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Recommended Citation

Edward T. Swaine, Restoring (and Risking) Interest in International Law, 100 Am. J. Int'l L. (2006).

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RESTORING (AND RISKING) INTEREST IN INTERNATIONAL LAW

The Limits of International Law. By Jack L. Goldsmith and Eric A. Posner. Oxford, New York: Oxford University Press, 2005. Pp. 262. Index. \$29.95, £17.99.

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).

² See, e.g., Steven R. Ratner & Ann-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AJIL 291 (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 influ-

enced 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

Limits 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 *Limits* musters would be deemed admissible (and, taken as true, persuasive) even under purely traditional state practice and *opinio juris* criteria.³ 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 afflicts 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, *Limits* 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 obligate themselves by creating legitimate expectations regarding their conduct⁴—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.

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).

⁴ See, e.g., INTERNATIONAL LAW ASSOCIATION, FINAL REPORT: STATEMENT OF THE PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW §1(i) (2000).

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.⁵ 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

⁵ For reasons of space, I will not describe this literature here. For a recent example, see George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541 (2005); for my own views, see Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002).

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.⁶ 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 be 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.

⁶ This is not clear. For example, Thomas Nagel, whom the authors invoke for the requirement that duties be “motivationally reasonable,” nonetheless recognizes a political conception of morality entailing more modest duties—ones that better approximate the claims commonly made upon states. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 130–32 (2005).

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. *Limits* may be better vindicated, or contraindicated, by a reinvigoration of international-incident studies.⁷ 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 *Limits*—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 *Limits* 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, *Limits* addresses problems that are not unique to international law, but are present only to a greater degree. If its method is

⁹ As the authors themselves stress, the line between positive and normative analysis is easily blurred—which may already be evidenced in the misconstruction of their work. In acknowledging that *The Paquete Habana*, 175 U.S. 677 (1900), appeared to invoke customary international law to countermand U.S. state interest, Goldsmith and Posner predict that most states would let politicians rather than courts resolve such matters, and note that "although *The Paquete Habana* did not defer to the executive's views in Court, it did famously state that courts must apply customary international law where there is 'no . . . controlling executive . . . act'" (p. 77, quoting 175 U.S. at 700). Their point is predominantly a positive one: to note that U.S. courts, too, typically defer, and that *The Paquete Habana* was exceptional (though it might also be read as exceptional insofar as the government failed to anticipate a court's reckoning of customary international law). But their observation that "the political branches have the final say about whether and how [customary international law] applies in the United States and whether or not the United States will comply with it" (p. 77) has already been quoted, with the *Paquete Habana* dictum, as expressing a legal conclusion, *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005), when this is neither the thrust of their argument nor a position they elaborate. As to the role for courts under U.S. law, future decisions should note that in *The Paquete Habana* the Supreme Court seemed to be addressing when it was necessary to dig into custom and, in particular, the work of publicists, and stating that such inquiries were unnecessary "where there is [a] treaty [or a] controlling executive or legislative act"—or, it added, "judicial decision." 175 U.S. at 700 (emphasis added).

⁷ W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1985).

⁸ See, e.g., Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002).

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

The American Tradition of International Law. Vol. 1: Great Expectations, 1789–1914. By Mark Weston Janis. Oxford, New York: Oxford University Press, 2004. Pp. vii, 162. Index. \$65, £30.

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

¹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

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