconstrained judicial discretion. He looks

[50] Hannah Buxbaum & Ralf Michaels, *Reasonableness as a Limitation on the Extraterritorial Application of U.S. Law: From 403 to 405 (via 404)*, in this volume.

[51] Austen Parrish, *Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach*, in this volume.

[52] William S. Dodge, *International Comity in the Fourth Restatement*, in this volume.

[53] Donald Earl Childress III, Forum Non Conveniens *in the Fourth Restatement*, in this volume.

to the American Law Institute's ongoing Third Restatement of the Conflict of Laws as a possible source of further legal development.

Finally, George Rutherglen considers the ongoing problem of territoriality as a concept on which to ground various forms of state jurisdiction.[54] On the one hand, growing international connectivity and the dematerialization of interactions in a cyber world confound the practical consequences of the territorial concept. On the other hand, no other concept comes readily to hand to allocate assertions of state legal authority, whether prescriptive, adjudicative, or enforcement. Rutherglen leaves us with a sense of grudging respect for territoriality as a limiting principle, however out of date it might seem.

One area of international jurisdiction where Congress has taken an active role in defining U.S. obligations under international law is state immunity. That states enjoy some kind of immunity from the adjudicative jurisdiction of other states is a fundamental feature of contemporary international law. It rests on the core principle of sovereign equality, expressed in the maxim that no state's courts have the right to stand in judgment of another state's actions. This basic proposition leaves open a host of questions, however. How complete is this principle? May a state make an irrevocable waiver of its rights and thus submit to another state's courts? What about state acts that do not rest on a state's character as a sovereign to have legal effect, that is private acts that happen to be undertaken by a state? What about actions that are attributable to a state under general international legal principles of state responsibility, but which are antithetical to the international legal order (such as torture, genocide, or acts of aggression)? When an otherwise lawful civil judgment is entered against a state, how can that judgment be enforced?

Until adoption of the Foreign Sovereign Immunities Act in 1976, the executive branch had the leading, and perhaps exclusive, role within the U.S. constitutional system for answering these questions. With this legislation, Congress took over the subject, with the inevitable statutory ambiguity leaving a substantial role for the judiciary. The executive went from the center of power to an occasional amicus curiae with only limited success in bringing the courts around to its understanding of what the statute, as well as international law, requires.

How this system would evolve, and in what directions the courts would take the statute, were largely unclear at the time of the Third Restatement. The Fourth Restatement's reporters, by contrast, confronted a welter of decisions, many by the Supreme Court.[55] Much of their work consisted of making sense out of the

[54] George Rutherglen, *Territoriality and Its Troubles*, in this volume.

[55] The Court has delivered twenty opinions in cases involving the interpretation of the Foreign Sovereign Immunities Act since adoption of the Third Restatement, eight of those since the Fourth Restatement got under way. There were only two for the reporters of the Third Restatement to consider.

highly technical, sometimes confused decisions, rather than filling in gaps and trying to push the law in directions not clearly indicated by the statute.

The Fourth Restatement generally maps the approach of the U.S. courts, the Supreme Court in particular. As the Court has repeatedly emphasized, the Foreign Sovereign Immunities Act occupies the field of state immunity, leaving no room for implied exceptions or extensions.[56] Within that field, it sets a default of immunity and puts a plaintiff to the task of finding an exception within the four corners of the statute. It has done this not only with respect to adjudicative jurisdiction but also as to the enforcement of judgments against a foreign sovereign's assets.[57] The Court accordingly has paid less attention to the issue of whether customary international law demands immunity in particular cases and has not considered whether customary international law might forbid immunity in some instances. The Restatement consistently compares and contrasts the requirements of international law with those of the Foreign Sovereign Immunities Act, but does not indicate that a court should follow the former where it departs from the latter.[58]

One chapter in this book criticizes the Fourth Restatement for its failure to confront the inconsistency between contemporary international law and one significant aspect of the contemporary statutory structure, the so-called terrorism exception to state immunity. Various amendments to the Foreign Sovereign Immunities Act over the last quarter-century have removed immunity for states that, in the view of the U.S. executive, are sponsors of terrorism. Beth Stephens observes that this criterion is essentially orthogonal to any plausible argument for recognizing an exception's to international law's default rule of state immunity.[59] Foreign policy considerations dominate, so that the transgressions of friendly states are overlooked, while those of adversaries are magnified. She would welcome recognition of exceptions to state immunity that bolster human rights enforcement, but maintains that U.S. practice with respect to terrorism conflicts with established international law and brings with it no moral weight that might justify efforts to forge a new norm.[60]

[56] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (no exceptions to immunity from adjudicative jurisdiction outside statute); Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (no immunity from discovery provided by statute for cases within exception to immunity from adjudicative jurisdiction); FOURTH RESTATEMENT ch. 5, intro. note, at 323.

[57] Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi, 546 U.S. 450 (2006); Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018); FOURTH RESTATEMENT § 464 reporters' note 10.

[58] FOURTH RESTATEMENT § 451 cmt. *a* (adjudicative jurisdiction); *id.* § 464 reporters' note 16 (enforcement jurisdiction).

[59] Beth Stephens, *The Fourth Restatement, International Law, and the "Terrorism" Exception to the Foreign Sovereign Immunities Act*, in this volume.

[60] Kristina Daugirdas, in the course of her more general critique of the Fourth Restatement's approach to international law, makes similar arguments about the U.S. terrorism exception to state immunity. Kristina Daugirdas, *The Restatements and the Rule of Law*, in this volume.

Two other chapters explore topics in the international law of immunity that an extension of the Fourth Restatement might address. David P. Stewart and Ingrid Wuerth look at the immunity of international organizations and their officials.[61] In the United States, a statute addresses the question, but its fails to provide clear answers to the most important questions about the scope of those immunities. The Supreme Court recently stepped into the gap, but its interpretation of the statute leaves open as many questions as it answers. Stewart and Wuerth seek to clean this mess, and in the course of doing so guide future reporters of an extended Restatement.

Finally, John B. Bellinger III and Stephen K. Wirth address a significant problem that the American Law Institute thought too undeveloped to be incorporated into the first version of the Fourth Restatement, namely, the immunity of foreign officials from judicial jurisdiction.[62] In the United States, these cases almost always involve suits seeking compensation for alleged violations of international human rights law. As Bellinger and Wirth show, ongoing issues highlight the role of the executive in determining the scope of common law immunity and the inferences to be drawn from legislation, in particular the Torture Victim Protection Act, that establishes a federal cause of action for such violations. As they note, these questions may soon command the attention of the Supreme Court, although there is no reason to expect that the Court will put everything important to rest.

The significance of the debate is enormous. If immunity exists whenever a foreign state refuses to disavow the acts of its officials, civil litigation as a means of condemning and seeking reparations for grave human rights abuses would mostly disappear. But allowing suits to go forward whenever plaintiffs can obtain jurisdiction over foreign officials creates a hole in the principle of immunity, which is supposed to provide states, and arguably those through whom states act, freedom from litigation, not just from liability.

III. The Fourth Restatement's Future

However one assesses the accomplishments of the Fourth Restatement, what remains to be done? The Third Restatement had two volumes, the first comprising a kind of general part of foreign relations law, the second a series of special parts covering topics such as the law of the sea, international environmental law,

[61] David P. Stewart & Ingrid Wuerth, *The Jurisdictional Immunities of International Organizations: Recent Developments and the Challenges of the Future*, in this volume.

[62] John B. Bellinger III & Stephen K. Wirth, *Foreign-Official Immunity under the Common Law*, in this volume.

human rights, international economic law, and remedies under international law. Should the Institute take on all or any of these subjects? What about international humanitarian law, the relevance of which to the United States has grown enormously since 9/11? Something that the reporters of the Third Restatement could not have imagined is the rise of cyber conflicts, both militarized and politicized. Do we need a Restatement of the law of cyber relations, whether governing state-backed attacks, nonstate vandals, political interference, espionage, economic injuries (including theft of intellectual property), or censorship? Have particular areas of economic law, such as international trade, international financial regulation, or anticorruption, developed to the point where they demand separate treatment as elements of foreign relations law?

There are at least two schools of thought about the desirability of extending the Fourth Restatement to specific bodies of foreign relations law. On the one hand, these subjects give content to the concept of foreign relations law. They demonstrate concretely how the general framework laid out in the general part affects critical choices in areas of law that have evolved from esoteric to mainstream over the last thirty years.

The opposing view concedes the great significance of these areas of law and argues that for this reason they deserve separate restatements by specialized experts.[63] During the 1980s it might have been possible for four scholars, admittedly giants of the field, to stand astride such diverse topics as the law of the sea and human rights. But as these fields have deepened, the need for a firm command of their specifics has grown. As so often occurs, this argument goes, the emergence of a field makes it harder for generalists to remain relevant.

Two chapters flesh out the opposite positions on this question as to one especially salient topic, international humanitarian law. Bakhtiyar Tuzmukhamedov provides a survey of comparative international practice regarding authorization to deploy force outside a state's boundaries.[64] He indicates that patterns exist and the need for stronger legal foundations is clear. Ashley Deeks, however, looks at the fundamental instability of this body of law in the face of new technologies for conducting armed conflict and the profound divisions among states about the

[63] Current Institute projects that cover topics addressed in the Third Restatement include The U.S. Law of International Commercial and Investor-State Arbitration (Proposed Final Draft, Apr. 24, 2019), the Restatement of the Law Third Conflict of Laws (Preliminary Draft No. 5, Oct. 23, 2019), and Principles for a Data Economy (Tent. Draft No. 1, May 22, 2020; joint project with European Law Institute). Completed projects include Principles of the Law, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (Am. Law Inst. 2008); Principles of the Law, Transnational Civil Procedure (Am. Law Inst. 2004); Principles of the Law, Transnational Insolvency (Am. Law Inst. 2012); Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (Am. Law Inst. 2006); Legal and Economic Principles of World Trade Law (Am. Law Inst. 2012).

[64] Tuzmukhamedov, *supra* note 5.

feasibility of legal regulation, much less the content of such law.[65] She suggests that abstention would keep the reporters of a future Restatement out of trouble, and that plunging into the fray is not likely to lead to a positive outcome.

Edward T. Swaine reviews basic questions of methodology and ambition implicated in restating the law of foreign relations.[66] When considering state practice, for example, what weight should be given to the views of the government? It enjoys authority and experience, but also is disinclined to take a critical perspective or to own up to its own transgressions. Kristina Daugirdas also takes up this point.[67] She argues that reporters should assume, if not an adversarial stance, at least greater skepticism and detachment when faced with official accounts of encounters between domestic and international law. She envisions a Restatement as functioning somewhat like a judicial tribunal, disinterested, skeptical, and fair.

Jide Nzelibe ends the book with a set of more existential questions.[68] Does it make sense to restate a body of law that both shapes and reflects many dynamic processes, both international and domestic? Is there any reason to expect that forces that transformed the world between the adoption of the Third Restatement and the launching of the Fourth to slow down in the near future? It seems not only unrealistic but undesirable to freeze a body of law that must adapt broadly and quickly to a fluid environment. But if it is not to freeze the law, what else can a Restatement do?

* * *

It is our hope that the Fourth Restatement, of which we take personal responsibility as well as professional pride, can serve as a focus for the progressive development of the law and a means to illuminate some of the difficult issues that the law confronts, even if it cannot aspire to definitive resolution of anything. The essays in this book challenge that hope. It brings us great personal satisfaction that such a distinguished body of scholars agreed that the topic deserves their attention. Our fascination with and enthusiasm for the law of the foreign relations of the United States remains undiminished.

[65] Deeks, *supra* note 5.
[66] Edward T. Swaine, *Consider the Source: Evidence and Authority in the Fourth Restatement*, in this volume.
[67] Daugirdas, *supra* note 60.
[68] Nzelibe, *supra* note 13.