

**THE FUTURE OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES**

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I will discuss the following issues. First, I will start with a snapshot of the relevant beginnings of the American Law Institute's two *Restatements of the Foreign Relations Law of the United States*. Second, I will summarize key developments since publication of *Restatement (Third)* in 1987. Third, I will review the various ways that the ALI might consider an update. Fourth, I will describe the issue presented by the Supreme Court's being an active and controversial decision-maker. Fifth, I will mention the relationship between foreign relations law and the conflict of laws. Lastly, I will venture specific suggestions. I speak only in my individual capacity and not in a representative capacity.

The Restatement describes the foreign relations law of the United States as consisting of "international law as it applies to the United States" and "domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences."

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## **I. Brief History**

In 1955, the ALI began preliminary study of what became, in 1965, a restatement in the ALI's *Restatement (Second)* series. There was no Restatement First of foreign relations law. As the Reporters then stated, this initial Restatement represented "the opinion" of the ALI "as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law."

In 1980, the ALI considered the first *Tentative Draft* of what was then called the "Foreign Relations Law of the United States (Revised)." It eventually became *Restatement (Third)*. The Reporters, led by Chief Reporter Louis Henkin, noted that the law had "undergone dramatic changes . . . ." They stated that the Constitution itself refers to the "law of nations" and that international law "is part of the law of the United States, respected by Presidents and Congresses, and by the states, and given effect by the courts." Director Wechsler said the project was a "revision and expansion" and presented "a much more extensive analysis of the nature of international law and its relationship to the internal law of the United States, including the special role of the federal courts as its expositor." President Ammi Cutter also noted the "extraordinary development in the whole area of international law . . . ."

In 1986, after further consideration, a controversial but important deferral of one year within which to get the views of the government, and review by a special committee, the final draft was approved by the ALI. President Perkins stated that the project "deals with a vitally important and inevitably controversial set of subjects." Bennett Boskey, now our esteemed Treasurer Emeritus, noted "that the manner in which we've gone about this subject is in the

nature of an experiment for the Institute.” Additionally, in the *Conflict of Laws*, “where portions of the Restatement have become seriously out of date but not in a manner to require a redo of the entire Restatement,” we “asked . . . [the Reporter] to hold a watching brief for a couple of years on it and he has come up with certain revisions that may point the way in the future to handling other Restatements that are partly but not hopelessly out of date.”

In 1987, the ALI published *Restatement (Third)*. It was a singular achievement.

## **II. Developments Since 1987**

*Restatement Third* has been cited frequently by courts and commentators.

The ALI, recognizing the increasing global implications of its work, has undertaken additional international projects, for example, in international insolvency law, transnational civil procedure, foreign judgments, international intellectual property, world trade law, and international commercial arbitration. It has worked with International Institute for the Unification of Private Law (UNIDROIT) and with the International Insolvency Institute. It has convened or cosponsored meetings in various world venues to discuss specific projects as well as the possibility of an institute like the ALI in Europe and in Latin America.

Numerous developments have also occurred, not only in familiar areas such as antitrust, securities, and patents, but also in the following areas: human rights and the treatment of aliens; the immunities or lack of immunities of foreign officials; universal jurisdiction and piracy; the Alien Tort Statute; international child abduction, and child support; the “effects” test as a basis for jurisdiction; prescriptive jurisdiction and the reasonableness test for determining the reach and applicability of domestic legislation and regulations (a test that I prefer but note has been controversial from the outset); the adoption by the U.N. General Assembly of the U.N.

Convention on Jurisdictional Immunities of States and Their Property; the state secrets privilege; the political question doctrine; exhaustion of remedies; the law applicable to U.S. victims of international terrorism; exceptions to the Act of State doctrine; the consideration of foreign sources of law in judicial decision-making; transnational libel law; the environment and climate change; world trade and international investment law; intellectual property; the Hague Convention on Choice-of-Courts Agreements and related issues of state law and “cooperative federalism;” the law governing terrorism and detention; censorship of Internet communications; and the development of cooperative relationships as well as occasional hostile confrontations such as the Ecuador-Chevron litigation. Significant debate has also occurred about fundamental principles, including customary international law, the Supremacy Clause, the role of the Supreme Court in interpreting treaties, and the role of state law.

These developments are attended by ongoing globalization; transactions across borders; litigations and arbitrations that involve multiple jurisdictions; advances in technology, including the Internet and social media; the breakdown of the distinction between public and private law; and the emergence of various international tribunals. Our courts are addressing an increasing number and variety of international and foreign relations law cases. In recent years, for example, the U.S. Court of Appeals for the Ninth Circuit has decided key cases involving various issues, including the Alien Tort Statute; the Convention Against Torture; the Foreign Sovereign Immunities Act; the Trafficking Victims Protection Act; extradition; immigration, deportation, and asylum; the foreign affairs doctrine; child abduction and custody; foreign arbitration awards; consular notification; and treaty preemption.

### **III. Possible Forms for an ALI Project**

If the ALI were to undertake a new project, what form might it take?

The ALI is known for its Restatements, which state the law as it is and optimally should be stated, as well as more recently for its Principles of the Law, which state the law as it should develop, and for its statutory projects, which articulate principles and accompanying statutory language for legislatures, and by extension courts, to consider. It is also known for launching the Statement of Essential Human Rights, which contributed to the Universal Declaration of Human Rights. And the Reporters' Study entitled *Enterprise Responsibility for Personal Injury* set the stage for the *Restatement (Third) of Torts*.

The ALI remains open to new approaches to implementing its purposes “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” It could, for example, consider a comprehensive revision, as it did when it first undertook what became *Restatement (Third)*, or selected revisions, as it did with the *Conflict of Laws*. It could consider a simple Statement rather than a Restatement or develop an ongoing web-based project that it could update more frequently than Restatements. Such a dynamic project could mitigate the impact of the “Faustian bargain” that Professor Richard Falk describes as achieving clarity of doctrine “by taking a snapshot at a given point in time, and then freezing perceptions until the next photo opportunity, that is, the next restatement.” It could co-sponsor an updating project or a new project with one or more other institutions such as UNIDROIT, the American Society of International Law (ASIL), or the International Law Association (ILA). It could initiate a project with attendant conferences, as it did with Georgetown Law Center on

what is now known as the Sandra Day O'Connor Project on the State of the Judiciary. I expect that there will be other possibilities.

On the question of whether the ALI should undertake any project, varying views were expressed at an ASIL forum last year. Some point to the many and rapid developments, the unsettled controversies, and the enormous potential scope as grounds for deferring a project. Others point to the need for careful, objective analysis and the strength of the ALI as an institution that can address developments and controversy and offer a reasoned voice.

The history of the first two restatements suggests that developments provided a reason for the ALI to act and that controversy was not a deterrent. Indeed, the Reporters themselves recognized the need for review, revision, and restatement "at least once in every generation."

With regard to the scope issue, the ALI has addressed a similar problem in torts as well as in property with separate restatement projects and attendant coordination.

#### **IV. The Issue of the Supreme Court's Being a Key Decision-Maker**

In restating the law, the ALI usually chooses from among the best judicial decisions, state and federal, as well as from relevant statutes and other sources of the law. In general, the ALI has refrained, wisely in my view, from trying to restate constitutional law. The ultimate audience for constitutional work is the Supreme Court, which could render a restatement provision obsolete.

The foreign relations law of the United States involves significant constitutional matters, including the role of Congress and the references to the "law of nations" and to "commerce with foreign nations" in Article I; the power of the President under Article II; the role of the federal

judiciary under Article III; the Supremacy Clause in Article VI; and the powers reserved to the states by the Tenth Amendment.

The Supreme Court has engaged actively in foreign relations law, for example, in taking a reasonableness approach in *F. Hoffmann-La Roche Ltd v. Empagran* to prescriptive jurisdiction under the antitrust laws. In *Sosa v. Alvarez-Machain*, the Court held that under the Alien Tort Statute claimants can at least bring claims for a modest number of international law violations comparable to offenses against ambassadors and piracy. In *Samantar v. Yousuf*, the Court also held that former foreign government officials are not immune under the Foreign Sovereign Immunities Act from liability in this country to their victims for torture, rape, and murder (although they may enjoy immunity under customary international law and federal common law). The Court was also actively engaged in its foundational rulings in the *Guantanamo* cases.

These rulings are not without controversy. Even more controversial are the rulings in the recent *Medellin v. Texas* and the *Morrison v. National Australia Bank Ltd.*, cases.

In *Medellin*, the Court held that a judgment of the International Court of Justice (ICJ), which restricted the effect of procedural defaults under the Vienna Convention on Consular Relations, did not have binding effect in U.S. courts and was not self-executing despite the Optional Protocol under which the United States had acceded to ICJ jurisdiction and the U.N. Charter under which the United States undertook to comply with ICJ decisions to which it was a party. The Court also held ineffective the President's Memorandum for the Attorney General that the United States would "discharge its international obligations" under the ICJ decision "by having State courts give effect to the decision" and by requiring the state courts to reconsider the

capital sentence of a convicted murder who had been denied his right to confer with Mexican consular officials. The Court viewed congressional action as necessary.

Justice Stevens concurred in the judgment, while acknowledging that “there is a great deal of wisdom in Justice Breyer’s dissent” and stating that “this case presents a closer question than the Court’s opinion allows.” He also said that the Court’s judgment “does not foreclose further appropriate action by the State of Texas.”

Justice Breyer dissented, stating that “I would find the relevant treaty provisions self-executing as applied to the ICJ judgment” and that “the President has correctly determined that Congress need not enact additional legislation.” Justices Ginsburg and Souter joined in dissent.

Shortly after the Supreme Court’s decision, and notwithstanding Justice Stevens’ reference to “appropriate action,” Texas executed Medellin.

The majority decision has provoked extensive criticism. International law scholar Thomas Franck, for example, states that now “there is no real incentive for other states to enter into treaties with us, as they would be exchanging their binding commitment for an essentially worthless promise by Washington to see what it can do to obtain the voluntary compliance of the fifty states of the Union.”

In the *Morrison* case, the Court, in its opinion by Justice Scalia, invoked a general presumption against extraterritoriality in addressing the scope of section 10(b) of the Securities and Exchange Act of 1934 and raised the bar on the burden of proof, holding that in the absence of statutory language of extraterritoriality, the presumption can only be rebutted by proving what Congress actually intended, *i.e.*, that there is an “affirmative indication” in the statute that it “applies extraterritorially.” The Court ruled that “Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a

security listed on an American stock exchange and the purchase or sale of any other security in the United States.”

Imposing on Congress a heavy burden to rebut the presumption may disregard the policy of the statute and the government’s interest in applying it as well as subvert the nation’s interests in protecting its foreign commerce and in advancing “values central to the international state system,” as a recent review of extraterritoriality notes. In some instances, Congress may not wish to confront the extraterritoriality issue or would prefer to leave it to the courts. In many instances, the special interests who can afford lobbyists will have a far better chance to influence Congress than persons without such means such as victims of securities fraud, antitrust violations, or environmental pollution. The Court’s approach in *Morrison* also calls into question the extraterritorial reach of many laws that Congress has already passed, including other provisions of the securities laws. It is contrary to the restrained and enlightened approach of the *Empagran* case and *Restatement (Third)*. Its quest for a bright-line territorial rule is reminiscent of Professor Joseph Beale’s failed quest for territorially-based rules in the *Restatement (First) of Conflict of Laws*; indeed, it exceeds even the ambition of Beale, who at least recognized the “effects” test, as the petitioners urged when they cited Beale in their brief in *Morrison*.

In response, Congress, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, provided explicitly for extraterritorial jurisdiction of certain actions initiated by the Securities Exchange Commission (SEC). It also called for a study by the SEC on extraterritorial private rights of action.

On May 3, 2011, the ALI sponsored a conference on the Extraterritorial Application of the U.S. Securities Laws. At that conference, some commentators noted that the Court’s supposed bright-line rule is ambiguous (*e.g.*, when a security is dually listed on an American

exchange and a foreign exchange) as well as over-inclusive and under-inclusive. Professor Jack Coffee made the related and important suggestion that “the simplest, least controversial change would be to give U.S. citizens or residents the ability to sue U.S. companies (and possibly New York Stock Exchange (NYSE) listed companies) under Rule 10b-5, regardless of the location of the transaction.”

I would be concerned if the ALI attempted to merely restate what international scholars, judges, and lawyers conclude after careful analysis is questionable or bad law, even if it is final because it comes from the Supreme Court. I would prefer the ALI to set forth an independent statement or principle, notwithstanding the possibly contrary example of a particular Supreme Court case. That approach would not involve restating questionable or bad law. It would involve calling it out and appealing, through reason and analysis, to a larger international audience and to a future Supreme Court to take a different view. It would be contributing as Franck states to “a cooperative international legal system.” The ALI’s independent and nongovernmental approach can introduce “an element of stabilization into international disputes,” as Professor Karl Meessen suggests. The ALI should not subordinate its view to what could be a very narrow majority or plurality of justices at a particular time. Moreover, the ALI can continue to respect the Supreme Court as an independent institution that has the final word on the meaning of its own precedents. The ALI can alert the Court and give it an informed opportunity to elect to be in step with persuasive and internationally recognized analysis and scholarship and not isolated from it. It might also help the Court identify unifying themes that transcend at least some of the tensions reflected in specific cases.

Consider the issue percolating in the lower federal courts whether corporations are subject to liability under the Alien Tort Statute. In *Kiobel v. Royal Dutch Petroleum Co.*, a panel

of the Second Circuit recently held that they were not. Judge Pierre Leval issued a separate opinion saying that “the majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.” The panel recently denied rehearing and the full court voted 5-5 to deny a rehearing *en banc*.

Suppose the Supreme Court eventually holds that corporations are not subject to liability under the Alien Tort Statute. Should the ALI “restate” such a decision? Apart from the limitations of the statute, the ALI might consider stating a principle that corporations are *not* immune from liability for harm caused or profits made from slave trading or other abuses of human rights.

The ALI is a prized institution in the life of our country. It is a trusted institution. In large measure, although not everyone will agree, that reputation is due to its careful process, its objectivity, and its willingness to consider and to try to resolve competing viewpoints. I hope, therefore, that the ALI will maintain its independence, traditions, process, and reputation while it continues to tackle the subject of foreign relations law and other subjects.

#### **V. The Possible Relationship between Foreign Relations Law and the Conflict of Laws**

At the decisive 1986 annual meeting, Professor Fritz Juenger, a noted conflict of laws scholar, asked the important question whether the Restatement of Foreign Relations Law introduces “a new set of choice of law conflicts rules in private matters that have nothing to do with the regulatory topics that we’re discussing now — securities, antitrust — so that we have

more stringent principles on choice of law in international cases . . . than we have in interstate relations . . .” Reporter Andreas Lowenfeld responded that “it is certainly true that some of the teachings of private international law, as well as public international law conflicts of law, are part of the intellectual source materials from which we worked. . . . But all the Sections that we use here to illustrate -- taxation, antitrust, securities, and so on -- are really designed to focus on the exercise of prescriptive jurisdiction by the states, which you might say is public law. So it is not a Restatement of international conflicts of law; it’s the next shelf down in the library.”

When the *Restatement (Third)* was published, the Reporters made clear that they were concentrating on public law in addressing prescriptive jurisdiction.

In the separate section on Jurisdiction to Adjudicate, however, they specifically referenced the *Restatement (Second) of Conflict of Laws*. A significant development here is the Internet. So far, the Supreme Court has left the lower courts, federal and state, to wrestle with its pre-Internet cases that are governed by the Due Process Clause and fact-intensive; however, it recently decided two products liability cases that tested and limited jurisdiction over foreign defendants.

Symeon Symeonides, a scholar of the conflict of laws, in a recent email exchange with me, raised the important question whether the ALI, before commencing a Restatement Fourth or similar project on foreign relations law, should first develop a Restatement Third of the Conflict of Laws. He is a powerful advocate for such a Restatement. I responded that from a foreign relations project we might learn ideas that could help enhance a project someday on the conflict of laws. I have been opposed to starting just another Restatement of Conflict of Laws and think that the subject first needs a “systematic overhaul.”

There are useful interrelationships between the fields. International lawyer Peter Trooboff, for example, urges “the teaching of the act of state doctrine from a conflicts as well as a foreign relations law perspective.” Moreover, the line between public law and private law is not as distinct as perhaps it was when the Restatement Third was published. Consider, for example, cross-border issues of family law (*e.g.*, child custody, divorce, adoption, and inheritance), air and water pollution, fraud, copyright infringement, defamation, and whether a foreign country judgment sufficiently meets basic principles of due process to be entitled to recognition and enforcement in the United States. Such issues implicate both public law and private law issues and, potentially, international treaties.

If the ALI commissions early papers and a more comprehensive study, it could begin to consider the possible relationship between developing a modern work on foreign relations law and a modern work on the conflict of laws. Indeed, in historical terms, “domestic conflicts principles were derived from international law, rather than domestic law,” as Professor Joel Paul has noted. Moreover, as Professor Ernest Young has stated, the line between foreign and domestic affairs is “becoming increasingly difficult to draw in a globalized world.”

## **VI. Some Suggestions**

On balance, I think the ALI should undertake a project and that it should not just leave matters as they are. I also, however, do not think that it should begin immediately by selecting reporters for and creating drafts of a Restatement Fourth. The four steps I suggest taking necessarily depend on approval by the ALI’s Director, presently Professor Lance Liebman of the Columbia Law School, its Program Committee, presently chaired by U.S. District Judge Lee Rosenthal, and its Council.

*First*, with such approval, the ALI might commission a few short papers on selected subjects.

*Second*, the ALI might convene an invitational meeting of key scholars, judges, practitioners, government representatives, and selected foreign participants. They could consider the papers and the areas of the law that should get priority attention and that might benefit from ALI treatment; the areas that call for further study; the areas that may already have been attended to in other projects, perhaps judgments and world trade. The participants might also consider whether there should be some subdivision or segmentation of projects so that particular areas are addressed in reasonable scope and time. For example, might there be segmented projects, with two (or possibly more) running concurrently, say on jurisdiction (including civil, criminal, and regulatory jurisdiction; the prescriptive reach of statutes and regulations; and personal jurisdiction over natural persons, legal persons, and governmental entities of all types, including international organizations), immunities, and related subjects (such as, for example, the act of state doctrine, the state secrets privilege, exhaustion of local remedies, and the political question doctrine); on human rights, the Alien Tort Statute, and universal jurisdiction; on the law of the sea; on the foreign relations law of the environment, including water; and possible other new areas? There could be different advisers and reports (though sometimes with some overlap) as well as a coordination effort. Given that *Restatement (Third)* selected certain subjects and excluded others, it could be worthwhile to understand whether areas formerly excluded are potentially ripe for new ALI treatment now.

In addition to such matters, the ALI and its conferees should seek clarity in organizing the project lest it become merely a grab-bag of currently interesting issues that happen to cross national boundaries. Although the ALI may well decide to retain the title “Foreign Relations Law of the United States,” it will need to consider the implications of doing so given the developments in international law and in the conflict of laws discussed above, including the breakdown of the public-private distinction and the foreign-domestic distinction. As Hans Linde pointed out in a thoughtful message to me, “The old title ‘Foreign Relations Law of the United States’ neatly conveyed a central idea—that the work was not a Restatement of the Law of Nations but of the American law as applied to relations with other nations. It serves less well to convey what ‘foreign relations’ fall within its scope once it extends beyond those that constitute the substance and the procedures of dealings between the U.S. Government and their foreign counterparts.”

*Third*, if the papers and discussions are promising, the ALI, continuing its consultative process, might commission a deeper study of various related areas *for* the ALI rather than *by* the ALI, much as it did with its enterprise liability study.

*Fourth*, if the study seemed promising, the ALI could begin a project. It could do so by itself or with one or more co-sponsors. Any major effort would take resources, probably including significant grants from foundations.

A new project, attended by periodic conferences, could be a Principles project, a “Statement” project or, subject to resolution of the Supreme Court issue, still use the term “Restatement,” either in a Fourth version or a “Revised” Third version. Or it could have some other name or format. It would not be necessary to name it at the beginning, keeping in mind

then President Carter's remark in 1980 that we could wait a few years before christening the baby.

In the early 1940s, as peace after World War II became a realistic prospect, two crucial lawyer-initiated events occurred: The Statement of Essential Human Rights, initiated by the ALI, and the Future of International Law Project, initiated by Reginald Heber Smith, with the help of Louis B. Sohn, who later served as one of the Reporters on *Restatement (Third)*. A series of conferences among international law specialists throughout the United States and Canada and their report influenced the San Francisco conference in 1945 to finalize the United Nations Charter.

As an idealistic ten year old, I observed the formation of the United Nations in San Francisco. Gathered on the stage at the Opera House, world leaders worked diligently for an international structure promising a beleaguered world security and peace. As a still idealistic seventy six year old, it would be heartening indeed to observe, and perhaps even participate in, the formation of a project promising a still beleaguered world unifying principles of foreign relations law, starting with our country.

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