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What Should the *Restatement (Fourth)* Say About Treaty Interpretation?

*Jean Galbraith**

ABSTRACT

The Restatement (Second) and Restatement (Third) of the Foreign Relations Law took notably different approaches to treaty interpretation, reflecting intervening changes in the legal landscape. This symposium contribution identifies five developments in international and domestic law since the Restatement (Third). It then considers their import for the forthcoming Restatement (Fourth). Most importantly, it argues that the Restatement (Fourth) should fully incorporate two articles on treaty interpretation from the Vienna Convention on the Law of Treaties into its black-letter provisions. Since the time of the Restatement (Third), these articles have become central to international practice on treaty interpretation, and the principles they set forth are broadly consistent with how the U.S. Supreme Court approaches treaty interpretation. This contribution also suggests that the Restatement (Fourth) soften the Restatement (Third)'s provisions on deference to the executive branch in treaty interpretation. Finally, this contribution notes the rising importance in foreign relations law of the interpretation of legislation related to treaty implementation.

* Assistant Professor, University of Pennsylvania Law School. For their helpful comments, I thank the participants at the *BYU Law Review* symposium on Treaty Law and the Restatement. I also thank Zach Smith and other editors of the *BYU Law Review*. A full draft of this Article was written (and made publicly available) before the reporters of the *Restatement (Fourth)* circulated their draft provision on treaty interpretation.

At the end of the drafting of the *Restatement (Third) of the Foreign Relations Law*, one observer joked that the Restatements should be titled like serial westerns—“something like *Restatement*, *Return of the Restatement*, *Son of the Restatement*, and the *Restatement Rides Again*.”¹ As with all good analogies between law and popular culture, this quip is ridiculous and yet somehow right. To be sure, there is little of the lone rider in a Restatement. Instead, each Restatement is the product of a byzantine institutional process involving reporters, counselors, advisers, the ALI Council, and the ALI membership, as the immense number of drafts will attest. But the quip has a ring of truth. There is something undeniably heroic about the Restatements. They tower over most other private contributions to the understanding and the development of law.

With the *Restatement (Fourth) of the Foreign Relations Law* now on horse—though still far from the sunset—comes the scramble to influence its course. Like others, I have a wish list. Mine includes as narrow treatment as possible of some recent Supreme Court decisions relating to treaties and an emphasis on process-based flexibility for the political branches.² For purposes of this symposium, however, I wish to focus on a single issue: the legal principles that should govern the interpretation of treaties by U.S. courts.

Two core questions underlie treaty interpretation by U.S. courts. First, what legal principles govern the interpretation of treaties? Second, to what actors, if any, should deference be given with regard to treaty interpretation? Each of these questions potentially has both international and domestic legal dimensions. The *Restatement (Second)* and *Restatement (Third)* both addressed these questions,

1. *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, 81 AM. SOC'Y INT'L L. PROC. 180, 181 (1987) (remarks of Professor Harold G. Maier). I have reluctantly decided not to adopt this naming convention. Instead, I follow the American Law Institute in referring to the 1965 *Restatement of the Foreign Relations Law* as *Restatement (Second)* and to the 1987 *Restatement of the Foreign Relations Law* as *Restatement (Third)*—a naming schema used despite the fact that there was never a *Restatement (First) of the Foreign Relations Law*.

2. See Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014) (demonstrating that long-standing historical practice supports a congressional power under the Necessary and Proper Clause to implement treaties); Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012) (arguing that under certain conditions the Senate has the constitutional power to advise and consent to treaties before they are finalized).

but, as I detail here, they did so against quite different backdrops than are present today. Since the *Restatement (Third)* was finalized in the mid-1980s, there have been shifts both in international law on treaty interpretation and in U.S. domestic practice regarding treaty interpretation. The *Restatement (Fourth)* should ideally structure its provisions on treaty interpretation not only to reflect these developments, but also to situate them analytically in ways that further the “clarification and simplification of the law and its better adaptation to social needs.”³ I argue here that the most important way to do so would be to incorporate the full text of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) into the black letter of *Restatement (Fourth)*. In addition, I offer some thoughts on how the *Restatement (Fourth)* should approach the issues of deference and of the interpretation of statutes related to the implementation of treaties.

I. HOW THE *RESTATEMENTS (SECOND)* AND *(THIRD)* DEALT WITH TREATY INTERPRETATION

This Part describes the choices about treaty interpretation made in the *Restatement (Second)* and *Restatement (Third)* and sets them in the context of the times in which these Restatements were drafted. Doing so sets the stage for considering the prospects for change and continuity in the future *Restatement (Fourth)*.

A. Restatement (Second)

The original plan of study for the *Restatement (Second)* did not include treaty interpretation among its topics.⁴ It was quickly added, but mainly because of an interest in the domestic legal question of whether U.S. courts owed deference to the views of the executive

3. Certificate of Incorporation of the American Law Institute (Feb. 23, 1923), https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf. Throughout this piece, I focus on U.S. courts as the interpretive actors, but some of the analysis could also apply to executive branch actors engaged in treaty making.

4. Am. Law Inst., *Agenda for Discussion of Possible Work on Project in the Field of Foreign Relations* Law 3-5 (Mar. 1955) (describing four sub-issues for the planned treaty section, none of which was interpretation). All primary sources cited from the drafting of the Restatements, including this document, are available on Hein’s ALI database.

branch.⁵ By contrast, Reporter Adrian Fisher initially considered the international law on treaty interpretation to be a topic on which the Restatement would not add particular value.⁶ As the project developed, however, it came to encompass both international and domestic legal considerations in relation to treaty interpretation.

As to the international legal principles of treaty interpretation, Section 147(1) of the *Restatement (Second)* identified the overall aim to be “ascertain[ing] and giv[ing] effect to the purpose of the international agreement.”⁷ It produced a list of nine factors “to be taken [into] account by way of guidance” in doing so.⁸ The first factor was “the ordinary meaning of the words of the agreement in the context in which they are used,” while the remaining eight factors included the shared negotiating history, subsequent practice, and other textual and background considerations.⁹ Section 147(2) then provided that while the first factor “must always be considered as a factor in the interpretation of [an] agreement,” there was “no established priority as between the [other factors] . . . or as between them and additional factors not listed therein.”¹⁰

The *Restatement (Second)* identified two additional domestic-law factors that U.S. courts interpreting a treaty should use “for the purpose of determining its effect as domestic law.”¹¹ The first was relevant evidence from the U.S. negotiators and from the advice-and-consent process, regardless of whether this material was communicated to other parties to the treaty.¹² The second factor was the giving of “weight”—in fact “great weight”—to an interpretation asserted by the executive branch “in the conduct of [U.S.] foreign

5. Am. Law Inst., *Project for Work in the Foreign Relations Law of the United States* 37–38 (1955).

6. Am. Law Inst., *Transcript of Conference on Possible Project in Foreign Relations Law* 20 (Mar. 31, 1955) (explaining that while some international legal issues, such as reservations, were the “part of the wheel that seems to . . . be squeaking” and thus deserved treatment, treaty interpretation seemed straightforward and its coverage would be “awfully black-letter-ish”).

7. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147(1) (AM. LAW INST. 1965).

8. *Id.*

9. *Id.*

10. *Id.* § 147(2).

11. *Id.* § 151.

12. *Id.* § 151(a) & cmt. b.

relations.”¹³ Commentary in a preliminary draft asked “[h]ow [m]uch [w]eight [d]oes ‘[g]reat [w]eight’ [h]ave?” and observed bluntly that “[t]horough-going realists might say that in actuality the ‘great weight’ rule is merely a symbol of professional courtesy between coordinate branches of government, or that it is a rationalization of conclusions reached on other grounds.”¹⁴ The final commentary was not so explicit, but it did remark that “the relative importance of the weight to be accorded to the views of the executive branch and the factors indicated in § 147 cannot be precisely stated.”¹⁵

Several things are notable about the approach adopted by the *Restatement (Second)*. First, overall there is a strong preference for flexibility over predictability in treaty interpretation. The invocation of nine factors in Section 147 is the most obvious expression of this preference, but it can also be found in the comment suggesting the variable meaning of “great weight.” Second, the only institutional deference identified—the deference due to the positions of the executive branch—is to a domestic actor. The *Restatement (Second)* is mostly silent about the prospect of deference to foreign or international courts. As to foreign courts, the commentary effectively treats their interpretations as an uninteresting species of state practice, viewing their decisions as “no more conclusive internationally than any other unilateral national interpretation such as one by a foreign office or chief of state.”¹⁶ As to international courts, the *Restatement (Second)* notes that their interpretations can bind internationally for a state that has previously consented to their jurisdiction, but does not suggest deference in other circumstances.¹⁷ Third, the *Restatement (Second)* treats evidence of the U.S. intent in forming the treaty and deference to the executive branch’s interpretation as important for U.S. courts engaged in treaty interpretation because of treaties’ status as domestic law. By conceptually separating the treaty’s status as international law from

13. *Id.* §§ 149, 151(b), 152.

14. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 4.08 cmt. f (AM. LAW INST., Preliminary Draft No. 5, 1959).

15. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 cmt. b (AM. LAW INST. 1965).

16. *Id.* § 148 cmt. b.

17. *Id.* § 148(1).

the treaty's status as domestic law, the *Restatement (Second)* thus justifies parochial moves that can further U.S. functional and institutional values. But in the process it creates the odd potential of a treaty provision having one meaning under international law and a different meaning under domestic law. In the commentary, the authors of the *Restatement (Second)* signal consciousness about the awkwardness of their solution by noting that, in practice, courts and agencies try to “avoid differences between the international and the internal legal effects of international agreements.”¹⁸

The *Restatement (Second)* was published in 1965. Just four years later, the Vienna Convention was finalized.¹⁹ During its negotiations, the United States pushed hard for highly flexible clauses on treaty interpretation, but the Vienna Convention ultimately adopted a somewhat more focused approach.²⁰ Article 31(1) of the Vienna Convention provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²¹ Among other additional provisions, it also states that there “shall be taken into account . . . [a]ny subsequent agreement between the parties regarding the interpretation of the treaty [and] [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”²² Article 32 provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning where the interpretation according to Article 31” is ambiguous or manifestly absurd.²³ Taken together, Articles 31 and 32 cover much of the same ground as Section 147 of the *Restatement (Second)*, but they are not as free form. Among other

18. *Id.* § 151 cmt. a.

19. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

20. Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT'L L. 780, 798–820 (2013) (providing a detailed account of the negotiating history of Articles 31 and 32).

21. Vienna Convention on the Law of Treaties, *supra* note 19, at 340.

22. *Id.* Another provision of Article 31 notes that “[a]ny relevant rules of international law applicable in the relations between the parties” should also be considered. *Id.*

23. *Id.*

differences, they place a stronger emphasis on the treaty's text and a lesser weight on the negotiating history.

The United States signed the Vienna Convention in 1970. Because of a disagreement between the president and the Senate about an issue unrelated to Articles 31 and 32, the United States did not ratify the treaty in the years that followed its signature.²⁴ To this day, the treaty remains formally pending in the Senate's advice and consent process.²⁵

B. Restatement (Third)

The authors of the *Restatement (Third)* wrote their sections on treaty interpretation against the backdrop of both the *Restatement (Second)* and the Vienna Convention. One major choice for them, therefore, was what to do when the two differed. Which should they follow?

The first tentative draft forthrightly sided with the Vienna Convention over Section 147 of the *Restatement (Second)* in its proposed black-letter language. These proposed sections tracked Vienna Convention Articles 31 and 32 word-for-word, except for substituting the term "international agreement" for "treaty."²⁶ The draft commentary and reporters' notes stated that the Vienna Convention's provisions were "somewhat different from the approach ordinarily taken by courts in the United States" in that the Vienna Convention placed more emphasis on text, and less on purpose and on the drafting history.²⁷ This draft also concluded that Articles 31 and 32 of the Vienna Convention were too specific to embody customary international law and observed that therefore, since the United States had not ratified the Vienna Convention, these articles "do not strictly govern interpretation by the United States or by courts in the United States."²⁸ Yet the tentative draft

24. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 295–99 (1988) (describing this issue in depth).

25. *Treaties Pending in the Senate*, U.S. DEP'T ST. (Apr. 27, 2015), <http://www.state.gov/s/1/treaty/pending/>.

26. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 329–330 (AM. LAW INST., Tentative Draft No. 1, 1980).

27. *Id.* § 329 cmt. b.

28. *Id.* § 329 cmt. a.

nonetheless decided to throw its lot in with the Vienna Convention in describing the international legal principles, while retaining additional sections on principles relevant for U.S. courts as they interpret treaties as domestic law.²⁹

By contrast, the final draft opted for muddy waters. The black-letter provision on interpretation under international law—Section 325—offered only a partial endorsement of Vienna Convention Article 31. It followed Article 31 in noting that interpretation should be “in good faith in accordance with the ordinary meaning to be given to [an international agreement’s] terms in their context and in the light of its object and purpose.”³⁰ It then had a provision on subsequent agreement and subsequent practice, but this provision differed from Article 31 by indicating that subsequent practice was relevant even if this practice did not establish the agreement of the parties.³¹ The black-letter provision did not include other parts of Article 31 and made no reference to Article 32.

The comments and reporters’ notes revealed that fierce debates lay beneath this black-letter brevity. Like the tentative draft, a comment in the final draft concluded that the Vienna Convention’s specific rules on treaty interpretation did not embody customary international law and therefore did not currently bind U.S. courts.³² The remaining comments and reporters’ notes then emphasized ways in which U.S. practice differed from the Vienna Convention’s approach.³³ These included that U.S. courts placed greater emphasis on the negotiating history, that U.S. courts were more purposive in

29. *See id.* §§ 334–335.

30. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (AM. LAW INST. 1987).

31. *Id.* § 325(2); *see also id.* § 325 cmt. c.

32. *Id.* § 325 cmt. a.

33. The comments also observed that different interpretive approaches might be appropriate for different types of treaties. Articles 31 and 32 do not say anything about this explicitly but commentators have since read them to be compatible with this position. *See, e.g.*, Catherine Brolmann, *Specialized Rules of Treaty Interpretation: International Organizations*, in THE OXFORD GUIDE TO TREATIES 507, 508–09 (Duncan B. Hollis ed., 2012); Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES, *supra*, at 475, 504; Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 105, 122 (Enzo Cannizzaro ed., 2011).

approach, and that overall U.S. courts were “generally more willing than those of other states to look outside the instrument to determine its meaning.”³⁴ In other words, the comments and notes reiterated many of the positions taken by the United States during the negotiation of the Vienna Convention. Taken all together, the end result is one of studied ambiguity: one can find support in Section 325 either for following the Vienna Convention or for continuing the more free-form approach endorsed by the *Restatement (Second)*.³⁵

The *Restatement (Third)* mostly followed the *Restatement (Second)* in concluding that U.S. courts should take into account U.S. negotiating records and materials from the advice-and-consent process and that U.S. courts should give “great weight” to executive branch interpretations.³⁶ But there are some differences between the *Restatement (Second)* and its successor. For example, the obligation to take U.S. materials into special account was moved out of the black-letter provisions, the “great weight” accorded to the president is suggested to be strongest where the president’s interpretation is made in communication with other countries, and the linkage between these interpretive positions is tied not to a treaty’s status as “domestic law” but rather to its status as “law in the United States.”³⁷ But it is hard to tell if these differences were meant to be meaningful substantive changes. The *Restatement (Third)* also followed the *Restatement (Second)* in saying nothing particular about deference to interpretive decisions by foreign courts, save for a line in the reporters’ notes that “the interpretation of the agreement by other nations, or by international tribunals in cases to which the United States is not a party, will be given due weight.”³⁸

34. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. g (AM. LAW INST. 1987); *see also id.* § 325 cmt. e & nn.1 & 4. One can debate how accurately these assertions reflected U.S. case law at the time, but I do not undertake that inquiry here.

35. *Cf.* John Parry, *The Political Theory of Treaties in the Restatements of Foreign Relations Law*, 2015 BYU L. REV. 1581, 1618–19 (2016) (finding continuity between the *Restatement (Second)*’s and the *Restatement (Third)*’s approaches to treaty interpretation).

36. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) & cmt. a (AM. LAW INST. 1987); *see also id.* § 325 reporters’ note 5.

37. *See generally id.* §§ 325–326.

38. *Id.* § 325 reporters’ note 4 (adding that “such ‘foreign’ interpretations ordinarily are not binding on the United States as a matter of international law and are therefore not

II. CHANGES SINCE THE *RESTATEMENT* (*THIRD*)

Both the international and the domestic legal landscapes on treaty interpretation have changed in important ways since the *Restatement (Third)*. This Part briefly describes five changes that I see as important for purposes of evaluating what the *Restatement (Fourth)* should say on treaty interpretation. I focus on describing the changes that have developed rather than on assessing their normative desirability.

First, Articles 31 and 32 of the Vienna Convention are now accepted as customary international law, even as the status of customary international law as part of the law of the United States has become more controversial. As noted, the *Restatement (Third)* did not consider Articles 31 and 32 of the Vienna Convention to embody customary international law. Today, however, there is a strong consensus that Articles 31 and 32 do stand for customary international law on treaty interpretation.³⁹ Indeed, the United States takes this position in litigation before the International Court of Justice.⁴⁰ Accordingly, it seems safe to treat Articles 31 and 32 as applicable to the United States as a matter of customary international law.

Yet in the years since the *Restatement (Third)*, the status of customary international law as federal law in the United States has become more controversial. Scholars have taken a range of positions on the issue and, at present, there is no clear consensus.⁴¹

binding on United States courts”). The notes further observed that “The United States and its courts and agencies, however, are bound by an interpretation of an agreement of the United States by an international body authorized by the agreement to interpret it.” *Id.*

39. For discussion of this issue, see RICHARD K. GARDINER, *TREATY INTERPRETATION* 12–19 (2008). See also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 445–48 (2004) (collecting sources with a special emphasis on U.S. courts).

40. Counter-Memorial of the United States of America, Avena and Other Mexican Nationals (Mex. v. U.S.), 67–68 & n.142 (Nov. 3, 2003), <http://www.icj-cij.org/docket/files/128/10837.pdf> (describing Article 31 as “an article reflecting customary international law” and observing of Article 32 that “[t]his provision of the [Vienna Convention] likewise reflects customary international law”).

41. Some of the many articles in this debate include 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); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L.

Fortunately, this overall lack of clarity is mitigated on the particular issue of treaty interpretation. Regardless of the extent to which customary international law is part of federal law, there are good reasons for federal courts to draw on shared international principles in treaty interpretation. As the Supreme Court observed in a recent case, “[i]t is our responsibility to read the treaty in a manner consistent with the shared expectations of the contracting parties.”⁴² Using the accepted international rules on treaty interpretation would further the dispatch of this responsibility. In addition, given the executive branch’s acceptance of Vienna Convention provisions like Articles 31 and 32 as customary international law, “[p]erhaps not surprisingly, therefore, courts sometimes invoke the [customary international law] of [treaties] as embodied in the Vienna Convention.”⁴³

Second, Articles 31 and 32 of the Vienna Convention have proved more malleable in international legal practice than their language might suggest. The final draft of the *Restatement (Third)* was published in 1987, eighteen years after the drafting of the Vienna Convention and only seven years after it entered into force. Since that time, Articles 31 and 32 have mellowed with age. As Richard Gardiner has put it, practice “reveal[s] a quite loose structure for developing interpretations, rather than a straightjacket or formulaic set of requirements.”⁴⁴ This flexibility is also emphasized in the work of international bodies and individual scholars. As one example, the International Law Commission’s current project on Treaties Over Time defines subsequent practice as meaningful under the Vienna

REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824 (1998); David H. Moore, *An Emerging Uniformity for International Law*, 75 *GEO. WASH. L. REV.* 1 (2006); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 *HARV. L. REV.* 869 (2007); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *COLUM. L. REV.* 1 (2009); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 *NOTRE DAME L. REV.* 1495 (2011).

42. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014) (emphasis, citation, and internal quotation marks omitted).

43. CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 160 (2013) (footnote and citation omitted).

44. Gardiner, *supra* note 33, at 492.

Convention's rules on interpretation even when this practice falls short of clear agreement.⁴⁵ As another example, Julian Mortenson has argued that the Vienna Convention is in fact fairly generous in the extent to which it allows the drafting history to be used.⁴⁶ The authors of the *Restatement*, however, read the Vienna Convention narrowly on each of these issues and accordingly resisted its authority.⁴⁷ Now that there is more support for reading Articles 31 and 32 broadly, concerns about their constraints should be reduced.

Third, U.S. courts now approach treaty interpretation in ways that seem compatible with Articles 31 and 32. The last thirty years have also brought developments in treaty interpretation in U.S. courts. For better or worse, there has been a turn towards textualism in U.S. statutory interpretation, eroding what the reporters of the *Restatement (Third)* viewed as "the strong tendency in United States case law to reject literal-minded interpretation of statutes."⁴⁸ This same turn has manifested itself in treaty interpretation. A 1988 Supreme Court decision explained that "[w]hen interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used."⁴⁹ The Court immediately qualified this

45. The International Law Commission's current draft conclusions do this in two ways. First, they do so in relation to Article 31(3), which speaks of "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, *supra* note 19, at 340. The draft conclusions make clear that such agreement can be satisfied by active engagement by a varying number of parties combined with "[s]ilence on the part of one or more parties . . . when the circumstances call for some reaction." Int'l Law Comm'n, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, U.N. Doc. A/CN.4/L.833, at Draft Conclusion 9 (2014), <http://legal.un.org/docs/?symbol=A/CN.4/L.833>. Second, the draft conclusions find that subsequent practice by a single party is a supplementary means of interpretation for purposes of Article 32. Int'l Law Comm'n, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, U.N. Doc. A/CN.4/L.813, at Draft Conclusion 1(4) (2013), <http://legal.un.org/docs/?symbol=A/CN.4/L.813> ("Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32."); *id.* at Draft Conclusion 4(3) (observing that "[o]ther subsequent practice" can be the conduct of "one or more parties" to the treaty).

46. *See generally* Mortenson, *supra* note 20.

47. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmts. c, e, g, & reporters' note 4.

48. *Id.* § 325 reporters' note 4.

49. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (internal quotation marks omitted); *see also* E. Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991) (using this same language).

remark, however, by noting that “[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages” and “[t]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”⁵⁰ More recently, in *Abbott v. Abbott*, the Supreme Court simply stated that “[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text.”⁵¹ It is hard to tell how much this proclaimed emphasis on text affects the actual interpretive process engaged in by the Court. *Abbott* itself drew upon many interpretive principles besides text, including subsequent practice, evidence from the negotiations, and the “objects and purposes” of the treaty.⁵² And another more recent case, *Bond v. United States*, downplayed text in favor of the perceived purpose of the treaty at issue.⁵³

The overall picture is essentially one of convergence between Articles 31 and 32 as interpreted over time and the Supreme Court’s approach to treaty interpretation. Both emphasize text but make room for many other interpretive principles as well. As one scholar puts it, “at one time or another the Court has used every single interpretive tool reflected in the Vienna Rules” and indeed “consistently relies on the same interpretive tools.”⁵⁴ This similarity is likely one rooted in the common imperatives of engaging in

50. *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 700 (internal quotation marks omitted).

51. 560 U.S. 1, 9 (2010) (internal quotation marks omitted); *see also* *Medellín v. Texas*, 552 U.S. 491, 506–07 (2008) (using this same language but also noting that “we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the post-ratification understanding of signatory nations”) (internal quotation marks omitted).

52. 560 U.S. at 18–20 (not stating, however, how much weight it was giving the evidence from the negotiating history, perhaps because of doubts about how objectively this evidence reflected the negotiating history); *see also infra* note 63 and accompanying text (noting *Abbott*’s use of deference to the executive branch).

53. 134 S. Ct. 2077, 2087 (2014) (discussing the interpretation of the treaty in the course of interpreting its implementing legislation, stating that despite “its broadly worded definitions, we have doubts that a treaty about chemical weapons has anything to do with” an individual assault that used chemicals and adding that there “is no reason to think the sovereign nations that ratified the Convention were interested in anything like” such individual assaults).

54. Roger P. Alford, *Bond and the Vienna Rules*, 90 NOTRE DAME L. REV. 1561, 1561 (2015); *see also id.* at 1566–70.

interpretation rather than in direct causal ties. The Supreme Court has paid little formal attention to Articles 31 and 32—or, for that matter, to either *Restatement* with regard to treaty interpretation. To date, no Supreme Court majority opinion has cited the Vienna Convention Articles 31 or 32, and only two dissenting opinions have done so.⁵⁵ One Supreme Court majority opinion does cite Section 325 of the *Restatement (Third)* for the proposition that “[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”⁵⁶ The Court does not mention that this language is modeled off Article 31, but the use of this language demonstrates that the Court is indeed comfortable with the rule articulated in Article 31(1) of the Vienna Convention. This is consistent with the broader point that while the Supreme Court shows no specific attachment to the Vienna Convention’s provisions on treaty interpretation, it also shows no particular hostility toward them. Instead, the Court mostly just quotes its own precedent on the standards of interpretation which, as mentioned, seems within the big tent of Articles 31 and 32.

Although the general principles of treaty interpretation have converged, there remains the issue of how U.S. courts should deal with what the *Restatement (Second)* identified as domestic-law factors: first, deference to the executive branch and second, the

55. *Abbott*, 560 U.S. at 40 n.11 (2010) (Stevens, Thomas & Breyer, JJ., dissenting) (citing Article 32 of the Vienna Convention in arguing that the focus should have been on the plain language); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191, 194 (1993) (Blackmun, J., dissenting) (citing Articles 31 and 32 in chiding the majority for over-emphasizing dubious evidence from the negotiating history at the expense of the ordinary meaning of the text). Some lower court opinions do cite to Articles 31 and 32 of the Vienna Convention. See Criddle, *supra* note 39, at 447 n.72 (giving examples).

56. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006). In addition, one majority opinion of the Court has cited to Section 147 of the *Restatement (Second)*. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984) (citing in passing to the *Restatement (Second)*’s inclusion of subsequent practice as a factor in treaty interpretation). As best I can tell, Restatement provisions on treaty interpretations have been cited in only one other case—in a concurring opinion by Justice Scalia. In this opinion, he attacks the position taken in both the *Restatement (Second)* and the *Restatement (Third)* that U.S. courts can draw on materials from the Senate advice and consent process in interpreting treaties, at least where the text appears plain. *United States v. Stuart*, 489 U.S. 353, 371–76 (1989) (Scalia, J., concurring) (stating that this approach “commits the United States to a form of interpretation plainly out of step with international practice”).

added importance of U.S. intent in forming the treaty as shown by U.S. negotiating documents and evidence from the advice-and-consent process. I address the first point as a separate issue below.⁵⁷ As for the second point, my impression is that this issue has not proved particularly important in practice, at least outside the context of treaty self-execution, which I discuss as a separate issue below.⁵⁸ This may be because in practice evidence specific to internal U.S. processes may rarely end up shedding light on contested issues of treaty interpretation before U.S. courts. In *United States v. Stuart*, for example, the Court did discuss this evidence but only for the purpose of observing that it shed no light on the specific issue in the case.⁵⁹ The importance of this issue may be further diminished because, as discussed below,⁶⁰ the domestic law that courts are directly applying is often treaty-implementing legislation rather than treaties.

Fourth, the picture with respect to deference reflects some modest changes since the Restatement (Third). Current doctrine with respect to deference to the executive branch is hard to characterize with confidence. In an important survey of the issue, Robert Chesney suggests that “the high-water mark for the deference doctrine in its formal aspect” came with the Supreme Court’s 1982 decision in *Sumitomo Shoji America, Inc v. Avagliano*⁶¹—a few years before the *Restatement (Third)* was completed. Yet the Supreme Court and lower courts do frequently continue to invoke the principle of deference and, when they do so, they usually interpret the treaty in line with the executive branch’s position (although it is hard to know how causal the executive branch position is to the outcome).⁶² In *Abbott v. Abbott*, for example, the Court invoked the “great weight” doctrine over the dissenting view of Justices Stevens, Thomas, and

57. See *infra* Section III.B.

58. See *infra* Section III.C.

59. 489 U.S. at 366–67. As noted *supra* note 56, Justice Scalia objected to this interpretive consideration.

60. See *infra* Section III.C.

61. Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1749 (2007).

62. See *id.* at 1754–58 (reviewing published federal court decisions from 1984 to 2007 that invoke the concept of deference and finding that the executive branch position usually prevails in these cases, but noting that he only reviewed cases “in which the courts engaged, more or less directly, the deference doctrine”).

Breyer that the doctrine was inappropriate where the executive branch had “no unique vantage” on the issue.⁶³ But in *Hamdan v. Rumsfeld* the Supreme Court declined to even mention the “great weight” standard as it ruled against the executive branch on a point of treaty interpretation, even as Justice Thomas chided it in a dissent joined by Justice Scalia for not “acknowledging its duty to defer to the President.”⁶⁴ More recently, in *BG Group PLC v. Republic of Argentina*, the Court simply said that “we respect the Government’s views about the proper interpretation of treaties” and then disregarded those views.⁶⁵ In short, although the “great weight” standard continues to be frequently invoked, one cannot confidently predict that a court will in fact give great weight to the views of the executive branch on treaty interpretation.⁶⁶

Besides deference to the executive branch, the Supreme Court sometimes notes deference to treaty interpretations by foreign courts. As mentioned earlier, both the *Restatement (Second)* and the *Restatement (Third)* appear to view foreign court decisions as relevant only as state subsequent practice (unless they are directly binding decisions by international tribunals). The Supreme Court has indeed embraced foreign court decisions as evidence of state practice. In *Abbott v. Abbott*, the Court observed that in “interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight”⁶⁷ and then went on at some length to discuss court decisions in other jurisdictions.⁶⁸ Something notable about *Abbott*—and about other cases in which the Court has looked to the practice of other states—is how much the Court focuses on the decisions of individual foreign *courts* as distinct from statements

63. 560 U.S. 1, 15 (2010); *see also id.* at 41–43 (Stevens, Thomas & Breyer, JJ., dissenting).

64. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 619–32 (2006); *see also id.* at 718–19 (Thomas, J., dissenting).

65. 134 S. Ct. 1198, 1209 (2014).

66. Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 BYU L. REV. 1467, 1471–83 (2016) (discussing the deference trends of the Supreme Court in more detail).

67. *Abbott*, 560 U.S. at 16 (internal quotation marks omitted) (using this broad language even though, in addition, the accompanying statute emphasized the importance of uniformity in interpretation).

68. *Id.* at 16–18.

or positions taken by individual legislative or executive branches.⁶⁹ At the least, foreign court decisions appear to be the favored markers of state practice for the Supreme Court; at the most, one could say that there seems to be a level of deference that at least sometimes transcends the category of state practice. In addition, the Supreme Court has expressed a willingness, albeit a distinctly lukewarm one, to give “respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such.”⁷⁰ Taken all together, the Court seems to place special emphasis on the appropriateness of looking to foreign court decisions in treaty interpretation.

Finally, U.S. practice on treaty implementation has developed in ways that are relevant to treaty interpretation. Since the time of the *Restatement (Third)*, issues involving treaty implementation in the United States have received considerable attention. Two issues in particular relate to treaty interpretation.

One issue has to do with whether or not a treaty is self-executing. According to *Medellín v. Texas*, whether a treaty is self-executing in the United States is primarily a matter of treaty interpretation.⁷¹ Yet there is an important disconnect between this

69. *Id.*; *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014) (noting foreign court decisions in interpreting the Hague Convention on Civil Aspects of Child Abduction, although without expressly discussing the level of weight given to them); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 173–76 & n.16 (1999) (heavily emphasizing a decision from the highest court of England and Wales under the Warsaw Convention and noting other foreign cases as well); *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–51 (1991) (giving weight to an Israeli Supreme Court decision regarding the Warsaw Convention but concluding that this weight was outweighed by factors favoring a different interpretation); *see also Lozano*, 134 S. Ct. at 1238–39 (Alito, J., concurring) (stating that not only is the executive branch’s position “entitled to great weight,” but “[s]o, too, is the interpretation of the courts of our sister signatories” and discussing several foreign decisions); *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (arguing that the Court should have interpreted the Warsaw Convention differently in light of appellate court decisions in two of the many signatories to the Warsaw Convention).

70. *Breard v. Green*, 523 U.S. 371, 375 (1998) (per curiam). *Compare* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 334 (2006) (reiterating this standard but noting that it “cannot overcome the plain import” of the treaty provision at issue), *with id.* at 382–90 (Breyer, J., dissenting) (arguing that the majority was far too stingy in how it applied “respectful consideration”).

71. 552 U.S. 491, 506–07 (2008). *But see id.* at 541 (Breyer, J., dissenting) (arguing that prior Supreme Court precedent on self-execution is more important than a treaty’s particular text on this issue).

matter of treaty interpretation and most matters of treaty interpretation. Unlike typical treaty interpretation, the question of self-execution or non-self-execution is ultimately a matter only of U.S. domestic law, not also of international law.⁷² Although *Medellín* describes principles of treaty interpretation using language from prior cases engaged in typical treaty interpretation,⁷³ the Court approaches the issue of whether the relevant article of the U.N. Charter is self-executing in ways that show the distinctness of this issue. Most notably, it emphasizes background principles of foreign relations law and how, in its view, these would have affected the way the Senate perceived the treaty in giving its advice and consent.⁷⁴ In practice then, as well as conceptually, the issue of self-execution is not on all fours with typical treaty interpretation.

The other issue has to do with the increased prominence of statutes related to the implementation of treaties. John Coyle has coined the phrase “incorporative statutes” to describe statutes that implement non-self-executing treaties, facilitate the implementation of self-executing treaties, or approve and implement congressional-executive agreements.⁷⁵ These kinds of statutes have long existed,⁷⁶ but in recent years they have increasingly become the focus of specific consideration by the Supreme Court.⁷⁷ In the last few years, for example, the Court decided *Abbott v. Abbott*⁷⁸ and *Lozano v. Montoya Alvarez*,⁷⁹ interpreting the Hague Convention on Civil Aspects of Child Abduction in conjunction with its facilitating

72. See David Sloss, *Taming Madison's Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. REV. 1691, 1708 (2016) (discussing *Medellín* and the one-step versus the two-step analysis, both of which contain one step that is exclusively a domestic-law analysis).

73. 552 U.S. at 506–07. In addition, *Medellín* discusses the practices of other nations, although it does not explain precisely why this practice sheds light on what is ultimately an issue of U.S. domestic law.

74. *E.g., id.* at 508, 510–11; *see also id.* at 515–16.

75. John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 666–68 (2010) (discussing these three types of statutes).

76. See Galbraith, *supra* note 2, at 89–104 (noting some early examples).

77. See Coyle, *supra* note 75, at 681–85, 692–94 (discussing the Supreme Court's treatment of incorporative statutes in some cases in the 1980s and 1990s).

78. 560 U.S. 1 (2010).

79. 134 S. Ct. 1224 (2014).

legislation,⁸⁰ and *Bond v. United States*,⁸¹ interpreting the legislation implementing the Chemical Weapons Convention. In these cases, the Court offers some signals on the interpretation of incorporative statutes, although these signals do not all line up perfectly with each other.

Consistent with earlier Supreme Court practice,⁸² *Abbott*, *Lozano*, and *Bond* all suggest that the meaning of the underlying treaties is important for the interpretation of the incorporative statutes. For *Abbott* and *Lozano*, this follows obviously from the text of the facilitating statute.⁸³ *Bond* is more equivocal on this issue, and at one point the Court says, “[W]e have no need to interpret the scope of the Convention in this case.”⁸⁴ Yet actions speak louder than words, for the Court spends a great deal of effort in describing and interpreting the Chemical Weapons Convention itself.⁸⁵ As the Court puts it, the legislation “exists to implement the Convention, [and] so we begin with that international agreement.”⁸⁶ In all three decisions, therefore, the interpretation of the underlying treaty is important.⁸⁷

80. In addition, the Court decided *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), but that case is less significant than the other two with regard to treaty interpretation. There are differences between *Abbott* and *Lozano* in how they understand the relationship between the treaty and the legislation. In *Abbott*, the Court seems to treat the treaty as operative through the legislation but basically embodied in it, while in *Lozano* the Court takes care to indicate that the legislation expressly states that it is “in addition to and not in lieu of the provisions of the Convention.” 134 S. Ct. at 1233. These differences are perhaps due to the Court’s heightened sensitivities to these issues in deciding *Lozano* while *Bond* was pending.

81. 134 S. Ct. 2077 (2014).

82. Coyle, *supra* note 75, at 681–85.

83. See *Lozano*, 134 S. Ct. at 1229 (noting that the legislation “instructs courts to decide the case in accordance with the Convention”) (citation and internal quotation marks omitted).

84. 134 S. Ct. at 2088.

85. See *id.* at 2083–85, 2087–88, 2093. The Court not only interprets the Convention as likely not covering the use of chemicals in the individual assault at issue, *id.* at 2087, but also interprets the Convention to allow implementation to be done through state rather than federal legislation. *Id.* at 2087, 2093.

86. *Id.* at 2087. For a discussion of comparative practice in the United Kingdom on the interpretation of treaty-implementing statutes, see Michael Waibel, *Principles of Treaty Interpretation: Developed for and Applied by National Courts?* 13–14 (Univ. of Cambridge Faculty of Law, Legal Studies Research Paper Series, Paper No. 16/2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595681.

87. It would further seem logical for the Court to interpret these underlying treaties in line with its general approach to treaty interpretation. In fact, there is considerable variation between *Abbott*, *Lozano*, and *Bond* in how they approach treaty interpretation and principles of deference. Regarding deference to the executive branch, for example, *Abbott* uses the “great

These decisions differ, however, in how they reconcile tensions between the underlying treaties and principles of U.S. domestic law. *Abbott* does not seem to implicate such tensions, but both *Lozano* and *Bond* do. In *Lozano*, the Court considered whether equitable tolling applied to the treaty and its facilitating legislation where (1) the United States has a presumption in statutory interpretation in favor of equitable tolling of a statute of limitations but (2) other parties to the treaty lack a similar presumption.⁸⁸ The Court emphasized that “[e]ven if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to an agreement among sovereign powers.”⁸⁹ The Court accordingly interpreted the treaty not to require equitable tolling. It then went on to effectively hold that the facilitating legislation did not require tolling either.⁹⁰ In *Bond*, by contrast, the Court held that “in this curious case” it was appropriate to apply a federalism canon to the interpretation of the implementing statute—even though, depending on the scope of the treaty, this might make the implementing legislation cover less conduct than was covered by the parallel language in the treaty.⁹¹ Notably, the Court made this novel move

weight” standard while *Lozano* and *Bond* say nothing about deference (and differ in their conclusions from the executive branch). Nonetheless, it seems likely that these differences are unrelated to the role played by the incorporative statutes. To the extent that the Court does give “great weight” to the executive branch on the interpretation of the treaty, the principle that the interpretation of the treaty is relevant for the interpretation of the incorporative statute will make the executive branch’s position of significance to the interpretation of the incorporative statute as well.

88. See 134 S. Ct. at 1232–33.

89. *Id.* at 1233.

90. See *id.* The Court framed this discussion in terms of the facilitating statute not “altering our understanding of the treaty itself.” *Id.* For there to be no equitable tolling, however, the facilitating statute would also need to not provide for it implicitly, despite the background presumption in American law that equitable tolling is available. The Court thus effectively concluded that the facilitating statute did not impliedly allow for tolling. See *id.* (noting that this statute “does not address the availability of equitable tolling”).

91. See 134 S. Ct. at 2090. For a critique of this approach, see Edward T. Swaine, *Bond’s Breaches*, 90 NOTRE DAME L. REV. 1517, 1518 (2015) (noting that this approach raised the “risk of jeopardizing U.S. compliance with its international obligations, contrary to constitutional principles designed to reduce that risk”). David Moore, by contrast, suggests that U.S. federalism principles should be used even in interpreting treaties themselves. David H. Moore, *Treaties and the Presumption Against Preemption*, 2015 BYU L. REV. 1555, 1578–79 (2016).

against the backdrop conclusions that the treaty was “agnostic” about whether enforcement was done at the federal or state level and additionally that all U.S. states had laws to cover the conduct at issue.⁹² Between them, *Lozano* and *Bond* demonstrate how tensions can be found even between cases decided in the same term by the Court.

III. THE *RESTATEMENT (FOURTH)* AND TREATY INTERPRETATION

Now the Restatement rides again—but on different terrain from its predecessors. So what should the *Restatement (Fourth)* do about treaty interpretation? The most important change I recommend is heavier reliance on Articles 31 and 32. In addition, ideally the *Restatement (Fourth)* should make some tweaks to the *Restatement (Third)*'s approach to deference and address the interpretation of implementing legislation.⁹³

A. *Articles 31 and 32 as Black Letter*

In the last thirty years, Articles 31 and 32 have become a cornerstone of international treaty practice and have been read broadly enough to leave treaty interpreters with considerable discretion. Instead of tracking the *Restatement (Third)*'s half-hearted endorsement, the *Restatement (Fourth)* should fully embrace these articles. The full text of Articles 31 and 32 should appear in the black letter of whatever provision replaces Section 325 of the *Restatement (Third)*. Indeed, if it is compatible with the overall editorial choices, the black letter should ideally not only repeat the text of Articles 31 and 32, but explicitly name these articles as the legal framework governing treaty interpretation.

92. *Bond*, 134 S. Ct. at 2087, 2092.

93. This Article was drafted and circulated before the reporters of the *Restatement (Fourth)* circulated their draft provision on treaty interpretation. Although I thus will not comment in detail on this provision, I think it is an excellent one. Broadly speaking, the draft provision takes the approach that I advocate here with respect to Articles 31 and 32 of the Vienna Convention. See *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES* §106 (AM. LAW INST., April Discussion Draft 2015) (incorporating almost the entire text of Articles 31 and 32 into the black-letter provision). The draft provision also takes an approach similar to the one that I advocate with respect to deference, providing in the black letter that U.S. courts “will ordinarily give great weight to an interpretation by the executive branch.” *Id.*; see also *infra* Section III.B (advocating the use of “will typically give great weight”).

This approach would have considerable benefits. As discussed earlier, the principles of treaty interpretation applied by the Supreme Court are essentially those of the Vienna Convention, particularly since the Convention is taken to be a “quite loose structure . . . rather than a straightjacket.”⁹⁴ By incorporating Articles 31 and 32, the *Restatement (Fourth)* would accurately set forth what is not only customary international law on treaty interpretation, but also explicitly recognized by the United States to be so.

Incorporating Articles 31 and 32 would also provide a set of principles that are not only clear and simple, but also better than other options. One such other option might be simply to set forth some language about treaty interpretation used by the Supreme Court. But this would immediately raise the question of *which* language, as the Court uses different phrases in different cases without signaling that it has a single, carefully thought-out formula. (Indeed, one phrase on treaty interpretation offered by the Court is already the language of Article 31(1), as set forth in the *Restatement (Third)*).⁹⁵ Rather than privileging the choice of language made in some particular Supreme Court cases over other cases, the *Restatement (Fourth)* would do better to use the internationally accepted rules on treaty interpretation.

Setting forth the *full* text of Articles 31 and 32 is also better than picking and choosing. Regardless of whether it was a good choice at the time for the *Restatement (Third)* to set forth only part of Article 31, rewrite another part of Article 31, and take up all other issues in an ambivalent set of comments and reporters’ notes, it would be a poor one today. International practice has come to read the rules in Articles 31 and 32 broadly enough that there is no particular need to rewrite them for U.S. courts. For example, the International Law Commission’s developing recognition that subsequent practice of a single state can be a supplementary form of treaty interpretation under Article 32 mostly addresses the concern that the authors of the *Restatement (Third)* had with how the Vienna Convention approached subsequent practice.⁹⁶ By giving the rules in full, the *Restatement (Fourth)* would accurately reflect customary international

94. Gardiner, *supra* note 33, at 492.

95. Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006).

96. See *supra* notes 31, 45 and accompanying text.

law and also avoid the difficulties of having to determine and justify which aspects of the rules are most important in practice.

Although Articles 31 and 32 are long, their full inclusion makes particular sense because of how important the issue of treaty interpretation is. Unlike many other issues related to treaties, treaty interpretation comes up in almost every case involving a treaty. Articles 31 and 32 accordingly get used by courts far more than most other provisions of the Convention.⁹⁷ Of course, to say they get used is not to say that they have a powerful effect in channeling actual treaty interpretation. Indeed, the broadening understanding of their meaning may reflect the fact that the Vienna Convention “governs in part by not governing—or, put more precisely, achieves widespread compliance partly by deliberately declining to prioritize effectiveness.”⁹⁸ Yet widespread acceptance of Articles 31 and 32 has the advantage of focusing the attention of interpreters on the act of interpretation rather than on its meta-principles. Their inclusion in the black letter of the *Restatement (Fourth)* would also be a valuable affirmation of the importance that international legal principles should have to U.S. courts in interpreting international law.

My suggestions for the comments and reporters’ notes follow straightforwardly from my earlier analysis. I think these should (a) note that Articles 31 and 32 as interpreted are expansive enough to cover how U.S. courts approach treaty-making, (b) note that Articles 31 and 32 now reflect customary international law, (c) pragmatically recognize that Articles 31 and 32 set forth the appropriate rules of decision for U.S. courts while leaving vague exactly why this is the case (in order to dodge the broader debate of the role of customary international law in U.S. law), (d) briefly acknowledge that U.S. courts can further take into account specific evidence from the U.S. negotiating process or the advice-and-consent process, (e) note that U.S. courts may pay special attention to foreign courts both as sources of subsequent practice and as actors whose views are worthy

97. For example, my search of federal court decisions on Westlaw between 2009 and 2014 revealed that Articles 31 or 32 are cited in at least eight of the twenty-five cases in which at least one judge references the Vienna Convention on the Law of Treaties. At least four of these eight cases cite to Article 32.

98. Jean Galbraith, Book Review, 108 AM. J. INT’L L. 859, 861 (2014) (reviewing THE OXFORD GUIDE TO TREATIES, *supra* note 33).

of respectful consideration, and (f) state that the issue of treaty self-execution is sufficiently distinct from overall treaty interpretation that it is covered elsewhere. A section along these lines would be of great value in clarifying the foreign relations law of treaty interpretation.

B. Difficult Choices on Deference

A much harder question is how the *Restatement (Fourth)* should characterize the issue of deference by U.S. courts to the executive branch. Should it follow *Restatement (Third)*'s approach of stating in the black letter that courts "will give great weight" and then qualifying this through discussion of case law in the reporters' notes? Or should it soften the black letter—for example, "will typically give great weight"—in addition to discussing case law in the reporters' notes?

I think either of these approaches could effectively describe the Supreme Court's existing practice. From a descriptive perspective, the important thing is to communicate that the Court usually (but not always) says that it gives "great weight" to the views of the executive branch and yet sometimes decides cases in ways that seem inconsistent with substantial deference. In that sense, we may not be too far off from the frank observation in the *Restatement (Second)*'s preliminary draft that the "great weight" rule might in actuality be just "a symbol of professional courtesy between coordinate branches of government, or . . . a rationalization of conclusions reached on other grounds."⁹⁹ But this can be expressed either through softening the black letter or through building up the disclaimers that follow later.

Nonetheless, for normative reasons I favor the approach of softening the black letter to something like "will typically give great weight." I think "will give great weight" implies a duty to defer, while "will typically give great weight" implies a discretionary but generally wise exercise of deference. This difference speaks to a fundamental question of control—about whether courts defer to the executive branch out of a duty to show respect for presidential power in foreign affairs or instead out of a strong presumption that the executive branch has particular judgment and expertise in these matters. Where the interpretation of treaties is concerned—an area

99. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 4.08 cmt. f (AM. LAW. INST., Preliminary Draft No. 5, 1959).

where dubious interpretations by the executive branch could leave the United States in violation of legal obligations owed to other nations—I think it is better to characterize deference as a strong presumption rather than a duty.¹⁰⁰

C. The Interpretation of Incorporative Statutes

A final issue is the interpretation of incorporative statutes. Because of the increased attention this issue has gotten in practice, it deserves some treatment in the *Restatement (Fourth)*. It could conceivably be its own section, but because it is a still emerging issue, it seems to me that it would be best treated simply in a comment or in a reporters' note accompanying the main provision on treaty interpretation.

An incorporative statute should be interpreted in light of the underlying treaty (which itself will thus have to be interpreted). That is both evident from Supreme Court case law and intuitively correct. Less clear is how strong this interpretive canon is—and particularly how strong it is when it conflicts with canons of statutory construction in U.S. domestic law. Professor Coyle suggests that “the court should read the incorporative statute to conform to the” treaty as interpreted, “unless there is compelling evidence that Congress intended a different result.”¹⁰¹ This rule strikes me as eminently sensible and consistent with the implicit approach of *Lozano* and some earlier Supreme Court cases. But *Bond* takes a different tack and accepts that U.S. federalism principles could justify a gap between the interpretation of an incorporative statute and its similarly-worded underlying treaty. It remains for future practice to clarify whether *Bond* is a trendsetter or an outlier. Until then, the best thing for the *Restatement (Fourth)* to do might be just to state the obvious and note that courts can take different approaches in interpreting incorporative statutes when there is a tension between the interpretation of the treaty under international law and the usual canons of statutory construction under domestic law.

100. For another discussion of this question, see Cohen, *supra* note 66, at 1487–92.

101. Coyle, *supra* note 75, at 680.

CONCLUSION

Reflecting on the drafting of the *Restatement (Third)*, Associate Reporter Detlav Vagts described how the reporters would first meet to “thrash [a draft] out with a certain amount of blood shed on the floor, usually at the Columbia Law School.”¹⁰² They would then go to the Advisers and have it be “picked over, carefully and in detail,” then take it to the Council and have to “pick ourselves off the floor after that,” and then take it to the ALI membership where “the floor is somewhat of a bottleneck.”¹⁰³

Overall, the Restatement drafting process almost rivals the complexity of multilateral treaty negotiations. And in Articles 31 and 32 of the Vienna Convention, we have already the product of an exhaustive multilateral treaty negotiation—a product, moreover, that has clearly weathered the test of time. Given the broad international acceptance of these articles and their compatibility with the practice of treaty interpretation in U.S. courts, their incorporation into the black letter of the *Restatement (Fourth)* would be wise and might even be unusually easy to do. Although less important, a softening of the deference standard set out in the *Restatement (Third)* and some discussion of incorporative statutes would also be valuable. I hope the process will follow this course.

102. *The Restatement of Foreign Relations Law of the United States, Revised: How Were the Controversies Resolved?*, *supra* note 1, at 183 (remarks of Detlev Vagts).

103. *Id.*