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TREATY INTERPRETATION: RULE OF POLITICS OVER RULE OF LAW?

Lisa Baldez*

GREGORY H. FOX, PAUL R. DUBINSKY AND BRAD R. ROTH, EDS., *SUPREME LAW OF THE LAND? DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE UNITED STATES LEGAL SYSTEM* (CAMBRIDGE UNIVERSITY PRESS 2017). PP. 514. HARDCOVER \$91.35. PAPERBACK \$44.99.

DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (OXFORD UNIVERSITY PRESS 2016). PP. 472. HARDCOVER \$95.00.

Americans are currently living in a moment of extreme hostility toward international law. Under the Trump Administration, the United States government has pulled out of major international agreements (including the Joint Comprehensive Plan of Action on Iran's nuclear program and the Paris Agreement on climate change) on the grounds that they were "bad deals" for the American people. The U.S. has withdrawn from the U.N. Human Rights Council and has threatened to withdraw from the World Trade Organization. These moves reflect deep antipathy for international law and a belief that adherence to international agreements compromises American interests. The overarching view is articulated in a draft executive order that, if enacted, would issue a moratorium on multilateral treaties: "[T]hese types of treaties are . . . used to force countries to adhere to often radical domestic agendas that could not, themselves, otherwise be enacted with a country's domestic laws."¹ This understanding of treaties—that they impose policies that a country would not otherwise adopt—has undergirded conservative thinking since the creation of the United Nations. Conservative Republicans have sought to thwart American

* Professor of Government and Latin American, Latino and Caribbean Studies at Dartmouth College. Her most recent book, *Defying Convention: U.S. Resistance to the U.N. Treaty on Women's Rights* (Cambridge University Press, 2014), examines the battles over ratification of the Convention on the Elimination of All Forms of Discrimination Against Women in the United States.

1. Courtenay R. Conrad & Emily Ritter, *A Trump Moratorium on International Treaties Could Roll Back Human Rights – Here at Home*, WASH. POST, https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/01/a-trump-moratorium-on-international-treaties-could-roll-back-human-rights-here-at-home/?utm_term=.0a6427817919 (Mar. 1, 2017).

engagement with treaties, human rights treaties in particular, in many ways since then, from proposing constitutional amendments that would ban ratification of human rights treaties to grassroots mobilization opposing the appointment of Supreme Court justices hostile to international law.² What impact have these efforts had on treaty law in the United States? Are treaties still the “supreme law of the land” as Article VI of the Constitution avers? These two books offer rich responses to these questions.

A key issue at the center of both books is whether or not treaties are presumed to be self-executing, in terms of automatically entering into force upon ratification. They both concur that *contemporary* jurisprudence maintains that self-execution is optional.³ As of today, treaties do not automatically supersede conflicting state law. Their relationship to conflicting state law depends on whether they are self-executing and automatically enter into force, or non-self-executing and thus requiring domestic legislation in order to be implemented.⁴

Fox, Dubinsky and Roth, and the authors of the chapters in the edited volume, accept as given the “optional” aspect of self-execution and focus on the implications of that interpretation. They pose the erosion of treaty supremacy as a question (indicated by the question mark in the title *Supreme Law of the Land?*) and examine the degree to which it can be said to exist across a range of legal issues. For Sloss, on the other hand, current interpretations of treaty doctrine break with historical precedent and rest on incorrect interpretations of the law.⁵ A precipitous change in the interpretation of treaty law occurred in the postwar era and this change represents the death of treaty supremacy (hence the eponymous title, *The Death of Treaty Supremacy*).⁶

As an edited volume, *Supreme Law of the Land?* is organized around a series of questions about treaty supremacy. Each of the authors focus on the significance of the Third Restatement of the Foreign Relations law of the United States for various legal issues.⁷ The editors take the Third Restatement as a baseline and seek to determine “whether developments since 1987 have affirmed the Restatement rules, modified them in some discernible fashion, or abandoned them altogether,”⁸ with the intention of providing “as complete a record as possible of the Third Restatement’s impact or lack thereof” and thus influencing the drafting of the Fourth Restatement, which is now in process.⁹ When

2. Mark Weston Janis & Noam Wiener, *Treaties in U.S. Law from the Founding to the Restatement (Third)*, in *SUPREME LAW OF THE LAND?* 15, 48–50 (Gregory H. Fox et al. eds., 2017).

3. DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY* 5 (2016); David P. Stewart, *Recent Trends in U.S. Treaty Implementation*, in *SUPREME LAW OF THE LAND?*, *supra* note 2, at 228, 229, 234–36.

4. Stewart, *supra* note 3, at 250.

5. SLOSS, *supra* note 3, at 310–18.

6. *Id.* at 5–6.

7. Restatements are a legal resource created by the American Law Institute to be used by lawyers and judges. They summarize existing case law into a comprehensive body of knowledge. As the ALI website affirms, “[t]hey aim at clear formulations of common law and its statutory elements and variations and reflect the law as it presently stands or might appropriately be stated by a court.” *Frequently Asked Questions*, ALI, <https://www.ali.org/publications/frequently-asked-questions/> (last visited Oct. 6, 2018). The First Restatement was completed in 1944, the Second in 1965 and the Third in 1987. The ALI is currently in the process of drafting the Fourth Restatement.

8. Gregory H. Fox, Paul R. Dubinsky & Brad R. Roth, *Introduction*, in *SUPREME LAW OF THE LAND?*, *supra* note 2, at 1, 4.

9. *Id.* at 14.

it comes to treaty law, one of the main guidelines that the Third Restatement affirms is the doctrine of self-execution: treaties are generally considered to automatically determine domestic law, unless stated otherwise.¹⁰ What the authors find across a range of areas is that this basic premise of the Third Restatement has, for the most part, not been heeded by case law.

In general, the authors in this volume have a sanguine view of the Third Restatement. As the editors affirm, “the treaty norms of the Third Restatement were almost entirely uncontroversial during their drafting and were received largely without critical rebuke by federal courts and leading scholars.”¹¹ In Chapter 2, Gregory H. Fox presents empirical evidence that supports this view. Fox finds no evidence of dispute over the question of self-execution during the process of drafting the Restatement, in the court cases that followed the Third Restatement or in scholarly analysis in the ten years following its adoption.¹² Nonetheless, as the chapters of this study unfold, it becomes clear that the Third Restatement has been honored more in the breach when it comes to the question of self-execution.

The book begins with a sweeping historical overview of U.S. treaty law starting with the Founding. In the introductory chapter, Mark Janis and Noam Wiener highlight the impact of political and historical context on the ways that treaties have been understood and implemented over time, starting with the creation of the republic.¹³ They argue that domestic treaty obligations have waxed and waned over time depending on the nature of the relationship between the federal government and the states.¹⁴ They highlight historical continuity in the way that race has often been at the center of disputes over the jurisdiction of treaties.¹⁵ The emphasis on historical continuity and ambivalence about changes in treaty law differs markedly from the perspective offered by Sloss, who interprets contemporary treaty law as the result of a decisive and deeply problematic shift.¹⁶

In Chapter 3, Paul R. Dubinsky describes the history of treaty interpretation in terms of three analogies. The vision of “treaty as contract” viewed treaties in terms of private law; this perspective helped to establish the U.S. as a legitimate and equal partner vis-à-vis foreign powers at the time of the Founding.¹⁷ As the substance of treaties expanded beyond commerce and property rights, a second understanding of “treaty as statute” emerged, which allowed more room for interpretation about what a treaty entailed and viewed treaties more like pieces of legislation.¹⁸ These two views of treaties existed side by side for two hundred years.¹⁹ In the wake of the Third Restatement—as well as subsequent decisions that ignored the Third Restatement—a third model emerged, “treaty

10. Ingrid Wuerth, *Self-Execution*, in SUPREME LAW OF THE LAND?, *supra* note 2, at 148, 148–49.

11. Fox et al., *supra* note 8, at 5.

12. Gregory H. Fox, *Treaties in the Third Restatement*, in SUPREME LAW OF THE LAND?, *supra* note 2, at 55, 91.

13. Janis & Wiener, *supra* note 2, at 15.

14. *Id.* at 54.

15. *Id.* at 46.

16. SLOSS, *supra* note 3, at 1–5.

17. Paul Dubinsky, *Competing Models for Treaty Interpretation*, in SUPREME LAW OF THE LAND?, *supra* note 2, at 92, 99–106.

18. *Id.* at 106–15.

19. *Id.* at 92–96.

as delegation.”²⁰ Dubinsky finds this contemporary mode of thinking problematic in part because Congress rarely actually explicitly delegates the power to interpret treaties to the executive branch and, moreover, this vision of treaties is not grounded in law but in political imperatives.²¹ In the wake of the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, treaty interpretation has been guided by the policy priorities of the executive branch rather than the rule of law—and thus has departed from the Third Restatement.²²

In Chapter 4, Ingrid Wuerth examines the doctrine of self-execution in the wake of the Supreme Court’s decision in *Medellín v. Texas*.²³ She finds that the presumption of non-self-execution that has increasingly guided the interpretation of human rights treaties has bled over to other types of treaties—particularly those regarding “property, contract and commercial rights.”²⁴ Wuerth sees this trend as potentially “undermin[ing] the domestic enforcement of treaties long understood to be directly enforceable in U.S. courts.”²⁵ She holds both *Medellín* and the Third Restatement responsible here, on the grounds that they both offer contradictory guidance on self-execution. The majority opinion in *Medellín* stipulated that decisions made by the International Court of Justice are non-self-executing in the U.S. The U.S. is therefore obliged to comply with international law—but that obligation does not automatically require domestic action. Whether or not it does depends on the “intent of U.S. treaty makers” (166). This raises a series of questions for Wuerth: Is there a presumption of non-self-execution? What aspects of the text of a treaty are dispositive in determining self-execution? How should domestic courts interpret non-self-executing agreements? She concludes that the justices addressed the question of self-execution explicitly but in ways that have sown confusion.

Margaret McGuinness’s chapter traces the history of the relationship between federalism and treaties, highlighting the central tension that exists between the federal government’s ability to make and uphold international agreements, and limits on the ability of the federal government to impose authority over states.²⁶ She argues that federal treaty making power, especially as affirmed in *Missouri v. Holland*, has not substantially violated state autonomy and that concerns about whether the “U.S. [is] a significantly less reliable treaty partner” are unwarranted.²⁷ As McGuinness puts it, *Missouri v. Holland* “is often described as standing for the basic proposition that the national government can do through treaty what it otherwise may not do through national legislation.”²⁸ As McGuinness notes, however, this fear has not been realized; the federal government has not exercised the power to impose international law on states and localities, as critics of

20. *Id.* at 145.

21. *Id.* at 145–47.

22. Dubinsky, *supra* note 17, at 134 (discussing *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

23. 552 U.S. 491 (2008).

24. Wuerth, *supra* note 10, at 177.

25. *Id.* at 149.

26. See Margaret E. McGuinness, *Treaties, Federalism, and the Contested Legacy of Missouri v. Holland*, in *SUPREME LAW OF THE LAND?*, *supra* note 2, at 179.

27. *Id.* at 226.

28. *Id.* at 195.

Missouri vs. Holland feared.²⁹ Instead, the executive branch has acceded to reservations, understandings and declarations (RUDs) that limit the domestic application of international law.³⁰ She is sanguine about new federalist approaches to treaties, arguing that RUDs are a viable way to balance U.S. commitments to international human rights law because they facilitate U.S. ratification while allowing a range of local and state responses to treaty obligations.³¹

Much of the political struggle over treaties rests on an assumption that self-executing treaties differ from non-self-executing ones.³² In Chapter 6, David P. Stewart subjects the concept of self-execution to scrutiny and finds that, since the 1980s, very few treaties of the treaties deemed self-executing have actually been free of implementing legislation. Regardless of the type of treaty, “the majority . . . denominated ‘self-executing’ actually rest upon, and are effectively implemented by, existing legislation.”³³ Moreover, the empirical record does not support the Third Restatement assumption that self-executing treaties are more efficient in terms of clarity, speed or scope of compliance.³⁴ He seeks to identify patterns in the conditions under which implementing legislation is required, and what that legislation entails—but finds no systematic explanations.³⁵ Overlapping domestic law almost always renders treaty implementation a complex process that requires some implementing legislation: “in an increasingly multilateral world, treaty compliance is an ongoing task, not a ‘one and done’ undertaking that ends at ratification.”³⁶ Thus, Stewart’s analysis suggests that “self-execution” is really a misnomer—a legal fiction.³⁷

Much of the attention to treaties focus on Article II treaties, those signed by the president and approved by a Senate supermajority.³⁸ Michael D. Ramsey’s chapter reminds us that there are other kinds of international agreements, with Article II treaties representing “only a tiny fraction” of the international agreements to which the U.S. is a party—just 12% from 1980 to 2000.³⁹ He maintains that “there is no satisfactory explanation for why some agreements are made one way and some in others,” with the exception of international trade deals which almost always take the form of Congressional-Executive agreements.⁴⁰ In terms of sheer numbers, if not importance, most international agreements are made solely by the president. Both Stewart’s and Ramsey’s chapters suggest opportunities for further research. Quantitative analysis would be well suited for testing their conclusions that there are no systematic patterns in whether implementing legislation or why international agreements take the form they do.⁴¹

29. See McGuiness, *supra* note 26, at 195–213.

30. *Id.* at 190.

31. *See id.*

32. *Id.* at 229.

33. *Id.* at 271.

34. Stewart, *supra* note 3, at 233.

35. *Id.* at 234–36.

36. *Id.* at 281.

37. *Id.* at 280.

38. Michael D. Ramsey, *The Treaty and Its Rivals: Making International Agreements in U.S. Law and Practice*, in *SUPREME LAW OF THE LAND?*, *supra* note 2, at 282.

39. *Id.* at 283.

40. *Id.* at 284.

41. *See* Stewart, *supra* note 3; Ramsey, *supra* note 38.

In Chapter 8, Roger P. Alford explores the role of courts in enforcing treaties and discusses four ways in which the power of courts to adjudicate treaties has been constrained.⁴² Pursuant to *Medellín*, there is a presumption that private actors lack legal standing when it comes to international treaties, and thus cannot invoke treaty rights in a court of law.⁴³ The “last-in-time” rule suggests that, in the case of overlapping jurisdiction or conflict between a treaty and a domestic statute, the more recently approved one takes precedence; this rule limits court jurisdiction.⁴⁴ If an issue is deemed a “political question,” then it cannot be subject to interpretation by the court—but the conditions under which this holds are unclear.⁴⁵ Alford finds the criteria that have been applied to designate a question political to be “malleable,” “ambiguous,” “inconsistent,” and “unpredictable.”⁴⁶ Finally, international treaties, and particularly human rights treaties, increasingly rely on RUDs that “preclude the direct application of international law.”⁴⁷ Alford acknowledges the pros and cons of these restrictions. RUDs, for example, are a way of brokering compromise between internationalists and isolationists, allowing the U.S. to comply with human rights standards without “the direct application of international law.”⁴⁸ But ultimately Alford finds these trends troubling in terms of the importance of upholding and hewing to international legal obligations.⁴⁹

Geoffrey S. Corn and Dru Brenner-Beck’s chapter provides a case study of the way treaty interpretation has played out with regard to the law of armed conflict (LOAC).⁵⁰ They illustrate significant moments in LOAC with regard to the role that Congress, the executive and courts have played in interpreting the Geneva Conventions and the Chemical Warfare Convention in particular.⁵¹ Consistent with other chapters’ emphasis on political considerations, they maintain that “the Senate’s decision to consent to treaty obligations will often fluctuate based on the broader national sense of geostrategic necessity.”⁵² They provide a detailed analysis of historical examples to show that both executive and congressional support are necessary for the ratification of international treaties.⁵³

Corn and Brenner-Beck’s analysis stands out within this volume in its reference to the significance of a denial of cert.⁵⁴ Most of the other chapters focus primarily on cases that were granted cert and are thus potentially biased in terms of case selection.⁵⁵ When he was released from prison after serving a seventeen-year term, Panamanian General

42. See Roger P. Alford, *Judicial Barriers to the Enforcement of Treaties*, in SUPREME LAW OF THE LAND?, *supra* note 2, at 333.

43. *Id.* at 336–37.

44. *Id.* at 339.

45. *Id.* at 343.

46. *Id.* at 346–47.

47. Alford, *supra* note 42, at 354.

48. *Id.*

49. See generally Alford, *supra* note 42.

50. See Geoffrey S. Corn & Dru Brenner-Beck, *Case Study No. 1: Exploring U.S. Treaty Practice Through a Military Lens*, in SUPREME LAW OF THE LAND?, *supra* note 2, at 358.

51. See *id.*

52. *Id.* at 362.

53. *Id.* at 363.

54. *Id.* at 383.

55. See generally SUPREME LAW OF THE LAND?.

Manuel Noriega petitioned the Supreme Court to determine whether France's extradition request violated his rights as a prisoner of war under the Third Geneva Convention.⁵⁶ The Supreme Court refused to hear the case—but Justices Scalia and Thomas dissented on the denial of cert on the grounds that hearing the case would resolve lingering questions about self-execution.⁵⁷ Inclusion of cases that were denied cert provides one way to strengthen the validity of claims about the conditions that shape treaty interpretation.

In Chapter 10, Paul Dubinsky provides a second case study that traces the rise of the United States as a global leader in the area of private international law (PIL).⁵⁸ In the postwar era, the U.S. became a major economic power but lacked the legal infrastructure to support globalization.⁵⁹ Starting in the 1960s, the U.S. sought to address this lacuna by joining a large number of private international law treaties in a short period of time.⁶⁰ Engagement with these treaties imposed costs—"real requirements and limitations"—on state courts, yet the predominant focus on interstate trade ensured that these efforts generated "no significant opposition."⁶¹ By the 1980s, the U.S. had become a leader in this arena.⁶² The expansion of issues addressed by PIL in the 1980s raised federalist concerns about state interests and prompted a retraction of American leadership, a trend that Dubinsky finds troubling on the grounds that U.S. participation strengthens the PIL regime overall.⁶³

In the concluding chapter, Gary Born highlights the theme of American ambivalence about treaties.⁶⁴ As Born observes, "the United States appears simultaneously both to value and to devalue treaties."⁶⁵ He maintains that this ambivalence has shown remarkable continuity over time: "misgivings of almost exactly the same sort have been a recurrent feature of U.S. law and politics since the earliest days of the Republic."⁶⁶ The authors in this volume are also ambivalent about contemporary treaty interpretation, with some expressing concern and others more sanguine about the degree to which federalism has reshaped understandings of American treaty obligations.⁶⁷

A certain amount of ambivalence is appropriate for an edited volume that represents the views of many different scholars. In *The Death of Treaty Supremacy*, however, David Sloss is neither ambivalent nor sanguine about the current status of treaties in the U.S. Sloss makes four main points in this book.⁶⁸ First, current treaty law entails a presumption of non-self-execution, but it has mistakenly fused the doctrine of treaty supremacy with

56. *Id.* at 382.

57. *Id.* at 383.

58. Dubinsky, *supra* note 17, at 411–60.

59. *Id.* at 413.

60. *Id.* at 415.

61. *Id.* at 422–23.

62. *See* Dubinsky, *supra* note 17, at 430–35.

63. *See id.* at 435–38.

64. Gary B. Born, *Conclusion: Treaties as the Law of the Land: Change and Continuity*, in *SUPREME LAW OF THE LAND?*, *supra* note 2, at 461, 463.

65. *Id.*

66. *Id.* at 469.

67. *Id.*

68. *See* SLOSS, *supra* note 3.

the doctrine of self-execution.⁶⁹ Second, from the Founding of the republic until World War II, these two doctrines operated completely separately from one another, and should be separated today.⁷⁰ Third, the fusion of the doctrines of treaty supremacy and self-execution occurred in the wake of the formation of the United Nations and the global embrace of international agreements that recast racial discrimination as a matter of foreign policy.⁷¹ American conservatives saw the United Nations Charter and the Universal Declaration of Human Rights as threats and they reacted by seeking to curtail the power of treaties to affect domestic policy.⁷² What resulted, Sloss argues, was legal doctrine based on political preferences rather than sound legal precedent.⁷³ Fourth, this change, a radical departure from two hundred years of precedent, is an invisible constitutional change that occurred without the American people weighing in on its consequences for the protection of their human rights.⁷⁴

The first half of the book is devoted to demonstrating the status of treaty supremacy doctrine.⁷⁵ Sloss's main argument here is that the presumption of non-self-execution as applied to treaty law is a relatively new phenomenon in the history of the country's constitutional jurisprudence.⁷⁶ As he puts it, "from the Founding until World War II, treaty supremacy cases and self-execution cases proceeded along two independent, non-intersecting paths."⁷⁷ The section on the establishment of treaty supremacy during the Founding is relatively short because, Sloss maintains, scholars do not dispute the status of treaty supremacy during that time period. Sloss dedicates considerably more effort to the period from 1800 to 1945.⁷⁸ The exhaustive documentation that he provides here aims to demonstrate that treaties were simply assumed to be self-executing; the question of the relationship between self-execution and treaty supremacy was rarely even mentioned.⁷⁹ The evidence here challenges the effort by conservative legal scholars to claim historical precedent for non-self-execution doctrine prior to 1945.⁸⁰ One of the cases that Sloss analyzes is *Foster v. Neilson*, the case that many scholars point to as the basis of NSE doctrine.⁸¹ The analysis delves deeply into the details of the historical context in which the case occurred.⁸² He maintains that those who view *Foster* as the basis for NSE doctrine rely on a "mythical view" of the case, based on cherry-picking language from that case, taking it out of context of the rest of the decision and inflating the significance of a single passage that appears at the tail end of a decision (i.e., "the sixty-first page of a sixty-four

69. *See id.* at 1–13.

70. *See id.*

71. *See id.*

72. *Id.* at 204.

73. *See SLOSS, supra* note 3, 204–08.

74. *See id.* at 1–13.

75. *See id.* at 17–169.

76. *See id.*

77. *Id.* at 265.

78. *See SLOSS, supra* note 3, 67–169.

79. *See id.*

80. *Id.* at 129.

81. *Id.* at 67.

82. *See id.* at 67–84.

page decision”).⁸³

From Sloss’s perspective, the self-execution doctrine was clear and unequivocal from the Founding to the postwar era.⁸⁴ Moreover, it constituted “good law,” founded on solid legal principles and precedent.⁸⁵ As Sloss shows in exhaustive detail, treaty supremacy is relevant only in cases where treaty law conflicts with state law.⁸⁶ For most of history, this is how treaty supremacy was understood. After 1965, however, judges began to invoke the doctrine of treaty supremacy in cases involving the relationship between treaties and the federal government and/or Congress’s regulatory power despite the fact that these relationships are not governed by Article VI of the Constitution and thus ought not to be relevant to treaty supremacy.⁸⁷ The Genocide Convention provides one simple example. Legislators have insisted that the Genocide Convention and other human rights agreements are not self-executing, but Sloss dismisses this claim as based on a misapprehension of the law: “[t]he Constitution’s treaty supremacy rule means that treaties supersede *conflicting* state laws. The only type of state law that would present a genuine conflict with the Genocide Convention would be one authorizing genocide.”⁸⁸ As Sloss points out, there are no state laws governing genocide.

For two hundred years, treaty supremacy and self-execution never came up in the same legal cases: “in cases where one party alleged a conflict between a treaty and state law, the question of whether the treaty was self-executing was almost never raised.”⁸⁹ Self-execution doctrine was developed to address questions about the implementation of treaties “that regulate matters within the scope of Congress’s legislative powers” and was not relevant to treaties that addressed laws that fell within the jurisdiction of individual states.⁹⁰ To provide an example: if a treaty requires an appropriation of funds, then it must stipulate a self-executing clause directing Congress to appropriate those funds, consistent with separation of powers among the branches of government.⁹¹ Few cases are ever this simple—and Sloss patiently walks through the logic of innumerable, more complex cases to illustrate that clear distinctions existed between the proper application of treaty supremacy (relating to states) and self-execution (relating to separation of powers).⁹²

In Part Three, Sloss traces the gradual process by which the doctrines of treaty supremacy and non-self-execution became enmeshed with one another.⁹³ He bases his claims on a detailed analysis of Supreme Court decisions and lower court cases, scholarly commentary and the drafting of the Second Restatement.⁹⁴ Sloss argues that the doctrine of non-self-execution emerged as a conservative reaction to the “magnetic pull of

83. SLOSS, *supra* note 3, at 67.

84. *Id.* at 59–66.

85. *Id.* at 1–5.

86. *See, e.g., id.* at 72.

87. *Id.* at 6–8.

88. SLOSS, *supra* note 3, at 205.

89. *Id.* at 60.

90. *Id.* at 3.

91. *See, e.g., id.* at 72.

92. *See id.* at 129–52.

93. *See* SLOSS, *supra* note 3, at 181–284.

94. *Id.*

international human rights norms.”⁹⁵

Do international human rights treaties bestow individuals with rights that can be invoked in domestic courts of law? This emerged as a pressing issue in the midst of the creation of the United Nations, when African American organizations envisioned the fledgling institution as a place to redress racial discrimination—and American conservatives reacted by seeking to limit the U.N.’s power over domestic policy.⁹⁶ Sloss’s account examines the legal consequences of this political conflict. Given the doctrine of treaty supremacy as it was then understood, the U.N. treaties should have superseded conflicting state law—but the prospect of overturning state laws governing the rights of individual citizens proved untenable for many policymakers.⁹⁷ A new interpretation of treaty supremacy emerged as a compromise: treaties do not necessarily supersede conflicting local law unless the treaty is self-executing.⁹⁸ This interpretation has evolved over time, but is the current standard defining the relationship between international treaties and domestic law.⁹⁹

What happened in the postwar era? The prohibition on racial discrimination in two of the founding documents of the U.N.—the Charter and the UDHR—prompted a conservative reaction in the U.S. in which lawmakers sought to limit their domestic effect.¹⁰⁰ John Bricker, a Republican Senator from Ohio, and Frank Holman, president of the American Bar Association, spearheaded this effort.¹⁰¹ In response to this conservative reaction, the threat of a constitutional amendment that would prevent the president from signing human rights treaties, and the prospect of international law overshadowing the Constitution on the issue of human rights (and racial discrimination in particular), the doctrine of treaty supremacy was reinterpreted. As a result, the issue of treaty supremacy became decoupled from the doctrine of self-execution, paving the way for self-execution to become optional.¹⁰²

This change took a while to register in case law. Cases taken on and opinions rendered by the Supreme Court in the ensuing decade do not reflect the NSE exception, and there is only mixed evidence that the change mattered in lower federal and state courts initially.¹⁰³ Not until the American Law Institute (ALI) endorsed it in the Second Restatement did this change become evident in case law.¹⁰⁴ To illustrate this gap, Sloss describes in detail a series of cases in which the U.N. Charter had obvious relevance to the legal issue at hand but was not mentioned in the opinion—notably *Brown v. Board of Education*.¹⁰⁵ He argues that the Supreme Court did not mention the U.N. Charter in these cases because the justices realized that doing so would have tacitly acknowledged that it

95. *Id.* at 181.

96. *See id.* at 185–91, 198–200.

97. *See id.* at 211.

98. SLOSS, *supra* note 3, at 231.

99. *See id.* at 295–318.

100. *Id.* at 201.

101. *Id.* at 224.

102. *See* SLOSS, *supra* note 3, at 248, 254–55.

103. *Id.* at 258, 265; *see also id.* at 257.

104. *Id.* at 284.

105. *Id.* at 240 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

provided a stronger defense of rights than did the U.S. Constitution.¹⁰⁶ Moreover, the self-execution question did not come up in any of these cases.¹⁰⁷ As a result, “as of 1948 the conceptual firewall that insulated treaty supremacy doctrine from self-execution doctrine remained largely intact.”¹⁰⁸

One important exception is *Fujii v. California*, which “is one of the few cases in which a U.S. court applied the Charter’s human rights provisions in conjunction with the Constitution’s treaty supremacy rule to invalidate a state law.”¹⁰⁹ Senator Forrest Donnell, a Republican from Missouri, convened a debate on the floor of the Senate to discuss the *Fujii* case on April 28, 1950—four days after the decision had been handed down.¹¹⁰ This kind of attention to a pending decision by a lower court was “extremely unusual.”¹¹¹ Donnell and others were concerned about the potential for *Fujii* to set a precedent for international human rights treaties overriding domestic law—with regard to racial discrimination, but also sex discrimination.¹¹² Republican Senator Homer Ferguson from Michigan expressed concerns that *Fujii* implied that “the U.N. Charter ‘may . . . nullify or make void all statutes in any State in relation to distinctions made between the sexes.’”¹¹³ These concerns were prophetic for the time. Sloss claims that the basis for the *Fujii* decision cannot be found in law and contravenes 150 years of legal precedent of treaty supremacy.¹¹⁴ From his perspective, the decision in *Fujii* represents a solution to a political problem rather than a sound legal argument. The decision “enabl[ed] the U.S. political system to accommodate the demands of Bricker and his supporters without adopting a formal constitutional amendment.”¹¹⁵ This conflict prompted the treaty supremacy rule to become “‘unstuck’ from its traditional moorings.”¹¹⁶

Sloss delves deeply into the details of the drafting of the Second Restatement to discover why that document codified an interpretation of law that contravened what had up to that point been an uncontroversial principle.¹¹⁷ Drawing on the archival records of the Ford Foundation and the American Law Institute, Sloss argues that the prior experiences of key decision makers shaped the drafting of the Second Restatement.¹¹⁸ Particularly critical was the participation of a handful of ALI reporters who had worked in the State Department during the years of discussion of the Bricker Amendment; these men were keenly aware of the political conflicts that erupted over human rights treaties and eager to avoid them.¹¹⁹ As Sloss puts it, “the conference records show that the Bricker

106. *Id.* at 247.

107. SLOSS, *supra* note 3, at 190.

108. *Id.* at 191.

109. *Id.* at 201 (discussing *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952)).

110. SLOSS, *supra* note 3, at 210.

111. *Id.*

112. *Id.* at 211.

113. *Id.*

114. *Id.* at 231.

115. SLOSS, *supra* note 3, at 218.

116. *Id.* at 229.

117. *See id.* at 268–71.

118. *See id.*

119. *Id.* at 280.

Amendment controversy cast a long shadow over the ALI's deliberations."¹²⁰

Sloss suggests that the affirmation of the need to refer to the intent of treaty makers to address the question of self-execution is a legal fiction based on sloppy legal analysis.¹²¹ The Second Restatement asserts that the doctrine of non-self-execution was consistent with Senate practice of "insert[ing] an understanding or reservation that the treaty should not be the supreme law of the land until further action is taken by Congress"—although "the Senate had never [up to that point] adopted an NSE reservation as a condition of its consent to treaty ratification."¹²² Furthermore, the Second Restatement reflected a misapprehension of international law and in some places conflated international and domestic law.¹²³

Sloss suggests that the ALI reporters who drafted this section of the Second Restatement did not want to admit that their decision was influenced—or, perhaps, determined—by the Bricker Amendment controversy.¹²⁴ Moreover, and more problematically from a legal perspective, if they had affirmed treaty supremacy in this context, "they would have been tacitly admitting that the Charter provided stronger protection against racial discrimination than did the Fourteenth Amendment."¹²⁵ Thus, asserting that treaties were not necessarily self-executing "helped judges preserve their faith in American exceptionalism by ducking the uncomfortable question of whether international human rights law provided stronger protection for human rights than does the U.S. Constitution."¹²⁶

Sloss considers this shift to be deeply problematic. First, it emerged as the unintended consequence of a political response to U.N. human rights treaties rather than the accumulation of solid legal opinions.¹²⁷ Second, the consequences of this change have been profound but largely imperceptible, to judges and policymakers as well as the American people.¹²⁸ Third, the presumption that human rights treaties are non-self-executing leaves American citizens unprotected by basic principles of universal human rights as defined in international law—and unaware of what we lack.¹²⁹ Strangely, while the Third Restatement is the central focus of *Supreme Law of the Land?*, Sloss does not address it. Do the arguments that Sloss makes about the faulty foundations of treaty law hold for the Third Restatement as well as the Second? The lacuna is curious.

Overall, *The Death of Treaty Supremacy* offers an extremely thorough analysis of the institutional context, scholarly commentary and details of relevant cases. Nonetheless, Sloss's analysis may be biased by the way he selects cases for analysis. He selects for review cases that mention the terms he is interested in. For example, in his effort to determine the impact of the *Fujii* decision, he reviewed the "sixteen decisions between

120. SLOSS, *supra* note 3, at 272.

121. *Id.* at 282.

122. *Id.* at 280.

123. *Id.* at 281.

124. *See id.* at 283–84.

125. SLOSS, *supra* note 3, at 283–84.

126. *Id.*

127. *See id.* at 173–79.

128. *Id.* at 319.

129. *Id.* at 326.

1946 and 1965 in which a party raised a treaty-based claim or defense and one or more justices relied expressly on a treaty to support his opinion.”¹³⁰ It’s possible that judges denied cert to cases that pertained to treaties, and that including those negative cases in his analysis would change the kinds of inferences he draws.

In the current presidential administration, there has been a concerted effort to abrogate America’s treaty obligations. At the bottom of this effort is a belief that American interests at home and abroad are ill-served by cooperating with foreign powers. These policies represent the logical, or perhaps illogical, extension of the thinking underlying the “new federalist” era that began in the 1980s.¹³¹ As Margaret McGuinness puts it in her chapter, this approach rests on “a deep skepticism of the power of international law to solve global problems, a rejection of at least some of the normative foundations of the international legal order, a concern about the antidemocratic nature of international lawmaking, and a view that international law-making could be used to dilute state and local power in ways that were offensive to constitutional structure and the ideals of federalism.”¹³² In *The Death of Treaty Supremacy*, Sloss excavates the origins of these views and lays bare the faulty legal reasoning that underlies them.

These two books offer extremely rich analyses of a wide range of issues surrounding treaty interpretation, only a few of which have I been able to explore here. Taken together, they provide considerable insight on how the legal terrain surrounding treaties has changed over time. The authors differ in terms of how they characterize the history of these changes. From the perspective of the authors in *Supreme Law of the Land?* concerns about competing jurisdiction between treaties and state law are part and parcel of federalism; moreover, it is possible to trace the current administration’s ideology back to the Founding, where federalist-inspired concerns about treaty obligations were central to the establishment of the republic. Sloss’s account emphasizes historical discontinuity and argues that current treaty doctrine is a politically-inspired aberration from longstanding precedent. Despite their differences, however, these two books concur that politics has overtaken the rule of law in troubling ways.

130. SLOSS, *supra* note 3, at 258.

131. McGuinness, *supra* note 26, at 205–06.

132. *Id.*