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Restating US Foreign Relations Law: Lessons from the Treaty Materials

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Abstract

This short article responds to observations made by Alina Miron and Paolo Palchetti about the treaty sections of the Restatement of the Law (Fourth): The Foreign Relations Law of the United States*. We describe the nature of the Restatement process and explain why the choices made in the* Restatement (Fourth) *were more constrained than what might be suggested by Miron and Palchetti's critique. We also engage with some of their specific observations about the* Restatement (Fourth)*'s approach to treaties, resisting the suggestion that the approach marks a retreat from engagement with international law.*

This brief article responds to the thoughtful observations made by Alina Miron and Paolo Palchetti in their article on the treaty sections of the *Restatement of the Law (Fourth): Foreign Relations Law of the United States*.[1] The two of us had the privilege of serving as reporters for the *Restatement (Fourth)*, and our principal responsibility was helping to draft the materials relating to treaties. Miron and Palchetti contend that the *Restatement (Fourth)* marks a retreat from the earlier *Restatement (Third)* in terms of its engagement with international law.[2] Relatedly, they contend that the *Restatement (Fourth)* is more inward-looking than the *Restatement (Third)* and that the foreign relations law that it describes operates more as a filter of international law than as a bridge.

In this article, we describe the nature of the *Restatement* process and explain why the choices made in the *Restatement (Fourth)* were more constrained than might be

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1 *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018). See Miron and Palchetti, 'Foreign Relations Law on Treaty Matters from *Restatement (Third)* to *Restatement (Fourth)*: More a Filter Than a Bridge', 32 *European Journal of International Law* (*Eur. J. Int'l L.*) (2021) 1425.

2 *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987).

suggested by Miron and Palchetti's critique. We also engage with some of their specific observations about the *Restatement (Fourth)*'s approach to treaties, resisting the suggestion that the approach marks a retreat from engagement with international law.

1 The Nature and Process of the *Restatement*

In considering Miron and Palchetti's critique, it may be helpful to provide additional context regarding the *Restatement (Fourth)* and the nature of the *Restatement* process.[3] Restatements of the law are published by the American Law Institute (ALI), a private organization founded in the 1920s whose members include prominent lawyers, judges and academics. As the ALI has explained, 'Restatements are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court'.[4] The initial *Restatements* concerned areas of US common law – that is, law developed by judges, primarily at the state level, on topics such as contracts and torts. Because the law in these areas was being developed through cases, and across multiple jurisdictions, it was often difficult to discern. It was therefore thought useful for experts to distil the trends and best practices from the various approaches in a way that might guide judges and influence some convergence around particular rules.[5]

Foreign relations law is different from those common law topics. It is primarily national public law, not state common law, and it is generally made top-down by the national government and interpreted by the national courts in a way that is binding on the state courts. Moreover, the legal materials are not simply judicial decisions, but include the US Constitution, federal statutes and executive branch policies and practices; judicial decisions construing these materials are still quite important, but foreign relations law disputes are less likely to be justiciable than private, common law disputes. These aspects of US foreign relations law present some unique challenges to those attempting to restate it, including the involvement of a different set of stakeholders whose views need to be considered (including, most notably, the US State Department, which has a leading role in managing US foreign relations).

The first *Restatement of the Law: Foreign Relations Law of the United States* was published in 1965 as part of the ALI's second series of *Restatements* and, hence, was entitled the *Restatement (Second)*. A substantially revised and expanded *Restatement (Third)* was published in 1987. The *Restatement (Fourth)* was published more than 30 years later, in 2018, after about six years of work by the reporters, including the two of us, who worked on the treaties topic alongside Professor Sarah Cleveland, who

[3] See also Stephan, 'The US Context of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States*', 32 *Eur. J. Int'l L.* (2021) 1415.

[4] American Law Institute (ALI), 'Frequently Answered Questions', available at www.ali.org/about-ali/faq/.

[5] ALI, 'About ALI', available at www.ali.org/about-ali/ (explaining that *Restatements* were originally designed to address the law's uncertainty 'stemm[ing] in part from a lack of agreement on fundamental principles of the common law' as well as its complexity, which 'was attributed to the numerous variations within different jurisdictions of the United States').

also served as one of the two Coordinating Reporters. Because foreign relations law involves matters of public law – aspects of which can be highly controversial – the ALI appointed an ideologically diverse set of reporters to work on the *Restatement (Fourth)*. The formulation of the draft sections involved substantial dialogue and negotiation among the reporters, and it often required compromise. The ALI approval process also entailed numerous rounds of deliberation and discussion of drafts with counsellors and advisers, who have varying perspectives on the issues, and some of whom are judges or executive branch officials. The reporters also sought advice from a group of foreign advisers. Ultimately, in order for the reporters' drafts to become part of the *Restatement*, they had to be approved by the ALI membership, which is itself ideologically diverse.

In part because of this process, and also because, as noted, *Restatements* aim to 'reflect the law as it presently stands or might appropriately be stated by a court',[6] the goal of the *Restatement (Fourth)* was not to set out an idealized account of what US foreign relations law should look like, an enterprise that almost certainly would not have generated consensus among the reporters or among the ALI membership. Instead, the reporters sought to describe a complex area of law to judges, practitioners and others who may or may not be familiar with the relevant doctrines and their intricacies. This is not to suggest that the reporters on the *Restatement (Fourth)* did not make choices. Elements of foreign relations law are often unclear or subject to more than one interpretation, and the reporters sometimes offered their views about what seemed to be best supported by the available legal materials. They also retreated in a few places from claims that had been made by the *Restatement (Third)*, either because of what appeared to be a lack of legal support at the time they were pronounced or because the claims had been undermined by subsequent developments. (We give examples below of retreats concerning whether there is a presumption in favour of treaty self-execution and about whether there might be a subject matter limitation on the treaty power.) Despite elements of choice, however, the reporters were obliged to work with, and make sense of, the relevant judicial decisions and political branch practices.

Even with these limitations, when the *Restatement (Fourth)* process started, some observers were sceptical that the reporters would be able to reach agreement. One reason they were able to do so was that they operated primarily inductively, starting with the judicial decisions, statutes and executive branch practices, and then articulating the legal standards that these materials appeared to support. In part because of the scepticism, however, the *Restatement (Fourth)* was initially authorized to address only a select set of topics: Article II treaties, jurisdiction and sovereign immunity. It was thought that a restatement of these topics had the highest likelihood of generating consensus, as opposed to more controversial subjects such as executive agreements, the domestic status of customary international law or foreign official immunity. It is quite possible that the success of the *Restatement (Fourth)* to date will help persuade the ALI to authorize work on more controversial topics.

[6] See text accompanying note 4 above.

Although not evident in Miron and Palchetti's critique, there is significant continuity between the *Restatement (Third)* and *Restatement (Fourth)* with respect to Article II treaties. As is traditional for the *Restatement* process, the reporters operated with a presumption in favour of retaining the articulations of the law in the prior *Restatement*, especially if those articulations had been endorsed or relied upon by judges and others. The *Restatement (Fourth)* emphasizes, for example, that treaties are the supreme law of the land, that they take precedence over state and local law, that there is a broad scope to the treaty power, that treaties can displace earlier-in-time federal statutes and that statutes should be construed, where fairly possible, to avoid violating treaties.[7] Even the more restrictive provisions in the *Restatement (Fourth)* are often similar to those set forth in the *Restatement (Third)* – for example, a provision recognizing that, as a matter of practice, presidents may withdraw the United States from treaties.[8]

To be sure, there are some differences between the positions of the two *Restatements*. This should not come as a surprise; indeed, if there were no changes to be made, there would have been no need for a new *Restatement* project. A central reason why the ALI decided to authorize a new *Restatement of Foreign Relations* was that substantial changes in the law had occurred since the publication of the *Restatement (Third)* in 1987. The US Supreme Court, for example, had decided a number of significant foreign relations law decisions. In the treaty area, this included most notably the *Medellin v. Texas* decision on treaty self-execution.[9] The practices of the political branches had also changed and developed in ways not accounted for in the *Restatement (Third)*. To take one example, the frequent practice by the Senate of including reservations, understandings and declarations in its approval of treaties – including declarations of treaty non-self-execution – largely emerged after the *Restatement (Third)*, as the United States finally started joining human rights treaties.

The scholarly commentary in the foreign relations law field had also changed substantially since the *Restatement (Third)*. Some of the core claims of the *Restatement (Third)* were challenged in the commentary and sometimes questioned by the courts. In part, this reflected the fact that the *Restatement (Third)* had staked out some claims that were more aspirational than inductive and, in doing so, had deviated from the more cautious approach of its predecessor, the *Restatement (Second)*. (The most commonly cited example was the *Restatement (Third)*'s decision to attribute to customary international law a new, multi-factored reasonableness test for the exercise of prescriptive jurisdiction.[10]) Because several decades had passed since the publication of the *Restatement (Third)*, it was possible to see whether its claims had taken hold in the law. Where this had not occurred, it made less sense to continue restating the same propositions without qualification. Indeed, the *Restatement*'s credibility with

[7] See *Restatement (Fourth)*, *supra* note 1, § 301 (supremacy); § 308 (relationship with state and local law); § 309 (conflicts between treaties and federal statutes and interpretive avoidance).

[8] Compare *ibid.*, § 313, with *Restatement (Third)*, *supra* note 2, § 339.

[9] *Medellin v. Texas*, 552 U.S. 491 (2008).

[10] *Restatement (Third)*, *supra* note 2, § 403; Comment *a* and Reporters' Note 10.

judges and other audiences depends in large part on whether it continues to set forth accounts of the law that accord with the thrust of the relevant legal materials.

2 Friendliness to International Law?

At the core of Miron and Palchetti's critique is the suggestion that the *Restatement (Fourth)*'s treaty sections reflect a less friendly approach to international law than the *Restatement (Third)*. The picture, in our view, is more complicated.

A *Focus on Article II Treaties (Not Executive Agreements)*

Miron and Palchetti note that the *Restatement (Fourth)* addresses only Article II treaties and thereby leaves out a majority of international agreements concluded by the United States, and they suggest that this serves to promote an autonomous US conception of treaties different from the international conception as reflected, for example, in the Vienna Convention on the Law of Treaties (VCLT).[11] It is fair to observe, as they do, that the *Restatement (Fourth)* does not state explicitly the reasons for focusing on Article II treaties nor, for that matter, for focusing on the immunity of states but not those of foreign officials, international organizations or diplomats. As the foreword by the ALI's director states, however, these decisions were part of an administrative decision to avoid undertaking a full revision of the *Restatement (Third)* all at once and, instead, to begin with discrete projects.[12] Undoubtedly, this reflected a decision about the work that could be most readily accomplished, but it does not mean it reflected 'a political choice',[13] let alone one that was hostile towards non-Article II agreements (or hostile towards international law). Instead, the idea was to take up additional topics in the 'not-too-distant future', subject among other things to the ALI's overall workload.[14]

Even in a more comprehensive work, there would be good reasons to highlight and address issues relating specifically to Article II treaties since they involve the domestic process for concluding treaties that is specified in the Constitution. Furthermore, any account of US foreign relations law needs to highlight the differences between Article II treaties and executive agreements because both the process and the substantive standards under US law differ somewhat between those categories. Doing so does not signal any less respect for non-Article II agreements under international law.

To be sure, addressing Article II treaties without addressing other agreements required editorial choices. One of these was to discuss several components of international practice that would be of interest to US courts and the political branches, and essential to presenting a full picture of Article II treaties, but which by and large applied to all forms of US agreements irrespective of the process chosen for their domestic

[11] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.
[12] See *Restatement (Fourth)*, *supra* note 1, at xvii.
[13] See Miron and Palchetti, *supra* note 1, at 1427.
[14] See *Restatement (Fourth)*, *supra* note 1, at xvii.

approval. These included topics like capacity and authority to conclude agreements, entry into force and interpretation.[15] In the judgment of the reporters, discussing these topics was essential to presenting a full account of Article II treaties, even if, as a necessary consequence, the *Restatement (Fourth)* stole the march on future work.

B *Focus on the US Law of Treaties (Not the International Law of Treaties)*

Miron and Palchetti note, quite fairly, that, despite its focus on Article II treaties, the *Restatement (Fourth)* still addresses international law rules governing treaties – but does so selectively and without attempting anything like a comprehensive account of the international law rules governing treaties. Miron and Palchetti describe this as a 'missed opportunity',[16] but this is debatable. There are already excellent treatments of the international law governing treaties, many by scholars in other countries, and the International Law Commission (among other actors) regularly takes up and elaborates important components of those rules. These treatments are readily available to judges and lawyers in the United States, and their coverage of the international law issues will almost inevitably be more focused and thorough than that of the *Restatement*, given the need of the *Restatement* to address in detail various aspects of US domestic law (and the fact that the expertise of the ALI, which plays a vital role in reviewing the proposed *Restatements*, is more focused on domestic law). It might also seem presumptuous for a group of primarily US-based reporters to assume the task of restating international law for the world. A more modest approach is at least arguably validated by the relative success of the first volume of the *Restatement (Third)* as compared to its second volume, which addressed a number of subjects that were largely determined by multilateral treaties and customary international law and which has played a much less significant role in shaping subsequent discourse.

International law still plays a prominent and recurring role in the *Restatement (Fourth)*, including in the treaty sections. When discussing US practices such as joining a treaty, attaching a reservation to a treaty or withdrawing from a treaty, the *Restatement (Fourth)* discusses in some detail the international law standards governing those practices, without attempting to provide an exhaustive treatment or weigh in on contested international law debates.[17] As Miron and Palchetti kindly mention, the *Restatement (Fourth)* also addresses provisional application, both in regard to international law and as a matter of US practice, at some length, and likewise pays careful attention to the interim obligation arising upon signature of a treaty.[18] Moreover, the *Restatement (Fourth)* repeatedly emphasizes the importance of harmonizing US practice with international standards where possible – concerning, for example, treaty interpretation. Indeed, there is more of an effort in the *Restatement (Fourth)* than in the

[15] See, respectively, *Restatement (Fourth)*, *supra* note 1, paras 302, 304, 306.
[16] See Miron and Palchetti, *supra* note 1, at 1430.
[17] See, respectively, *Restatement (Fourth)*, *supra* note 1, §§ 302, 304, 305, 313.
[18] *Restatement (Fourth)*, *supra* note 1, § 304, Reporters' Notes 7–8.

Restatement (Third) to situate US treaty interpretation practice within the framework of the VCLT, in part to encourage US judges in this regard.

C *Focus on Constitutional Limits (Not Promoting Compliance with International Law)*

Miron and Palchetti are especially concerned with aspects of US foreign relations law that may not promote compliance with international law, and they appear to fault the *Restatement (Fourth)* for unduly emphasizing constitutional considerations that may limit treaty implementation. This is an important consideration, and they are surely correct that the *Restatement* inevitably confronts 'the question of where to strike the balance between compliance with international law and compliance with U.S. law' and that '[t]hese two objectives are not always reconcilable'.[19] Reasonable minds may differ as to how this balance is struck. On the whole, however, the objection seems to us misplaced.

As discussed above in Part 1, the *Restatement* is designed to explain the complexities of US law, and it would not be fulfilling this role if it neglected to account for the particular features of the US constitutional order. This is not novel to the *Restatement (Fourth)*. The *Restatement (Third)* may have seemed more hospitable to international law in some regards, but that is not due to any fundamentally different commitment; Miron and Palchetti quote a reviewer opining of the *Restatement (Third)* that '[i]t seems to be one of the main concerns of the new Restatement to give as much effect as possible to the basic tenets of public international law in the domestic sphere', but his point was made to express disappointment in the *Restatement (Third)*'s treatment of the domestic act of state doctrine.[20]

Indeed, many aspects of the US constitutional order that are described in the *Restatement (Fourth)* were also described in the *Restatement (Third)*. Miron and Palchetti highlight a few important topics that they believe illustrate discontinuities. One concerns conflict between a treaty provision and state or local law, addressed in section 308 of the *Restatement (Fourth)*. As they indicate, the *Restatement (Third)* was different insofar as it indicated, in a comment, that '[e]ven [a non-self-executing treaty] may sometimes be held to be federal policy superseding State law or policy'.[21] When that 'sometimes' might be was not at all explained, and (as discussed below and as Miron and Palchetti note) the possibility seems to have been qualified by subsequent decisions like *Medellin*. As they observe, the *Restatement (Third)* also noted the possibility, though not yet adjudicated, that the state law might be pre-empted even in the absence of a direct conflict; the *Restatement (Fourth)* noted that too, but, this time, it also cited an important instance involving an executive agreement in which this had transpired and suggested its application to Article II treaties.[22] The most substantial

[19] See Miron and Palchetti, *supra* note 1, at 1432.

[20] See Herdegen, 'Restatement Third, Restatement of the Foreign Relations Law of the United States', 39 *American Journal of Comparative Law* (1991) 207, at 211.

[21] *Restatement (Third)*, *supra* note 2, § 115, Comment *e*.

[22] Compare *ibid.*, § 115, Comment *e*, with *Restatement (Fourth)*, *supra* note 1, § 308, Comment *c* (citing *American Ins. Association v. Garamendi*, 539 U.S. 396, at 421–427 [2003]).

difference between the two approaches was simply due to developments in the case law – in this latter instance, favouring the place of international agreements relative to state and local law.

A second area of possible discontinuity involves subject-matter limitations on treaty-making power. Here, Miron and Palchetti point to a genuine difference, acknowledged by the *Restatement (Fourth)*, between the two undertakings. The *Restatement (Third)* stated that there was no subject-matter limitation other than what was suggested by the United States's 'national interests in relations with other nations', reversing the position taken by the *Restatement (Second)*. By contrast, the *Restatement (Fourth)* took no position as to whether there was a subject-matter limitation.[23] The subject is a complex one on which much ink has been spilled (including in trying to understand the *Restatement (Third)*'s position).[24] In candour, though, the debate is of very limited significance. No treaty has been struck down on the ground that it exceeded a subject-matter limitation, and although three US Supreme Court justices recently expressed interest in adopting some kind of limitation, only one thought any such limitation had immediate application, and the majority reached the same disposition of the case on other grounds.[25]

In a third area involving possible conflicts between a treaty and a federal statute, there seems to be some misunderstanding. While Miron and Palchetti suggest that the *Restatement (Fourth)* decided 'not to resolve the issue' of whether there was, or was not, a presumption against treaty violations by statute, the reporters' notes on the question tried instead to state that the form of the presumption, and the evidence necessary to overcome it, had varied and was not clear enough in the case law.[26] The comments to which the reporters' notes pertain said that 'courts presume that Congress does not lightly intend' to override treaties in domestic law and that federal statutes should accordingly be construed to avoid treaty violations 'where fairly possible', and the black-letter principle (which is the most authoritative) is to the same effect.[27] This interpretive approach – the *Charming Betsy* canon of interpretation, pursuant to which courts will attempt to construe statutes to avoid violations of international law – is itself the subject of misunderstanding. Miron and Palchetti note the somewhat unsatisfactory phrasing concerning when statutes will be construed to avoid conflict ('where fairly possible') and suggest that the canon has been weakened, but this standard is taken directly from long-standing US Supreme Court precedent, and its formulation in

[23] Compare *Restatement (Third)*, *supra* note 2, § 302, Comment *c*, with *Restatement (Fourth)*, *supra* note 1, § 312, Reporters' Note 8.

[24] Compare, e.g., Golove, 'Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power', 98 *Michigan Law Review* (*MLR*) (2000) 1075, at 1288–1292 (describing prevailing *status quo* accounts, including the *Restatement (Third)*, as maintaining very general subject-matter limits on treaties), with Bradley, 'The Treaty Power and American Federalism, Part II', 99 *MLR* (2000) 98, 105–111 (disagreeing).

[25] *Bond v. United States*, 572 U.S. 844, 897 (2014) (Alito J, concurring in the judgment); see also at 882 (Thomas J, concurring in judgment) (endorsing international concern limitation).

[26] *Restatement (Fourth)*, *supra* note 1, § 309, Reporters' Note 1.

[27] *Ibid.*, § 309, Comment *b*; § 309(1).

the *Restatement (Fourth)* is functionally identical with that in the *Restatement (Third)*.[28] Not insignificantly, the *Restatement (Fourth)* also stated that the same approach should be applied to avoid conflict with non-self-executing treaty provisions.[29]

Stepping back from the finer details, we would also note that if the *Restatement (Third)*, or the *Restatement (Fourth)*, had taken a substantially different approach, it could have substantially undermined its credibility. The United States is not alone in regarding its Constitution as having higher status in its domestic legal order than do treaties, and the Constitution has also been held to inform (sometimes with less clarity than may be desired) the relationship between treaties and other domestic law as well. In approaching 'the question of where to strike the balance between compliance with international law and compliance with U.S. law',[30] the reporters, and the ALI as a whole, were mindful that the power of any restatement to successfully restate the law depended greatly on its ability to persuade judges, and the political branches, that it understood what US law had established.

D *Focus on Self-execution*

As Miron and Palchetti note, the *Restatement (Fourth)* gives more attention than the *Restatement (Third)* to the topic of treaty self-execution, and what it says about that topic is more restrictive with respect to the domestic application of treaties – perhaps most notably, by indicating that there is no presumption in favour of self-execution. But this shift stems from the fact that the courts and the political branches have given more attention to the topic of treaty self-execution since the *Restatement (Third)*. An especially notable development was the US Supreme Court's 2008 decision in *Medellin*, in which the Court held that Article 94 of the Charter of the United Nations was not self-executing and thus could not be used to pre-empt state law in US judicial proceedings.[31]

In taking account of *Medellin*, the *Restatement (Fourth)* avoided interpreting it as broadly as might have been possible. Thus, the reporters' notes included the following caution: 'The unusual circumstances of Medellín… counsel against generalizing too much from the Court's finding there of non-self-execution, and make it difficult to derive from that decision any clear test for determining when treaty provisions should or should not be regarded as self-executing.'[32] Miron and Palchetti suggest that the *Restatement (Fourth)* should have read *Medellin* even more narrowly – for example, as simply applying to the domestic effect of the decisions of international courts or other institutions. This is appealing in many regards, but it is not how the Court framed its analysis, and nor is it how either the lower federal courts or the political branches have

[28] Compare *ibid.*, § 309 ('[w]here fairly possible, courts in the United States will construe federal statutes to avoid a conflict with a treaty provision'), with *Restatement (Third)*, *supra* note 2, § 114 ('[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States').

[29] See *Restatement (Fourth)*, *supra* note 1, § 309, Reporters' Note 1.

[30] See text accompanying note 19 above.

[31] *Medellin*, *supra* note 9.

[32] See *Restatement (Fourth)*, *supra* note 1, § 310, Comment 2.

read the decision. For example, the Senate and president reacted to *Medellin* by issuing declarations in providing advice and consent to certain other treaties (not involving constitutive treaties of international organizations) to better ensure that they were self-executing.[33] Rather than depending entirely on the prospect that *Medellin* would be confined to its facts, the *Restatement (Fourth)* expressed scepticism about some of its reasoning (for example, as to whether inferences could fairly be drawn from the discussion of implementation measures in a treaty itself) and explicitly resisted the idea developing in the lower courts that *Medellin* implied a presumption against treaty self-execution.[34]

Miron and Palchetti also suggest that the *Restatement* should have been more critical of *Medellin* and other developments in the law that restrict treaty implementation. As discussed above, however, although the reporters inevitably made interpretive choices and sought ways to clarify the law, their objective was not principally one of law reform. Nor would such a law reform project have generated the consensus required during the *Restatement* drafting process. Fortunately, there is robust academic commentary on US foreign relations law, including by reporters writing in their individual capacities, that is not similarly constrained.

Ultimately, Miron and Palchetti's critique is probably more about the content of US foreign relations law than the *Restatement*'s account of it. This is not the place to assess the normative desirability of the many facets of this area of law, and it is unlikely that the two of us would agree on every point if we did attempt such an appraisal. But we do resist the suggestion that limitations on the direct application of treaties are inherently problematic. A key question is whether these limitations, including the non-self-execution doctrine, undermine US compliance with international law. In considering this question, it is worth remembering that the United States can and does comply with most treaties regardless of whether they are self-executing. Non-self-execution limits judicial enforcement, but many treaties do not need direct judicial enforcement to be followed. For other treaties, there is often implementing legislation, and, in fact, in the US system, this is sometimes constitutionally required as a matter of practice, such as when conduct is being criminalized.[35] In some countries, treaties are never self-executing, and yet those countries manage to comply with their international obligations.

The most significant example of US non-compliance stemming from treaty non-self-execution is the non-compliance with the International Court of Justice's *Avena* decision, which was at issue in *Medellin*.[36] But that situation – compliance with an international decision mandating the reopening of state criminal proceedings that had already become final – is unusual in a number of respects (as Miron and Palchetti themselves stress). In any event, nothing in *Medellin* prevents the United States from

[33] See *ibid.*, § 310, Comment 9.

[34] See, respectively, *Restatement (Fourth)*, *supra* note 1, § 310, Comments 3, 7.

[35] See *Restatement (Fourth)*, *supra* note 1, § 310, Reporters' Note 11.

[36] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 12.

complying with the *Avena* decision through statute. The United States has by most accounts done a much better job in recent years of educating state and local officials about their obligation to provide the consular notice and access at issue in *Avena*, although federal legislation would better guarantee that consular rights are observed.[37]

3 Conclusion

Miron and Palchetti appear to envision domestic courts as 'agents for ensuring compliance' with international law and criticize the *Restatement* for not pushing for such a role.[38] While we are quite comfortable rejecting any opposing vision of the courts as 'agents of resistance to international law'[39] – and, for the reasons already stated, think the *Restatement (Fourth)* plainly rejected that opposing vision as well, both in the sections on Article II treaties and elsewhere – we doubt whether a *Restatement* can embrace any overarching vision for the courts like the one suggested by Miron and Palchetti. Among other things, important trade-offs would need to be considered. If the *Restatement* advocated a judicial role of ensuring compliance, without adequately accounting for potentially competing principles in US law, including principles relating to the separation of powers, courts might well distrust it and reject its counsel altogether. If they did not, and followed its lead, it might engender backlash and resistance to international law of exactly the sort that Miron and Palchetti worry about. Moreover, while US foreign relations law, as they note, may sometimes operate as a filter for international law rather than as an open spigot, this filtering function may in some instances actually enhance international law's acceptance and usefulness within the domestic legal system.[40] This may or may not foster the kind of precisely equilibrated 'internationally-minded contestation' that one might design from scratch,[41] but a *Restatement* cannot by itself will that into existence. It was our conviction, in essence, that the US Constitution, statutes, case law and well-established practices of the political branches tendered a plausible approach to many of the actual controversies involving compliance with international law and that, in at least some instances, what was required was a careful and well-evidenced explanation of how international law had actually been accommodated.

Nor, as we have explained, did the *Restatement (Third)* postulate such an 'international agents' role for domestic courts. While emphasizing that courts can play an important role in the foreign relations law area, many of the *Restatement (Third)*'s provisions, like those in the *Restatement (Fourth)*, emphasized political branch control rather than judicial primacy. The *Restatement (Third)*, for example, endorsed judicial

[37] For legislation that was proposed but not adopted, see the Consular Notification Compliance Act of 2011, S. 1194 (112th Cong.).

[38] See Miron and Palchetti, *supra* note 1, at 1439.

[39] *Ibid.*, at 1439.

[40] *Cf.* Bradley, 'The Supreme Court as a Filter Between International Law and American Constitutionalism', 104 *California Law Review* (2016) 1567.

[41] See Miron and Palchetti, *supra* note 1, at 1440 (quoting the International Law Association's Study Group on Principles on the Engagement of Domestic Courts with International Law).

deference to the executive branch in treaty interpretation, the unilateral authority of the president to withdraw the United States from treaties and the authority of Congress to override earlier-in-time treaties for purposes of US law.[42] Moreover, in the select instances in which the *Restatement (Third)* did appear to advocate for a broader judicial role, such as with respect to treaty self-execution, its approach never seemed to take hold, either in the courts or with the Senate and the president.

None of this is to suggest, of course, that US foreign relations law cannot be improved or that careful interrogations of the *Restatement (Fourth)* like Miron and Palchetti's are unwelcome. The *Restatement*'s primary contribution to efforts to improve foreign relations law is to restate the existing law clearly and to point out areas of tension or uncertainty. But the *Restatement* also serves an additional function, which is to emphasize the close connections between foreign relations law and international law. Among the most frequently repeated observations in the *Restatement (Fourth)* are that the Supremacy Clause establishes treaties as part of US domestic law, that US rules of foreign relations law do not relieve the United States of its international law obligations and that many questions that relate to US foreign relations are actually to be determined by reference to international law rather than to US law.[43] In this and other respects, the *Restatement (Fourth)* sought to highlight and maintain well-supported bridges to international law.

[42] See, respectively, *Restatement (Third)*, *supra* note 2, § 326, Comments *a–b*, 339, 115.

[43] See, e.g., *Restatement (Fourth)*, *supra* note 1, § 301(1) ('[t]reaties made under the authority of the United States are part of the laws of the United States and are supreme over State and local law'); § 301(3) ('[t]reaties create 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'); § 305(4) ('[t]he extent to which a condition affects the United States' rights or obligations under the treaty is determined by international law'); § 313(2) ('[i]nternational law determines the extent to which acts by the United States to suspend, terminate, or withdraw from a treaty will be effective in altering U.S. obligations under the treaty').