BOOK REVIEW

RATIONALISM AND REVISIONISM IN INTERNATIONAL LAW

THE LIMITS OF INTERNATIONAL LAW. By Jack L. Goldsmith and Eric A. Posner. New York: Oxford University Press. 2005. Pp. 262. $29.95.

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INTRODUCTION

International law has moved from the periphery to the center of public debate in the course of only a few short years. The ever-quickening globalization of politics, culture, and economics has prompted new efforts to find global solutions to global problems. International law now touches an astonishing array of activities. It governs everything from the goods and services that cross state borders and the greenhouse gases that industries and consumers produce, to the circumstances that justify intervention in humanitarian disasters and the treatment afforded suspected terrorists. Of increasingly urgent concern, then, is whether all of this law actually makes much of a difference.

Legal scholars have traditionally argued that it does. They have, for the most part, portrayed international law as a powerful and much-needed external limit on states' pursuit of their own short-term interests. Over the last half decade, however, Professors Jack Goldsmith and Eric Posner have aspired to revolutionize policymaking and scholarship by arguing precisely the opposite — an argument now presented fully in *The Limits of International Law*. In their view, international law does not check self-interest but instead "emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power" (p. 3).

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Classical accounts of international law that assume otherwise are simply turning a blind eye to the fact that states violate their legal obligations whenever it suits them to do so. Moreover, Professors Goldsmith and Posner argue, that is exactly what states *should* do. States have every right to place their sovereign interests first — indeed, democratic states have an *obligation* to do so. Any form of legal globalization that may threaten states' right to govern themselves free from foreign interference will, and ought to be, resisted.

As shocking (or, perhaps, appealing) as some of these claims may seem, the significance of Professors Goldsmith and Posner's book lies less in what it says than in what it represents. Despite over a decade of collaboration between political scientists and international lawyers, inquiries into international law generally remain rooted in "normative models" and assume that legitimate obligations significantly constrain and shape state behavior.[1] In contrast, Professors Goldsmith and Posner advance a rationalist, interest-based perspective that, until recently, was largely absent from modern international law scholarship (even though it has long been dominant in political science and has been present for several decades in domestic legal scholarship). At the same time, they provide an intellectual framework that unites a scattered set of critiques that have appeared in law reviews with increasing frequency over the last decade. What began as the "new American foreign affairs law"[2] and a disdain for the incorporation of customary international law (CIL) by U.S. courts[3] has developed into a revisionism deeply critical of all international law scholarship, with Professors Goldsmith and Posner at the forefront.[4] Indeed, even those who reject

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[1] *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1955–60 (2002).

[2] *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1090 (1999).

[3] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Curtis A. Bradley & Jack L. Goldsmith III, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*].

[4] The term revisionism encompasses at least four significant critiques of traditional scholarship. The first is that no single understanding of international law is morally binding. The second is that it is the role of the political branches, and not the courts, to determine how the United States should meet its obligations under international law. Thus, treaties should not be assumed to be self-executing and customary international law should not be incorporated as federal law by U.S. courts. The third is that the principles of federalism embodied in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), invite the possibility that international law can be interpreted differently by state and federal courts. The fourth is that many of the issues that customary international law once purported to address, like capture and prize, are no longer relevant in the modern world. Thus, admiralty law precedent, like the *Charming Betsy* doctrine, for example, is inapposite to modern human rights disputes. For a longer discussion of some of these critiques, see Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study*

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The Limits of International Law — and there will be many — must acknowledge the significance of the rationalist-revisionist convergence that it reflects.

Ultimately, however, *The Limits of International Law* is marked by limits of its own. Professors Goldsmith and Posner make a provocative case, to be sure, but in the process they claim both too little and too much. They claim too little when they suggest that they offer nothing more than "a simple but plausible descriptive account . . . of international law . . . in terms of something other than a state's propensity to comply with international law" (p. 10). If all Professors Goldsmith and Posner sought to do was demonstrate that international law can be understood through the lens of self-interest rather than obligation, then we would suppose that they have accomplished this much. But their book would then be a contribution of little significance, as such accounts have long dominated political science scholarship and have increasingly found their way into international law scholarship — in part through Professors Goldsmith and Posner's own earlier work.

If, however, Professors Goldsmith and Posner's goal is to understand "how international law works in practice: how it originates and changes; how it affects behavior among very differently endowed states; when and why states act consistently with it; and why it plays such an important role in the rhetoric of international relations" (p. 3), then they claim far too much. The thin outline of a theory that they deliver is, we shall argue, not nearly enough to help us really understand international law. They do not explain, for example, which interests matter, how they are formed, or how we are to discover them. We are left with a theory of state behavior that explains too much and hence too little.

And yet, as their title promises, Professors Goldsmith and Posner arrive at many bold — and relentlessly negative — pronouncements about the "limits" of international law. They conclude, for example, that most of customary law is the product of coincidence, that much of multilateral treaty law will fail, and that reliance on legal rules is frequently counterproductive. But these conclusions do not follow from the (thin) rationalist theory that Professors Goldsmith and Posner present. Rather, they emerge from deeply held normative concerns that international law takes policymaking power out of the hands of those who Professors Goldsmith and Posner think should have it (the political branches and state governments, chief among them) and gives it to

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of the Supreme Court's Docket, 114 YALE L.J. 855, 864 (2005). *Cf.* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 7 (2005) (describing the revisionist movement and identifying Professor Goldsmith as a movement leader). In this Review, we place the greatest emphasis on the first two critiques.

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those who should not (international institutions and unelected federal judges) — in a word, from revisionism. The conclusions drawn in *The Limits of International Law*, we argue, result more from these unacknowledged assumptions than from the rationalist theory that frames them.

This does not mean that answers to the difficult questions posed by Professors Goldsmith and Posner cannot be found, or that it is a mistake to look beyond traditional modes of international law scholarship, or even that Professors Goldsmith and Posner are alone in allowing their normative leanings to cloud their analytical judgment. If anything, *The Limits of International Law* demonstrates the need for a *new* rationalist research agenda, informed by well-developed theory and unburdened by revisionist commitments. This next generation of scholarship must move past stale, dichotomous debates over whether international law exists or whether it matters, to instead address *how* it matters, *under what conditions*, and *why*. Such a shift promises substantial theoretical, empirical, and practical payoffs that *The Limits of International Law*, like too much traditional scholarship, simply fails to provide.

This Review proceeds in five Parts. Part I presents a brief history of international relations and international law scholarship over the past fifteen years. This history demonstrates that *The Limits of International Law* exemplifies two of the most important trends in recent scholarship. Hence, this Review offers an opportunity to evaluate not only the book, but the course of the modern debate as well. Part II summarizes the book's arguments. Part III evaluates the analytic power of Professors Goldsmith and Posner's rationalist approach. We argue that the minimal rationalist theory that they advance cannot tell us much without more specificity about the nature of states and the source of their interests. Accordingly, we suggest that Professors Goldsmith and Posner's finding that international law has "limits" stems more from their revisionist beliefs than from their rationalist theory. Part IV examines three questions that rationalist legal scholars should answer as they move to develop deeper and more sophisticated theories of international law. Part V concludes by outlining a new rationalist research agenda for international legal scholars.

I. RECENT TRENDS IN THE STUDY OF INTERNATIONAL LAW

The modern story of international law and political science scholarship — and of the difference between the two — begins in the middle of the twentieth century, when scholars and policymakers struggled to understand why the world twice collapsed into war in the span of

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thirty years.[5] Cataloguing the failures of collective security in the interwar period, "realists" like E.H. Carr and Hans Morgenthau argued that international law was simply incapable of effectively restraining the never-ending struggle for power in the international arena. Carr derided the League of Nations as "an attempt 'to apply the principles of Lockeian liberalism to the building of a machinery of international order'"[6] and counseled extricating "ourselves from the blind alley of arbitration and judicial procedure."[7] Morgenthau concurred, arguing that "[f]ar from restraining the aspirations of power of individual nations, they see to it that the power position of individual nations is not adversely affected by whatever legal obligations they take upon themselves in their relations with other states."[8] These scholars defined themselves in opposition to what they considered the unjustified and dangerous utopianism of "idealists" like Charles Evans Hughes and Elihu Root. The disagreement quickly became a rift and then a schism. Realists commandeered political science departments; idealists returned to the legal academy from which many of them had emerged.[9] Each discipline operated in near isolation from the other for the next fifty years, until the sudden peaceful end of the Cold War and the enduring vitality of numerous international institutions forced scholars on both sides of the divide to reevaluate the strengths and shortcomings of their respective fields.

From the perspective of international law (IL), the story of convergence largely begins with Kenneth Abbott, who called upon lawyers to familiarize themselves with the approaches, insights, and techniques of modern international relations (IR) theory in order to address "such fundamental issues as the functions that international rules and institutions perform for states, the allocative and distributional conse-

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[5] For a more detailed account of the schism and its aftermath, see OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 1–3 (2005); Hathaway, *supra* note 1, at 1944–62; and FRANCIS ANTHONY BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 3–74 (1985). For a deep and enlightening account of the history of international legal scholarship, see MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001).

[6] E.H. CARR, THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 29 (Palgrave 2001) (1939) (quoting R.H.S. Crossman, *British Political Thought in the European Tradition*, *in* J.P. MAYER, POLITICAL THOUGHT 171, 202 (1939)).

[7] *Id.* at 189.

[8] HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 271–72 (5th ed. 1973) (1948).

[9] By contrast, this schism was and is much less pronounced in Europe, where the so-called "English School" predominates. *See, e.g.*, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977). Neofunctionalist accounts of international law and politics have also remained above the fray. *See, e.g.*, THE INSTITUTIONALIZATION OF EUROPE (Alec Stone Sweet et al. eds., 2001); Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1 (2002).

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quences of particular rules, and the circumstances under which desirable rules can be created."[10] Abbott began simply but powerfully, introducing the terms of basic rationalist analysis and demonstrating the value of game theory to the study of international law. "Modern IR theory," Abbott argued, "offers IL scholars an escape from the narrow positivism excoriated by [critics of IL]."[11] The thick description of legal institutions and the normative beliefs of idealist lawyers could now be complemented, if not replaced, by hard social science, which "helps justify our confidence in the reality and value of international law, and can help convey that confidence to hard-headed skeptics."[12]

Picking up where Abbott left off, Anne-Marie Slaughter described the evolution of IR theory during its forty-year estrangement from international law.[13] While realism had remained the dominant paradigm, rationalist research agendas that emphasized the importance of international institutions and the salience of domestic factors on the world stage had emerged as viable competitors. Each of these research paradigms — known as "institutionalism" and "liberalism" — had a great deal more to say about international law than did realism, creating the genuine prospect of a "dual agenda" of collaboration between the disciplines of law and politics.[14] Slaughter identified the core assumptions and variables of each paradigm and described meaningful issues that each model was best suited to explore. Five years later, Slaughter declared something of an early victory for the interdisciplinary project, noting that "political scientists and international

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10 Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 336 (1989). Abbott explicitly introduced IR theory to international law scholars, but he was not the first to notice the artificial divide between the disciplines and seek to close it. At the time Abbott wrote, the New Haven School of international law had already begun the task of integrating law and politics. As Michael Reisman wrote:

> In the desperate drive to develop an autonomous discipline or specialization, many theorists purport to find a distinction between law and politics. I do not find this distinction realistic, cogent or useful. . . . To the affected human being or to the lawyer he engages in his interest, it makes little difference if a decision emanates from a "legal" or a "political" institution; the crucial question is whether it meets his needs.

Michael Reisman, *A Theory About Law from the Policy Perspective*, *in* MARK MACGUIGAN ET AL., LAW AND POLICY 75, 75–76 (David N. Weisstub ed., 1976).

11 Abbott, *supra* note 10, at 340.

12 *Id.* at 405.

13 *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

14 *See id.* at 206–07. As we discuss at greater length, *see infra* section IV.C., a fourth nominally rationalist paradigm, epistemic theory, has congealed since Slaughter's writing. Like constructivism, epistemic theory focuses centrally on the role of beliefs and perceptions. These four theories are labeled and defined differently by different scholars. For example, many consider institutionalism and liberalism not as distinct theoretical paradigms but as a single one (often referred to as "liberal institutionalism"). We join those who treat them separately because the primary distinction between them — the unitary actor assumption — is an important one for our purposes. We acknowledge, however, that these distinctions can be blurry.

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lawyers have been reading and drawing on one another's work with increasing frequency and for a wide range of purposes."[15] Her essay in the *American Journal of International Law* went on to document the numerous ways that international law scholars had used IR theory and empirical research over the previous decade and laid out yet more promising new avenues for joint research. At the close of the twentieth century, then, the wall between international law and politics seemed destined to fall as peacefully as did its metaphorical counterpart in Berlin.

It has been eight years since Slaughter last evaluated the convergence of international law and politics, and during that period the project has continued at a vigorous pace. The sophisticated rationalist analyses of international law envisioned by Abbott are now increasingly common in both legal[16] and political science scholarship.[17] Under the banner of "legalization," leading scholars of both fields have begun a joint effort to understand international law by reference to its functional value and the preferences of domestic political actors.[18] And, due in part to the efforts of Professors Goldsmith and Posner, ra-

[15] Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 367 (1998).

[16] *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Andrew T. Guzman, *The Design of International Legal Agreements*, 16 EUR. J. INT'L L. 579 (2005); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 612 (2005); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Hathaway, *supra* note 1; Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002); George Norman & Joel P. Trachtman, The Customary International Law Supergame: Order and Law (Mar. 9, 2004) (unpublished manuscript), *available at* http://ase.tufts.edu/econ/papers/200415.pdf; *see also* Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis* (George Mason Law & Econ. Working Paper Series, Paper No. 02-24, 2002), *available at* http://ssrn.com/abstract=335220; Francesco Parisi, *The Formation of Customary Law* (George Mason Law & Econ. Research Paper Series, Paper No. 01-06, 2001), *available at* http:// ssrn.com/abstract=262032.

[17] For example, in the past three years alone, *International Organization*, the preeminent rationalist journal of international relations, has published thirteen articles on treaties or customary international law and nearly a dozen more on international institutions like the United Nations. *See, e.g.*, Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363 (2005); Paul F. Diehl et al., *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT'L ORG. 43 (2003); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004). In addition, political scientist James Vreeland has studied states' decisions to commit to the International Monetary Fund. *See, e.g.*, JAMES RAYMOND VREELAND, THE IMF AND ECONOMIC DEVELOPMENT (2003).

[18] *See* LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001).

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tionalist approaches to international law are now popular topics for symposia[19] and law school seminars as well.[20]

During the same period, however, two important new trends have emerged, each of which could strengthen the project of interdisciplinary convergence — or ultimately undermine it. The first trend comes from political science departments, where a sociological approach to international relations called "constructivism" has come to offer a general theoretical orientation and specific research programs that rival the rationalist paradigms of realism, institutionalism, and liberalism.[21] In contrast to rationalist approaches, constructivism begins from the premise that a full account of state behavior requires an understanding of normative influence as well as consequentialist reasoning. Constructivism asks how norms evolve and how identities are constituted, analyzing, among other things, the role of identity in shaping political action and the mutually constitutive relationship between agents and structures.[22] This focus on norms, identity, and agency makes constructivism a natural companion to traditional international law scholarship and hence holds out the possibility of even deeper engagement between the two disciplines.[23]

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[19] *See, e.g.*, Symposium, *Rational Choice and International Law*, 31 J. LEGAL STUD. 1 (2002); Conference on Compliance in International Law at the University of Southern California (Apr. 30 & May 1, 2004).

[20] For example, the University of Chicago will offer a course on International Law, International Relations, and Contract in the spring of 2006; the Harvard Law School offered a course on International Law and International Relations in the winter of 2006; and the Yale Law School curriculum included Introduction to Transnational Law in the spring of 2005 and 2006 and State Behavior and International Law in the spring of 2004. Indeed, there is a new reader for use in law school classes that is devoted to laying out both rationalist and normative theories of international law. *See* HATHAWAY & KOH, *supra* note 5.

[21] Though the sociological perspective has long influenced international studies, the end of the Cold War unleashed "substantial dissatisfaction with reigning realist and liberal approaches to international relations," and thereby "opened up space for cultural and sociological perspectives . . . that had been neglected by both realists and liberals." Peter J. Katzenstein et al., *International Organization and the Study of World Politics*, *in* EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS 5, 30 (Peter J. Katzenstein et al. eds., 1999). For a thoughtful "state of the art" review of international relations and a summary of the rationalist/constructivist divide, see *id.* at 30–42. *See also* Christian Reus-Smit, *Constructivism*, *in* THEORIES OF INTERNATIONAL RELATIONS 188, 209 (Scott Burchill et al. eds., 3d ed. 2005).

[22] Constructivism is not only a distinct theory, but also a distinct ontology based on the beliefs that the "structures of human association are determined primarily by shared ideas rather than material forces" and that "the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature." ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 1 (1999). For an insightful discussion of the so-called "ideational 'turn' of recent years," its roots in earlier scholarship, and several key dimensions of the debate between norms and rationality, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 888 (1998).

[23] *See, e.g.*, Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human*

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But the emergence of constructivism brings danger as well. By challenging the shared ontological basis of the major categories of rationalist international relations theory — realism, institutionalism, and liberalism — constructivism has given the three established theories reason to unite under the more general banner of "rationalism."[24] As a result, the salient differences between the three interest-based paradigms are frequently overlooked, a trend noticed and criticized by several political scientists.[25] And, unfortunately, because this flattening has coincided with the convergence of IR and IL, international lawyers have not yet developed a robust understanding of the important differences between the various rationalist approaches to world politics. Instead, the emerging rationalist/constructivist debate in international relations is in danger of leading international lawyers to return to the simplistic realist/idealist debate that precipitated the very schism that disciplinary convergence promised to close. While a handful of interdisciplinary efforts in the legal literature continue to distinguish between variations of rationalist and constructivist arguments,[26] the vast majority now characterize the debate at the more simplistic level of interests versus norms. This trend — which *The Limits of International Law* aids and abets — therefore threatens to send international law scholarship backward nearly half a century. It is thus far from clear whether the debate that Professors Goldsmith and Posner's book will generate will enrich international law scholarship or render it asunder once more.

The second trend to shape the convergence of international law and politics over the last few years emerges from the legal academy and signals a generational shift in thinking about international law. Perhaps in part because international human rights law has been a topic of shared exploration for early constructivists and traditional international lawyers, the convergence project has until recently been led, if not completely dominated, by scholars who strongly favor globalization and internationalism. These scholars share many ideals, but none more important and universal than the position that international law plays an important and valuable role in shaping world order. Hence, the work urging convergence of the disciplines was until re-

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Rights Law, 54 DUKE L.J. 621 (2004); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, LAW & CONTEMP. PROBS., Autumn 2004, at 195.

24 *See, e.g.*, Katzenstein et al., *supra* note 21, at 30 (grouping theories into "rationalist" and "constructivist" approaches); Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379 (1988).

25 *See, e.g.*, Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, INT'L SEC., Autumn 1999, at 5; Richard Rosecrance, *Has Realism Become Cost-Benefit Analysis?*, INT'L SEC., Fall 2001, at 132 (reviewing LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS (2000)).

26 *See, e.g.*, HATHAWAY & KOH, *supra* note 5; Hathaway, *supra* note 1.

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cently almost entirely led by a group of scholars publicly identified with a positive normative vision of world order that assumes international law is both valuable and effective. This has left their scholarship vulnerable to the charge that it sometimes substitutes idealism for analysis — a charge that interdisciplinary convergence was supposed to dispel.

In recent years, this vulnerability has been the subject of unrelenting attack by a revisionist movement of smart young scholars not afraid to question the assumptions and claims of their predecessors.[27] They came to the field from a very different perspective than most of their predecessors. The young guns, almost to a man (and the original core group is, indeed, all men), cut their teeth not by carrying out careful analyses of treaties, decisions of the International Court of Justice, or the workings of the United Nations — the kind of scholarship that had been the hallmark of the discipline. Instead, they got their start in U.S. constitutional law, particularly foreign affairs law.[28] Unlike most of their predecessors, these scholars did not have any vested interest in whether international law was *effective*. Their initial concern was whether it was *legal* as a matter of U.S. law — that is, whether or not it violated constitutional notions of federalism and separation of powers.[29]

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[27] This is not the first time that traditional approaches to international law have come under attack. The "new stream" scholarship has long been critical of traditional approaches to international law. *See, e.g.*, DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) (criticizing traditional theories of international law and advocating an internal analysis of international law's doctrinal and rhetorical cohesiveness); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991) (discussing the work of four contemporary international law scholars, all of whom advocate nontraditional concepts of international law and criticize traditional international law theory); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988) (criticizing traditional conceptions of international law and advocating a rhetorical and interactive theory).

[28] Two of the leading international law scholars before them also started their careers with a focus on foreign affairs — though from a very different perspective. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

[29] One of the earliest and most prominent works in this vein is a famous (or infamous, depending on one's perspective) article that appeared in 1997 in the *Harvard Law Review* in which Professors Goldsmith and Bradley attacked the foundations of customary international law. *See* Bradley & Goldsmith, *Customary International Law As Federal Common Law*, *supra* note 3. As a recent profile of Professor Bradley put it, the piece was based on a belief that "many commonplace assumptions in international law scholarship were simply wrong." *Curtis Bradley: Foreign Relations and International Law Specialist Joins Duke*, DUKE L. MAG., Spring 2005, *available at* http://www.law.duke.edu/magazine/2005spring/faculty/bradley.html?linker=3. The article was the first of many pieces in which, both together and separately, Professors Goldsmith and Bradley took a sledgehammer to many of the central foundations of then-existing international law schol-

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It does not take long to see that the antipathy for international law shared by the cohort of scholars to which Professors Goldsmith and Posner belong stems at least in part from a strong commitment to a particular vision of the U.S. Constitution — one in which states are sovereign and hence must operate with minimal interference from the federal government,[30] federal courts are prone to activism and must be kept from overextending federal authority through "interpretation" of international law,[31] and each nation-state is sovereign and should bow to international authority only when it chooses to do so (a pronouncement that is all the more true for democratic states, which should not bow to decisions of international bodies with significantly less claim to democratic legitimacy).[32] These scholars see international law, in other words, as threatening to push the balance of lawmaking authority toward those they believe are least deserving of it and are least able to handle it — to international bodies and federal courts — at the expense of the states, Congress, and the President. For these scholars, then, the study of international law is not only an empirical question, but also a normative one: can international law be reconciled with a commitment to democracy?

The Limits of International Law exemplifies these two central trends in modern international legal scholarship. As a substantive matter, the book explicitly embraces the rationalist approach that Abbott introduced so many years ago and portrays it as a superior alternative to constructivism and traditional international legal scholarship. As a normative matter, the book's authors stand at the forefront of the conservative, revisionist vanguard that has emerged to challenge mainstream thinking on a variety of constitutional and foreign affairs topics. By highlighting existing divisions in international legal schol-

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arship and jurisprudence. By contrast, Posner entered the international law field as a relative latecomer, having focused his early career much more centrally on understanding the function of social norms from a law and economics perspective. Nonetheless, he too has written on foreign affairs issues. *See, e.g.*, Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423 (2005); Eric A. Posner, *All Hail . . . King George?*, FOREIGN POL'Y, Mar. 2005, http://www.foreignpolicy.com/story/files/story2814.php.

[30] *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003). *See generally* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001).

[31] *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997).

[32] *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000). *See generally* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).

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arship, *The Limits of International Law* has the potential to strengthen the field by encouraging legal scholars to directly engage both rationalist and revisionist arguments. But, as we argue, there is also real danger that the book, by too closely tying rationalism to revisionism, will take us back to some of the unproductive debates of the past instead of pushing scholars toward a deeper, more sophisticated understanding of international law.

II. UNDERSTANDING *THE LIMITS OF INTERNATIONAL LAW*

The Limits of International Law is a summary and synthesis of arguments about international law that Professors Goldsmith and Posner have steadily introduced over the past six years. The book manifests a strong skepticism toward traditional international legal studies, both as a tool of positive analysis and as a normative project. As an alternative, it articulates a theory of state rationalism, grounded in game theory, that emphasizes the strategic interactions of states motivated solely by self-interest within an anarchic international system.

Professors Goldsmith and Posner's theory represents an outright attack on some of the central principles that motivated the international legal scholarship of those before them. For all the disagreements between various traditional scholars of international law, virtually all agree that a central reason for international law's influence on states is that it has moral and legal force. *Pacta sunt servanda* — treaties must be respected — is the fundamental background norm of international law that carries with it a moral and legal obligation that compels states to abide by international law.

At its core, *The Limits of International Law* makes the simple yet controversial claim that this notion of obligation is philosophically unsound (pp. 185–203) and empirically unproven (p. 15). It is "unenlightening," Professors Goldsmith and Posner argue, "to explain international law compliance in terms of a preference for complying with international law" (p. 10). Such an approach, characteristic of traditional, idealistic international legal theories, is "unfruitful" (p. 15) because it fails to explain why "states frequently change their views about the content of customary international law, often during very short periods of time," and does not recognize that those changes appear to be a "response to shifts in the relative power of states, advances in technology, and other exogenous forces" (p. 25). Professors Goldsmith and Posner treat much of modern international law scholarship as a virtual strawman; indeed, they dispose of the last decade's most significant works of international law, from Abram Chayes and

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Antonia Chayes's *The New Sovereignty*[33] to Harold Koh's work on transnational legal process,[34] with not much more than the assertion that "[t]here is little empirical evidence" for their claims (p. 104).[35]

In contrast to traditional scholarship, *The Limits of International Law* takes a wholly consequentialist approach and sees legal obligations in strictly instrumental terms. Professors Goldsmith and Posner argue that the variety of phenomena traditionally labeled "international law" are merely conventions of international politics best explained by reference to state power and state interests. This approach is relatively new in international legal circles, but it reflects the core, longstanding assumptions of rationalist scholarship in international relations, which Professors Goldsmith and Posner strive to model (p. 16). In this paradigm, compliance is a choice, not an obligation: states adhere to the obligations of international law to advance their own interests, and when international law fails to do so, states cease to abide by it. In the international system, law is completely endogenous to politics and has no independent force, moral or otherwise. Yet despite the centrality of states and their putative interests to this formulation, Professors Goldsmith and Posner employ flexible definitions of both — a point we return to in Parts III and IV.

Professors Goldsmith and Posner posit that four models of strategic behavior — coincidence, coordination, cooperation, and coercion — explain the behavior that legal scholars have termed "compliance" with international law (pp. 11–13). The first model, *coincidence*, suggests that states may act in accordance with international law simply by acting in their own self-interest, with no regard to the actions or interests of other states. The second model, *coordination*, describes instances in which two or more states can do better if they coordinate their actions but are essentially indifferent about the rule that they apply to do so; they therefore create and abide by a rule not out of a sense of obligation but simply because it is convenient. The classic game theoretic example of this model is one of the rules of driving: few care whether

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[33] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

[34] *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing CHAYES & CHAYES, *supra* note 33, and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)).

[35] Professors Goldsmith and Posner appear to believe that the "traditional account" is proven *only* by evidence that international law has caused states to take actions adverse to their interests (pp. 23–26, 104–06). But because most international law is premised on the idea of consent, utility-seeking and law-abiding behavior will often be one and the same. Indeed, this fact — not an ungrounded faith in international law — forms the foundation of Chayes and Chayes's account of international law. *See* CHAYES & CHAYES, *supra* note 33, at 4 ("A treaty is a consensual instrument. It has no force unless the state has agreed to it. It is therefore a fair assumption that the parties' interests were served by entering into the treaty in the first place.").

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they drive on the right side of the road or the left, but it is important that all drivers in the same place coordinate their actions. The third model, *cooperation*, describes cases in which "states reciprocally refrain from activities [like protectionism or polluting] . . . that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits" (p. 12) or to avoid longer-term costs. Unlike coordination, which requires only that states engage in identical or symmetrical actions, cooperation implies a more difficult process that may involve states engaging in different activities to produce the desired gains. The final model, *coercion*, results when a powerful state forces, or threatens to force, a weaker state to engage in acts that benefit only the stronger party. Professors Goldsmith and Posner explain that "[t]he key analytic difference between coercion and cooperation is that when the weaker party cooperates, it is better off from the baseline of the status quo ante, but when it is coerced, it is worse off from this baseline" (p. 118). In cases of coercion, international law is largely epiphenomenal — it simply reflects the interests and capacity of the state with the greater power.

Much of *The Limits of International Law* is an application of these four models to the wide range of substantive areas that international law now reaches, the exercise essentially called for by Abbott so many years ago. Like many international relations scholars, Professors Goldsmith and Posner address treaty regimes, among them those governing trade and human rights. But like international law scholars, they also reach customary international norms — including those governing ambassadorial immunity and the free passage of neutral ships — that political scientists usually ignore. In doing so, the book strives to demonstrate that rationalist theories have explanatory value that extends beyond traditionally state-centered issues like arms control.[36]

In presenting their case studies, Professors Goldsmith and Posner are less concerned with characterizing legal regimes as reflections of one model or another than with explaining the implications of viewing international law in purely instrumental terms. Three of the conclusions they draw in the case studies are particularly striking.

The first is that "[m]uch of customary international law is simply coincidence of interest" (p. 225) and that scholars too often confuse such coincidences with compliance (p. 53). As Professors Goldsmith and Posner put it, "[s]cholars who think that customary international law results from a sense of legal obligation fail to distinguish between a pattern of behavior and the motives that cause states to act in accor-

[36] *Cf.* Koh, *supra* note 34, at 2649 ("Instrumentalist interest theor[y] . . . works best in such global issue areas as trade and arms control law, where nation-states remain the primary players, but essentially misses the transnational revolution." (citation omitted)).

dance with that pattern" (p. 39). Here, international law is much ado about nothing: "[w]hen a state declines to violate customary international law, this is usually because it has no reason to violate it," not because international law prevents it from doing so (p. 133).

Second, even when international law reflects more than simply coincidence, Professors Goldsmith and Posner remain skeptical that it can meaningfully advance international cooperation, as many political scientists suggest.[37] They argue that "in the context of customary international law, . . . genuine multistate cooperation is unlikely to emerge" (pp. 36–37) because "as the number of [participating] states increases, the cost of monitoring increases, and therefore the likelihood of erroneous punishment and undetected or unredressed free-riding increases" (p. 36). Moreover, even when treaties increase public information and enhance the monitoring of agreements, Professors Goldsmith and Posner "are skeptical that genuine multinational collective action problems can be solved by treaty" because their efficacy is still severely undercut by weak enforcement mechanisms (pp. 87–88).

Third, Professors Goldsmith and Posner believe that misplaced reliance on international law will have a deleterious impact on the international system as a whole. For example, "[i]f human rights law becomes clearer and more specific, the likely outcome would not be greater compliance but rather more violations and perhaps withdrawal from the treaties as well" (p. 134). The same is true of the World Trade Organization, because "[t]here is a danger . . . that increased legalization of international trade will . . . put too much pressure on the system and cause it to collapse" (p. 162). Here, the problem with international law is not its inefficacy but its ability to wreak havoc on an otherwise already unstable world, much as Carr suggested was the case during the interwar period.[38]

But if international law is of such limited use, why do we nonetheless observe so much discussion of it in the international system? Professors Goldsmith and Posner suggest three possibilities. The first, and most plausible, is that appeals to international law are a form of signaling that permits states to "clarify[] what counts as cooperation or coordination in interstate interactions" (pp. 13, 175–76). A paradigmatic example is a treaty that coordinates communications standards between countries. The second is that the appeals to law are simply a way for states to deny that they act only in their own self-interest and

[37] *See, e.g.*, Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997).

[38] Professors Goldsmith and Posner do not specify *how* "over-legalization" will cause these disastrous outcomes. Part of that story is found in a recent article co-written by Professor Goldsmith and the realist scholar Stephen Krasner. *See* Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Spring 2003, at 47.

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to indicate to others that they are cooperative (which they in fact may or may not be) (pp. 172–75). States thus use international legal and moral rhetoric much like job applicants claim to be good workers — they use the rhetoric because if they fail to do so, the audience will infer that they are the "bad type" (p. 174). That is true even if the statements are simply "cheap talk" and everyone knows it (p. 175). The third explanation they offer is that international law is an appeal to audiences, domestic and foreign. In the domestic case, politicians invoke law to show evidence of loyalty to their supporters and to confuse other, "poorly misinformed" constituents (pp. 178–79). In the foreign case, politicians invoke law to confuse and divide the enemy, much as Hitler did during World War II (p. 179).

These different theories may explain why states engage in dialogue, but they do not explain why states engage in so much *moral* and *legal* talk. To meet this objection, Professors Goldsmith and Posner "conjecture that the appeal to the basis of obligation will occur at the lowest level of abstraction consistent with the characteristics of the intended audience" (p. 182). Thus, Christian states will use religious terms when talking to each other but might use economic terms when talking to a larger pool of developed countries. In both cases, however, the goal is to use the language most likely to appeal to audiences in the target state, who may be swayed by this rhetoric. Accordingly, "[w]hen returns are maximized by dealing with a larger number of diverse states, talk will be watered down and reference will be to thin moral values (friendship, loyalty, trust) and, at the extreme, purely formal values such as law or political interests that are already shared" (pp. 182–83).

That is not to say that states are, in fact, morally obligated to follow international law. In the final part of the book, Professors Goldsmith and Posner argue that not only do states *act* as if they have no moral obligation to follow international law — in fact, they don't: "international law imposes no moral obligation" on states (p. 185). When the self-interested, instrumental calculations of the state indicate that the state should depart from international law, Professors Goldsmith and Posner declare that it can do so free of moral guilt. Indeed, they argue that states are not just permitted to violate international law; they may be *obligated* to do so. Liberal democratic states are bound by constituent preferences, not by some abstract cosmopolitan duty to follow international law or to pursue the interests of all humanity (pp. 205–24). When the constituents of a state want the state to act in a way that is contrary to its international legal obligations, the state must do its democratic duty and follow the dictates of its own people.

We thus come to the crux of their argument: For Professors Goldsmith and Posner, as for most revisionist scholars, international law poses a threat to the separation of powers, federalism, and democracy. The only way to secure the sanctity of liberal democracy against over-

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reaching activist judges who seek to usurp legislative power and undemocratic international institutions that threaten the state's authority to govern itself is to reject international law as a binding force, either legally or morally. Professors Goldsmith and Posner thus argue that when self-interest and morality conflict, states will (as a descriptive matter) choose self-interest, and that this is precisely what they *should* do. Indeed, as we discuss below, the "rationalist" theory outlined in the first two parts of the book might be seen as an effort to provide an account of international law that does not offend these normative commitments.

Across their positive and normative arguments, Professors Goldsmith and Posner suggest that the study of international law is itself an overly optimistic endeavor in which any putatively good international interaction is characterized as evidence not only of the presence of international law, but of its benefits (p. 15). They attribute this flaw in no small part to the misguided, idealistic efforts of those who study international law (pp. 202–03). In a sense rejecting the convergence project even as they exemplify it, Professors Goldsmith and Posner argue that "[t]he international lawyer's task is like that of a lawyer called in to interpret a letter of intent or nonbinding employment manual" (p. 203). It is not to study world order, which is better left to "international relations scholars [who] take theoretical, methodological, and empirical issues more seriously than international lawyers do" (p. 16).

III. THE RATIONAL "LIMITS" OF INTERNATIONAL LAW

The Limits of International Law highlights both the great potential and the serious dangers of current trends in international legal scholarship. By offering a sustained interest-based account of customs and treaties, it crystallizes the important move toward using the tools of rationalist theory to develop a deeper understanding of international law and its influence on state behavior. But by failing to go further — by failing to offer a more complete and robust theory — the book threatens to simplify, rather than deepen, the terms of the debate. After all, rationalism is no longer as new to international law scholarship as it was when Abbott wrote his justifiably famous essay. And by ignoring many of the theoretical advances made by political scientists and lawyers since then, Professors Goldsmith and Posner create the danger that those advances will be swept away.

Moreover, by sometimes substituting revisionist assumptions for rigorous theoretical underpinnings, Professors Goldsmith and Posner's account threatens to reopen the very schism that the convergence of IR and IL scholarship promised to close. It is true that rationalism's

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methodological assumption that international law is the product of state self-interest dovetails nicely with revisionism's normative claim that international law is not legally or morally binding.[39] But Professors Goldsmith and Posner's account goes too far when it draws upon assumptions furnished only by their revisionist normative convictions to reach descriptive conclusions about the value of international law. This book may thus lead readers to incorrectly assume that a rationalist approach to international law necessarily implies or requires a revisionist normative commitment. Revisionism may need rationalism, but rationalism does not need revisionism.

A. *The Power of "Rational Self-Interest"*

Let us begin by considering what Professors Goldsmith and Posner's theory does and does not explain. Their approach has both the virtue and the sin of simplicity. It is, as they suggest, "a simple but plausible descriptive account for the various features of international law . . . in terms of something other than a state's propensity to comply with international law" (p. 10). Because Professors Goldsmith and Posner do not specify a fixed conception of state interest and do not consistently treat states as unitary actors,[40] their theory essentially amounts to the singular assumption of rationality: actors (whoever they may be) select a strategy by choosing the most efficient available means to achieve their ends (whatever those may be).[41]

Rationality is a powerful assumption about motivation that enables Professors Goldsmith and Posner, like Abbott before them, to use formal, game theoretic models to explain international law as the result of interaction among actors rather than simply as an exogenous force.[42] Such a shift in perspective permits the possibility that some legal phe-

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[39] It is worth noting that the one does not necessarily follow from the other. Positivists have long believed that international law is the product of rational self-interest, but nonetheless also accept it as legally binding once states do in fact consent. *See, e.g.*, HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438–39 (Robert W. Tucker ed., 2d rev. ed. 1966).

[40] *See infra* Part IV.

[41] We oversimplify a bit. Professors Goldsmith and Posner actually make two assumptions. The first is that states are rational. The second is that the international system is "anarchic," which is to say that there is no force that controls or regulates the activity of all states in the way that sovereigns exercise control over their own territory. In political science, approaches that retain only the core assumptions of rationality and anarchy have been labeled "minimal realism," Legro & Moravcsik, *supra* note 25, at 19–21, or "generalist realism," Rosecrance, *supra* note 25, at 135–36.

[42] As Duncan Snidal once argued, game theory "illuminates the fundamental issues of international anarchy and the implications of different configurations of national interests and political circumstances for international conflict and cooperation. At its best, it uses simplifying assumptions to expand our range of understanding and to provide deeper interpretations of international politics." Duncan Snidal, *The Game* Theory *of International Politics*, 38 WORLD POL. 25, 36 (1985).

nomena merely reflect coincidence while others result from coercion. Moreover, it offers a plausible explanation for why self-enforcing exercises in coordination or cooperation — those that are maintained by the self-interested behavior of states without centralized enforcement — might be more stable than those requiring iterated adjustment. By incorporating the concept of incomplete information, this approach might even help explain why states overreach and legalize agreements that do not ultimately provide their intended benefits. Idealist theories of international law do not generate these insights because they begin from different premises.

But how useful is all of this? As a tool of positive analysis, the assumption that states pursue their rational self-interest can form the basis for a compelling alternative to obligatory notions of international law. If outlining this broad alternative account were the only goal of this book, then what they have written here might be sufficient for that narrow purpose. But, in part because of Professors Goldsmith and Posner's own earlier work, this insight alone adds almost nothing to the existing conversation about international law. Indeed, a significant number of contemporary international law scholars already share these same ideas.[43] Moreover, the concept of rationality, when not anchored by some larger theory of the world that provides additional assumptions about state interests or behavior, tells us very little about the form and function of international law. Hence Professors Goldsmith and Posner decidedly seek to do more. They set out to offer a "theory" of international law that explains "how international law works" (p. 3) and that clearly identifies its "limits."

The problem with this ambition is that the theory they offer is not really much of a theory at all. Professors Goldsmith and Posner's main theoretical contribution in the book, beyond their emphasis on the concept of rational self-interest, is the introduction of a menu of games that attempt to explain international law. Each model (coincidence, coercion, cooperation, and coordination) is interesting in the abstract, but Professors Goldsmith and Posner do not provide any guidance on how to use the models to really understand international law. They are imprecise about the conditions that characterize or lead to one model rather than another. Compliance with customary international law could be the result of coincidence or cooperation; compliance with a treaty could result from coercion or coincidence or both at once.[44] They do no better when considering each model separately.

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[43] *See supra* note 17 and accompanying text.

[44] For example, they argue that American compliance with the "free ships, free goods" rule of customary law could be seen "as coercion as well as a coincidence of interest" (p. 52). Moreover, they suggest that "agreements that seem dominated by coincidence of interest or coercion [also] have a cooperative element, however thin" (p. 89).

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Why are some coincidences formalized as law, while others are not? Will states always engage in treaty-based cooperation or coordination when benefits outweigh costs? If so, what explains the exponential rise in treaties over the past fifty years? And if states do not care about their reputations for complying with international law, should we assume that large numbers of agreements are simply coerced? Would this fact have *any* bearing on third-party behavior?

These flaws plague Professors Goldsmith and Posner's case studies. Though they claim that their empirical work bolsters the argument that states comply with international law out of self-interest, their discussions are more descriptive than analytical.[45] For each legal regime, Professors Goldsmith and Posner use stylized facts to reconstruct different game theoretic models that supposedly underlie each legal rule during a given period of time. In some cases, like the "territorial sea" rule of customary international law, Professors Goldsmith and Posner attribute different models to the same regime at different periods in time (pp. 65–66). Depending on changes in state interest and power, the same legal rule could eventually reflect all four of their models. That is to say that a rule established through coercion could persist out of coincidence until, for some exogenous reason, it came to serve a cooperative or coordinative function.

The problem with this approach is that it is simply an exercise in Professors Goldsmith and Posner's skill at reconstructing and explaining history in game theoretic terms. It is not a test of the rational choice approach itself because it leaves the most interesting question — when and why each model applies — completely unexplained. Such a treatment undercuts two traditional advantages of rational choice theory: the push to specify explicitly the assumptions of the model used and the ability to examine systematically the effects of changes in any relevant variables. As Robert Keohane writes, "The menu of causal mechanisms identified by rational choice theory is rich and tasty . . . [but] identifying mechanisms is not equivalent to successful explanation."[46]

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[45] Contrast this approach with a growing body of empirical scholarship in the field. *See, e.g.*, VREELAND, *supra* note 17; Hathaway, *supra* note 1; Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000); Adam Przeworski & James Raymond Vreeland, *The Effect of IMF Programs on Economic Growth*, 62 J. DEV. ECON. 385 (2000); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000); James Raymond Vreeland, *Why Do Governments and the IMF Enter into Agreements?: Statistically Selected Cases*, 24 INT'L POL. SCI. REV. 321 (2003); James Raymond Vreeland, Institutional Determinants of IMF Agreements (Dec. 11, 2002) (unpublished manuscript), *available at* http://pantheon.yale.edu/~jrv9/Veto.pdf.

[46] Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. S307, S313 (2002).

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For a theory to be useful, it must make particularized predictions about specific events. Such predictions necessarily create the possibility of being proven wrong (thereby rendering the claims "falsifiable"). As Jeffrey Legro and Andrew Moravcsik point out, "no single theory can or should claim to explain all of world politics or to be empirically preeminent under all circumstances. Assertions of blanket preeminence undermine [a theory's] credibility"[47] because empirical research cannot prove or disprove them. Because they use the totality of the circumstances (including the outcome) to generate their game models, Professors Goldsmith and Posner do not provide any specific predictions that can be empirically falsified beyond the basic claim — shared by all rationalist theories of international law — that states will act out of self-interest rather than simply a sense of legal obligation.[48] Beyond this, Professors Goldsmith and Posner's theory predicts that any instance of apparent compliance with international law can be explained by some combination of coincidence, coercion, cooperation, and coordination. Yet because these models are so poorly specified, it is impossible to know what their more particular claim may be, let alone how one might falsify it. This is an important shortcoming of the book, for a theory that is impossible to contradict does not provide opportunities for advancing true understanding of its subject.[49]

For a rationalist analysis to make useful predictions, it must do something that Professors Goldsmith and Posner's does not: it must make additional assumptions about state preferences or the perception of payoffs.[50] As Keohane (himself an institutionalist) once noted: "That rationalistic theory can lead to many different conclusions in international relations reflects a wider indeterminacy of the rationality

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[47] Legro & Moravcsik, *supra* note 25, at 49.

[48] *Cf.* Snidal, *supra* note 42, at 27.

[49] Alexander Thompson, *Applying Rational Choice to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. S285, S299 (2002). As we noted earlier, *see supra* note 35, the falsifiability of Professors Goldsmith and Posner's approach is compromised by the fact that utility-seeking and law-abiding behavior are in fact often one and the same, an overlap that begs for an analysis much more specified than theirs. But even if one does find the claim that states are self-interested rational actors useful, it is hardly new, for it was articulated by Abbott over fifteen years ago and is implicit in every rationalist analysis advanced since then. *See* Abbott, *supra* note 10.

[50] *See, e.g.*, Katzenstein et al., *supra* note 21, at 40 ("Any rationalist analysis must stipulate the nature of the actors in the sense of specifying their preferences and their capabilities. What do actors desire? What moves can they make? Moreover, for any formal game theoretic analysis to work, it must assume common knowledge. The players have to share the same knowledge about the game. They must know what they do not know because of imperfect information, and they must share the same view of the payoff matrix and the available set of strategies. Rationalist accounts make very limited claims about the insights they can offer into the origins of such common knowledge."); Snidal, *supra* note 42, at 55 (noting that game "theory is very general and does not provide specific predictions without additional, auxiliary assumptions" about factors like preferences and payoffs).

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principle as such."[51] The principle of rationality "generates hypotheses about actual human behavior only when it is combined with auxiliary assumptions about the structure of utility functions and the formation of expectations."[52] If anything, *The Limits of International Law* demonstrates that without these assumptions a rationalist theory's predictive power is indeterminate because rationality can be made to explain almost any outcome in the international system.[53] Indeed, in a world characterized by repeat interactions, even what appears to be completely irrational altruism could be the product of strategic behavior on the part of states.[54] Hence Professors Goldsmith and Posner's theory may not even entirely exclude the idealism they set out to reject.

Professors Goldsmith and Posner, of course, are careful not to promise too much. They admit that their "predictive claims are not as precise as, say, those made by sophisticated economic analyses[, b]ut that level of methodological sophistication is not [their] aim here" (p. 10). Yet the bold and controversial conclusions that they reach belie this modesty. They claim that much of customary international law is coincidence, that much of multilateral treaty law will fail, and that international law in general can be quite counterproductive. Does the rational theory they offer support these notions of international law's limits?

The answer, quite simply, is no. Such conclusions require some insight into the interests that states pursue and the relative value that states give those interests. A rationalist approach to international law could just as easily emphasize the law's *power* to influence state behavior — by expanding the moves available to a state or changing the calculus of its payoffs for doing so, for example — rather than its *limits*.[55] Indeed, there is a new and growing body of scholarship, ac-

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[51] Keohane, *supra* note 24, at 381.

[52] *Id.* Indeed, the paradigmatic folk theorem holds that in infinitely repeated games there are usually an infinite number of subgame perfect equilibria. Hence rationality alone does not itself determine the outcome. For a simple proof of the folk theorem, see KEN BINMORE, FUN AND GAMES: A TEXT ON GAME THEORY 369–77 (1992).

[53] *See, e.g.*, Keohane, *supra* note 24, at 381 ("Furthermore, rationality is always contextual, so a great deal depends on the situation posited at the beginning of the analysis. Considerable variation in outcomes is therefore consistent with the assumption of substantive rationality."); Snidal, *supra* note 42, at 44 ("[T]heoretical specification of payoffs makes the game model more vulnerable to empirical evidence and leaves it potentially falsifiable. This condition qualifies it as a serious explanation and more than just a tautological redescription of the world.").

[54] *See, e.g.*, Snidal, *supra* note 42, at 41 (noting that "[s]ince actors sometimes forgo immediate interest for longer-term gain, observed action may not reflect preferences directly" and that "[o]bserved behavior . . . is thus often a biased and unsatisfactory indicator of underlying interests").

[55] Ironically, the institutionalist theory in political science that Professors Goldsmith and Posner purport to draw upon was inspired by an effort to do just this — that is, explain why states can and do create robust international regimes to govern themselves and others. *See infra* Part IV.

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knowledged only in passing by Professors Goldsmith and Posner, that does just this.[56]

B. Rationalism and Revisionism

If the assumption that states act according to rationalist self-interest does not, by itself, support the conclusion that international law has severe "limits," why, then, do Professors Goldsmith and Posner place such emphasis on this point? The answer can be found at least in part by examining the deep but unacknowledged relationship between normative and descriptive accounts of international law.

The vanguard of traditional legal scholars to whom Professors Goldsmith and Posner are responding has long operated on the assumption that states not only have a propensity to abide by international law, but they should in fact do so. The notion of obligation thus has both normative and descriptive force: as a normative matter, states *should* abide by international law (because they are morally and legally obligated to do so), and as a descriptive matter, they *do* abide by international law (because norms of obligation have the power to shape state behavior).[57]

Revisionists reject all this. International law does not carry moral or legal obligation. How could it when it threatens to undermine federalism, separation of powers, and domestic sovereignty? Revisionist scholars thus cannot accept a theory of international law that describes state behavior as motivated by obligatory norms: states (or at least most states) cannot possibly act according to legal and moral obligations if such obligations do not exist! Hence, it is obviously important for revisionists to develop an alternative descriptive theory that can explain state behavior under international law as arising from something other than obligation.

The rationalist theory adopted by Professors Goldsmith and Posner does just that. It provides an account of international law that does not offend revisionist normative commitments. It does not rely on the pull of compliance or the moral authority of the law. It simply relies on states' pursuit of self-interested goals: states use international law when it is convenient and ignore it when it is not. Although Professors Goldsmith and Posner portray the normative arguments in the final part of the book as a defense of the rationalist approach against traditionalists' attacks, the true relationship is quite the opposite. The ra-

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[56] *See* sources cited *supra* note 16.

[57] Again, this broad proposition does not include positivists. They would argue that international law created by virtue of state consent is legally binding, but they would not necessarily assume that it is also morally binding.

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tionalist theory is necessary to defend a revisionist normative vision, rather than the other way around.

The comfortable relationship between revisionism and rationalism might help explain in part why Professors Goldsmith and Posner promise to demonstrate the limits of international law — in the book's title, no less. This choice has much more to do with the rise of revisionism than it does with the dictates of rationalism. As the final part of *The Limits of International Law* demonstrates, Professors Goldsmith and Posner's understanding of how a self-interested state would act is shaped by a discomfort with international law that goes far beyond a scholarly disagreement about the ontology of the international system and the relative explanatory power of instrumental and non-instrumental theories. It is shaped, too, by a belief that international law threatens to undermine the fundamental institutions of liberal democracy.

International lawyers have often been criticized for letting their normative commitments color their analyses. It is perhaps ironic, then, that the critics have themselves produced a book that seems colored by the normative commitments of its authors — though in this case the commitments weigh against rather than in favor of international law. Yet it is hard to explain Professors Goldsmith and Posner's conclusions about international law's limits without reference to the normative arguments they make at the close of the book. If you believe, as they apparently do, that international law threatens to take the power to make policy out of the hands of those who should have it — elected state and federal officials — and give it to those who should not — unelected activist judges and international institutions that are sometimes run by despots — then of course you will conclude that states will rarely find that such "law" can serve their interests.

To be sure, Professors Goldsmith and Posner's conclusions can be justified by neutral-sounding assumptions that have no obvious relationship to revisionist thinking — about how many rounds are in a given game model[58] or the discount rate of a given set of states,[59] for example. The problem is that Professors Goldsmith and Posner appear wholly uninterested in the possibility that varying these assumptions — which their theory does not explain or justify — can lead to conclusions contrary to those implied by revisionism.

What, then, does the "rationalist approach" have to do with "the limits of international law"? Analytically, very little. Revisionism may need rationalism, but rationalism does not inexorably lead to revisionism. The assumption that drives Professors Goldsmith and Posner's

[58] *See infra* note 68 and accompanying text.

[59] *See, e.g., infra* notes 79–80 and accompanying text.

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account — that states act purely for instrumental reasons — does not, by itself, lead to the conclusion that international law is more limited than traditionally believed. We must know more about what interests states pursue — more than Professors Goldsmith and Posner tell us — to know how limited international law really is. Before we can know where the limits of international law actually lie, we need to develop a more rigorous theory of state behavior under international law. Doing so will allow us to move beyond the unproductive polarized debates over whether international law is limited or whether it works "almost all of the time"[60] to learn more about when and why it sometimes works and sometimes does not. In the next Part, we propose a way that rationalist scholars can begin to do just this.

IV. CONSTRUCTING A RATIONALIST APPROACH TO INTERNATIONAL LAW

The claims that "'power and interests matter,' that states seek to 'influence' one another in pursuit of often conflicting 'self-interests,' and that 'self-help' through military force is an important, perhaps the most important, instrument of statecraft, are trivial."[61] They are trivial not because they are wrong, but because they tell us very little about how states will behave. They lay a valuable foundation on which a theory can be built, but they do not in themselves constitute a theory of state action. It is therefore time for rationalist international legal scholarship to move beyond these basic claims to develop a deeper and more complex understanding of state behavior in relation to international law. By doing so, we can resist the pull back toward the polarized, dichotomous debate between "rationalism" and "constructivism" and instead move forward to build upon the more nuanced theoretical advances of the last twenty years.

Although rationalism has made significant inroads into international law scholarship, there is still much for legal scholars to learn from the work of rationalist scholars of international relations. To generate more specific hypotheses about state action and interaction than a single assumption about rationality permits, political scientists have supplemented minimalist commitments to rationality with other assumptions about the international system. These auxiliary suppositions, which provide content to issues like state interest, the relevance of substate actors, and the perception of payoffs, allow scholars to make clearer and more precise causal statements about world events. For example, if compliance with international law is alleged to reflect changes in state interests over time, a well-specified theory of interna-

[60] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).
[61] Legro & Moravcsik, *supra* note 25, at 21.

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tional law might say something about the origin of those interests and what precipitates change. Of course, introducing greater specificity exposes scholarship to the potential of being wrong. But this potential drives the development of new theoretical refinements and clarifies new avenues for empirical research.[62]

Legro and Moravcsik have identified four types of assumptions — about "power, preferences, beliefs, and information" — "[which] roughly correspond to the four major categories of modern rationalist international relations theory, namely realist, liberal, epistemic, and institutionalist theories. These theories correspond also to the four generic determinants of actor behavior in fundamental rationalist social theory: resources, tastes, beliefs, and institutions."[63] A central failing of Professors Goldsmith and Posner's approach is that, unlike these theories, it lacks a clear causal story. It instead adopts an apparently ad hoc application of all four types of auxiliary assumptions. Those seeking to move beyond this account to develop a richer rationalist theory of international law may thus begin by answering three simple but important questions about the nature of the state.

A. *When Are States More Interested in Relative or Absolute Gains?*

In political science, this question differentiates the two most established rationalist theories of international relations: realism and institutionalism. For realists, limits on "material resources constitute a fundamental 'reality' that exercises an exogenous influence on state behavior no matter what states seek, believe, or construct."[64] Simple and elegant, this belief in power politics and adherence to the idea of relative gains — the notion of "your gain is my loss" — leads to the straightforward conclusions that weaker states will balance against stronger ones and that conflict is inevitable. Viewed through this lens, "international law is an oxymoron."[65] If anything, it merely reflects coercion. As the story goes, someone will always lose (in relative terms) from cooperative endeavors like treaty organizations or customary legal norms, so the empirical existence of these phenomena must reflect unseen coercive behavior. This realist approach to international

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[62] *See* Thompson, *supra* note 49, at S299 ("To maximize the consequence of a theoretical argument, the researcher should present it in its most vulnerable form.").

[63] Legro & Moravcsik, *supra* note 25, at 46–47. Because epistemic theory examines how the ends-means calculations of rational actors are shaped by constructed beliefs and perceptions, it might be appropriate to characterize such work as sitting at the cross-section of rationalism and constructivism. Many of these theories are given more extensive treatment in HATHAWAY & KOH, *supra* note 5; and Hathaway, *supra* note 1, at 1944–55, which describes the application of rational actor and normative models to questions of international law.

[64] Legro & Moravcsik, *supra* note 25, at 18.

[65] Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 98 (2000).

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law leads to two clearly falsifiable predictions. The first is that the distributional consequences of international legal regimes will be consistent with the distribution of power between member states. The second is that changes in compliance will track exogenous changes in state power and that a state's choice to exit a legal regime likely reflects an increase in power (and conversely, that its new compliance likely reflects a decrease in power).

In contrast to realism, institutionalism assumes that states are interested in absolute gains — the notion that if your gain is also my gain, then so be it — and that "the exemplary problem in international politics is market failure and not, as it is for realists, a coercive struggle involving distributional and sometimes even zero-sum relative gains."[66] This difference in perspective makes institutionalism a theory of cooperation and coordination: states will work together when doing so reduces "transaction costs" and promises greater absolute gains (for themselves) than does unilateral action. To regulate interactions and monitor cooperative behavior, states might establish formal international regimes and organizations through treaties. But they need not. To the extent that informal regimes like those reflected in customary international law also create useful information about compliance, states will use them as well.

With regard to international law, the key analytical difference between realism and institutionalism — a difference that follows directly from the latter's assumption that cooperation and coordination can benefit states — is that institutionalists assume that when the distribution of power among members of an institution (or legal regime) shifts, the beneficiaries of the shift are not likely to leave the institution in an attempt to become less dependent on the choices and preferences of others. Instead, they are likely to make an effort to maximize their gains within the regime, possibly by changing the rules. Thus, while realism is a story about the inevitable fall of international legal institutions, institutionalism stresses their evolution and growth.

What do Professors Goldsmith and Posner believe? It is far from clear. Although they repeatedly emphasize the role of coercion in international law (it is one of their four models, after all), they explicitly disavow the realist label because they do not believe that state interests are fixed, let alone that states are only interested in power (p. 6). They instead claim the mantle of mainstream institutionalism and its position that states may cooperate and coordinate, that "transaction costs" matter, and that international law can address these concerns by generating important information about compliance. Nonetheless, they

[66] *Id.* at 96.

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remain skeptical that states will actually engage in multilateral coordination.[67]

The root of their skepticism lies in the cost of enforcement. In a multilateral prisoner's dilemma, they argue, the cost of enforcement is subject to free-riding and related collective action problems. Hence they doubt that "genuine multinational collective action problems can be solved by treaty, especially when a large number of states are involved" (p. 87). Yet, as Mark Chinen demonstrated in a response to Professors Goldsmith and Posner's earlier work on customary law, evolutionary game theory shows how states interested in absolute rather than relative gains might eventually overcome these very problems — a point the authors grudgingly acknowledge and then promptly ignore.[68] Although Professors Goldsmith and Posner recognize the potential for coordination and cooperation, they do so in a manner that often gives pride of place to power: standards of coordination will benefit stronger parties,[69] and cooperation is largely limited to bilateral or small group contexts where both parties are clear who the relative winner is.[70] Indeed, Professors Goldsmith and Posner's persistent re-

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[67] While they "have sympathy" for the IR institutionalist account of how states use multilateral treaties to overcome hurdles to multilateral cooperation, Professors Goldsmith and Posner think "proponents of this view have made claims on its behalf that are not always supported by the evidence" (p. 86). In particular, they are skeptical that states are capable of solving the multilateral prisoner's dilemma, a model they believe best represents the dynamic in a broad swath of legal regimes, from the protection of fisheries to the reduction of atmospheric pollution, and even peace (p. 87).

[68] *See* Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001). Chinen's work focused on the stability of customary international law, and while there are meaningful differences between customary and treaty regimes, the basic logic of his argument applies in both contexts. In a footnote, Professors Goldsmith and Posner concede this point, admitting that Chinen's "model shows that as long as parties either experiment or occasionally make errors, and as long as they interact frequently, they will eventually coordinate on Pareto-optimal actions" (p. 229 n.3). Curiously, however, they then add that "'[e]ventually' . . . may be a very long time, and the games the model uses rely on institutional structure that is lacking with respect to customary international law" (*id.*). This is a puzzling remark, at best, since the state system has certainly existed for "a very long time." Moreover, the response does nothing to support Professors Goldsmith and Posner's skepticism regarding the potential of treaty-based institutions to solve collective action problems. In a recent article, Andrew Guzman expands on Chinen's analysis and demonstrates that CIL can provide rational states with plausible solutions to collective action problems so long as the problems are not modeled as one-shot games. *See* Guzman, *Saving Customary International Law*, *supra* note 16.

[69] Professors Goldsmith and Posner implicitly make this claim when discussing the resolution of coordination games that fit the "battle of the sexes" model (pp. 33–34). We are left to assume that where a common standard is required, the standard posed by the strongest party will prevail until power structures shift and the newly dominant player forces other states to shift to a new standard (p. 34).

[70] To further illustrate this point, it is worth noting that Professors Goldsmith and Posner do not make clear whether they believe that cooperation will consistently occur when the absolute gain from a cooperative endeavor is relatively smaller for the more powerful party in a bilateral

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fusal to characterize legal regimes as dominated by coercion, cooperation, coincidence, or coordination is symptomatic of their lack of clarity about when and whether states are concerned with relative gains.[71]

As the indeterminacy of Professors Goldsmith and Posner's theory illustrates, rationalism requires some specificity about the conditions under which relative gain concerns do or do not influence state behavior, particularly if those concerns undermine or change otherwise potentially successful efforts at cooperation. In the absence of such assumptions, a rationalist theory is of limited utility. In order for future rationalist work to explain why certain issue areas have become legalized while others have not, and why certain types of regimes are more durable than others, more attention must be paid to when and how relative and absolute gains matter.

B. Is Every State the Same?

As we noted above, both realism and institutionalism assume that states are undifferentiated unitary actors. The dual assumptions that states are undifferentiated (that characteristics like regime type do not matter) and unitary (in the sense that domestic politics do not matter on the world stage) are necessary in order to isolate power or information as the primary independent variable of analysis. In both paradigms discussed above, it is the distribution of power and the potential for wealth creation that drive world politics, not the particular characteristics of individual states.

That said, theories built around differences between states — based on regime type, substate actors, or both — are entirely consistent with the assumption of rationality. Liberalism has developed around the premise that "[s]ocietal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments."[72] Liberal theorists like Slaughter and Moravcsik tie issues like treaty mak-

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relationship. An institutionalist would clearly say yes; a realist, no. In describing ambassadorial immunity, a paradigm case of bilateral cooperation, Professors Goldsmith and Posner take the ambiguous position that "details of behavior will vary in important respects when the relationships between states vary" (p. 57).

[71] It would not be incorrect to say that, by the end of Professors Goldsmith and Posner's book, one is left wondering whether there is any difference, in practice, between the four ideal models. Professors Goldsmith and Posner note that "cooperation and coercion are in many respects functionally identical" and that "it is often difficult to determine from the evidence whether cooperation or coercion best describes events" (p. 118). But they note also that "even agreements that seem dominated by coincidence of interest or coercion have a cooperative element, however thin" (p. 89).

[72] Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997).

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ing[73] and supranational adjudication[74] to regime type.[75] Liberalism proposes a causal mechanism in which international legal obligations mobilize domestic interest groups, which in turn pressure their governments to comply. Such theories are rational in the sense that Professors Goldsmith and Posner employ the term — actors are maximizing interests — but find the engine of world politics in the preferences of substate actors, rather than in the distribution of power or the potential for state-level wealth creation. Though based on a different set of assumptions than realism and institutionalism, liberalism puts forth its own set of falsifiable predictions about international law, foremost among them that liberal democracies "do law" — that is, enter into legal agreements and then comply with them — better than illiberal states.

As in the debate over relative and absolute gains, Professors Goldsmith and Posner do not stake out a clear position on the similarity of states. As a general matter, they assume that states are undifferentiated and unitary, but they then go on to relax those premises at various points in the book in order to "consider how various domestic groups and institutions influence the political leadership's decisions related to international law" (p. 6). While there is nothing inherently wrong with this approach, it begs the question of when domestic actors become salient and when they can be ignored, an issue Professors Goldsmith and Posner make no attempt to address. Without a well-specified explanation of when and why state-level differences matter on the international level, the theory threatens to devolve into reductionism and a collection of ad hoc independent variables that may or may not provide consistent explanations of international law.[76] Although they explicitly acknowledge this danger in response to early criticism (p. 6), they fail to avoid it.

Consider first their treatment of substate actors. In explaining the shifting levels of international trade cooperation in the early nineteenth century, Professors Goldsmith and Posner note that "[m]any of these movements can be explained by shifts in the balance of power between import-competing firms and farmers, and manufacturers that used imported supplies; shifting military alliances . . . ; and liberal ideology"[77]

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[73] *See* Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L REL. 157 (1995); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

[74] *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 278 (1997).

[75] For a fuller description of her liberal theory of international law, see Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000).

[76] *Cf.* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 18–37 (1979) (cataloguing the problems with reductionist approaches to world politics).

[77] Citation has been omitted.

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(p. 137). Indeed, Professors Goldsmith and Posner base their theory of why states use trade barriers on their "internal political economy" (p. 139), which is a coarse aggregate of the interests of domestic industry that "vary from good to good, depending on the relative political strength of exporters and import competers" in each country (p. 138). This assumption about the origin of state preferences allegedly provides a better prediction of the behavior of states than does the institutionalist assumption that states are simply interested in wealth.

The problem with such a formulation is that it offers insufficient insight into *when*, *to what extent*, and *why* substate actors shape a state's preferences. It leaves open the possibility that the desires of powerful substate actors may be welfare-negative for the states as whole units (an outcome that is decidedly inconsistent with their general assumption that states can be treated as rational unitary actors). Such ambiguity undercuts the power of the analysis: it is hard to validate (and even harder to refute) the claim that international law is the result of self-interest when those very interests vary by other, unspecified contextual factors.

A similar problem arises in Professors Goldsmith and Posner's treatment of different types of regimes. In several of their case studies,[78] Professors Goldsmith and Posner refer to states' time horizons or "discount rates" to explain the success or failure of various customary and treaty regimes.[79] In these cases, they do not assume that all states have similar discount rates (that is, that they are undifferentiated), as realists and institutionalists would traditionally assume. Rather, they suggest that "[w]hen states have unstable political institutions, their leaders weigh short-term payoffs more heavily than leaders in other states do" (p. 57). In doing so, they create a distinction between a "rogue state" and, "[a]t the other extreme, a state whose institutions successfully aggregate the preferences of citizens and are able to extend them across time . . . and whose citizens care about future payoffs" (p. 31), namely liberal democracies.[80] They use this same distinction to

[78] In explaining the "free ships, free goods" custom, for example, Professors Goldsmith and Posner note that "[i]n each of the wars discussed, a belligerent's decision whether, and to what extent, to forgo capturing enemy property on neutral ships was the product of an assessment of its (usually short-term) interests" (p. 52). This discussion of the short- and long-term interests is again important to their discussion of ambassadorial immunity (pp. 54–59) and their theory of international rhetoric (pp. 172–77).

[79] It appears that Professors Goldsmith and Posner are skeptical of customary international law in large part because they believe that states must have low discount rates to engage in multilateral cooperation (p. 36). Their use of the concept is not surprising: cooperation through legal regimes is a difficult and time-intensive process that is unlikely to provide many "quick wins," so if states have high discount rates, they are unlikely to work well together.

[80] It is interesting to note that, if Professors Goldsmith and Posner are right that liberal democracies have relatively low discount rates, multilateral cooperation should be possible if states are indeed only interested in absolute gains. It is only in a realist analysis, where relative gains

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conclude, for example, that "rogue states violate the rules of diplomatic immunity more often than 'civilized' states do" (p. 57) and that liberal states are more interested in human rights than authoritarian ones (p. 109).

As with the salience of substate actors, Professors Goldsmith and Posner do not incorporate a generalized distinction between states with different regime types into their theory. Instead, they refer to regime type in particular cases when they deem it relevant. But this kind of ad hoc approach provides little insight into when regime type really matters and when it does not.[81] Whereas liberal theorists like Moravcsik and Slaughter propose generalizable theories of domestic politics, in which regime type *causes* compliance, Professors Goldsmith and Posner consistently rely on a context-specific approach — one that allows them to bolster the claim that states act out of self-interest, while at the same time leaving open to continual reinterpretation the content of that interest. As we have suggested already, the difference between these two approaches is crucial: one is falsifiable, the other is not. If rationalists are to claim that their approach provides better explanations than traditional legal scholarship, these issues need to be addressed.

C. *How Much Do Perceptions and Beliefs Matter?*

Working at the intersection of rationalism and constructivism, epistemic theorists have explored the role that perceptions and beliefs play in shaping state behavior. As Legro and Moravcsik explain, "the epistemic paradigm stresses exogenous variation in the shared beliefs that structure means-ends calculations and affect perceptions of the strategic environment."[82] In doing so, this line of inquiry problematizes much of what the other paradigms we have discussed take as an unexplained given — for example, that states understand the environment in which they operate and that similar states in similar situations act similarly. But unlike sociological theories about norms and values, which may not require an assumption of rationality, epistemic theory both embraces consequentialism and strives for generalizable observations about actors' behavior based on certain perceptions or beliefs.

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matter more than absolute gains, that one would expect actors with relatively lower discount rates to refuse to cooperate.

[81] For example, it allegedly matters insofar as the high discount rate of rogue states will sometimes make them unlikely, if not unable, to comply with international law. But why does that same characteristic not lead Professors Goldsmith and Posner to expect that liberal states with low discount rates will do the opposite, that is, comply with agreements? This is a particularly important question in light of our discussion of evolutionary game theory. *See supra* section IV.A.

[82] Legro & Moravcsik, *supra* note 25, at 11.

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An example may help illustrate the importance of epistemes as causal variables in rationalist research. Game theorists (and their critics) have long recognized that incomplete information can undermine the emergence of cooperative equilibria, even among actors for whom such cooperation would be beneficial. Though communication, in the way Professors Goldsmith and Posner characterize international law, can help, it cannot resolve these issues because such cheap talk does not preclude misinformation or treachery. The question, then, is whether all states treat this uncertainty similarly, or whether some aspect of the state, perhaps culture or history, leads to meaningful variations in response. As Robert Jervis has noted:

> [S]ince international politics is an interactive process, a statesman's understanding of the other's behavior is influenced by how he thinks his own state is behaving toward the other. Indeed, perhaps the most important psychological factor that interferes with cooperation is that statesmen — and people in their everyday lives — greatly underestimate the extent to which their actions threaten or harm others. They think they are cooperating when an objective observer would say that they are, at least to some extent, defecting.[83]

Thus, "[t]he general question raised by this case is the extent to which (and the circumstances under which) the main impediments to cooperation are rooted in potentially malleable beliefs about the situation rather than in its structure."[84]

In evaluating international law, Professors Goldsmith and Posner do not explicitly rely upon exogenous changes in epistemes, as they do upon power, information, and preferences. But at times they come close. Their theory of rhetoric is premised on the belief that states understand the language of obligation differently than the language of custom or comity (p. 183) and that such differences are key to resolving problems of perception. Moreover, they assert that talk is a cheap mechanism for signaling a desire to communicate or bluffing about a state's relatively high discount rate (pp. 175, 181). In so doing, they acknowledge that even states that intend to cooperate can have difficulties *perceiving* the intentions of their partners (to cooperate or to defect, for example) and that "disagreements in the interpretation of [a] cooperative move might lead to retaliation and thus to a breakdown in cooperation" (p. 176). Similarly, they assert that references to international law function as a filtering mechanism to differentiate between social and religious *belief systems* that constitute groups at the state and substate levels.[85]

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[83] Robert Jervis, *Realism, Game Theory, and Cooperation*, 40 WORLD POL. 317, 337 (1988).
[84] *Id.* at 340.
[85] Professors Goldsmith and Posner write:

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By appealing to social and religious groups as relevant audiences for international rhetoric, Professors Goldsmith and Posner beg the question of how much these identity groups matter. Do states that share religious and regional values understand appeals to law differently than states that share no salient characteristic? Do Professors Goldsmith and Posner think they do? Though *The Limits of International Law* (wisely) does not broach these issues, its attempt at expansive explanations stretches its ability to rely on the core assumptions it asserts. In doing so, it sacrifices theoretical congruence.

* * * *

Professors Goldsmith and Posner are, of course, far from alone in failing to provide clear and coherent answers to the three questions posed here. In this sense, their failings exemplify those of international legal scholarship more generally. Accordingly, we address these questions to ourselves as much as to Professors Goldsmith and Posner. Our point is therefore to encourage current and future rationalist scholars to begin to fill the gaps that this book exposes.

V. SETTING INTERNATIONAL LEGAL SCHOLARSHIP STRAIGHT

The Limits of International Law is emblematic of the most important recent trends in modern international legal scholarship. Bringing a rational choice approach developed by political scientists to bear on international law, it illustrates the deepening engagement of the disciplines of international law and politics. And it represents the coming of age of the revisionist approach, which casts a suspicious eye on international law and its power to shift decisional authority from local government and the federal executive to international institutions and activist federal judges. Understanding where the book succeeds and where it falls short can help us chart a new agenda for international legal scholarship.

By laying bare both the promise and the faults of modern international law scholarship, Professors Goldsmith and Posner help us see the way forward. Scholars should resist the pull back to the polarized debates between those who believe international law almost always works and those who argue that it virtually never does. Instead, we must move forward to develop more rigorous accounts that allow us to

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When returns from cooperation are maximized by dealing with a small number of states with similar traditions and values, talk will appeal to relatively specific values: religious (Christian), regional (Europe), and so forth. When returns are maximized by dealing with a larger number of diverse states, talk will be watered down and reference will be to thin moral values (friendship, loyalty, trust) and, at the extreme, purely formal values such as law or political interests that are already shared. (pp. 182–83)

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better explain when and why international law sometimes works and sometimes does not. Three principal goals should guide the next wave of international legal scholarship. First and foremost, international legal scholars must pay more attention to making clear, defensible, falsifiable assumptions. Second, scholars on both sides of the constructivist/rationalist divide should engage one another in dialogue and consider whether and how the two approaches might work together to provide a more complete understanding of state behavior. And finally, once scholars specify clear assumptions, they should test them against the evidence to establish that they do, in fact, reflect how international law works in the real world. This book, then, should spur the discipline to continue to reach for more complex and empirically engaged scholarship.

A. *Making Theory Useful*

The Limits of International Law demonstrates all too clearly that the discipline needs to be much more precise about the assumptions used to analyze and evaluate international law. Scholars can begin by thinking about how to answer the questions we pose in Part IV: When are relative or absolute gains more valued by states and why? Is every state the same? Might some states act differently toward international law than others? And how much do perceptions and beliefs matter? Do they matter more under some circumstances than others? How can we tell?

This is not to say that scholars should explicitly adopt one of the four rationalist paradigms we have described. Nor does the answer to each question we have posed have to be the same in every circumstance (indeed, that would seem highly unlikely). But when a theory incorporates multiple assumptions, about power *and* preferences for example, scholars must be clear about the scope of their analysis and the circumstances in which different assumptions and variables become salient. This is where Professors Goldsmith and Posner fall short. The absence of a framework that explains why rational behavior takes different forms under different circumstances can make rationalism look like nothing more than a game-theoretic retelling of history.

In calling for greater analytical clarity, we do not mean to say that all scholarship needs to begin with a lengthy exegesis of its theoretical core, much less expound on its contribution to some grander theory of international law. Indeed, most should not. International law is well suited — and far better positioned than political science — to engage in a more focused and narrow inquiry into the form, function, and effectiveness of specific customary and treaty-based legal regimes. This

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"mid-range" theorizing[86] has the potential to place in analytic context the thick descriptive efforts that international lawyers are so uniquely situated to provide. As we suggest in Part III, a central weakness of *The Limits of International Law* is that it does not do enough of this, nor does it give direction to others as to how to do it. The command to go forth and "be rationalists" is not by itself enough.

B. *Taking Constructivism Seriously*

Professors Goldsmith and Posner largely dismiss traditional international legal scholarship and its cousin, constructivism, as offering an "unfruitful" research agenda (p. 15). They claim that the noninstrumental accounts of international law offered by such scholars "mask many different reasons why states act consistently with international law, and result in an impoverished theory of compliance" (p. 15). This is too bad, because in dismissing the arguments of their critics without engaging them, they not only fail to convince skeptics, but also miss an opportunity to consider whether and how the two approaches might work together to provide deeper accounts of international law.

Rationalist scholars would do well to give their counterparts in constructivism and international legal studies a bit more credit than Professors Goldsmith and Posner do. Rationalist analysis of the sort Professors Goldsmith and Posner outline is well suited to providing insights into the structure of the international system and legal regimes. But all rationalist analyses leave open critical questions about the nature of the international system and the role of human agency, ideas, and preferences within it. Where do actors come from? How do they know what moves (in game-theoretic terms) are available to them? Where do their preferences come from? Rationalists ignore these issues for the purpose of simplicity, but in doing so they run the danger of assuming away some of the most important questions about the international system. This is as true for Professors Goldsmith and Posner's approach as it is for most rationalist approaches.

At its best, traditional international legal scholarship has tried to answer these questions. And recent innovative and careful work by constructivist scholars — like Christian Reus-Smit, Kathryn Sikkink, Martha Finnemore, Jeffrey Checkel, Jeffrey Legro, and Vaughn P. Shannon[87] — has responded to the criticisms of earlier constructivist

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[86] *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 39 (enlarged ed. 1968) (defining middle-range theories as "theories that lie between the minor but necessary working hypotheses . . . and the all-inclusive systematic efforts to develop a unified theory").

[87] *See* CHRISTIAN REUS-SMIT, THE MORAL PURPOSE OF THE STATE (1999); Jeffrey T. Checkel, *Norms, Institutions, and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83 (1999); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Fail-*

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work and begun to fill some of the gaps necessarily left by rationalist theory. This scholarship can be a productive complement to future rationalist studies; the two can be partners, even as they are rivals. That is the mark of a productive scholarly debate.

The failure of rationalist scholarship and normative international legal scholarship to see one another as complements rather than simply as rivals has as much to do, we suspect, with ideological differences between those who are doing the theorizing as it does with the substance of the theories themselves. As Professors Goldsmith and Posner note, international law scholars have traditionally assumed that states are both legally and morally required to follow international law (p. 185).[88] By contrast, Professors Goldsmith and Posner argue (based on a very brief legal and moral philosophical account of international law) that states have no legal or moral obligation to follow international law. This fundamental normative divide in part underlies the descriptive divide — the disagreement over whether states are actually motivated by a sense of legal and moral obligation to follow international law or whether they instead act purely out of self-interest. What this points to, then, is a desperate need for the discipline to engage the moral and legal philosophical questions raised by international law more deeply. While their treatment of these issues is fairly cursory, Professors Goldsmith and Posner deserve credit for addressing them at all (few modern legal scholars have) and for making exceedingly clear the importance of these philosophical questions to the theoretical debates over how international law works.

C. *Testing Theory Against Practice*

Professors Goldsmith and Posner argue that international legal scholarship has, to date, wrongly assumed that "'almost all nations observe almost all principles of international law and almost all their obligations almost all of the time'" (p. 165).[89] Professors Goldsmith and Posner adopt the opposite assumption. They assume that states do not have a preference for complying with international law but instead act entirely out of self-interest (p. 9).

The problem with both accounts is that the scholars making them rarely put their assumptions to the test. Though Professors Goldsmith and Posner promise to explain "how international law works in practice" (p. 3), they make remarkably little effort to test their theory against state practice. Their empirical evidence consists of references

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ure" of Internationalism, 51 INT'L ORG. 31 (1997); Vaughn P. Shannon, *Norms Are What States Make of Them: The Political Psychology of Norm Violation*, 44 INT'L STUD. Q. 293 (2000).

[88] This is much more true of the generation of international law scholars that preceded Professors Goldsmith and Posner than it is of their contemporaries. *See* sources cited *supra* note 16.

[89] Professors Goldsmith and Posner are here quoting HENKIN, *supra* note 61, at 47.

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to particular historical events that illustrate their claims (for example, they make several references to Hitler's use of rhetoric to illustrate their claim that international discourse is frequently false and misleading (pp. 168, 174, 179–80)). But such references, without more, cannot serve as objective empirical validation of a theory. Professors Goldsmith and Posner offer no explanation for why they chose the particular historical events that they did[90] nor, for the most part, do they cite to other scholars — of history or political science, for example — who concur with their appraisals of those events. To be fair, this is perhaps more than can be expected of a single book. But to move the debate beyond the current he-said she-said dynamic, scholars on all sides of the debate must move to test their theoretical claims against the empirical evidence.

Focused and effective empirical work will help address the valid concern that international lawyers (on both sides of the debate) sometimes lead with their hearts and not with their heads. This is not to say that legal scholars must completely sever the link between positive analysis and normative concerns, much less that there is little reason to explore the relationship between international law and foreign affairs or constitutional concerns. As we review in Parts I and IV, both traditional and revisionist scholars have much to say about these topics. But there is a real need to be clear about the difference between empirical analysis and normative advocacy.[91]

There are, of course, many hurdles to focused empirical work in international law. To begin with, the field is plagued by a shortage of good, reliable data. In part because little empirical analysis has been done to date, little data have been gathered on which such work can be based. This is starting to change, but the shortage of data will undoubtedly remain a challenge for the foreseeable future. Yet we need not — indeed should not — wait for impeccable data to arrive before we begin the task of evaluating the external validity of the theories we

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90 For a critique of such approaches, see GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128–30 (1994), which describes the problem of selection bias and the need for scholars engaged in qualitative analysis to explain how they choose their case studies.

91 Professor Goldsmith has made this very point himself. *See* Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153 (2002) (writing that "[s]cholarship generally, not only in law or political science, should ground its empirical assertions in warranted inferences from sound evidence, should admit to causal and empirical uncertainty where it exists, should avoid tendentiousness and selection bias, and should follow the best statistical practices when making statistical claims," but noting that "legal scholarship [also] frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones").

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put forward. Instead, we must do our best with what is available, all the while calling for and generating more and better evidence.[92]

Another hurdle to testing the impact of international law is that it can be difficult to separate behavior motivated by self-interest from that motivated by law. This is particularly true in international law because the law is primarily consent-based and therefore utility seeking and law-abiding behavior is often identical. This sometimes leads scholars like Professors Goldsmith and Posner to dismiss law as an independent force on state behavior, explaining law-abiding behavior as instead motivated by self-interest.[93] Once again, there are ways past this real challenge. Even if we were to assume that self-interest is the central motivating force for states, we can test whether international law has an independent causal impact on state behavior by, for example, examining cases where self-interest predicts one behavior and law-abiding behavior predicts another (for example, where short-term interests and long-term cooperative goals conflict or when a state's interests undergo exogenous change after it joins a legal regime so that the legal regime now requires behavior that is no longer in the state's self-interest).[94] Scholars might also examine whether some legal regimes act differently with respect to international law than do others. Or they might examine whether state institutions treat international law as important, for example by citing it in court opinions.[95] This is, of course, not meant to be an exhaustive list of possible approaches. But it does demonstrate that the conceptual hurdles to empirically testing assumptions about the effect of international law on state behavior are far from insuperable.

International law has survived generations of criticism. In part, this is because assaults have led legal scholars to take a step back and appraise the value and strength of their commitments. Much like E.H. Carr and Hans Morgenthau a half-century ago, Professors Goldsmith and Posner have crystallized the revisionist challenge to international law in *The Limits of International Law*. Whether this will lead to a more robust scholarship on international law or to a rehashing of a half-century-old debate depends on what scholars do next. Do we return to the tired debates of the 1940s and 50s or do we move forward

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[92] For an elaboration of this argument in the context of a debate over the value of empirical research regarding the effect of human rights treaties on state behavior, see Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185 (2003).

[93] This problem was highlighted in a discussion of international law scholarship by political scientists in Charlotte Ku et al., *Exploring International Law: Opportunities and Challenges for Political Science Research*, INT'L STUD. REV., Spring 2001, at 3, 7.

[94] For more on this, see Beth Simmons's contribution in *id.* at 11.

[95] *See, e.g.*, Lavinbuk, *supra* note 4, at 874 (outlining the extent of the Supreme Court's use of international law in the Jay and Marshall eras).

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to develop deeper, more sophisticated understandings of how international law really works? There is only one rational choice.

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