Introduction

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Imagine a claim brought in a U.S. federal court involving the violation of a treaty. The plaintiff asserts that she enjoys rights under a treaty ratified by the United States, that state-level officials have violated those rights and that the court should grant her relief. In the early twenty-first century, the road to litigating such a claim to conclusion will be a rocky one indeed. The court may dismiss the claim because the Senate, as part of its approval package, declared the treaty to be non-self-executing.[1] Even absent such a declaration, the court may on its own inquiry find the treaty to be non-self-executing.[2] Or the court may find that the treaty creates no individual rights.[3] Or it may find that the treaty or legislation implementing the treaty impinges upon exclusive state prerogatives protected by the Tenth Amendment to the Constitution.[4] Or the court may determine that the claim presents a non-justiciable political question.[5] Even if all these procedural hurdles are

[1] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 735, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) ("[T]he United States ratified the Covenant [on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

[2] *See* Medellin v. Texas, 542 U.S. 491, 512–13, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

[3] *Ibid.* at 506 n. 3 ("Even when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts'"); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20 (2006–2007).

[4] *See* Bond v. United States, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014) (employing statutory construction to sidestep a challenge on this basis); Curtis A. Bradley, *Current Developments: Federalism, Treaty Implementation, and Political Process: Bond v. United States*, 108 AM. J. INT'L L. 486 (2014).

[5] *See* Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001) (dismissing claim that NAFTA should have been approved as an Article II treaty because such a claim is

surmounted and the court reaches the merits of the claim, the court may accord special deference to the Executive branch's adverse interpretation of the treaty.[6] Or it may reach essentially the same unfavorable outcome through an inquiry of its own that is based solely on U.S. sources and ignores the views of other states parties to the treaty and the decisions of international tribunals.[7] Finally, the court may find the treaty contravened by a U.S. statute enacted after the treaty was ratified and give preference to the statute.[8]

If the claim fails in court for one or more of these reasons, the plaintiff might instead turn to the Executive branch for assistance. Surely an executive order requiring state officials to implement a federal treaty obligation would prevail over contrary state law. The Supremacy Clause provides that "the Constitution, federal laws made pursuant to it, *and treaties made under its authority*, constitute the supreme law of the land" and that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9] In fact, however, such an executive order would not be effective; if the treaty is non-self-executing, its obligations would not come within the ambit of the Supremacy Clause, so the Executive would have no federal law to enforce against the state.[10] Moreover, if the Senate had approved the treaty as non-self-executing, efforts to enforce the treaty against a state would be deemed an assertion of Executive authority against the will of Congress, a category of Executive action that rarely survives judicial scrutiny.[11]

Many of these grounds for dismissing treaty claims or filtering them through the policy preferences of the Executive branch have deep roots in American

a non-justiciable political question); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999).

6 *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–5, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007).

7 *See, e.g.*, Medellin, 542 U.S. at 508–11 (interpreting meaning of Article 94 of the UN Charter without reference to any non-U.S. sources); Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 470 (2010).

8 *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376, 118 S. Ct. 1352, 140 L. Ed. 2d 765 (1998) (articulating last-in-time rule); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

9 U.S. Const., art. VI, cl. 2 (emphasis added).

10 Medellin, 542 U.S. at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law.")

11 *Ibid.* at 527 (stating that when the President seeks to enforce a non-self-executing treaty unilaterally "he acts in conflict with the implicit understanding of the ratifying Senate").

history. But their number and scope have expanded substantially in recent years. In just the last decade, three major Supreme Court decisions crystallized treaty-claim limitations based on non-self-execution,[12] on the last-in-time rule,[13] and on resistance to treaty interpretations originating from abroad.[14] The result of these and other judicial decisions, taken in combination with congressional and executive actions, appears to be a substantial diminution of treaties as a source of law within the U.S. legal system. As David Sloss has concluded, these doctrines "effectively shield government actors from accountability for treaty violations."[15]

To be sure, the prospects are much less bleak if treaty-based rights are asserted not against state or federal officials but rather against private parties. Some private law treaties – for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[16] – have been fully incorporated into statutory schemes and are regularly invoked with few procedural limitations.[17] The reason for their more favorable reception is likely that private law treaties are much less likely than their public law counterparts to challenge American laws or policies based on non-American norms. Instead, the private law treaties ratified by the U.S. seek to enhance transnational judicial cooperation in cases in which the parties typically are private and the underlying claims are grounded in domestic law.[18] Nonetheless, as the chapters that follow show, the treaty limitations discussed above may well be applied to private law treaties in the future. In addition, the more favorable treatment of private law treaty claims has not been uniform. In the *Schlunk*[19] and *Aerospatiale*[20] cases, for example, the Supreme Court declined to make resort to the Hague Service and Evidence Conventions mandatory, thereby

[12] *Ibid.* at 512–13. [13] Breard, 523 U.S. at 376.
[14] Sanchez-Llamas v. Oregon, 548 U.S. 331, 352–7, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006).
[15] David L. Sloss, *Treaty Enforcement in Domestic Courts: a Comparative Analysis*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, 25 (David L. Sloss, ed. 2009).
[16] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 21 U.S.T. 2519, 9 U.S.C.S. § 201.
[17] The New York Convention is part of the Federal Arbitration Act. *See* 9 U.S.C. §§ 201–208. The Hague Service Convention is incorporated into U.S. procedural law at Fed. R. Civ. P. 4 (f), (h)(2). The Hague Child Abduction Convention is implemented by the International Child Abduction Remedies Act, 102 Stat. 437, 42 U.S.C. § 11601 et seq.
[18] One might argue that the New York Convention is an exception, since the enforcement of a foreign arbitration award is a free-standing claim, separate and apart from the claim pursued in the arbitration itself.
[19] Volkswagen Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988).
[20] Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987).

substantially undercutting the value of these treaties to many foreign litigants in U.S. courts.

The central question to be explored in this volume is whether these limitations have made the U.S. legal system less receptive to the enforcement of treaty claims. Additional questions follow. Do the limitations discussed above represent a break with past practice or continuity with preexisting trends? Do constraints on the implementation of U.S. international obligations reflect views embedded in the Constitution and in the assumptions of the founding era, or are they of a more recent vintage? Are such limitations motivated by an aversion to treaty-based claims, by hostility to the incorporation of international law more generally, by a belief that certain types of treaties (more prevalent in recent decades) threaten the integrity of national values and institutions, or by some other concerns?[21]

The answers to these questions will turn to a large extent on the historical baseline used to measure change in the domestic status of treaties. As Mark Janis and Noam Wiener demonstrate in their historical review in Chapter 1, treaties in American law have been profoundly affected by the political debates and geopolitical challenges of different eras. As those debates evolve and new challenges appear, treaties take on new roles. Measuring evolution from the founding era or from the immediate post–World War II period, for example, would yield very different conclusions about the nature and extent of change.

The present volume is not a general history of treaties in American law and so will not attempt to chart their ebb and flow across all of American legal history. We seek instead to assess treaties' contemporary status within the U.S. legal system. We have therefore chosen a relatively recent baseline – the treaty rules set out in the Restatement (Third) of Foreign Relations Law of the United States, published in 1987.[22] Each of the authors will ask whether developments since 1987 have affirmed the Restatement rules, modified them in some discernible fashion, or abandoned them altogether. We have chosen the Third Restatement as a baseline for four interrelated reasons. First, it is the most recent and most comprehensive codification of rules related to treaties in American law. As Chapter 2 of this volume will discuss, the Restatement took eight years to produce and each of its treaty provisions was subject to detailed

[21] The creation of barriers to incorporating ratified treaties into American law is distinct, of course, from reticence about entering into multilateral instruments in the first place. *See* Jessica T. Matthews, *The Death of Our Treaties*, 63 *N.Y. REV. BKS*, No. 5, March 24, 2016, at 28 (describing U.S. failure to ratify most recent multilateral agreements).

[22] Restatement (Third) of the Foreign Relations Law of the United States, (Am. Law Inst. 1987) [hereinafter Third Restatement].

examination both within the American Law Institute (ALI), its institutional home, and in outside fora such as the Annual Meetings of the American Society of International Law.

Second, as Chapter 2 again demonstrates, the treaty norms of the Third Restatement were almost entirely uncontroversial during their drafting and were received largely without critical rebuke by federal courts or leading scholars. The Restatement rules, in other words, were the subject of little or no criticism that they misrepresented the law of the time. Other parts of the Third Restatement were highly controversial and led to a year-long standoff between the ALI and the State Department, which had strong objections to provisions related to customary international law, expropriation, the extraterritorial application of U.S. law, and the act of state doctrine.[23] But the Restatement's treaty rules faced no such pushback. If the intervening decades demonstrate a departure from the Restatement rules, therefore, one can be reasonably confident that the departure is also from the underlying law that the Restatement codified.

Third, in the period between the Second and Third Restatements (1965 to 1987) the United States began to consider, and in some cases ratify, multilateral agreements that would generate a large body of domestic jurisprudence on treaty issues. In the area of private law, the United States ratified the Hague Service Convention in 1967,[24] the New York Convention in 1970,[25] the Hague Evidence Convention in 1972,[26] and the Hague Convention on the Legalization of Foreign Public Documents in 1981.[27] The Hague Convention on Child Abduction was under consideration while the Third Restatement was being drafted and was ratified the year after its publication.[28] In the area of human rights, the United States was considering the Genocide

[23] *See, e.g.*, Benedict Tai, *A Summary of the Forthcoming Restatement of the Foreign Relations Law of the United States (Revised)*, 24 COLUM. J. TRANSNAT'L L. 677, 680 (1985–1986); John B. Houck, *Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions*, 20 INT'L L. 1361, 1361 (1986); Malcolm R. Wilkey, *Sections of the Revised Restatement Arousing Interest, Comment and Controversy*, 77 AM. SOC. INT'L L. PROC. 77 (1983).

[24] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 103.

[25] New York Convention, *supra* note 16.

[26] Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555.

[27] Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, *opened for signature* Oct. 5, 1961, T.I.A.S. No. 10,072, 527 U.N.T.S. 189.

[28] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 49.

Convention, which it eventually ratified in 1988.[29] The Carter Administration had submitted four major human rights treaties to the Senate in 1978.[30] While these instruments were not acted upon before 1987, their pendency generated discussion in the Third Restatement[31] and all four treaties were ratified soon after the Third Restatement's publication.[32] Perhaps in part as a result of this treaty activity, the period immediately before and after 1987 saw an increase in the attention paid in law school casebooks and treatises to the role of treaties in international civil litigation and in foreign relations law.[33] The Third Restatement thus appeared at a time when American courts were increasingly in need of guidance on the domestic status of treaties. It is noteworthy that the Third Restatement overall was cited 96 times by federal courts in the five years following its publication, as compared to 16 citations to the Second Restatement in the same period following its publication in 1965.[34]

Fourth, in 2012 the American Law Institute began preparations on a Fourth Restatement of Foreign Relations Law,[35] with treaty norms an early part of that effort.[36] The conclusions reached in the chapters of this volume – whether the rules of the Third Restatement remain good law and, if not, how they have

[29] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[30] President's Human Rights Treaty Message to the Senate, 14 WEEKLY COMP. OF PRES. DOC. 395 (Feb. 23, 1978).

[31] *See* THIRD RESTATEMENT, *supra* note 22, Part VII, Introduction, § 701, cmt. e & rptr. n. 7.

[32] The United States ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1988, the International Covenant on Civil and Political Rights in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination in 1994 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1994. University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties – USA, available at http://www1.umn.edu/humanrts/research/ratification-USA.html. *See generally*, Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321 (2010).

[33] *See, e.g.*, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (LOUIS HENKIN, MICHAEL J. GLENNON & WILLIAM D. ROGERS, ED. 1990); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990); GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1989); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1987).

[34] These numbers are based on a Lexis/Nexis search of the Federal Courts Combined Library for the two time periods. The search for citations to the Third Restatement excludes citations to non-final drafts produced prior to May 14, 1987.

[35] *See* Layla Nadya Sadat, *The Proposed Fourth Restatement of the Foreign Relations Law of the United States: Treaties – Some Serious Procedural and Substantive Concerns* (Aug. 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650528.

[36] *See* FOURTH RESTATEMENT OF THE FOREIGN RELATIONS OF THE UNITED STATES (Treaties – Council Draft No. 2) (Dec. 6, 2016).

changed – will, it is hoped, inform the choices to be made by the ALI in crafting the Fourth Restatement. This volume may serve in effect as a scholarly companion to the upcoming debate over treaty rules in the new Restatement and a reference work for courts and others seeking to understand those rules in the context of past practice for the sake of deciding whether ALI's forthcoming work should be followed.

With the 1987 baseline in place, how should one characterize the Third Restatement's approach to treaties? At the risk of oversimplification, one might describe it as seeking accommodation between the external obligations imposed by treaties themselves and the internal demands of a fluid and often rancorous federal system, one in which struggle over foreign relations power occurs both vertically (between the states and the federal government) and horizontally (between the Executive branch, the Congress, and the courts). When doctrines of U.S. law threatened to put the United States in breach of its treaty obligations, the Third Restatement sought wherever possible to shape the former in order to avoid the latter. Thus, while the Third Restatement's Reporters acknowledged that "[i]nternational law and the domestic law of the United States are two different and discrete bodies of law," they cautioned against devaluing international law on that basis. Lawful domestic acts can have internationally unlawful consequences:

> When international law is not given effect in the United States because of constitutional limitations or supervening domestic law, the international obligations of the United States remain and the United States may be in default.[37]

In the case of treaties, even if U.S. law prevailed domestically in conflicts with treaty obligations, "the United States remains bound internationally."[38] Repeating a principle of the international law of state responsibility, the Reporters explained that the United States (or any state) "cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation."[39] In order to minimize U.S. violations of international law, the Third Restatement sought to overcome barriers to incorporation of treaty norms, sometimes in clever and farsighted ways.[40]

This spirit of accommodation appeared in each critical area of treaty law. Finding a treaty non-self-executing might well cut off an important means of

[37] THIRD RESTATEMENT, *supra* note 22, ch. 2, Introductory Note, at 40. [38] *Ibid.*
[39] *Ibid.*, § 115, cmt. b.
[40] *Cf.* Peter J. Spiro, *Sovereigntism's Twilight*, 31 BERKELEY J. INT'L LAW. 307, 307 (2013) (noting the "conventional wisdom of the Third Restatement of Foreign Relations Law. . . that was receptive to the incorporation of international law.").

implementation or enforcement, leading to the international law violations about which the reporters warned. The Restatement fully accepted that if a treaty text clearly indicates that it is non-self-executing or if the Senate upon consent to ratification declares that intention, the courts are bound to give effect to those determinations. But absent such clear evidence, the Restatement articulated a presumption *in favor* of self-execution.[41] The reason again was the danger of non-compliance with international law: "Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing."[42] On the issue of treaty interpretation, the Restatement noted that American courts have been more willing to consult *travaux preparatoires* than the Vienna Convention on the Law of Treaties permits and that this difference in interpretive method could result in U.S. judicial decisions being viewed as breaches of American treaty obligations.[43] On the question of federalism limitations on the treaty power – or on Congressional authority to legislate pursuant to a treaty – the Restatement wholly agreed with Justice Holmes's opinion in *Missouri v. Holland*[44] and found only marginal instances in which exclusive state authority might preclude the federal government from legislating pursuant to a previously ratified treaty.[45] Finally, the likelihood of the United States undertaking an international treaty obligation at all is substantially affected by the domestic approval process deemed to be required – whether by a supermajority vote in the Senate (as provided by Article II of the Constitution), by a majority vote in both Houses of Congress, or by the President's signature alone. Not surprisingly, the Restatement adopted an exceptionally broad range of options, asserting that Article II treaties and congressional-executive agreements are fully interchangeable.[46]

[41] THIRD RESTATEMENT, *supra* note 22, § 111, rptr. n. 5 ("[T]here is a strong presumption that the treaty has been considered self-executing by the political branches and should be considered self-executing by the courts.").

[42] *Ibid.*

[43] *Ibid.*, § 325, cmt. g. The Restatement attempted to downplay this possibility by asserting that the results of the VCLT approach and U.S. treaty interpretation doctrine tend to yield the same result, *ibid.*, though the Restatement did not cite any cases in support of this assertion.

[44] Missouri v. Holland, 252 U.S. 416, 40 S. C. 382, 64 L. Ed. 641 (1920).

[45] THIRD RESTATEMENT, *supra* note 22, § 302. The two instances mentioned were when a treaty is not "validly made" (i.e., a "sham" treaty designed to circumvent otherwise-applicable constitutional provisions) or when a treaty contravenes specific constitutional limitations, specifically those in the Bill of Rights. For a more detailed discussion of § 302, *see* Margaret McGuinness, "Treaties, Federalism, and the Contested Legacy of *Missouri v. Holland*," Chapter 5 of this volume.

[46] THIRD RESTATEMENT, *supra* note 22, § 303, cmt. e.

The chapters that follow will assess how this accommodationist view of treaties has fared since 1987. The first two chapters set the stage for later discussions of specific treaty law issues. In Chapter 1, Mark Janis and Noam Wiener explore the history of treaties in the U.S. legal system since the founding era. Whereas later chapters review the political and judicial histories of particular issues, Janis and Wiener's broad historical overview reveals patterns of treaty embrace and rejection that cut across doctrinal categories. They conclude that for much of U.S. history – and notably with respect to the Bricker Amendment controversy of the 1950s – the domestic politics of race lurked behind many treaty controversies. Chapter 2 reviews the drafting and subsequent reception of treaty provisions in the Third Restatement. As noted above, unlike other provisions of the Restatement that provoked rancorous debate, the treaty sections were almost wholly uncontroversial during the drafting process. In the years following the Restatement's appearance, few courts or scholars of foreign relations law criticized the treaty sections or found them inconsistent with prevailing law.

The volume then moves from these general assessments to a discussion of how six specific areas of U.S. treaty law have fared since the Restatement's publication. Paul Dubinsky examines treaty interpretation in Chapter 3 and concludes that in the past three decades, judicial deference to executive interpretations of treaties has increased, with the result that the U.S. legal system as a whole has become less receptive to foreign views of a treaty's meaning than in the past. Chapter 3's innovative approach to this set of issues is to focus not on categories of agreements or on traditional canons of construction. Rather, Professor Dubinsky examines how models and analogies have guided the American approach to treaty language. Well before the Restatement era, and for much of American history, treaties were analogized to contracts. Courts following this approach would consult a variety of sources in order to reach the overarching goal of determining the treaty parties' mutual intent. By the late nineteenth century, a second model of treaties as analogous to statutes began to emerge. This brought with it a decline in efforts to seek the mutual intent of treaty parties in favor of ascertaining only the views of the United States as expressed during Senate (or, in the case of Congressional-Executive agreements, Congressional) approval of an agreement. The Third Restatement did not choose between these approaches but seemed to embrace both. It also confirmed that both were to be applied with some deference to the views of the Executive branch. As Chapter 3 reveals, in the post-Restatement period, the extent of executive deference has increased substantially, a development accentuated by the appearance of a third model of interpretation – the treaty as delegation. With this model, implementing

legislation is regarded as a delegation of interpretive authority to executive departments and agencies, whose views are entitled not just to "one voice" deference but to *Chevron* deference, at least where a treaty relates to complex regulatory matters.[47]

In Chapter 4, Ingrid Wuerth addresses self-execution, perhaps the most widely debated doctrine concerning treaties' susceptibility to judicial application. The Third Restatement, departing from the Second, articulated a presumption in favor of self-execution, reasoning that it would facilitate treaty compliance. This argument echoed the Reporters' repeated link between domestic treaty application and compliance on the international plane. But as Wuerth details, the presumption did not take hold in the federal courts, and in its pivotal 2008 opinion in *Medellin v. Texas*, the Supreme Court arguably posited a presumption *against* self-execution.[48] *Medellin* also adopted the most far-reaching consequence of characterizing a treaty provision as non-self-executing: rather than merely limiting judicial enforcement of the provision, the Court altogether denied such a provision the status of "domestically enforceable federal law."[49] Moreover, the *Medellin* court appeared to agree with the Third Restatement that the question of whether or not a treaty is self-executing should be determined primarily by reference to the views of the President and the Senate at the time of the treaty's ratification. In his majority opinion, Justice Roberts notably did not consult any foreign or multilateral sources. Given that the treaty provision in question was an article of the United Nations Charter, to say that such sources existed in abundance is a vast understatement.

In Chapter 5, Margaret McGuinness considers issues of federalism. As in other areas of law in which the states and federal government compete for plenary authority, the question of Congress's capacity to legislate pursuant to treaties was thought to be essentially settled for most of the twentieth century. *Missouri v. Holland*, decided in 1920, not only declined to place meaningful limits on the subject matter of treaties, but also validated, as "necessary and

[47] The Supreme Court frequently asserts that the United States must speak with "one voice" to the international community and has used this idea as a basis for deferring to the foreign policy judgments of the Executive branch. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953 (2014). *Chevron* deference involves courts deferring to interpretations of statutes by Executive branch agencies charged with their implementation. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d. 694 (1984).

[48] Medellin, 552 U.S. at 526 (2008) (treaty to be regarded as non-self-executing if it was "ratified without provisions clearly according it domestic effect"); *but see* Carlos Manuel Vazquez, *Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 652 (arguing against reading *Medellin* to say that "a treaty is non-self-executing unless its text clearly specifies that it has the force of domestic law").

[49] Medellin, 552 U.S. at 534.