

REFINING THE LIMITS OF INTERNATIONAL LAW

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I. INTRODUCTION

International legal scholarship is in a period of change. Old orthodoxies are facing challenges and new subfields are growing. Theories from political science, economics, sociology, and other disciplines are increasingly deployed to explain international law.¹ Much of this shift reflects the rising prominence of international relations theory over the last decade,² but it is clear that the general interdisciplinary turn in American legal scholarship is manifested in international law as well.

Jack Goldsmith and Eric Posner's *The Limits of International Law* thus comes at a propitious time.³ In clear and uncomplicated prose, the authors attempt to offer a comprehensive theory of international law in some two hundred pages. *Limits*, as its title suggests, is not an uplifting read for most international lawyers, who are trained to think international law makes an important difference and generally believe more international law is better. The authors' overarching message is that international law is an endogenous outgrowth of individual state interests, and almost never a constraint on those interests. Compliance is often deceptive, reflecting a mere coincidence of interests, and change in the content of rules tracks the preferences of the powerful. International law can, under special conditions, promote limited cooperation. But its ability to do so is very restricted.

Goldsmith and Posner come to these conclusions via an analysis grounded in rational choice theory. Their preferred approach is broadly what political scientists call "rational-functionalism": legal rules and institutions are explained as a result of the ex ante choices of rational agents who seek

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¹ Symposium, *Method in International Law*, 93 AM. J. INT'L L. 291 (1999).

² Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

³ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

functional benefits *ex post*.⁴ In international relations this approach is mainstream, and has been since at least the publication in 1984 of Robert Keohane's highly influential *After Hegemony*.⁵ Despite their greater emphasis on the limitations of international institutions as cooperative tools, Goldsmith and Posner's analysis is largely consistent with a very large body of existing work in international relations, and is even more derivative of it than they, or their readers, may realize.

Limits nonetheless advances important and trenchant criticisms of prevailing legal scholarship. And its positive analytic approach to state behavior reflects the burgeoning attention to theories and approaches drawn from political science and economics. Despite these virtues, the book is unjustifiably skeptical about the ability of international law to influence state behavior. Focusing particularly on its chapters on the dynamics of international cooperation, I argue here that the relentless rationalism and sometimes simplistic approach of *Limits* is at times clarifying, but fails to explain much of the texture of international cooperation—in large part because it fails to take proper account of the last twenty years of research in international relations, much of which highlights complex but important feedback between international institutions and domestic politics, preferences, and institutions.

Part II of this Essay contextualizes the book's arguments within political science scholarship. Part III then shows that even within the rationalist tradition in political science from which the authors draw, there is far less skepticism about the effects of international agreements than we see in *Limits*. That relative enthusiasm, moreover, is not at all grounded in flights of normative fancy or shoddy analysis, but rather in advances in the literature on institutional design in political science.⁶ Part IV argues more generally that our understanding of the role of law in world politics can be enriched by accounting for a major strand of theory that they largely ignore: liberal

⁴ Beth A. Simmons & Lisa L. Martin, *International Organizations and Institutions*, in THE HANDBOOK OF INTERNATIONAL RELATIONS 195-96 (Walter Carlsnaes et al. eds., 2002).

⁵ ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984). Some of the ideas in this book were presaged by Keohane and others in an equally influential special issue of the journal *International Organization*, later republished as *INTERNATIONAL REGIMES* (Stephen Krasner ed., 1983).

⁶ Helen V. Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 INT'L ORG. 759 (1998) [hereinafter Milner, *Rationalizing Politics*]; Martin & Simmons, *supra* note 4; Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 726 (2001).

international relations theory. Domestic politics seeps into Goldsmith and Posner's analysis here and there, but a more systematic incorporation would improve their arguments substantially. I illustrate the value of such an approach with a brief discussion of a vexing topic examined in *Limits*: the choice between binding and non-binding international agreements.

II. INTERNATIONAL INSTITUTIONS & INTERNATIONAL RELATIONS THEORY

Political scientists have debated the dynamics of international cooperation for decades. The various major theoretical paradigms in international relations—realism, constructivism, etc.—have been well described elsewhere.⁷ What is sometimes called “rational-functionalism” is most germane here. Rational-functionalism, which became dominant in the 1980s and 1990s, can be understood as a response to realism, which was (and for the most part remains) pessimistic about international cooperation generally and the role of international law specifically.⁸ Postwar realism was itself a response to the failure of international law and institutions to contain what E.H. Carr famously dubbed the “Twenty Years’ Crisis.”⁹ *Limits* is in many ways a contemporary restatement, in rational choice language, of postwar pessimism about the uses of international law. As Martti Koskenneimi has written, in the 1930s and 1940s “political science departments at U.S. universities received from the German refugees [such as Hans Morgenthau, who largely founded the field of international relations in the United States] an image of international law as Weimar law writ large: formalistic, moralistic, and unable to influence the realities of international life.”¹⁰ With some twists and updates, *Limits* imparts the same basic message about the futility of international law.

Pessimism about international law nonetheless faced a major challenge in the postwar period, a challenge that is obvious to international lawyers. The

⁷ Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for Lawyers*, 14 YALE J. INT’L L. 335 (1989). For a recent discussion of trends in these paradigms see Susan Peterson et al., *Inside the Ivory Tower*, FOREIGN POL’Y, Nov.-Dec. 2005, at 58.

⁸ Contemporary realism has strands that consider international law to be more consequential. See the discussion in Richard Steinberg & Jonathan Zasloff, *Power and International Law*, 100 AM. J. INT’L L. (2006) (forthcoming draft on file with author).

⁹ EDWARD H. CARR, *THE TWENTY YEARS’ CRISIS, 1919-1939* (1964). Of course, the study of world politics goes back to Thucydides at least, but IR as a discipline is much newer. See Brian Schmidt, *On the History and Historiography of International Relations*, in Carlsnaes et al., *supra* note 4.

¹⁰ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 471 (2001).

postwar era was effervescent with institution-building.¹¹ And despite its supposed infirmities, international law never went away. Indeed, a signal feature of the last fifty years has been the enormous growth in the number of international agreements and organizations. If these institutions do not constrain states—if they are simply “formalistic, moralistic, and unable to influence the realities of international life”—what are they doing? Why do states continue to create international agreements, and to create so many of them?

In the early 1980s, theorists in political science tried to answer this question without resort to claims about legal normativity and with the assumption of rational, self-interested actors. They sought to show that even with narrow definitions of interest it was possible to understand cooperation as a rational response to enduring features of world politics. The answer they provided, which drew on game theory, rational choice theory, and microeconomics, had several prongs. International institutions, they argued, had various features that promoted and sustained cooperation among sovereigns. Institutions help to align expectations and create focal points; reduce transactions costs; enhance the credibility of commitments; link issues and thus promote package deals; and increase bargaining transparency.¹² Each of these mechanisms assists self-interested states in achieving mutually beneficial cooperation that otherwise would be precluded by their inability to make enforceable contracts. The paradigmatic problem in this line of scholarship is the prisoner’s dilemma.¹³ Information is the key to success; by enhancing the flow of information, cooperation can be enhanced as well, even under conditions of anarchy.¹⁴ While international agreements are never like contracts under domestic law, rational-functionalists argued they were far more than empty and moralistic formalities.

¹¹ John Ikenberry is probably the leading proponent of the view that the postwar order was marked by a phenomenal outpouring of institutional creation, particularly on the part of the United States, which led this effort. G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2001).

¹² *E.g.*, Krasner, *supra* note 5.

¹³ The prisoner’s dilemma is a useful model, but it does not capture—or does not capture well—many international problems. As Goldsmith and Posner rightly emphasize, coordination games are ubiquitous. Much of international law is devoted to coordination situations, whether it is ensuring that weather information is gathered and disseminated or international aviation kept moving. In coordination games expectations are critical, and once they are aligned around a particular rule, that rule is unlikely to be dislodged absent a very public act.

¹⁴ One of the signal volumes of the era was entitled *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986).

In many respects, *Limits* follows this basic approach with regard to international cooperation. Like early rational-functionalists, Goldsmith and Posner assume rationality, generally treat the state as a unitary actor, and use elementary game theory. They focus on law much more than the predecessors in international relations did. And they make a few novel moves, the most significant of which is to apply the approach to customary international law. (International relations scholars never really engaged custom, though they did occasionally look at unwritten behavioral regularities under the guise of regime theory.)¹⁵ Despite these commonalities Goldsmith and Posner claim to be more dubious than mainstream political scientists about the possibility of cooperation in multilateral settings.¹⁶ The main reason is that they do not consider a wide range of scholarship illustrating the power of international law and institutions.

III. RATIONAL COOPERATION

Despite their debt to extant theories of cooperation in political science, Goldsmith and Posner ignore some of the most interesting insights of the last fifteen years. These insights suggest a more potent role for international law and institutions. International law clearly has limits. But even working within the same paradigm as Goldsmith and Posner, it is easy to see that the limits are not nearly as constraining as they claim. While they make an important contribution—by illustrating how mainstream legal scholarship has uncritically accepted many claims about international law, and has failed to theorize adequately about how international law really works—they bend too far toward realist skepticism.

International agreements are a useful illustration. Goldsmith and Posner's analysis of international agreements goes something like this: Agreements can provide information about which actions count as cooperation or coordination; they clarify expectations and thereby allow states to converge on a particular equilibrium. Agreements work best in coordination situations, and, they argue, coordination is what a large fraction of international law is about. Agreements work worst in n-person prisoner's dilemmas, because in these situations there remains a serious problem of enforcement. If a state defects from a multilateral

¹⁵ Donald J. Puchala & Raymond F. Hopkins, *International Regimes: Lessons From Inductive Analysis*, in INTERNATIONAL REGIMES (Stephen Krasner ed., 1983).

¹⁶ But even their particular brand of skepticism, focused on the problem of enforcement, is well-established. As they acknowledge, George Downs pioneered this line of analysis; see George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996).

accord, what happens? Enforcement itself faces severe collective action problems—who will take action against the violator? Treaties cannot solve this, they claim, without some irreducibly bilateral method of enforcement. The result is that we see some meaningful agreements that operate through reciprocity, but many that simply ratify the status quo, creating what George Downs and others have dubbed “shallow cooperation.”¹⁷

Indeed, as Scott Barrett has shown, the problem may be even worse than it appears when we take into account the issue of participation.¹⁸ Some international cooperation involves club goods, which are goods that only the member states share. Free trade agreements are an example of this. Some of the benefits of free trade pacts, such as greater economic growth and perhaps more peace, may spill over to non-member states. But in the main the advantages of joining NAFTA accrue to the NAFTA parties, not to the nearly two hundred non-NAFTA states.¹⁹ Public goods are different.²⁰ The free-riding they engender can paralyze efforts at multilateral cooperation. When many states banded together in the 1980s to try to stem the erosion of the stratospheric ozone layer, they faced a serious free rider problem. The ozone layer is global, and hence an intact ozone layer would benefit all states, not just those party to the Montreal Protocol.²¹ In such situations, the incentives to free ride on the efforts of a few are quite large. To achieve effective cooperation, leader states must prod laggard states, either via sidepayments or coercion, to participate in the regime. The Montreal Protocol witnessed both strategies deployed successfully. A fund was created to help cover the costs of implementation in countries such as India, and trade restrictions aimed at raising the costs of nonparticipation were negotiated as well.²² Even with these strategies in place, leader states must often water down an accord to attract laggards whose participation is necessary. Sometimes the result of this watering down process is a nonbinding or “soft law” agreement rather than a

¹⁷ *Id.*

¹⁸ SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003).

¹⁹ Outsiders can of course be harmed by the diversion of trade and it that sense left worse off than the status quo ante.

²⁰ GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999).

²¹ Not all states would benefit equally. Those near the equator, and with darker skinned populations, felt they had less to lose by the depletion of the ozone layer, which was both concentrated at the poles and likely to dramatically increase skin cancer deaths. These states were, in general, also poorer.

²² EDWARD A. PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY (2003).

treaty.²³ In other cases, the substantive commitments are lowered or the provisions for monitoring and enforcement weakened.²⁴ The bottom line is that the participation problem, which plagues public goods, seems to pose a significant constraint on deep cooperation, just as the enforcement problem does.

Consequently, rational actor analysis suggests that the problems of enforcement and of participation severely constrain what states are capable of achieving through international law. Yet we see extensive cooperation nonetheless. States invest substantial resources, not only in negotiating and elaborating treaties, but also in creating and maintaining international organizations.²⁵ To be sure, many international agreements can, as *Limits* argues, be explained as straightforward coordination. Or they may be examples of shallow cooperation (or even coincidence of interest, though this is much more prevalent in customary law than in treaty law). But not all agreements can be explained this way, and so we still face the puzzle of why states create so many agreements—at last count more than fifty thousand since 1945. If states act rationally, as Goldsmith and Posner expressly assume, why would they expend substantial political and economic resources on such a wide array of feeble institutions? And why NATO, the WTO, the U.N., and the many other international organizations that populate New York, Geneva, and elsewhere? *Limits* provides no compelling theory to explain why, if international law is so limited, states keep creating and elaborating it.²⁶

Many words have been devoted to these questions. Here I can only highlight a few examples of answers that international relations theory itself provides, but that the authors slight or overlook. One is the central importance of credibility. Credibility is a core problem in world politics. State *A* might promise to take Costly Action *X*, but other states cannot be sure it really will. And if State *A* reneges on its word, States *B* and *C* may be worse off if they detrimentally relied on the commitment. So from an *ex ante* perspective, the problem is, what makes *A*'s commitment credible to *B* and *C*? The problem of

²³ I return to this topic below.

²⁴ All three of these outcomes are discussed in Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005) [hereinafter Raustiala, *Form and Substance*].

²⁵ Abbott & Snidal, *supra* note 6.

²⁶ It does contain a theory of legal rhetoric, but this is a different issue. As they state, the challenge is from “those who argue that the rhetorical practices of states cannot be reconciled with an instrumental theory of international law.” GOLDSMITH & POSNER, *supra* note 3, at 165. That is a different challenge than the one I raise: if international law is so limited, why do states keep *creating* it?

credibility flows directly from the lack of a centralized enforcement authority in the international system.

But centralized enforcement is not the only way to make promises credible. Sometimes social norms do the trick, as when I promise to meet a friend for dinner and, even though it is inconvenient, do so out of a sense that it is wrong to stay home instead. Sometimes extralegal institutions work, like the medieval Law Merchant, which “enforced” commercial laws through the power of information and reputation.²⁷ Normative forces may well propel international cooperation, but it is clear in any event that international institutions can render state behavior more open and transparent to others and can ground it in a repeat-play situation. In the process, international institutions, like the Law Merchant system, harness reputational concerns and dispense information to constrain opportunistic renegeing.²⁸

The power of better information to foster cooperation turns partly on the density of the system: when would-be collaborators have many partners to choose from, they can reject those with bad prior records. (Think Ebay’s system of seller reliability standards.) In the international system, of course, there are not thousands of players but rather a couple of hundred (or many fewer, depending on the issue). But information about past behavior still helps states predict future behavior. Goldsmith and Posner are skeptical about the power of reputation to constrain violations. They note, rightly, that reputation is not necessarily fungible across agreements, nor is a reputation for compliance with international law something states always desire. Nor are reputational concerns limited to compliance. Indeed, the Bush administration arguably incurred reputational costs by deciding not to engage with or remain in the International Criminal Court, the Anti-Ballistic Missile Treaty, the Kyoto Protocol, and many others, but this cost had nothing to do with legal compliance (since the United States is not or was no longer a party to these agreements).

While it is true that reputation has to be treated with care, the analysis in *Limits* fails to consider how variegated reputational forces may be.²⁹ For

²⁷ Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 2 *ECON. & POL.* 1 (1990). On reputation generally see Andrew Guzman, *The Design of International Agreements*, 16 *EUR. J. INT’L L.* 579 (2005); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 *J. LEGAL STUD.* 95 (2002).

²⁸ Milgrom et al., *supra* note 27; Guzman, *supra* note 27; Downs & Jones, *supra* note 27.

²⁹ See, e.g., ANNE E. SARTORI, *DETERRENCE BY DIPLOMACY* (2005). Sartori directly challenges cheap talk models of international diplomacy. See also Guzman, *supra* note 27.

example, reputational concerns interact with the behavior of private actors. Private actors may promote compliance with international law by punishing or rewarding states for certain acts. International agreements can make these acts more transparent to private actors ex post, deterring states from violating the rules ex ante. In her study of the International Monetary Fund (IMF), Beth Simmons makes precisely this argument. She writes that, “despite the formal ability of the IMF to enforce the rules, it is likely to be the market that ‘enforces’ the public international law of money. The broader message for theorists of international relations is that enforcement need not be overt and centralized to give behavioral rules their bite.”³⁰ The important point in Simmons’ research is that enforcement is primarily driven by private actors rather than other states. While this does not vitiate arguments that collective action problems among states lead to suboptimal enforcement by states, it points to an alternative means of enforcement—one that is largely ignored by Goldsmith and Posner.

Private actors may also promote compliance with international law through their political activities. In democratic states especially, but even in all states, influential private actors may have incentives to seek adherence to international agreements. These “constituencies for compliance” can form coalitions that pressure executives and legislatures not only to comply with international law, but also to create new international law.³¹ International agreements and institutions can assist and channel this political pressure. One recent study found, for example, that the European acid rain agreements “empowered domestic environmental activists by providing them with specific [compliance] relevant information and by legitimizing their demands.”³² “By altering the domestic balance of competing interests and thus indirectly influencing policymakers’ compliance decisions, even ‘weak’ institutions and ‘soft’ laws can impact national policies.”³³ The opposite, of course, is also true: Many private actors benefit from the violation of international law and will push state leaders to defect from cooperation or to resist agreeing in the first place.³⁴ But

³⁰ Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 820 (2000).

³¹ Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT’L ORG. 661 (2000). See also Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501 (2004).

³² Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT’L ORG. 363, 366 (2005).

³³ *Id.* at 388.

³⁴ Kal Raustiala, *Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity*, 49 WORLD POLITICS 482

either way, a theory of international law that treats the only relevant interaction as state-to-state will miss this entire dimension of world politics. And the varied studies noted above suggest that a theory that pays so little attention to domestic factors will tend to underestimate the power of international law to affect state behavior. Hence this form of “omitted variable bias” may systematically skew conclusions, yielding more skepticism than is merited.³⁵

Another central theoretical advance not embraced in *Limits* relates to delegation. International institutions allow national political leaders to delegate certain decisions and processes in ways that are politically advantageous domestically. In the trade context, for example, Judith Goldstein has shown that the executive branch favors delegating dispute settlement to international tribunals as a way to achieve its preferred policy ends related to economic liberalization.³⁶ Others argue more generally that delegation to international institutions enhances credibility and that the more powerful and independent the international institution is, the more profound the impact of this credibility enhancement. This line of analysis suggests that international law often “may have the aim of imposing constraints on domestic political behavior.”³⁷ Thus, the creation of external constraints on monetary policy, perhaps by negotiating a common currency agreement, as in the European Union, can be a rational policy for domestic policymakers concerned about the inability of national institutions to credibly constrain inflation.³⁸

Human rights agreements sometimes embody similar forms of delegation. Some human rights accords are designed to lock-in particular norms and

(1997). As Helen Milner writes,

in any international negotiation the groups who stand to gain or lose economically from the policies are the ones who will become politically involved. Those who stand to lose should try to block or try to alter any international agreements, whereas those who may profit from it should push for its ratification.

HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 63 (1997).

³⁵ GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 168-82 (1994).

³⁶ Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American “Unfair” Trade Laws*, 50 INT’L ORG. 541 (1996); see also Daniel Nielsen & Michael Tierney, *Delegation to International Organizations*, 57 INT’L ORG. 241 (2003).

³⁷ Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 393 (2000). See also Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055 (2003).

³⁸ On the European case generally see KATHLEEN R. MCNAMARA, THE CURRENCY OF IDEAS: MONETARY POLITICS IN THE EUROPEAN UNION (1999).

practices in unstable polities, or at least to raise the costs of political change ex post.³⁹ Similarly, a recent analysis of the International Monetary Fund argues that reform-minded leaders seek the leverage of IMF agreements to push through and sustain domestically unpopular policies.⁴⁰ IMF agreements serve as lock-in devices that shift the costs of pursuing (or reversing) a given domestic policy. Investment agreements work in a like manner: by providing credible signals about a state's commitment to refrain from expropriation, making clear what activities fall within that claim, and rendering any later deviation obvious and notorious to other potential investors, these agreements tie the hands of governments so that they are less likely to give in to future demands to take actions that violate the law. Even the work of international tribunals can be thought of in delegation terms: Laurence Helfer and Anne-Marie Slaughter argue that states create international tribunals in part to delegate decision making to them in a manner that enhances the credibility of state commitments within the underlying treaty.⁴¹ Independent tribunals act as trustees rather than agents, and in so doing they extend and enhance some of the cooperation-fostering properties of international institutions generally; they clarify rules, make commitments credible, and disperse information.⁴² Moreover, tribunals also require states to justify behavior—to give reasons for actions—and this, in turn, “can mobilize compliance constituencies to press governments to adhere to their treaty obligations.”⁴³

Finally, international agreements can change the structure of states themselves, not only in the constructivist, identity-shifting sense,⁴⁴ but also potentially in a much more literal manner. International law is often the tool by which strong states couch their demands to weak states, as in the WTO TRIPs Agreement's requirements of extensive judicial remedies and sweeping changes to local intellectual property laws. This sort of change is consistent with realist premises. Yet, over time such legal agreements may engender political and institutional changes that lock-in future behavior. Take for instance the WTO. Richard Steinberg argues that the WTO has spurred fundamental structural changes in member states.⁴⁵ As states that formerly

³⁹ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000) [hereinafter Moravcsik, *Human Rights*].

⁴⁰ James Vreeland, Institutional Determinants of IMF Agreements (draft, 2004).

⁴¹ LAWRENCE R. HELFER & ANNE-MARIE SLAUGHTER, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

⁴² The trustee concept is from Karen Alter, *Agents or Trustees?* (draft on file with author).

⁴³ HELFER & SLAUGHTER, *supra* note 41, at 935.

⁴⁴ ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

⁴⁵ Richard Steinberg, *State Formation and the WTO* (draft on file with author).

raised revenue through tariffs on imports lose that ability due to WTO commitments, they are forced to seek resources elsewhere. The result, often, is the creation of new taxation systems and/or reduced outlays and subsidies. The resulting adjustment in national economies, and the new political coalitions that result from opening markets, may provide a bulwark against backsliding in economic liberalization. This, in turn, should help to lock-in adherence with, and commitment to, the WTO.⁴⁶ Again, the core point is that if this set of claims is correct, compliance with WTO obligations is likely to be higher than a simple rational unitary actor model would predict. Deductive arguments that ignore such claims, therefore, are ignoring a potentially significant pathway to compliance.

There are many other arguments one could marshal against the undue skepticism that runs through *Limits*. Many of these arguments come from outside the paradigm of rationalism, namely from constructivism,⁴⁷ from the English School,⁴⁸ and from other sociological approaches to world politics.⁴⁹ But as I have demonstrated, even within the broad tent of rationalism there is substantial theoretical and empirical support for the conclusion that international law “matters” in many more instances than Goldsmith and Posner acknowledge. The various arguments that I have summarized above share a focus on how international agreements can further domestic political ends, or can influence domestic actors, who then influence state behavior. These processes are explicable only when the state-as-unitary-actor assumption is dropped in favor of a more realistic and complex understanding of the state and its component parts. While doing so plainly complicates analysis, political scientists have long recognized that basic unitary actor models are far too limiting and systematically overlook important aspects of the politics of cooperation. Hence the theoretical action today involves melding the insights of comparative and American politics into our understanding of international institutions.⁵⁰

⁴⁶ E.g., Helen Milner, PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE 15 (1988) (arguing that “a change in the way that domestic and international economies are integrated has affected the trade preferences of domestic, nonstate actors, and has thus influenced trade policy outcomes”).

⁴⁷ WENDT, *supra* note 44.

⁴⁸ HEDLEY BULL, THE ANARCHICAL SOCIETY (1977).

⁴⁹ E.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

⁵⁰ Milner, *Rationalizing Politics*, *supra* note 6; Daniel W. Drezner, *Introduction: The Interaction of Domestic and International Institutions*, in LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS (Daniel W. Drezner, ed.,

An additional reason to be skeptical of the strong skepticism in *Limits* is the baseline against which the authors evaluate international law's effects. The book's implicit understanding of what law is as a conceptual matter, or what would count as evidence of the impact of international law on state behavior, often appears to be crudely based on some kind of Austinian conception, in which international agreements "cause" or "force" states to act against their wishes.⁵¹ Given this approach, it is no surprise that the authors view international law as limited. When Goldsmith and Posner argue that international trade law is not a source of mutual restraint but rather just a device to communicate expectations,⁵² or when they analogize agreements to letters of intent in commercial law,⁵³ they betray an overly simplistic understanding of international cooperation. For example, they claim that international agreements achieve no more than letters of intent; that letters of intent do not force actors to do anything *ex post*; and therefore international agreements also do not force actors to do anything *ex post* either. But because states are complex political actors with internal processes of their own, agreements often act as precommitment devices that tie hands, raise the costs of noncompliance *ex post*, extend the shadow of the future, provide authoritative dispute settlement, create domestic audience costs for compliance, and generally render behavior more transparent. Consequently, their existence often, though not always, changes outcomes.

That international agreements are the deliberate product of state design, in other words, does not vitiate the claim that they shape state behavior. International agreements and organization may be endogenous, but not necessarily epiphenomenal.⁵⁴ Take for instance investment treaties. I suggested earlier that what constrains states from expropriating foreign investment are market actors. One might therefore argue that international law's role is quite limited; what really matters are the actions of firms, and these firms might deter expropriation without any legal agreement. Law does not make much difference. But investment treaties and their attendant tribunals play a powerful role in signaling policy stances to these actors, in elaborating substantive standards, and in constraining political choices domestically, by raising the profile and hence the political costs of expropriation. Only if the

2002).

⁵¹ Anthony Clark Arend has a useful discussion of the "is international law really law?" question in ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999).

⁵² GOLDSMITH & POSNER, *supra* note 3, at 140.

⁵³ *Id.* at 90-91.

⁵⁴ Simmons & Martin, *supra* note 4, at 200.

implicit point of departure is domestic law, with its ex post powers of enforcement, do these roles seem limited.

In sum, *Limits* fails to provide a satisfactory answer to the fundamental question raised above: Why do rational states create so many international agreements? Mainstream political science scholarship offers an answer, but it is not the one given by Goldsmith and Posner:

States spend significant amounts of time and effort constructing international institutions precisely because they can advance or impede state goals in the international economy, the environment, and national security. States fight over institutional design because it affects outcomes . . . because institutions matter, states pay careful attention to institutional design.⁵⁵

Goldsmith and Posner are far too quick to deduce that the endogeneity of international institutions renders these institutions epiphenomenal. To say, as they do, that international law is “not a check on state self-interest; it is a product of state self-interest”⁵⁶ elides a basic point they surely recognize: that an international rule or agreement can be *both* a check and a product of self-interest. The interesting questions pertain to when and why.

IV. THE DOMESTIC POLITICS OF INTERNATIONAL LAW

What is sometimes called liberal international relations theory extends the basic rational design orientation that Goldsmith and Posner draw on, but does so by looking directly and systematically at the role of domestic politics and institutions. This approach “complements . . . functionalist explanations for legalization by supplying an explanation for government preferences.”⁵⁷ Above I pointed to a few examples of such theorizing, but it may be easier to see the value of liberal theory through a specific inquiry. I will use a question drawn from *Limits*: Why do states use legal agreements at all, when they can (and often do) negotiate accords that are not legally binding?

⁵⁵ Koremenos et al., *supra* note 6, at 726.

⁵⁶ GOLDSMITH & POSNER, *supra* note 3, at 13.

⁵⁷ Kahler, *supra* note 31, at 667. See generally Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

Goldsmith and Posner tell us that because customary law can be often ambiguous, or vague, states will often want to clarify what counts as cooperation, and they will often do this the way most of us clarify such things: by writing them down in agreed language. Written agreements thus result from a desire for clarity.⁵⁸ States spell out expectations about future behavior in an agreement, after which the parties proceed to do what they intended to do *ex ante*: lower trade barriers, control arms, reduce pollution, or whatever.

Let's assume this analysis is correct: The key to understanding why formal agreements exist is the clarification of expectations, and clarification is achieved via explicit rather than implicit accords. As Goldsmith and Posner recognize, there is nothing in this account of agreements that explains why state leaders do not simply concur informally about what counts as what, perhaps by writing on the back of napkins at G8 summits. (Elsewhere I have called such informal written accords *pledges*; legalized accords can be called *contracts*.)⁵⁹ Their sherpas could photocopy the napkins so everyone is crystal clear about the terms of the pledges. In Goldsmith and Posner's account, the legalization of agreements appears superfluous as long as commitments are precise and common knowledge.

Yet legalization is plainly not superfluous to international cooperation. There are literally tens of thousands of legalized agreements. To explain the enormous number of contracts we actually observe, Goldsmith and Posner make three arguments. One is that states sometimes prefer contracts because these accords have a built-in set of interpretive rules in the form of the Vienna Convention on the Law of Treaties. This consideration seems marginally important, but hardly overwhelming. A second, familiar, argument is that legalizing an agreement is evidence of seriousness of commitment. When states really mean it, they use "law." Here legal form acts like a wax seal or a signature; it is a formality that conveys seriousness of intent, but nothing more. The third argument requires Goldsmith and Posner to suspend their normal rational-unitary-actor approach in favor of a focus on the role of domestic institutions. Contracts, they suggest, usually require legislative action and this domestic action makes the commitment more credible to others.

The first argument is unobjectionable but relatively unimportant. The latter two are also unobjectionable, but as I will argue below, are in tension with other aspects of their analysis. Most importantly, their account cannot explain many of the key features of the empirical pattern of legalization. Only by

⁵⁸ GOLDSMITH & POSNER, *supra* note 3, at 84-85.

⁵⁹ Raustiala, *Form and Substance*, *supra* note 24.

looking more closely at the role of domestic politics can we understand the choice between legally-binding agreements and agreements that are not legally binding.

Consider human rights agreements, one of the two substantive areas of treaty law addressed in *Limits*. Human rights agreements, the authors argue, solve a coordination problem.⁶⁰ Great powers (who are generally liberal) desire that other states act in certain ways. They reward those who do and punish those who do not. To effectively deter bad behavior and induce good behavior, it is important that great powers clarify ex ante what counts as good or bad. Human rights agreements are the means of clarification.⁶¹ According to Goldsmith and Posner, “States know that when they comply with this guide or code, they are more likely to receive benefits (however small) and to avoid diplomatic, military, and economic pressures (even if minor).”⁶²

Yet if human rights agreements are just guides or codes for good behavior issued by liberal states to illiberal ones, then why legalize these agreements at all? It cannot be that powerful liberal states rely on legalization for credibility reasons. Under Goldsmith and Posner’s model, the problem is one of clarifying the new “standard of civilization,” not of constraining ex post defection.⁶³ Credibility is not at issue since, outside of the very small number of agreements today that address minority rights regimes involving co-ethnics and co-religionists, there is no appreciable risk of opportunism. (Even then, reciprocity would be a strong check.) Moreover, as the authors note, the United States and other great powers pressure bad states regardless of whether they have ratified human rights accords. (And, as history makes plain, great powers often look the other way if foreign policy demands it.) Hence legalization makes virtually no difference in their analysis; simple standards articulated in a transparent manner are all that is needed.

Goldsmith and Posner seem to recognize this problem, but quickly conflate it with the issue of why states ratify human rights accords. The answer to that question, they say, is that human rights accords exhibit a sort of pooling equilibrium. Every state, liberal or illiberal, wants to send the “practically

⁶⁰ GOLDSMITH & POSNER, *supra* note 3, at 130.

⁶¹ *Id.*

⁶² *Id.*

⁶³ As David Fidler describes it, contemporary human rights law can be seen as an updated version of the nineteenth century standard of civilization. David P. Fidler, *International Human Rights Law in Practice: The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137 (2001). The nineteenth century standard and its place in international law are discussed in ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 32-114 (2004).

costless” signal that it is a good state that respects human rights.⁶⁴ So it signs human rights agreements. But this does not tell us why *the agreements themselves* are legalized. All states could simply sign a pledge drafted by the liberal states that detailed what is good and bad behavior. Yet that is not what we observe empirically. Of the dozen major human rights accords listed in a leading casebook, only one is nonbinding; the rest are contracts.⁶⁵ None of the three reasons given in *Limits* for choosing legalized agreements—applicability of the Vienna Convention, the need to evidence seriousness, or the need to enhance credibility through legislative action—convincingly explain this pattern.

More generally, Goldsmith and Posner’s account of the choice of legal form leads us to expect pledges to be plentiful—and in the area of human rights, dominant. For example, throughout the book, the authors repeat that much cooperation is really about coordination. If this is true, pledges should be very common across many issue areas. In coordination games credibility is rarely important, because there is rarely an incentive to defect surreptitiously.⁶⁶ Yet it is difficult to argue that pledges are the dominant form of international cooperation generally. It is especially hard to argue this in human rights or trade, the two substantive areas the authors focus on.

What then explains the choice between pledge and contract? Political scientists have broadly understood this choice in terms of a functional tradeoff between credibility and flexibility.⁶⁷ Contracts are said to be more credible but less flexible; pledges exhibit the reverse pattern. When flexibility is prized, because states are uncertain about the future, or uncertain about the costs of cooperation, we ought to observe more pledges. When credibility is critical—generally due to concerns about ex post defection from the agreement—contracts ought to prevail.⁶⁸

⁶⁴ GOLDSMITH & POSNER, *supra* note 3, at 131. In this regard see Beth Simmons, International Human Rights ch. 4 at 1 (book manuscript) (arguing that “contrary to the expectations of theories that emphasize their universally—costless nature, the evidence shows that treaty ratifications follow some strong patterns: Preferences and expectations of compliance matter”).

⁶⁵ HENKIN ET AL., HUMAN RIGHTS (1999), Part III, Ch. 2.

⁶⁶ Lisa L. Martin, *The Rational State Choice of Multilateralism*, in MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 102 (John G. Ruggie ed., 1993).

⁶⁷ Raustiala, *Form and Substance*, *supra* note 24.

⁶⁸ Rational-functionalist accounts of this choice have also stressed the ability of pledges to bridge heterogeneous preferences and to maintain confidentiality. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421; Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499 (1999); Anthony Aust, *The*

Like most rational unitary actor accounts, this tradeoff analysis is useful to a point. But the choice to legalize an international agreement can be better understood by accounting for the complex domestic politics of international cooperation. From this perspective, the choice of pledge or contract is less about unitary states “solving” games in an anarchic setting and more about political leaders responding to domestic political pressures. Politics may have once stopped at the water’s edge, but today domestic interest groups and transnational interest groups lobby hard about foreign policy. And in democracies especially their preferences about cooperation carry significant weight. Hence my claim here is that in many cases governments negotiate agreements because domestic constituencies demand them—and they usually demand contracts, not pledges. To be sure, these demands exert influence against a backdrop of concerns about credibility and flexibility. But it is the domestic pressure for contracts that helps explain why pledges are relatively rare, and under what conditions they are most likely to be rare.

This argument rests crucially on the claim that domestic actors favor contracts. While the case cannot be fully made here, it seems plain that in many areas of cooperation—including trade and human rights, the two areas discussed in *Limits*—domestic actors are not indifferent to the choice between contract and pledge.⁶⁹ Indeed, the preference for contracts is often pervasive. It is not that domestic constituencies always favor contracts (indeed, they may oppose any agreement at all). Rather, my claim is that domestic actors that seek international agreements exhibit a decided tendency in favor of contracts. This bias on the part of private actors skews the supply of international agreements.

Domestic institutions are also significant factors in liberal theory. Typically international accords, especially contracts, must be approved by some legislative process. Goldsmith and Posner rightly emphasize this, in a deviation from their usual unitary actor approach. But they ignore an important aspect of this process. In democratic states the executive branch often negotiates agreements and presents them to the legislature, or part of the legislature, for consent prior to ratification. The choice between pledge and contract is not unrelated to these domestic procedures. Consider U.S. practice. Unlike a contract, in the United States a pledge is not subject to congressional action. And it is in Congress that private actors often wield the greatest influence—or at least different forms of influence than they wield vis-à-vis the

Theory and Practice of Informal International Instruments, 35 INT'L & COMP. L.Q. 787 (1986).

⁶⁹ See Raustiala, *Form and Substance*, *supra* note 24 for elaboration.

executive. Even when the Senate need not approve an agreement, the Case Act mandates that the agreement be transmitted to Congress.⁷⁰ But for the Act to apply, “the parties must intend their undertaking to be legally-binding”⁷¹ This limitation sheds light on both why the U.S. government (and, by analogy, that of other states) sometimes prefers pledges and why domestic actors rarely do. Pledges are more confidential and less prominent; members of Congress are less likely to hold hearings on pledges; legislative debate is likely to be rare. These claims should not be overstated. But it is nonetheless unusual for a pledge to result in high levels of political attention. Pledges have lower political salience and provide fewer access points for private actors. These features are unlikely to be attractive to domestic actors, but they are sometimes attractive to the executive.

Thus, there are at least two reasons why domestic actors may prefer contracts to pledges. Domestic actors often believe that contracts are more effective at shaping state behavior. And tactically, because of the nature of domestic institutions in many democracies, contracts require more legislative process and therefore create greater opportunity for influence by private actors. At the same time, executives often prefer pledges, because they insulate agreements from political control and allow them greater flexibility *ex post*. When politics permits, we should expect executives to use pledges. Thus, an observable implication of this argument is that the mix of pledges and contracts should vary by the level of domestic demand for cooperation. All else being equal, we should observe a higher percentage of contracts when domestic constituencies for cooperation are politically powerful, and a lower percentage when they are weak.

The empirical evidence is generally, though not entirely, consistent with this broad claim. Pledges to be appear comparatively uncommon in the areas of the environment, human rights, and trade—areas which exhibit active domestic constituencies and in which those constituencies tend to favor contracts. By contrast, pledges appear to be most common in areas of technocratic cooperation, in which domestic interest groups are relatively inactive. Thus, where domestic pressures are comparatively weak, states appear to have greater latitude in the choice of legal form and, as a result, more frequently negotiate pledges. These areas include securities regulation, antitrust enforcement, sovereign debt restructuring, and monetary cooperation. In these more technocratic areas of cooperation, the available empirical evidence suggests

⁷⁰ U.S. CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 350 (1993).

⁷¹ *Id.* (citing Regulations of the Secretary of State, 22 C.F.R. § 181 (1999)).

that the prevalence of pledges rises roughly, if inconsistently, as uncertainty rises—as functional theory predicts. For example, as international capital and foreign exchange markets have grown and intensified, monetary agreements have declined in terms of legalization.⁷² Exchange rate pacts address issues of high uncertainty, as governments have only limited control over the fundamentals that determine exchange rates, and often are pledges. Similarly, the OECD's money laundering accord is a pledge, as is the Basel Accord on capital adequacy and the various Paris Club agreements on sovereign debt.⁷³ These examples are consistent with the functional expectation that uncertainty, leading to a desire for flexibility, influences the form of commitments. They are also consistent with the liberal claim that pledges are most common in areas of low domestic salience.

In short, the liberal analysis I have put forward suggests an answer to the question of why so few human rights accords are pledges.⁷⁴ Why do we not observe the great powers writing their checklists of good behavior in nonbinding form? It is because human rights agreements exist in part to solve domestic political problems, not just international coordination problems. They are responses to the demands of private and transnational actors, who seek such agreements as a way to express normative judgments, to influence the behavior of other states, and to provide tools for activists to use in seeking better protection of rights abroad. They are also mechanisms that domestic leaders can use to lock-in rights-regarding behavior, in an effort to ensure that later governments act liberally (or more liberally) than they might have.⁷⁵ To be sure, Goldsmith and Posner are right that some states simply sign human rights accords because it is easier than not signing them. But this does not tell us why the agreements themselves are written in legally-binding form. For many states, especially for powerful states, human rights agreements are fundamentally grounded in domestic politics and institutions, and these factors create a bias in favor of contracts. Once we see that, and once we appreciate

⁷² Simmons, *supra* note 30.

⁷³ See Financial Action Task Force, <http://www.oecd.org/fatf>; on the Basel Accord and Basel II see Basel Committee on Banking Supervision, www.bis.org/bcbs/index.htm; on the recent Paris Club Iraqi debt decision see Craig S. Smith, *Major Creditors Agree to Cancel 80% of Iraq Debt*, N.Y. TIMES, Nov. 22, 2004, at A1. The Paris Club agreements are nonbinding, though the creditor nations then typically negotiate binding bilateral accords, based on the Paris Club agreement, with the debtor state.

⁷⁴ Nonbinding human rights accords are not unknown—the so-called “consensus documents” that emerged out of the many U.N. conferences of the 1990s are examples. But they are not the primary mode of cooperation on human rights.

⁷⁵ Moravcsik, *Human Rights*, *supra* note 39.

the nature of that bias, it is easier to understand why so few nonbinding human rights accords exist.

V. CONCLUSION

John Chipman Gray once wrote that, “on no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on International Law.”⁷⁶ This is probably still true today.⁷⁷ For this reason, *Limits* is, despite my criticisms, an important addition to international legal scholarship. Austere rationalist explanations can be clarifying and can stimulate progressive research programs and responses. The general thrust of the book—to critically examine how international law works, rather than to assume its power or normative appeal—is thus welcome. While, from the vantage point of political science, many of the book’s conclusions are straightforward, even obvious at times, within international law they are more controversial. But this is in part because *Limits* stakes out a position on international law that even many political scientists find unjustifiably skeptical. The main reason Goldsmith and Posner are so skeptical, I have argued, is that they have overlooked a panoply of ways that international institutions interact with domestic politics. Many of these interactions suggest a greater, and more influential, role for international law than that found in their rational unitary actor approach. The failure to consider these alternative mechanisms renders their conclusions suspect.

The challenge *Limits* poses to traditional legal scholarship is nonetheless a serious one. The book undoubtedly will spur many critics to hone their arguments and reconsider their evidence, and this is precisely what international legal scholarship needs to do. Consequently, my critique is friendly, as I support the authors’ effort to think more analytically about the role of law in world politics. Increasingly, however, scholars have incorporated, in sophisticated ways, the role of domestic politics and institutions. Had Goldsmith and Posner followed suit, and recognized the deep and rich connections between domestic and international institutions, I would support their efforts even more.

⁷⁶ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 127 (1927), cited in Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 991 (2005).

⁷⁷ The Internet may have eclipsed international law in this competition.