RECENT BOOKS ON INTERNATIONAL LAW

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REVIEW ESSAY

INTERNATIONAL LAW IS, AS INTERNATIONAL RELATIONS THEORY DOES?


Academicians who study either international law or international politics share a dirty little secret: both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is still reluctant to admit the necessity of the other. The unmentionable fact is that international law and international politics are intertwined in a symbiotic relationship. Governments need political trade-offs to secure the creation, adoption, and implementation of international legal rules; national decision-makers need the means and measures of international law to conduct their foreign policies, regardless of whether those policies concern diplomatic matters, international trade, transborder data flows, international banking, disaster relief, international communication, or issues of war and peace. In response to this unspoken, but real, connection between international law and world politics, numerous theorists emerged during the twentieth century to suggest explanations regarding how and why the dealings between the governments of states take place in the ways that they apparently do. While most of these theorists were international political scientists who wrote about foreign policy and international relations, an increasing number today come from the ranks of international lawyers. *Foundations of International Law and Politics* (Foundations), an engaging compilation of previously published materials, and *The Politics of International Law (Politics)*, a collection of original essays, are among the most recent of these contributions by international lawyers striving to clarify how and why international relations (IR) theories relate to the real world of international legal events. Significantly, these two volumes are especially welcome as the most important additions thus far to this literature.

The editors of *Foundations* are well known in international law circles. Oona Hathaway is an associate professor of law at Yale Law School and a 2004 Carnegie Scholar. Harold Koh is dean and Gerard C. and Bernice Latrobe Smith Professor of Law at Yale Law School. Their compilation presents in four major sections the scholarly debate between international relations and international law theorists over why and how the international system operates. Part I provides a brief, but useful, introduction to the relationship between international law and international relations. Part II sets out three prominent “interest-based theories” (namely, realism, institutionalism, and liberalism) that purport to explain what motivates state behavior. In the third part, a number of now popular “norm-based theories” of state conduct (namely, constructivism, the “fairness and legitimacy model,”1 and so-called legal process theories2) are introduced. The editors see these latter

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theories as sharing the belief that interest-based theories sidestep explanations for state behavior that emphasize the pull of legal obligations. Contrariwise, theories grounded in normative considerations strive to explain how and why governments adopt specific policies and perform certain actions in their international relations.

The forty contributions in this anthology not only represent learned thinking of prominent academic experts, but also elucidate major disagreements and contrasting approaches for explaining and predicting state behavior in diverse circumstances. In this way, Foundations invites the reader to reconsider modern IR theories and to question their importance in understanding the efficacy of modern international law. What assumptions do these theoretical approaches make about international affairs? How and why did these schools of thought emerge? What relevance do these theories have for international law, and conversely, what relevance does international law have for these theories? To what extent is the functioning of international law reliant on international politics? And significantly, how are the processes of international politics dependent upon the contents of international law? These questions are neatly addressed by the Foundations compendium, which serves as a valuable framework for critically discussing the enduring relevance of IR theory to the impact of international legal rules on state behavior.  

Each chapter in Foundations is subdivided into three sections. First, a brief introduction supplies fundamental explanations of the key ideas to be addressed by a particular theoretical approach. This material sets the stage for the second section, which includes two or three excerpts from key original texts that address a theoretical approach. The third section, entitled "notes and comments," stands out as particularly enlightening. The editors use this opportunity for commentary to tie each core theory or spin-off into a neat intellectual package. They do so by enumerating questions that probe and flesh out more substantively the authors' perspectives on each theoretical approach and that illuminate additional aspects of the theories being analyzed. This analytical commentary provides much grist for the reader in that it skillfully brings together and elaborates on key questions that pervade theoretical selections in the chapter. No less important, it also carefully annotates, with impressive documentation, various schools and methodologies related to the approach being discussed.

Politics comes from a different direction. The volume closely examines a single school of IR theory—constructivism—and highlights its salience for explaining how states address a variety of issues. Its editor and triple contributor, Christian Reus-Smit, is professor and head of the Department of International Relations in the Research School of Pacific and Asian Studies at the Australian National University, and very sympathetic to the constructivist approach. As affirmed by all the contributors, constructivism begins with the fundamental assumption that international actors, especially governments of states, do not perceive the world objectively. Rather, constructivists contend that states (which, in actuality, are decision makers in governments) conceive of their interests, identities, and strategies in terms of their social milieu. Perceptions of interests and identities are affected by, and derived from, environmental circumstances; these perceptions then affect how policies are made on international legal issues. Within the context of this theoretical framework, Reus-Smit and the other nine contributors undertake pensive critiques of international responses to various legal issues, among them the use of armed force, global warming, migrant rights, the International Criminal Court (ICC), the war in Kosovo, roles of global financial institutions, and acts of humanitarian intervention.

Taken together, both volumes illuminate the panorama of international legal development within the evolution of modern IR theory. In this reviewer's opinion, that body of theory evolved in

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four intellectual waves during the twentieth century, and each set of contributions has a specific conception of the role played by international law in world affairs.

The first of these waves—idealism—flourished in the period between the First and Second World Wars. President Woodrow Wilson, who often is associated with his principled approach to foreign policy, institutionalized idealism in his hopes for peace in a universal League of Nations. As a theory, idealism considers international law, morality, and multilateral organization, rather than the quest for power in and of itself, as the main influences in international politics. Human nature is viewed as inherently good or altruistic, or at least constrained by a “harmony of interests” in which law and morality result from individual pursuit of self-interest. Emphasis is put on interstate community, cooperation, and conciliation, not power relations. People are capable of mutual assistance and collaboration through reasoned behavior. Hence, the proper education, acceptable habits, and appropriate structure of the international system can give rise to shaping human nature into the basis of peaceful and accommodating international relationships. Idealists view the world political system as a community of international actors with the potential to work cooperatively to resolve mutual problems.

Both Foundations and Politics omit substantial reference to the contributions of idealism to the evolution of contemporary legal rules in IR theory. Although the three editors undoubtedly did not intentionally do so, an impression surfaces that idealism’s philosophical tenets are, for the most part, impractical, anachronistic, and irrelevant for the real world of modern international law and politics. But is that conclusion correct?

For idealists, morality serves as the wellspring for principles guiding international relations. Strengthening multilateral institutional arrangements can ameliorate conditions giving rise to war and international anarchy. Politics embodies the art of good government, as opposed to the art of the possible. Good diplomats do not aim exclusively for what can be done; they strive to accomplish what is good. They seek to create a world political system governed by the good life, which involves justice, obedience to lawful rules, and respect for their fellow human beings. For idealists, no pattern of human behavior is immutable. Habits can be changed. Humans retain the capacity to learn, to adapt, and to abide by new rules for behavior. Reform must be inspired by compassion and by sincere ethical concern for the welfare and security of all people. The claims of the critics notwithstanding, these attitudes are neither passé nor defunct. They are authentic and entrenched in the real world of international legal behavior, as Foundations makes explicit in the sections “Theories of Fairness and Legitimacy” and “Applications.” Granting stature to the constructs of fairness, legitimacy, and authority enable the fundamental theoretical foundations of idealism to creep into the discussion. Like fairness and legitimacy, idealism maintains that it is facile to conclude that interest-motivated behavior is the driving force behind human nature and international relations. People learn to live, improve, and grow in their social milieu, both at home and internationally. The societal objective is to attain an acceptable level of civilization, which means learning to coexist in societies, functioning under fair and just laws, and banning conduct that is conflictive and disruptive. As for authority, the idealist argues that, should the art of the possible become the chief guide for intergovernmental political behavior, it would amount to a sinfully permissive license to lie, steal, cheat, and murder in diplomatic dealings. Instead, the idealist posits that moral principles should serve as the foundation for instituting free, fair, and obligatory international conduct among states. In sum, for legitimacy and a sense of obligation to take root globally, interstate politics must strive to reject the use of force, encourage learning, and establish unbiased rules that permit the fair and just operation of international society.

5 In his Fourteen Points speech to Congress in 1918, President Wilson set out a number of the pillars supporting the idealists’ agenda for peace, including self-determination, open diplomacy, national reductions in armaments, freedom of the seas, free trade, and an end to colonization. U.S. Department of State, President Woodrow Wilson’s 14 Points, in 45 THE PAPERS OF WOODROW WILSON 536 (Arthur S. Link et al. eds., 1984). Among the proponents of the “idealist school” are pacifists, world federalists, humanitarians, legalists, and moralists.

6 See, e.g., BERTRAND RUSSELL, HAS MAN A FUTURE? (1962); GRENVILLE CLARK & LOUIS SOHN, WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS (1966); RICHARD A. FALK, A STUDY OF FUTURE WORLDS (1975).

7 The lone exception is Jack Goldsmith and Stephen Krasner’s contribution, The Limits of Idealism, 132 DAEDALUS 47 (2003), excerpted in Foundations at 350.
To appreciate the lasting influence of idealism, as the contributions to Foundations make perfectly clear, one only has to consider how principles of idealism undergird modern human rights law, international criminal law as reflected in the ICC and the war crimes tribunals for Rwanda and the former Yugoslavia, global trade law and the World Trade Organization (WTO), international environmental law, and international humanitarian law. Similarly, contributions in Politics also plant their constructivist roots in idealist soil. Particularly notable in this regard are treatments assessing the Convention on Climate Change and its Kyoto Protocol, the Landmines Convention, international law and migrant rights, the ICC, the 1998 Kosovo bombing campaign, and international financial institutions. Given the reality of their pervasiveness in current international law, such fundamental principles of idealism should neither be ignored nor left unappreciated.

In the wake of massive devastation and incredible inhumanity inflicted during the Second World War, strident intellectual criticism erupted against the idealist paradigm. Critics attributed the war to aggressive, brutal dictatorships—Hitler, Mussolini, Stalin, and Tojo—who sought to conquer the world and to that end, ran roughshod over the idealists' legalistic and moralistic assumptions. Idealists were rebuked as naive utopians who underestimated the brutal reality of power politics and the innate selfishness of humans to put their own desires above the needs of others. Neither international organizations without military capability nor paper treaties could prevent such horrendous aggression, which could be halted only by military might and the resolute commitment of governments to exercise power.

These criticisms gave rise during the 1940s to a new, second wave of IR theory called realism, which challenged the foundations of idealism. Realists viewed international politics as a struggle for power, which is exercised when one actor is able to influence or control the behavior of another actor. For realists, a key element in this power calculus appears as the concept of interest. Rational governments act to promote their interests. Accordingly, to act in the pursuit of personal, group, and national interests is to engage in politics. To do so also is to obey forces inherent in nature. That is, to seek power to promote one's own interests is to follow the fundamental dictates of natural law, summed up in the survival of the fittest. The rational person's most prized asset is neither moral principle nor good intentions. It is prudence. The rational decision maker is not concerned with justice, morality, or legal righteousness in the game of international politics. Rather, he is preoccupied with maximizing political advantage and ensuring survival of the state—especially in terms of its sovereignty, territorial integrity, and political independence.

Contrary to idealism's faith in human nature, realism exudes pessimism. For realists, political struggle is inevitable since human beings innately seek power and strive to dominate others. With
regard to international affairs, policymakers struggle to defend their policy’s national interests and to acquire more power on the world stage. States coexist in a Darwinian world where governments wrangle with each other for political primacy. In that conflictive milieu, governments shape their states’ foreign policies by making prudent decisions to ensure survival. Put another way, realists define national interest principally in terms of factors that enhance or preserve a state’s security and its military and economic power.

Both *Foundations and Politics* make clear that realism rests in theoretical groundwork that is fundamentally antagonistic to the purposes and practice of modern international law. For hard-core realists, respect for moral principles amounts to a wasteful and dangerous exercise that can interfere with the rational pursuit of national self-advantage. Advocates of power politics believe that questions of goodness, virtue, and morality must not obstruct rational policy calculations. The government, being the authoritative embodiment of the state, possesses neither good nor evil ethical or philosophical predilections. The critical consideration for a government’s intentions is how best to amass and project power to serve the national interest of the state.

Where is international law in this mix of international relations and power politics? Why do governments obey nearly all international legal rules nearly all of the time? Realists declare that diplomacy and statecraft merely are tools that ensure the survival of the state in a brutal, harshly antagonistic world environment. To achieve survival, the acquisition of power is paramount; no legal principle can override the ability to exercise self-help. In fact, the realist contends that the legal principle of state sovereignty gives to governments lawful free will and responsibility to take whatever actions—within the realm of prudence—that are deemed necessary to advance their state’s interests at home and abroad.

To the realist, the state remains paramount among world actors since it answers to no higher political authority. The international political system is anarchical—that is, no centralized governmental authority exists. Consequently, the makers of foreign policy must act as rational decision makers and determine which choices most effectively enhance the national interest.

But these views seem simplistic—indeed superficial—when set against the overarching concepts expressed in the legal process theories involving compliance and enforcement discussed in *Foundations*. Governments comply with international legal rules because people have a psychological “propensity to comply.” There is a felt need to obey in order to acquire political and economic opportunities worldwide. In a world system of states—a system characterized by complex interdependence—participation is essential. To gain acceptance as a participant in world affairs, it is first essential that a state gain the mutual trust from other governments that it will honor its obligations. To obey one’s duties is to be granted access to international deliberations. If other governments do not trust a state’s intentions based on past delinquency, then admission to future negotiations is likely to be withheld. Living up to expectations is essential for international relations to occur in a predictable fashion. Put another way, the legitimacy of international law does not merely rest on procedures of international relations, nor is law obeyed because of an overhanging threat of force. Rather, and more significantly, legitimacy flows from considerations of a rule’s normative content. A functionalist theory evolves: people in governments often do what feels right in deciding their state’s foreign policies—which, when collectively replicated by many states, gives rise to a norm. When this norm is repeatedly followed, it often evolves into habits of compliance, leading to the government’s own sense that it should comply.20

What about the world economy and the globalization of international commercial activities? To many realists, economics is of less importance for national security than military capability. Why, then, does attainment of economic growth hold such significance for governments? Realists contend it is principally because such economic expansion provides the means for a government to acquire wealth, which can be used to expand that state’s power and prestige. Similarly, when it comes to the global economy, states must never entrust their security to international organizations or legal agreements. Nor in the quest for self-protection should states ever accept attempts to regulate their international economic conduct through agreements aimed at standardizing trade

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relations or securing some form of world commercial regime. To do so is to invite national insecurity and risk subversion at the hands of other governments. Indeed, if all states seek to maximize their power, the international system will reach a natural equilibrium or balance of power. While these arguments might carry some weight with unilateralists or stay-at-home isolationists, the processes of globalization today make such realist arguments anachronistic, impractical, and ill-advised. Indeed, the contribution by Antony Anghie on international financial institutions in Politics and those on the functioning of the WTO by Jeffrey Michael Smith, Joost Pauwelyn, and Warren Schwartz and Alan Sykes in Foundations render such arguments practically nonsensical.21

As portions of Foundations reveal, realism is fraught with limitations. For one, there is clearly a lack of clarity and precision in the ways that realists use terms critical to their theory—especially power, national interest, and balance of power. Many assumptions that realists make about world politics are not testable and therefore cannot be verified. For example, what constitutes the national interest? What standards should be used for determining the relative significance of data in quantifying power? By what unbiased criteria should events be analyzed and interpreted? These questions are fundamental ones for which realists provide no adequate answers.

Realism took on new dimensions in the 1980s. Neorealism, sometimes referred to as structural realism, seeks to explain why conflict occurs. Neorealists perceive world politics as a competitive struggle for survival in an anarchic international system in which international law, international organizations, and morality have but scant influence. They differ from realists over what they see as the driving force underlying this condition. Realists find explanations for international relations in basic human nature. People are inherently selfish and bent on acquiring power. Neorealists excise individual-level motivation from their considerations and focus exclusively on the arrangement of state capabilities as the determinant of state behavior. The world system is characterized by anarchy—that is, the absence of core governing institutions above the sovereign state. States are the primary actors and act according to the principle of self-help to ensure to their own survival. For neorealists, states confront the same challenges in international relations, but they differ in their capabilities to do so successfully. In sum, neorealists stress the anarchical character of world society in the absence of governance as the preeminent factor driving state behavior, rather than pursuit of power inherent in human nature.22

A third wave of IR theory is neoliberalism—an outgrowth of (classical) liberalism,23 a theory that takes seriously, and addresses, issues left untouched by realism, such as the impact of domestic politics on state conduct, the implications of economic interdependence, and the role of international norms and institutions in facilitating international cooperation. Liberals believe in reason and the possibility of progress in interstate relationships. The individual person is the repository of moral value; human beings should be treated as ends, rather than means, in society. Unlike realists, who would have policymakers seek lesser evil as opposed to greater good, liberals stress the primacy of ethical principle over the pursuit of power, and of institutional involvement over the buildup of military capabilities.

For liberals, international politics becomes more a contest of consensus building and attaining win-win outcomes and absolute gains than a struggle for power and prestige, typically a zero-sum game. Liberals believe that interstate conflict stems not from governments’ lust for power, but from conditions and circumstances of peoples in society. For liberal theorists, a priority is therefore attached to initiating political reforms that might produce stable democracies, which will, in turn, temper conflict between states and thus enhance the prospects for international peace. In general, liberals believe that humans are capable of engaging in more cooperative, less aggressive international relations. They reject the proposition that power must be acquired, secured, and applied in international relations, and assert that a government’s foreign policy should be calculated according to cooperative and ethical standards. Significantly, liberals place emphasis on domestic

21 See FOUNDATIONS at 273–304.
23 A notable group of thinkers contributed to liberalism’s philosophical roots, among them Immanuel Kant, John Locke, and Adam Smith.
variables as providing leverage on explaining particular patterns of international relations. 24

Neoliberalism, which emerged during the 1980s as a fresh approach to world politics, reinvigorated the study of international legal theory. Neoliberal theorists posited new explanations for the conduct of international relations that focused on how intergovernmental organizations and other nonstate actors contribute to international cooperation. During the twentieth century, certain rules of international law clearly emerged in state practice, among them near-universal prohibitions against slavery, piracy, colonialism, and freewheeling exploitation of the planet’s common areas, such as the oceans, Antarctica, the atmosphere, and outer space. The broad expansion of international trade, underscored by the massive rise in transborder communication and information technologies, demonstrated that governments are often willing to give up pieces of their sovereignty to create new multilateral relationships. The processes of international relations encompassed much more than just considerations of power and interest. In this regard, neoliberal thinkers focused on how forces such as democratic governance, mass education, free trade, international law and organizations, arms control and disarmament, and multilateral diplomacy can improve the human condition—above and beyond any national struggles for power. 25

For international legal theorists (who must necessarily analyze the mix of world politics), neoliberals highlight the roles of international institutions and organizations, which are affected by normative standards and nonstate actors. They suggest that humans cooperate in order to attain mutual benefits. The wider path to international peace, neoliberals aver, is found in how effectively state governments

24 For liberal arguments, see Michael Doyle, Liberalism and World Politics, 80 AM. POL. SCI. REV. 1151 (1986); Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Relations, 51 INT’L ORG. 513 (1997).

25 It should be noted that neoliberals agree that certain key assumptions of realism are accurate: for one, the international system is anarchic, which hinders intergovernmental cooperation; for another, states (administered by their governments) are the central actors in international relations; and third, inquiry into the ways and means of international politics must be guided by a rationalist approach. See ROBERT KEOHANE, AFTER HEGEMONY (1984); ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE (1977).
this construct as a fact of international life and conduct much earlier, as exemplified by the series of Hague Conventions on the Laws of War produced by the Hague Peace Conference of 1907, the multiplicity of multilateral regime-making agreements produced since 1945 by the United Nations’ fifteen functional agencies, the expanding regime for international trade generated by the General Agreement on Tariffs and Trade since 1947 (and by the WTO since 1994), the regime for humanitarian law created by the four 1949 Geneva Conventions on the Laws of War, the regime for ocean space stemming from the four 1958 Geneva Conventions on the Law of the Sea and the 1982 UN Convention on the Law of the Sea, and the four principal conventions that define the regime for outer space law. Given the extensive history of real-world regime creation in international legal affairs, one would think that lessons can be found in these experiences for regime-building theories and for the establishment of patterns for multilateral collaboration to solve common problems.

Neoliberals, like most international legalists, assert that governments bear the onus of securing greater stability in world affairs, and that governments should make better use of international institutions to serve their interests in pursuit of that end. Governments create formal multilateral organizations such as the United Nations, the International Monetary Fund, World Bank, WTO, and the European Union, as well as international agreements such as the Nuclear Non-proliferation Treaty, the 1982 UN Convention on the Law of the Sea, and the two International Covenants on human rights, in order to make international relations more transparent and predictable. In these ways, the rules for traveling on the international highway are amplified and clarified. It falls to the governments of states to make these rules work—and no less importantly, to make them work well—for everyone’s welfare.

Constructivism is the fourth main theoretical approach relevant to contemporary international legal theory. Constructivism aims to explain the international dynamics between “agents” (that is, persons and other actors) and “structure” (that is, international agreements, laws, international organizations, and other attributes of the global system). Constructivists stress the interactive processes that reciprocally allow agents to create various international structures, which, in turn, affect those agents.

The core theme in constructivism is that political and legal actualities are socially constructed. The international state system lacks central authority. Given that reality, the manner in which people communicate and think about international events becomes essential for determining how international relations proceed. For constructivists, the condition of anarchy in international relations does not compel a certain state behavior. Rather, conduct stems from the way in which people perceive the outside world. It is their expressions of those perceptions that set the course for state actions. Similarly, international conflict does not erupt out of a struggle for power. Rather, such discord arises from the inability of individuals to communicate in ways that give rise to positive policies for the construction of a mutually positive vision, which is then able to elaborate the measures for accomplishing that vision. The overarching message here suggests that state identity, corresponding interests, and systemic constraints shape each other. The interaction of agents and structures, largely influenced by perceptions of interest, determine the path of international relations. Individuals play an important role in the constructivist ontology.  

In this context, it is worth remembering that law and politics are usually viewed as separate and distinct dimensions of international relations. Often international relations is cast in terms of state-to-state contests for power and resources, with policy outcomes determined by a government’s perceptions of what strategic choices best protect that state’s interests. By contrast, international law is portrayed by statesmen as the “hard slog” to achieve utopian aspirations or to establish normative rules by which governments should conduct their interstate relations. Both of these divergent perceptions seem superficial and simplistic—as is suggested by many of the contributions to *Politics*.

The overarching theme of *Politics* is that politics and law cannot be neatly separated. They are, in fact, intimately related in a complex nexus that lacks clear-cut boundaries. It is this relationship

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that underscores the constructivist synthesis of IR theory and the pragmatism of national foreign policies. Constructivists contend that international relations, like all relations, are inherently social activities that determine not only when and how politics are played out, but also who will be accepted as legitimate actors in such sociopolitical processes. There is no question that the establishment of international legal rules is fundamental to this process. Interstate relations take place in a relatively orderly fashion; the governments of states conduct themselves such that they work to avoid friction and confrontation between other governments. The framework within which these dealings take place is the multifaceted complex of international law, which is constructed of norms, customs, and rules that create expectations for governments. The glue that binds these legal ingredients together is national interest—the perception by government policymakers that various legal rules were made to serve the best interests of a state. Interestingly enough, adherence to those rules enhances that interest and also reinforces the rule as normative and legally binding.

Perusal of Politics suggests the need to rethink how political deliberation affects human beings. This multidimensional process of political deliberation amplifies the need for social institutions. This need for multistate collaboration, grounded in the neoliberal theoretical tradition, suggests that the sovereign state is not omnipotent, and that governments depend on each other to arrive at reasonable solutions for common global problems. From this certainty comes the realization that forums are inherently useful. Governments must work together through multilateral conferences, international organizations, international unions, and multistate regimes toward the eventual codification of common state interests into multilateral institutions and international legal rules.

Both Foundations and Politics stress that a person's theoretical perspective helps shape his or her assumptions, predictions, and understanding of cause and effect in international politics. In general, theory provides a framework that serves as a useful starting place in the search for an explanation of a puzzle, and provides some consistency for analysts and scholars who follow a given theoretical tradition. For political scientists, theory links together a set of causal variables (that is, independent variables) of some political behavior with the variable that is to be explained (that is, the dependent variable). This logical sequence then enables the scholar to draw inferences about why certain events unfolded as they did, and then to make predictions about future events, given the perceived confluence of the particular set of inputs or variables. Resort to theory forces the analyst to rely on logic and reason—as opposed to ideology—in the search for causal relationships.

But certain deficiencies and intellectual liabilities undercut the process of theorizing about international law's place in international relations. For one, theory can be overused or misapplied. That is, proponents of a particular approach to international legal theory may assume that their theory explains more than reasonably should be expected. In the absence of "authoritative proof," such inflated inferences can make theoretical tools appear to be more authoritative than they actually are. Does constructivism actually explain the relationship between law and politics relative to the use of armed force, the Climate Change Convention, prohibition against landmines, the ICC, or U.S. bombing in Kosovo? Can that allegation be scientifically substantiated? How? A second deficiency is that, by definition, theories represent abstractions of reality—models seeking to explain apparent random events using a cluster of predictive variables. Because theory is abstract and often inaccessible, the community that might benefit most from calculated reasoning about international political puzzles—that is, the policymakers—is prone to disparage theory as being disconnected from reality.

As regards modern issues, theorizing seems more likely to resuscitate old Austrian questions about the nature of international law than to give rise to new answers about norm creation. If states are sovereign polities functioning in the anarchic Westphalian system, how can their governments be obligated by legal rules, given that these rules were not created, implemented, or enforced by any supreme legitimate authority? How can concepts, hypotheses, and theoretical constructs be used in the making and implementation of international norms and legal rules? Where do such legal rules come from? On what bases can it be affirmed that such legal rules are binding on governments? Why should states obey them? The

33 See John Austin, Lecture 1, in LECTURES ON JURISPRUDENCE 86 (R. Campbell ed., 5th ed. 1875).
inference drawn from both Foundations and Politics seems to be that theorizing, while helpful for understanding the nature of international politics and processes, is not suitable as a practical guide for the day-to-day operations of a state’s foreign policy. Nor can theory help diplomats to negotiate and draft legal instruments or to determine when and how to seek to settle international disputes. Nor is theory a panacea for explicating why or how events happen in world affairs.

The second deficiency of theory suggested by these impressive volumes is that, regardless of the intellectual rigor invested, certain limits still confine the validity of any form of theory building in international legal relations. The theorist studying international law does not stand in an abstract, detached impersonal position away from the object of his or her analysis. Rather, the legal theorist approaches the subject of study with nuanced perspectives filtered through culture influences, social mores, political biases, educational experiences, and family values. All of these factors combine to make the formulation of a rigorous cumulative body of politico-legal theory a difficult undertaking, even though the dedicated theorist might make serious attempts to transcend such preconceptions. Other personal limitations lie in subconscious predispositions and perceptual distortions that can foster shifts in prioritizing ideas or guide their categorization in ways that might shade research outcomes. Such perceptual legerdemain can critically affect how a theorist treats and interprets, or even discards, data. Where some decision makers see scientific disagreement over the controversial use of techniques for hypothetical climate modeling, others see global warming as a growing threat that necessitates adoption and implementation of special legal instruments to address it. Where some see the need to outlaw comprehensively tests of all nuclear weapons, others see the vital need to protect national security by not foreclosing any option to test weapons that might one day be of military utility. Hence, the dilemma remains: where to draw lines of perception and priority.

The lack of data is a third limitation that both international relations and international law theorists confront. Sensitive questions involving issues of national security, especially war and peace, are often debated by policymakers in secret meetings. Not surprisingly, diplomats and policymakers usually keep academics who study international relations at arm’s length. Often diplomatic archives are closed from scholarly investigation for decades, which makes testing theoretical hypotheses by using historical facts much more difficult. Similarly, international legal theorists can be swamped by too much information. Vast collections of materials from the World Wide Web, newspapers, periodicals, books, films, and other media are proliferating so rapidly that even the most conscious theorists risk being overwhelmed by data. The problem of discriminating among the superabundance of possible sources of relevant information and selecting which pieces best fit the ways and means for testing a puzzle (and interpreting its results) is enormous, if not stupefying.

Perusing these volumes suggests a fourth limitation on cumulative IR theory-building—namely, the difficulty of reaching agreement on what units of analysis should be examined and how key terms should be defined. In examining the reasoning behind the United States’ invasion of Iraq, should the researcher concentrate analysis on the decision-making role of the president and his circle of advisors? Or advice given by the Legal Adviser’s Office in the State Department? Or past actions of Saddam Hussein as legitimizing factors? Or the UN Security Council’s decision to take no action? Or the role played by the Pentagon? Did law restrain American policy, or was law interpreted such that it was fashioned to support the U.S. position? How does the researcher determine what factors were paramount in the process, and which were largely contrived? In the hard sciences, an American physicist and a Chinese physicist may easily concur on the validity of certain equations and their implications for the projection of objects into space. Theorists of international law who come from diverse legal, political, and cultural backgrounds, however, will be exasperated at the political impediments that frustrate standardized agreement on the meanings of fundamental concepts, such as democracy, humanitarian intervention, torture, discrimination, genocide, sustainable development, aggression, human rights, and terrorism.

For IR theorists, multicultural considerations confound universally acceptable formulations of transnational legal phenomena. Theory appears useful because it organizes and facilitates examination of social phenomena. At the same time, theory may also enhance the ability of researchers and
policymakers to improve the rationality of decision making. Rather than accomplishing this task directly, however, theory does so by clarifying dogmatic positions, enlightening which means might be more efficient to reach desired ends, and reducing the prospects for uncertainties and ignorance that a policymaker cannot ever eliminate. More directly, theory can concentrate on revealing elements and contingencies that are uncontrollable or unpredictable.  

There are links between legal theory and interstate practice. Theory distills fundamental legal principles of state behavior and sets out rational rules to explain their relationship to the real world. Theory allows for more precise definition and organization of legal concepts that affect subjects of international law that engage in international relations. Legal theory can facilitate the separation and identity of relevant factors that affect whether a policy or legal stance should be considered lawful—which can be especially useful should that policy or stance reappear later in a different context. No less significant, while international legal theories might not scientifically establish valid causal relationships, they can suggest documented and plausible correlations or outcomes. 

Neither Foundations nor Politics is intended for casual observers of international legal events, for legal practitioners who appear before international tribunals, or for makers of foreign policy. Rather, they are directed at students and scholars who engage in legal theorizing. Both volumes contain compilations of academic works designed to persuade readers of the genuine intellectual worth that comes from theorizing about international law and politics. Their authors search for explanations about how international law and politics are intertwined within conceptual frameworks. What theoretical pillars support explanation for the process of multilateral treaty-making and the evolution of customary norms? How is it that principles of international law can arise in such a diverse interstate order? What kinds of intergovernmental institutions function to promote and facilitate the integration of political ambitions into legal outcomes that promote the common good? These queries resist proof and are tricky to apply to the world of interstate political means and multilateral legal ends. One gets the sense that foreign policy practitioners and statesmen are hardly conscious of the theoretical implications posed by their interstate political actions or the conceptual implications arising from negotiations undertaken to produce new international legal rules. Both of these volumes are likely to prick their consciences into rethinking that attitude of indifference. 

Theory aims to preview events and issues not as isolated phenomena, but rather as pieces of a blueprint that unveils the interactions of international behavior. In this regard, Hathaway and Koh's Foundations of International Law and Politics provides a valuable scholarly synthesis of IR theory, as it probes into how legal concepts evolve, function, and disappear in the face of weighty real-world events. Reus-Smit's The Politics of International Law provides much insight into the relevance of constructivist theory applied to real-world events. Yet the fact remains that no single theory provides compelling explanations that satisfy all theorists all of the time. Nor is theory even generally viewed by all students and scholars of international relations as essential for appreciating the stuff of world politics. No international relations or legal theory works well in every instance, under any political circumstances, in every political situation. No theory can explain with reliable predictive accuracy when or why a political event will occur or whether rules of international law will be followed or violated by which government, under what circumstances. The multiplicity of actors operating in world affairs—states, nongovernmental organizations, transnational groups, multilateral organizations, multinational corporations, and individuals—is too complex. Nevertheless, though randomness is ever present, setting out a theoretical model can make the journey through international relations richer and more rewarding. And that, in itself, will make perusal of both of these volumes an even greater, more gratifying intellectual experience. 

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RESTORING (AND RISKING) INTEREST IN INTERNATIONAL LAW


What are the limits to international law, and what limits does it impose? Both questions are posed by this important book, and its answers—one (but a doozy) and few (if any), respectively—will be controversial. In The Limits of International Law (Limits), Professors Jack Goldsmith (Harvard Law School) and Eric Posner (University of Chicago Law School) advance the theory that “international law 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). Countering the belief that international law makes states behave, they argue that international law instead results from (and is wholly constrained by) state interests. They add that states are not morally obligated to comply with existing international law, nor are they morally obligated to make more of it.

This summary may strike some lawyers as a call to arms, so it is useful to clarify the authors’ agenda. Goldsmith and Posner seek to counter the normative tilt of international law, which they portray in terms likely to rankle. For example, they suggest that legal scholars see state compliance as morally right or legitimate, and ignore state power, interest, and behavior, at least in part for reasons of self-interest—since such views not only tend to license doctrinalism and abstract theory, but, more fundamentally, justify the need for legal expertise.¹

At the same time, the authors exhibit a pragmatic respect for international law, and this book is not intended to be a brief for defying it. The authors repeatedly confront the fact that states seem to care more about international law than their theory might have predicted; they affirm that instrumental reasons usually counsel in favor of compliance; and unlike many critics, they scorn arguments that international governance threatens state sovereignty. Limits contends that the relentless pursuit by states of their interests is consistent with everyone acting—to a point—as though international law exists. Perceiving international law as it really is, the authors insist, does not deny it legal status, but only recognizes that it fails to act as an exogenous constraint. In a more Panglossian moment, they describe international law as essentially “a special kind of politics, one that relies heavily on precedent, tradition, interpretation, and other practices and concepts familiar from domestic law”; the resulting law is “binding and robust, but only when it is rational for states to comply with it” (p. 202).

This is a fine line to walk, and though the authors do so with great skill, their ambivalence is apparent: the last-quoted passage, for example, involves either an impoverished sense of “binding and robust” (in contrast to the authors’ stringent understanding of opinio juris in traditional doctrine), rational decision-making that includes internalized legal values (despite the authors’ misgivings about assuming anything of the sort), or perhaps both. These kinds of tensions afflict the positive and normative argument of Limits and significantly temper its success. Notwithstanding, Limits is a pioneering work that sets the standard for serious-minded criticism of international law, while identifying questions that rival theories can benefit from answering; for this reason it merits careful consideration even by those unsympathetic to its perspective.

I. METHODOLOGY AND APPROACH

Goldsmith and Posner make a compelling case for the positive analysis of state behavior (which is, after all, central to determining international legal rules), and their election of rational choice methodology is also reasonable. While many other international relations approaches bear on international law,² employing all of these diverse perspectives at once would turn assessments of legality

¹ The authors do not pretend to canvass the secondary literature—and could not, while maintaining this slender volume’s focus and ambitious argument—but while many of their generalizations are astute, others deserved qualification. For example, their complaint that scholarship ignores power and interest, or assumes that “customary international law is unitary, universal, and exogenous” (p. 25), might have addressed exceptions such as Michael Byers, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999).

into Rashomon. We need more focused efforts if we want to develop theories, and Limits is to be applauded for championing a single approach against the world. Goldsmith and Posner deliberately do not evaluate alternatives at any length, but instead challenge others to offer something better.

Understanding this stance is indispensable to appreciating Limits. Readers may contest whether this particular theory “take[s] theoretical, methodological, and empirical issues more seriously than international lawyers do” or is better steeped in “economics, sociology, and history” (p. 16); they may also resist the authors’ efforts to shoehorn rules into bimatrices, or articulate scores of other explanations for state behavior. But the authors’ central question is whether any other theory more parsimoniously explains a larger swathe of state behavior. Those who balk at unified theories or positive analysis may have stepped off long before, but critics should be clear as to whether they challenge the authors’ objective, their attempt to achieve it, or both.

The theory’s analytic power is achieved at a considerable price. Goldsmith and Posner acknowledge that supposing that states rationally pursue their interests is a simplification—individuals are the real decision-makers, states may act irrationally, and nonstate actors also play roles. Conspicuously, they also do not take international institutions very seriously. They put to one side constructivist views that such institutions may influence state preferences, and discount their potential for independent agency; perhaps the authors’ most extensive consideration of such claims winds up hazarding that even if the WTO induces greater compliance than the GATT, it would be hard to demonstrate that eliminating state veto power has been the cause. In theory, their model licenses this casual dismissal: if state interests closely map on to state behavior, the need to resort to institutional and other explanations withers away. But the exclusion of so many putatively significant factors is eyebrow-raising and warrants shifting the question from the relative to the absolute—focusing less, that is, on whether this model is to be preferred to others, than on whether there is a verifiably high correlation between state interests and state behavior in circumstances nominally governed by international law.

What, in any event, are the state interests that are supposed to drive everything? In theory, whatever a state’s leaders prefer (sometimes, as influenced by domestic interest groups and institutions). The authors want to identify these preferences accurately and objectively, being aware that the tractability of rational choice—the ability to explain any behavior given a sufficient arsenal of interests—is its Achilles’ heel, but also knowing that to limit the class of potential interests might artificially hamstring their analysis. It is notable, then, that they expressly exclude any “preference for complying with international law” (p. 9), partly because including it would assume the question at issue, and partly because they regard that preference as relatively weak.

Even if one can segregate a preference for compliance—would that include, for example, the interest in avoiding being diverted by accusations of noncompliance?—assuming it away is a serious compromise in the model. To be sure, testing the correlation between compliance and interests (such as national security) is instructive, irrespective of whether states also prefer, ceteris paribus, to comply. But ignoring any appetite for compliance tends to exaggerate preferences coinciding or covarying with compliance, including preferences that may actually be less pronounced. Moreover, when other preferences are in tension with one another, or uncertain and prone to shift, an interest in compliance may prevail; leaders could even be systematically (if marginally) biased toward compliance, either because the law is relatively ascertainable or due to social norms governing individuals rather than states.

These are only conjectures, of course, but Limits relies to a considerable degree on them not being so, while offering only inconclusive evidence. The authors’ particular take on compliance-pull seems based on their appraisal of leading exemplars of binding rules, but the data is tilted against compliance. Incidents in which states violate putative norms are more visible than circumstances in which states refrain from acting out of a concern for those norms, or temper the degree of their deviance in order credibly to maintain that they are complying; it is easier, too, to posit retrospectively an overriding state interest like security or wealth, as Goldsmith and Posner sometimes do, than to determine how the state actually regarded its interests or perceived its legal options. What quantum of (other) self-interest is necessary to overcome a state’s perception that a proposed course violates international law? The authors’ basic position—that states are likely to disregard the law when it
suits them—does not provide any clearer answer to this confounding question, and depends substantially on an intuition that is as pessimistic as the conventional guesswork is rosy.

II. CUSTOMARY INTERNATIONAL LAW

*Limitis* first takes on the most vexed species of international law—customary international law—and their approach is unquestionably a contribution to the field. Goldsmith and Posner model customary international law as behavioral regularities resulting from state self-interest. They explain how routines may result from coincidences of interests (in which states obtain private advantages from a behavior regardless of what other states do), coercion (in which states are forced to engage in acts benefiting others), cooperation (as in the familiar, if difficult to resolve, prisoner’s dilemma), and coordination (in which states have to agree on a solution, but no one has any incentive to cheat once that is accomplished). The authors’ great insight is that regularities thought to result from customary international law may be better explained as equilibria resulting from one of these games. The driver is state interest, not a sense of obligation; even in cooperation games, which seemingly constrain selfish behavior by states, “[t]he rule does not cause the states’ behavior; it reflects their behavior” (p. 39). Goldsmith and Posner claim that all customary international law (indeed, international law in toto) can be described in terms of these four ideal types, singly or in combination. Their analysis suggests that cooperation and coordination are difficult either to achieve or to maintain, so it is unsurprising that their reviews of four prominent customary rules—the free ships, free goods principle; the breadth of the territorial sea; ambassadorial immunity; and the exemption of coastal fishing vessels from the laws of prize—suggest that many behavioral regularities are really not so regular after all.

These case studies both vindicate and qualify the relative power of their approach. Their analysis is distinctive and illuminating in many regards, as in their argument that diplomatic immunity is better understood in terms of bilateral relations than as a multilateral rule (a note that they strike repeatedly, perhaps most effectively in connection with treaties, where they pay greater attention to how multilateral commonalities might have originated). Their argument that state interest under-

lies both the development of rules and compliance with them also coheres much better than do traditional accounts. But the upshot may be conventional in the end. As to whether particular rules really have come into being, much of the evidence that *Limitis* musters would be deemed admissible (and, taken as true, persuasive) even under purely traditional state practice and *opinio juris* criteria. Their diagnoses as to why particular rules have failed (styled as predictions), such as the notion that rogue states are more likely to be intransigent, or that new states, new technologies, and changes in stakes matter substantially, also seem uncontroversial. The problem lies in cashing out those intuitions, and it is not evident that formalizing them yields better predictions. The same problem affects their more general claim that changes in payoffs may change behaviors: whether such changes will suffice to upset the equilibrium (or even exceed the original variation among states) is hard to say, and retrospective accounts sound ad hoc.

Abstracting from its case studies, *Limitis* implies that rational choice analysis would cut down on the number of rules hitherto assumed to exist. While the authors’ approach shows how existing understanding may produce these sorts of false positives—instances in which regularities attributed to law are really due to other interests—their theory does not seem to dictate any dramatic result. For one, the incompatibility between interest analysis and the sense of obligation required by *opinio juris*, while drawing succor from sources like the Restatement (Third) of Foreign Relations Law, is overstated. Other mainstream sources are more amenable to the notion that states may oblige themselves by creating legitimate expectations regarding their conduct—behavior that is entirely compatible with their pursuit of self-interest. And interpreting doctrine in this way is, after all, a more parsimonious way of explaining the prevailing tendency of courts and commentators to find custom.

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3 This is not to say, however, that their own application of traditional doctrine is beyond challenge, including their claims that threats of retaliation or failed treaty discussions belie the existence of customary international law rules (pp. 50–51).

Second, a fuller range of rational choice tools suggest that the prospects for sustaining regularities are not as limited as Limits proposes. A burgeoning second-generation literature, inspired by Goldsmith and Posner, suggests that different strategic circumstances, repeated game play, or the perceived relations among games may be more readily available to sustain customary practices than the authors suggest. This does not mean that many customary rules do, in fact, fit these molds; it suggests, instead, that if rules are few, it is not due to the paucity of possible models for reconciling state interests. The limits of international law, in other words, are more contextual or circumstantial, rather than theoretical, in character.

III. TREATIES

The authors' position on treaties is far less negative and, indeed, offers a distinctive argument for their potential success. Goldsmith and Posner have little truck with conventional legal accounts, particularly those that see their task as “strengthening the normative obligation created by treaties” (p. 83). They also resist standard rational choice arguments that multilateral negotiations and institutions improve transparency, communication, and monitoring—but for reasons that are not entirely clear. “True international public goods” (p. 87) may be hard to regulate, but it is not clear how many issues fit that ideal type. Nor do they explain why “every state would need to commit to punish every state that violates the treaty, and to punish every state that fails to punish every state that violates the treaty, and so forth” (id.). If some states have an exaggerated interest in enforcing rules—for example, because they are so-called middle powers—effective enforcement may yet emerge.

Nonetheless, the authors acknowledge that multilateral regimes are genuine. Their positive account emphasizes that treaties can provide focal points that reduce inadvertent and opportunistic misunderstandings. Establishing common terms through treaty provisions may, for example, facilitate bilateral cooperation, whether through observing, ignoring, or renegotiating those provisions. Goldsmith and Posner also suggest that the legal character of treaties adds value in ways that customary international law does not: treaties enhance the credibility of commitments by involving legislatures; they tap into shared expectations created by the Vienna Convention on the Law of Treaties; and they convey greater seriousness of purpose. The contrast to customary international law is overdrawn—similar analysis might redeem states’ use of obligatory language, since that allows them a comparable means of enhancing commitments—but the virtues of treaties remain.

Limits is much more pessimistic concerning compliance. Goldsmith and Posner dismiss claims that states comply with treaties because they believe that that is the right thing to do, and they deemphasize the impact of reputation, too—both because they think that reputation is not a unitary construct risked by every treaty violation, and because relying on reputation offers little insight. Finally, they reject the notion that government officials prefer compliance as a matter of habit. The all-or-nothing approach to each of these factors may be convenient for modeling, but there is a tendency to caricature. For example, Goldsmith and Posner find plausible the idea that delegating governmental authority may routinely lead to compliance “even when it is not in the [state’s] self-interest in each individual case,” but dispute that there is a “general willingness or habit of complying with international law against the state’s interest,” that “international law compliance will always be the top priority for an agency” (p. 105), or that every bureaucracy will be equally punctilious—views that I doubt many international law scholars hold.

In a substantial advance upon their prior work, the authors apply their treaty analysis to the cases of human rights and trade. The former discussion is the more provocative. Accepting that states have many reasons to be attracted to promoting human rights, they model compliance as due to coincidences of interest (as suggested, for example, by widespread rejection of genocide), symmetrical interests in protecting territorial minorities, cooperative bartering for human rights commitments by foreign states, and coercion. But they are very skeptical about compliance with multilateral treaties—citing the lack of enforcement mechanisms and enforcement activity, studies showing little
correlation between accession and human rights performance, and several cases—while acknowledging counterexamples like the European human rights regime.

Why, again, would rational states devote resources to treaties that do so little work? Goldsmith and Posner suggest that accession is cheap, and find marginal benefit insofar as multilateral treaties “provide[] a rough guide to the kinds of behavior that are deemed acceptable” (p. 128). This rings true, to a degree, but it is hard to accommodate within their model. Rational states might be satisfied with a nonlegal instrument clarifying expectations (particularly since they and others may enter reservations to any real restraints, thereby degrading standard-setting). The authors also suggest that multilateral treaties cull nonratifying states as the least committed to human rights. But as the cost of acceding approaches zero, so does the cost of sending the “right” signal—given that there is no clear tradeoff with any other signal the state may wish to send—to the point that the exercise becomes nearly valueless. Their model also does not attempt to explain why treaties vary in their ratification rates or in the (apparent) strength of their obligations and their amenability to enforcement. Finally, the model makes no tangible progress in predicting which states will spur negotiations, ratify, object to reservations, or shoulder enforcement responsibilities. If we wish to predict the course of human rights treaties, Limits gives us only hints at how to explain the uneven efforts we presently observe.

IV. RHETORIC AND MORALITY

Admirably, the entire last third of Limits evaluates external challenges to the authors’ theory. The first concerns the fact that state officials frequently justify their behavior in legal or moral terms, and accuse others of breaching their obligations, when this behavior is plainly self-serving—and thus not credible and (seemingly) not worth doing. In the authors’ view, states talk (among other reasons) to signal that they are no less cooperative than anybody else, to identify points for coordination, to clarify what counts as cooperation, and to achieve support among domestic and foreign audiences (usually by misleading them). Legalisms are one way to indicate that states heed long-term, rather than transient, interests, and can be particularly useful when states wish to indicate that they remain committed to an arrangement notwithstanding disagreements.

This account is illuminating, but the authors likely overestimate its explanatory power; it is like saying that firms write contracts because a tolerance for legal expenses demonstrates solvency. If “[t]he appeal to law is simply the denial of self-interest” (p. 184), it remains hard to see why anyone believes, or bothers with, such transparent conduct. And if states may adopt “mixed” strategies of sometimes subordinating their short-term interests for the longer term, it becomes difficult to predict how often (and when) such concessions will be made. Other variables, such as the consistency of state rhetoric with others’ perceptions of the law, or the effect of law-talk on collective understandings and preferences, are even harder to incorporate in any instructive model, but that does not mean that we are at liberty to ignore them.

Second, Limits considers whether states are morally obligated to comply with international law. It is not obvious that the strong assumption they test, in which morality dictates compliance even when decidedly contrary to the state’s self-interest, “permeates modern international law scholarship” (p. 185), but that does not diminish its interest. The authors persuasively critique claims that states and their citizens are morally obligated by consent or by virtue of international law’s benefits for individuals. Their argument, though, cuts quite broadly: Goldsmith and Posner suggest that international law obligations are more attenuated, but they properly note the difficulty of substantiating a moral basis for any legal obligations. Even the alleged amorality of changing international law—regarding deviation as violative or as proposing change, depending on how it is received—hardly seems more off-putting than how constitutions are sometimes ratified and changed, to which they also allude. The argument that amorality has special purchase on international law turns on the lack of “special institutions like legislatures or courts” (p. 201), but as noted previously, Limits devotes little attention to international analogues.

Third, and finally, the authors address whether states have a duty to enter into further international obligations—even if it lowers the state’s own welfare—based on the cosmopolitan notion that individuals everywhere are equally valuable. Goldsmith and Posner assume that cosmopolitanism puts the best gloss on mainstream attempts to
moralize international law. But just as various practical limits on human agency warrant turning to institutions for assistance, they argue that government duties, too, are circumscribed; for example, states are not organized for altruism or charity, and the heterogeneous tastes of their citizens constrain liberal democracies.

The moral capacity of states is fair game, but the initial move here—in which limits on individual duties are extrapolated to states—is far from obvious. States do not have biological, psychological, and other limits akin to those of individuals, and their own constraints may not be morally significant; there is a recursive limit to the duties imposed on individuals for their own benefit that may not be relevant to states. It is also unclear why the purported anti-cosmopolitan “moral duty of leaders” . . . to promote the welfare of the state and its citizens” (p. 218) extends to a duty to avoid significant sacrifices of local for global welfare, especially if democratic preferences are to the contrary.

The focus on the U.S. case also bears mention. Goldsmith and Posner discount polls suggesting unfulfilled preferences by U.S. voters for cosmopolitan acts, and they cast doubt on the potential for change by scrutinizing a poster child for cosmopolitanism: Sweden’s “cosmopolitan-seeming actions,” they argue, are better attributed to a middle power’s preference for securing interests through international law and institutions, and they recall that “it is important not to confuse internationalism with cosmopolitanism” (p. 222). But perhaps the moral claim is stated too simply. One would think it open to the Swedes to regard cosmopolitanism as morally desirable if and only if it can pursued consistently through procedures it considers morally defensible. It may be, as Limits suggests, that Swedes and other Europeans equivocate about humanitarian intervention because they are less cosmopolitan than they pretend, but they may also regard cooperation as a side constraint or consider intervention to be inconsistent with peremptory (and moral) limits on the use of force.

One common lesson from these external objections is the difficulty of addressing public international law in the aggregate. States and their citizens do not speak similarly about, or feel the same obligations toward, subjects as disparate as trade, human rights, or diplomatic privileges, any more than they treat tax, criminal law, and parking regulations equivalently. The evolution of “relative normativity,” among other things, suggests that both traditional and revisionist scholarship need to make differentiated, context-sensitive claims about the normative potential of international law.

V. IMPLICATIONS

Criticisms aside, Limits largely succeeds in its ambition of sketching a leading, perhaps the leading, theory explaining and predicting state behaviors connected with all international law. This is a signal accomplishment. How should the field react? It may be difficult for any wholesale change of methodology to do any better than Limits; this reflects well on the relative capacity of rational choice, but it also calls into question the basic objective. That is, any rival attempt to explain so much may encounter similar obstacles and fail to predict any higher proportion of results, but this might just suggest that the physicists’ elusive Theory of Everything is no easier to derive for state (and, ultimately, human) behavior.

What more marginal improvements might be attempted? One reaction, well under way, is to refine the authors’ rendering of the limits imposed by rational choice. For example, the relationship between customary international law and treaties deserves exploration; although Goldsmith and Posner occasionally compare the two, they do not consider, in depth, the possibility that one might be a proving ground for the other (perhaps in providing focal points). A second reaction might be in terms of customary international law theory. If existing doctrine artificially narrows the range of rules that can meaningfully be termed international law, it may be fruitful to clarify the weight given state behavior (say, by increasing somewhat the level of state deviance consistent with maintaining a rule of international law) or to insist on the relevance of individuals and suprastate, substate, and nongovernmental institutions. There is no compelling reason to try to reclaim all the rules presently asserted to exist, but there is also no reason to hew to existing doctrine if it makes
demands that are more stringent than states require in practice.

Even here, though, theoretical refinement may have limited returns: even if one shows that under certain conditions, legal obligations may emerge consistent with rational choice theory, it remains unclear whether particular conduct qualifies. *Limitis* may be better vindicated, or contraindicated, by a reinvigoration of international-incident studies.º Deeper analysis of international behaviors can help expose the extent to which state actors are guided by considerations of international law, or identify cases in which equilibrium is, in fact, achieved and maintained without any specter of a state preference for compliance. Such analyses (which may be contemporary or historical in character) may also provide insights into how to evaluate overdetermined results—for example, when legal and nonlegal interests are each independently sufficient to produce a particular outcome. In what may be the lengthiest such discussion in *Limitis*—that concerning the coastal fishing exemption from prize—Goldsmith and Posner constructively point to significant instances in which the rule’s performance can be examined, but the section is too short to consider them fully and does not assess all the evidence mustered in *The Paquete Habana*. More extensive analysis is required to judge particular episodes, let alone to conclude whether the rule ever existed (and when) or to generalize the case to customary international law as a whole. Progress may also be made by applying rational choice to newer, procedural norms, such as the rules that govern entering and exiting treaties and the recognition of peremptory norms.⁸

What of the world beyond the academy? By the authors’ lights, their theory should have little bearing on states, which will go on talking (and even behaving) as though international law matters, whether it does or not. International lawyers will also continue to interpret international agreements (and perhaps customary international law), even if their sources are reduced to resembling “letter[s] of intent” or “nonbinding employment manual[s]” (p. 203).


This interpretation seems overly sanguine—perhaps, in part, because works like *Limitis* are easily misconstrued. As noted initially, the authors do not really argue that states should disregard international law, and they also do not offer much new evidence that states typically do; precisely because theirs is a state-centered approach, they also offer very little analysis regarding how state officials should or do behave. Yet it is predictable that their work will be seized upon as showing that international law is entitled to less respect. If so, it may diminish the respect of key audiences—such as U.S. elites—for international law,⁹ and at a pace faster than for their peers abroad. Other states might, in consequence, grow more reluctant to enter into mutually beneficial treaties, or they might discredit U.S. views when it comes to developing customary international law.

The above situation may be exacerbated in two ways. One has to do with international law’s relative standing. As noted, *Limitis* addresses problems that are not unique to international law, but are present only to a greater degree. If its method is
accepted more readily here than, say, for U.S. constitutional law, it may inappropriately diminish the weight of international law relative to conflicting legal values (such as presidential prerogatives) that are also contestable. A second problem concerns agency. If leaders come to regard international law as gussied-up politics, they might take it upon themselves to assess, subjectively, whether compliance in a particular case is in a state’s immediate interests—ignoring, for example, rationalist calculations about a state’s reputation, the desirability of showing that the state is concerned about the longer term (that is, has low discount rates), and the myriad externalities that are hard to appreciate in the grips of a live controversy. Such an outcome could be calamitous.

Goldsmith and Posner rightly insist on examining international law’s shibboleths, and their outstanding book shows how obligations may be mistakenly inferred from patterns of interests—at the expense, potentially, of ignoring when those interests change. But if long-term interests may actually be aligned with compliance, if states have democratically consistent preferences favoring compliance, and if normative claims that the state should comply are not markedly inferior to other claims upon it, it would be regrettable if international law came to be regarded as trifling. This risk is one that antedated Limits, and addressing it is the challenge for future work.

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BOOK REVIEWS


Great Expectations, 1789–1914, the first of two volumes of Mark Janis’s The American Tradition of International Law, does not really live up to the ambition of its title. In six essays of varying length and somewhat disparate focus, the author examines the writings of nineteenth-century American lawyers and peace activists and reads some of the cases that established the position of international law under the U.S. Constitution. His aim is to provide an account of the “great expectations” that many U.S. lawyers had for the increased role of international law in the world. As he points out, these expectations may have been inspired, at least in part, by the role of the law of nations in the political rhetoric of the Founding Fathers. They were carried over to midcentury by Protestant lawyers and peace activists, and received significant support from the settlement of the Alabama affair in 1872. A last flicker of these expectations arose when the disillusionment of the First World War gave way to the legalistic “Wilsonianism” to which even President Wilson, Janis argues, turned only late in life.

Perhaps inspired by the sense that lawyers such as Henry Wheaton or activists such as David Dudley Field have not received sufficient attention in recent accounts of the period, Janis has labeled them representatives of an “American tradition” whose significance he has wished to reexamine in the creation of the “modern” (that is, nineteenth-century) sensibility about the role of law in diplomatic affairs. This is a welcome effort. Nevertheless, in part owing to the unorganized nature of the chapters, and in part to the author’s inattention to nineteenth-century American political and cultural consciousness, no plausible account of a “tradition” emerges here—beyond a reminder that the Americans, too, wrote on international matters at the time. The account of a tradition would, surely, have required reflection on whether the international law writings were central or marginal in the legal profession and how, for instance, they related to the formation and crisis of what Morton Horwitz calls the legal orthodoxy.1 Even more interesting would have been to ask to what extent they were reflected in the preferences of U.S. foreign policy elites.

A simple example will illustrate the awkwardness of Janis’s intellectual focus: whereas a whole chapter rehearses the old argument about Jeremy Bentham’s coinage of the expression “international law,”2 there is no mention there of the Monroe doctrine, of U.S. policy in Latin America or the Far East, or, indeed, of the emergence of the United States as a perhaps initially reluctant, but


2 Much of this material had been published by Janis in Jeremy Bentham and the Fashioning of “International Law,” 78 AJIL 405 (1984).