RESPONSE

THE NEW INTERNATIONAL LAW SCHOLARSHIP

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I. INTRODUCTION

The Limits of International Law sets forth a general theory of international law.[1] The book rejects the traditional explanations of international law based on legality, morality, *opinio juris*, and related non-instrumental concepts. Using simple rational choice tools, the book seeks instead to provide an instrumental account of when and why nations use international law, when and why they comply with it, and when and why international law changes. The basic descriptive story is that international law emerges from and is sustained by nations acting rationally to maximize their interests (*i.e.*, their preferences over international relations outcomes), given their perception of the interests of other states, and the distribution of state power. *Limits* also makes two normative arguments: nations have no moral obligation to comply with international law, and liberal democratic nations have no duty to engage in the strong cosmopolitan actions so often demanded of them.

We are grateful for the thoughtful criticisms of *Limits* in this symposium. Below we identify points of agreement, clarify some of our positions, and respond to major criticisms. We also outline what appears to be an emerging consensus about the appropriate path of international law scholarship.

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[1] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

II. POINTS OF CONSENSUS

Most of the essays in the symposium are critical of the book. But underneath the criticisms lies an emerging consensus in support of several propositions central to *Limits*.

The primary intellectual target of *Limits* is the claim—widespread in earlier generations of international law scholarship, and still dominant today—that nations comply with international law for non-instrumental reasons. Non-instrumental explanations for compliance can include a sense of obligation to comply (*opinio juris*), or international law's normative pull,[2] or the absorption of international law into a nation's internal value set.[3] To our surprise, many of the essays in this symposium question whether these non-instrumental explanations are even worthy of an academic response. Andrew Guzman and Kal Raustiala reject the non-instrumental approach explicitly. Margaret McGuinness calls our focus on it "a classic straw man," a sentiment echoed by Peter Spiro and Daniel Bodansky.[4] And Allen Buchanan says that the claim that nations have a moral obligation to comply with international law is an obvious "error" that is hardly worthy of a response.[5]

As Ken Anderson correctly notes, "norm-based methods of international law [the view "that international law itself exerts a discernible 'pull' upon the behavior of states, as a normative and moral force"] still predominate in the international legal academy both in the United States and Europe."[6] The fact that none of the commentators in this symposium defends such normative approaches to international law, and that many question our focus on it, is surely, as Anderson says, a "telling fact about shifts in international law scholarship, at least in the United States."[7]

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[2] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24-25 (1990).

[3] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997).

[4] Margaret E. McGuinness, *Exploring the* Limits *of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 395 (2006); Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 288 (2006); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445, 453 (2006).

[5] Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305, 309 (2006).

[6] Kenneth Anderson, *Remarks By an Idealist on the Realism of* The Limits of International Law, 34 GA. J. INT'L & COMP. L. 253, 254 (2006). Anderson also notes that this view prevails among NGOs and other international activists.

[7] *Id.*

A related point is that, as Anderson also notes, the symposium participants "are all quite accepting of the basic utility of the rationalist paradigm that underlies" *Limits*.[8] To be sure, McGuinness and Spiro question whether we have focused on the right actors (nations v. NGOs), David Golove raises methodological objections to our particular use of rational choice, and Guzman and Raustiala argue that rational choice is consistent with more robust conceptions of international law. But overall these essays reflect a point made by Bodansky: "many international lawyers . . . would not fundamentally disagree with [*Limits*'] rationalist methodology."[9]

The contrast between the attitudes of the symposium participants and the non-instrumental view of international law embraced by traditional international law scholars thus could not be starker. This raises a puzzle. How can the traditional international law scholarship "predominate" if the symposium participants "are all quite accepting of the basic utility of the rationalist paradigm that underlies" *Limits*?[10] The answer is that a major generational change is underway. The symposium participants are generally young people who have rejected the traditional international law scholarship of their elders. Having been exposed in law school to social scientific approaches to legal scholarship, and having witnessed how political science and economics have brought fruitful insights to international relations, these scholars have realized that international law scholarship has fallen behind other areas of legal scholarship by at least thirty years. This is not just a point about rational choice. Other new forms of international law scholarship that reject, or complement, rational choice approaches are also more sensitive to methodological issues and empiricism.[11] The result is greater attention to the

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[8] *Id.* Anderson and McGuinness are partial exceptions, as is Buchanan, who is not a lawyer, and who does not express a view on the descriptive elements in *Limits*.

[9] Bodansky, *supra* note 4, at 288. Our most sympathetic critic at the symposium, Anderson, is the major exception here. Anderson correctly notes that not everyone has been swept away by the advance of the social sciences over the last three decades. And Anderson (along with others in the symposium) correctly identifies a central methodological move in *Limits* (and in social science and the natural sciences generally)—namely, simplification. We explained in *Limits* the virtues of building a theory from simple and reductive premises, virtues canvassed in Bodansky's essay, and we will not rehearse the arguments in favor of doing so (or of using social science methodologies generally). These arguments are extremely familiar and can be found in many places—in legal debates about law and economics, in philosophical critiques of rational choice, in the work of dissenting economists, and in the debates over the advance of rational choice in political science.

[10] Anderson, *supra* note 6, at 254.

[11] *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and*

social science virtues: methodological self-consciousness, empiricism, and theoretical rigor.

Limits is unusual in the field of international law scholarship for (1) making its assumptions explicit, (2) addressing the limitations and criticisms of its assumptions, (3) separating positive and normative arguments, (4) framing claims as testable hypotheses, (5) addressing alternative hypotheses and attempting to weigh the evidence, and (6) choosing case studies and other evidence carefully.[12] Many of the commentators criticize *Limits* on methodological and empirical grounds; we welcome such criticisms, and address them below. For now, what is important to notice is how the standards of analysis are shifting in international law scholarship. If international law scholarship generally—including the scholarship of our critics—comes to embrace the standards of methodological and empirical care that the critics demand of *Limits*, the discipline would be significantly improved.

III. HOW INTERNATIONAL LAW MATTERS

The responses evince much confusion about how we believe international law matters to the behavior of states.

Our essential claims are as follows. International law provides a focal point for coordination, and establishes what counts as cooperation in a prisoner's dilemma.[13] Such patterns of behavior can arise in a decentralized fashion, in which case they are identified as rules of customary international law (CIL). But CIL rules tend to be relatively unclear, making cooperation and coordination by custom relatively fragile. Through communication, negotiation, and drafting common documents, nations can clarify their expectations about the opportunities for the joint gains that can be achieved by

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International Human Rights Law, 54 DUKE L.J. 621 (2004).

[12] This degree of rigor will be familiar to law professors who write about domestic law, and especially to law and economics scholars. And it is largely absent from traditional international law scholarship, where scholars generally (1) do not explain their assumptions, (2) do not address limitations on their assumptions, (3) conflate their positive and normative arguments, (4) do not advance testable hypotheses, (5) ignore evidence that contradicts their argument, and (6) selectively choose evidence that supports their theory. No one who has read the international law literature would deny these claims, so we do not think it is necessary or fruitful to cite particular examples.

[13] The content of international law can also reflect coercion, but treaties that result from coercion always reflect a cooperative element, however thin. *See* GOLDSMITH & POSNER, *supra* note 1, at 89. International law in the form of treaties can also provide important information about the intensity of state preferences. *Id.* at 91-99.

coordination and cooperation. In a repeated prisoner's dilemma, a clear rule of cooperation can reduce both opportunism and unintended defections from the cooperative game. In a coordination situation, a clear rule reduces the likelihood of an unintended failure of coordination.

Once the rule of cooperation or focal point for coordination is established by custom or treaty, nations comply for one of three general (and not mutually exclusive) reasons. The first is fear of retaliation in a prisoner's dilemma. Each state complies with the rule because it fears retaliation, and a loss of the cooperative surplus, if it does not. The second is fear of a failure of coordination. A CIL rule or treaty works by aligning the relevant expectations and helping parties to avoid the costs of failing to coordinate. A third and quite different reason is fear of reputational loss from failing to comply with the rule.

Under this theory, international law does not pull states toward compliance contrary to their interests. International law emerges from states pursuing their interests to achieve mutually beneficial outcomes, and it is sustained to the degree to which it continues to serve those interests. When international law changes, as it often does, it does so because state interests (again, state preferences over international relations outcomes) change due (for example) to changes in technology, or in relative wealth, or in domestic government. The transition from the old to new rule of international law is not always smooth, for the world lacks stable international institutions—legislatures, regulatory agencies, effective courts—to facilitate the change. Instead, we often see violation, rhetorical clashes, retaliation, and sometimes war as the international order shifts from an old to a new equilibrium.

With this background, it should be clear that we do not, as many of our critics suggest, think international law is irrelevant or unimportant. It is very important, and indeed often crucial, in helping nations to reap gains from (and avoid losses from) interaction. Nor do we think that international law is inconsequential. The terms of a treaty matter to the gains each state receives from the treaty through cooperation or coordination. That is why states negotiate so intensely over treaty terms. We even accept that international law "constrains" states, as long as one is careful to understand "constraint" to mean that when international law establishes a focal point for coordination or the cooperative solution in a prisoner's dilemma, nations wanting to reap the benefits of coordination or cooperation will be constrained to abide by the coordinating or cooperating solution.

We do, however, think it is generally wrong and theoretically unhelpful to view international law as an exogenous force on state behavior.[14] In that sense, and that sense primarily, our theory does not give international law the same type of importance attributed to it by traditional international law scholars. In addition, we show throughout the book that the evidence traditional scholars have used to show the exogenous force of international law is susceptible to multiple plausible interpretations, including the very simple interpretation that states are acting consistently with the law because the law does not require that they deviate from their private interest (the "coincidence of interest" paradigm). Perhaps some scholars mistake the last claim to be an argument that international law does nothing at all—a claim associated with some "realists" in political science[15]—but that is a serious misreading of our book.

It is true that our book emphasizes the "*Limits*" of international law, and that we are more skeptical than most scholars about what international law might accomplish. But it is important to understand why, in our view, international law is so limited. International law is limited because it is a product of, and is bounded by, state interests and the distribution of power. Given the multiple conflicting interests of states on various issues, and the particular distribution of state power with respect to those issues, many global problems are unsolvable. To recognize this point is not to reject international law.

Indeed, the view to the contrary implicitly adopts a kind of "Whig" theory of the development of international law, analogous to the long discredited Whig theory of history, which holds that history is a story of constant improvement toward some ideal end. International law scholars recognize the current imperfection of international law, but, lacking a theory of the limits of international law, see no reason why this imperfection should be tolerated. Thus, they are drawn to the conclusion that international law can only get

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[14] Bodansky says that "if international law has little potential to constrain state behavior, then we have little reason to try to develop it." Bodansky, *supra* note 4, at 287. This is untrue if "constraint" is understood as we explain it in the previous paragraph.

[15] But not Hans Morgenthau. McGuinness claims that Morgenthau argued that "international law does not affect interstate relations and is therefore unworthy of much scholarly attention." McGuinness, *supra* note 4, at 394. To the contrary, Morgenthau thought international law played an important role in international relations and he devoted significant scholarly attention to it, see HANS MORGENTHAU, POLITICS AMONG NATIONS 249-86 (2d ed. 1955); Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940), although he did criticize excessive doctrinalism and excessive optimism about international law's ability to foster collective security.

better, and all that stands in the way of its improvement is error or ideological rigidity. This is not a plausible view of either international law or history.

IV. REPUTATION AND THE ROBUSTNESS OF MULTILATERAL INTERNATIONAL COOPERATION

Guzman says that we "dismiss reputation" and "ignore reputation altogether"—at least with regard to multilateral cooperation.[16] This is not quite so. *Limits* relies on reputational theories of compliance "throughout the book,"[17] including in our analysis of multinational institutions. But *Limits* is indeed much more cautious than Guzman in its reliance on reputational arguments.

There are several ways that economists model reputation, and these ways can all be applied to international legal compliance, as a matter of theory. First, one might simply assume that a state incurs a reputational cost whenever it violates international law. Second, one might use a model of asymmetric information, where states comply with international law in order to show that they have characteristics that make them appealing cooperative partners with other states. Third, one might rely on the simple iterated prisoner's dilemma, where information is complete and states keep promises only to avoid retaliation.

One cannot dismiss any of these approaches out of hand, and we did not in *Limits*.[18] But we think the first and second are less fruitful approaches than the third, and we rely mainly on the third in the book. The first has the virtue of simplicity, but, as we noted in *Limits*, it assumes what needs to be explained—namely, why states comply with international law. The second can be used to explain compliance, but it is much more complicated than the third, and is thus difficult to test. The third has the virtue of simplicity and testability. For this reason, the book relies mainly on the third theory, though in several places (especially in chapters 4 and 6), we rely on the second theory as well.

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[16] Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379, 381-82 (2006).

[17] GOLDSMITH & POSNER, *supra* note 1, at 102. For our reliance on reputational arguments, see *id.* at 31, 93, 103-04, 172-75.

[18] With respect to the first approach, we set it aside for methodological reasons, and we question its empirical basis, see *id.* at 9-10, 103, but we did not claim to demonstrate that it is untrue.

One of the hypotheses that can be derived from the third approach (but not the second, at least not as clearly) is that compliance with a treaty should decline as the number of state parties increases. This hypothesis is familiarly known as the collective action problem. While this is hardly a novel claim, it is ignored by traditional international law scholarship, which attributes greater significance to multilateral treaties and international organizations than to old-fashioned bilateral treaties, which, on our account, should be more robust. Indeed, we argue that the main function of multilateral treaties is to provide focal points around which pairs of state cooperate.[19] Two important implications follow from this view. First, bilateral collective goods will vary greatly even though all the states are members of the same treaty regime. Second, multilateral treaties do not solve multilateral collective action problems; instead, they help states solve multiple bilateral cooperation problems. These implications are testable, and we support them with evidence throughout the book; unfortunately, with the exception of Golove, none of our critics discusses the evidence.

Ultimately, the role played by reputation is, as we noted in *Limits*, an empirical question.[20] Raustiala, relying in part on credibility (*i.e.*, reputation) arguments, maintains that states engage in "extensive" and deep multilateral cooperation.[21] If Raustiala is right—if we see multilateral treaties and international organizations solving genuine multilateral prisoner's dilemmas among several dozen or more states—then it would be fair to conclude that reputational concerns of either the first or second sort outlined above would be doing more work than we suggest in *Limits*. But do we really see extensive and deep multilateral cooperation?

Raustiala notes that there have been over 50,000 treaties since 1945. This number is much less impressive than it seems. If each of 190 states entered just two treaties—say, an extradition treaty and a treaty of amity—with every other state, this would amount to about 36,000 treaties. All of these bilateral treaties might (at best) reflect genuine bilateral cooperation, but would say nothing about multilateral cooperation. And of course most nations have many more than two bilateral treaties. So the 50,000 figure is misleading, since the vast majority of the 50,000 treaties are merely bilateral treaties that do not purport to reflect multilateral cooperation. More relevant is the multilateral

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[19] *Id.* at 87-88.

[20] *Id.* at 102.

[21] Kal Raustiala, *Refining* The Limits of International Law, 34 GA. J. INT'L & COMP. L. 423, 429 (2006).

treaty, of which, according to the U.N., there are perhaps 500 or 600.[22] In our book, we address only a half dozen or so of these treaties, and provide evidence that they do not reflect genuine multilateral cooperation. Do the remaining treaties actually solve *n*-player collective action problems? Or do they do other things, like provide coordination for pairwise cooperation (our conjecture), express symbolic commitments, or simply fail because they were too ambitious?

These are important questions, and we lack space and time to analyze and address the literatures cited by Raustiala. But we do have simple answers to Raustiala's questions: "Why [do] NATO, the WTO, the U.N., and the many other international organizations that populate New York, Geneva and elsewhere [exist]," and "*why, if international law is so limited, do states keep creating and elaborating it*?"[23] Raustiala and we agree that nations entered into these treaties because they perceived that they gained more than they lost from them. But what they gained from these three treaties in particular was not, we think, the solution to a multilateral prisoner's dilemma. Article 5 of the NATO treaty imposes an important obligation of mutual self-defense that was never tested.[24] The rest of the treaty imposes empty obligations (such as settling disputes by peaceful means and strengthening free institutions) and performs the coordinating function of providing a forum and basic procedural rules whereby different constituencies can come together to solve particular problems at the retail level, often in small groups.[25] This coordinating function is also the primary accomplishment of the U.N. Charter. The Charter does, to be sure, impose strict obligations about the use of force, but these obligations have been honored in the breach.[26] As for the WTO, we argued in *Limits* that

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[22] The U.N. data base contains 517 multilateral treaties, but it is not clear whether this collection is comprehensive. It does appear to hold all major multilateral treaties; there may be other such treaties that are of minor importance. *See* http://untreaty.un.org/English/access.asp.

[23] Raustiala, *supra* note 21, at 429 (emphasis added).

[24] At least not before 9/11, when the NATO nations agreed that the attacks on the United States triggered Article 5. But the subsequent response of NATO to the 9/11 attacks has hardly been an example of solving a multinational prisoner's dilemma, or even of compliance with the NATO treaty.

[25] Our claim is not that NATO has been inconsequential. We think it has been consequential in discrete contexts, but that international law's contribution to these consequences is the establishment, in the NATO treaty, of a coordinating forum and process.

[26] *See generally* MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001).

it is an example of an institution that is best understood as resolving bilateral disputes between states.[27]

These answers are necessarily compressed, and there is much more to say about what multilateral institutions accomplish. But even these observations do lead us to flip Raustiala's question above and ask, "Why, if international law is *not* so limited, do states keep failing to create effective international law?" There are pressing international problems—war, refugee crises, global warming, the proliferation of nuclear weapons, international terrorism, the depletion of fisheries, intrastate conflict, lingering protectionism—that states are unable to solve. A good theory would explain both why international law exists and why it remains highly imperfect. *Limits* tries to do this. Other theories—at least other theories in the legal academy—do not.

V. STATE ACTORS AND STATE INTERESTS

Limits assumes that the relevant agent is the state, not the individual. We talk of states acting in their interest, rather than individuals causing states to act in their (the individuals') interest. As we explain in *Limits*, we generally identify the state interest with the interest (preferences) of its leadership—an interest that can be informed by many factors.[28] The most prevalent criticism of *Limits* concerns its focus on the state as the relevant actor, and on the concept of a state "interest." We explained these choices in *Limits*, but we add further thoughts here.

The assumption that collective entities like states act instrumentally to achieve certain ends tracks ordinary language and has proven extremely fruitful in the social sciences. In economics, it is conventional to assume that households, firms, corporations, governments, and—yes—states make decisions and take actions based on instrumental calculations. In political science, it is conventional to assume that Congress, the judiciary, parliament, governments, and—yes—states similarly make decisions and take actions to maximize their preferences. In these and other fields, scholars implicitly assume that collective entities act instrumentally. The claim that any good social science theory must assume that individuals are the relevant agents would require one to reject a huge swath of influential scholarship going back decades.

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[27] GOLDSMITH & POSNER, *supra* note 1, ch. 5.

[28] *Id.* at 6.

We do not deny that one can learn something about leaders' preferences (and thus about state interests) by looking at the domestic influences that inform those preferences. Indeed, in many places in the book—for example, in talking about the role of legislatures in ratification, or about how domestic interest groups determine a state's interest related to trade, or about how bureaucrats and courts foster compliance with international law—we do just this.[29] In this sense, our focus on the preference of government leaders as the embodiment of the state interest is, as we explained in *Limits*, a parsimonious methodological choice that can be modified in discrete contexts when focus on the domestic politics underlying leaders' preferences would be fruitful.[30]

McGuinness and Raustiala urge us to reject our presumptive focus on the state and rely more thoroughly and systematically on domestic politics. They argue that if we did, we might find reasons to be less skeptical of international law's power to foster cooperation. We are doubtful that a more thorough examination of domestic politics would lead to this conclusion, for we doubt that domestic actors systematically prefer international legalization or international law compliance to their opposites. Of course we might be wrong; it might be possible to build up a comprehensive theory of international law based on domestic politics and domestic actors that would be superior to, and more optimistic than a theory that rested primarily on government leaders and the state itself. We suspect that such a theory would be too complicated and fine-grained to yield general insights or predictions, but we will not know whether this is true until someone proposes such a theory. As far as we know, no one has. Although there is an interesting body of literature (some of which McGuinness and Raustiala cite) that tries to find correlations in particular contexts between international law and domestic political structure, no one writing in this literature offers a general theory of international law. We suspect the reason is that most of the interesting features of international law can be explained by simple assumptions about the state interest in discrete contexts, as opposed to lower-level or more fine-grained phenomena, which introduce unnecessary complexity. But again, we emphasize, we could be wrong, and as mentioned above, we sometimes found it useful for understanding the state interest to look at domestic politics.

McGuinness and Spiro make a different point about individual actors. They say that our theory is flawed because it leaves NGOs and other non-state actors out of the equation. In our view NGOs are like other interest group

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[29] *Id.* at 91-95, 104-06, 138-39.

[30] *Id.* at 6.

inputs that help determine the state interest.[31] We also make an important point—largely overlooked in the literature and in the commentaries—that NGOs have no particular interest in forcing states to comply with international law as opposed to whatever goals or agendas those NGOs have. McGuinness and Spiro want to give NGOs a more elevated status, but while they provide many stories, their claims are vague and they fail to advance a theory that makes sense of the significance of these actors. They both say, for example, that NGOs influence international norms more than they influence international law, a point we do not address in *Limits*. Spiro calls our failure to address such influence a "formalist dodge," because we focus on how legal rules and institutions, as opposed to other factors, affect international behavior. But we are not engaged in a formalist dodge; we are trying to figure out how international law, as opposed to scores of other factors, influence state behavior. In a book about the "limits of international law," we do not take a position on whether norm cascades, religious movements, the actions of great leaders like Napoleon and Gandhi, frenzies of nationalism, multinational institutions or NGOs like Amnesty International and Microsoft Corporation, and other economic, sociological, and psychological phenomena, might affect the behavior of states or the people who lead them. Indeed, compared to these kinds of phenomena, we suspect international law is often of minor importance. Perhaps McGuinness and Spiro agree? McGuinness and Spiro jumble up international law and non-legal norms into a witch's brew of influences on state behavior. But this explains nothing, and only highlights the fact that their assertions about the influences of NGOs are not based on a theory about how, or when, or why they have influence (and how, or when, or why they do not).[32]

Golove and others complain about our use of the concept of state interest.[33] Golove is wrong to claim that we do not specify a state's interest, for we were careful to do so in discrete contexts.[34] His real objection seems to be that our concept of state interest is too fluid and too context-dependent.[35] Any

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[31] Many others have taken this approach. *See, e.g.*, Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT'L STUD. Q. 719 (1997).

[32] For criticisms of the various NGO theories of international law, see Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797 (2005).

[33] David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's* The Limits of International Law, 34 GA. J. INT'L COMP. L. 333, 337-38 (2006).

[34] *See, e.g.*, GOLDSMITH & POSNER, *supra* note 1, at 109-10 (defining state interest in the human rights context); *id.* at 138-39 (defining state interest in the trade context).

[35] Golove, *supra* note 33, at 338.

instrumental account of state behavior—and Golove does not object to instrumental accounts in general—must posit what the state is trying to maximize. And, of course, there is nothing unusual, in everyday talk or in social science, about ascribing different preferences to states in different contexts. When economists model the behavior of corporations, they often assume that corporations maximize value to shareholders; but sometimes they assume that corporations maximize the interests of their managers or some combination of shareholders' and managers' interests. There is no single right way to model the interest of the corporation; the correct modeling strategy depends on the problem to be studied. Similarly, we do not assume that there is a single state interest like security or prosperity; a complex aggregation of factors influences such as leaders' decisions on the international stage, and so generalization is hazardous.

But when one moves from abstract discussions and tries to understand a particular area of international law, it becomes possible to make reasonable conjectures about leaders' preferences and thus about state interests. In the case of trade, for example, we agree with the approach of economists who assume that states maximize the interests of domestic exporters, import-competers, and consumers.[36] In the case of human rights, we assume that states do care to some degree about abuses in other states.[37] Both of these assumptions reflect common sense, both are possibly wrong, and both are the subject of valuable literatures. But however one ends up specifying the state interest (and it is noteworthy that our critics do not challenge our specifications in particular contexts), the structural factors identified by our theory—general problems of collective action and coercion, and the opportunities of coordination and cooperation—remain relevant.

VI. CIL, CASE STUDIES, HISTORY

In *Limits* we argued that because CIL rules were vaguer, more contested, and more ambiguous than rules embodied in treaties, CIL did a poorer job than treaties of fostering cooperation and coordination, and as a result was more fragile than treaties. We examined four case studies of supposedly well-settled CIL rules and concluded that the behaviors associated with these rules were more consistent with our theory than with other accounts of CIL.[38]

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[36] GOLDSMITH & POSNER, *supra* note 1, at 138-39.

[37] *Id.* at 109-10.

[38] *Id.* chs. 1-2.

Golove and Spiro say that our CIL case studies suffer from selection bias.[39] We are sensitive to problems of selection bias, and (unlike the overwhelming majority of international law scholarship) we explained the reasons we chose our case studies. We chose them because (a) they were supposed to be settled rules of CIL, according to the literature, and thus *hard* cases for us, and (b) there was lots of historical evidence that we could explore to test our theory.[40] Spiro criticizes us for looking at "musty old rules of little contemporary relevance or interest."[41] We looked for well-settled contemporary rules of CIL against which to test our theory, but frankly could not find a single example. The CIL of human rights is much talked about, of course. But as we explained in a different part of *Limits*, the gap between what this CIL requires and the actual behavior of states is vast.[42] We thus did not think that human rights was a plausible candidate for a case study of a CIL—it would have been *too easy* a case to discredit—and we doubt Spiro would either. We also looked at other CIL rules—for example, rules concerning prescriptive jurisdiction, or various modern aspects of the laws of war—and again could not find any settled and uncontroversial examples. In *Limits* we invited critics to offer different examples of CIL—modern or traditional—that contradict our hypothesis. No one at this symposium did.

We also invited critics to examine our case studies for accuracy and completeness. Golove took us up on this offer and his examination of historical materials concerning neutrality rules in the Civil War is useful and illuminating. There is much to agree with and argue about here, but we will focus on Golove's two central themes.

The first theme is that the relevant CIL rules were actually much less settled than we claimed in the 1860s, and thus the United States' response, while perhaps hypocritical, technically did not violate CIL.[43] As Golove notes, many treatise writers have claimed that the United States did in fact violate various CIL rules of neutrality during the Civil War.[44] We will not attempt to further defend this view, for such a defense would (because of the hopelessly contested nature of CIL) involve irresolvable arguments about what types of, and how much, evidence constitutes a settled and binding rule of CIL. We instead make three other points related to the broader themes in *Limits*.

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[39] Spiro, *supra* note 4, at 455; Golove, *supra* note 33, at 348.
[40] GOLDSMITH & POSNER, *supra* note 1, at 45.
[41] Spiro, *supra* note 4, at 455.
[42] GOLDSMITH & POSNER, *supra* note 1, at 132-33.
[43] Golove, *supra* note 33, at 362, 370-74.
[44] *Id.* at 363-64.

First, a remarkable aspect of Golove's history is how rigorously instrumental both U.S. and British leaders were in calculating whether and how to comply with CIL. Golove provides no evidence of leaders being motivated by moral obligation to follow international law, or by internalized habit, or by the pull of legitimacy. Second, Golove basically argues that an apparently settled rule of CIL was not in fact settled or binding, because the rule in fact was a complex standard or a nuanced group of rules-and-exceptions. This is a typical response to arguments and evidence that CIL rules do not constrain states. But this typical move in an area of supposedly settled CIL just underscores our main point about why CIL is so weak and manipulable. Third, as Golove briefly notes, the fragile CIL rules of neutrality did not survive World War I. This point is a useful reminder of an important dimension of international law (especially CIL) that our theory makes sense of, but that traditional theories neglect, namely: international law changes, sometimes frequently. This usually happens when exogenous shocks of various sorts are followed by "violations" of international law as states adjust to a new equilibrium reflecting the new configuration of power and interest.[45] These last two points highlight an irony in Golove's argument: He begins by criticizing us for claiming that CIL is "weak and unstable,"[46] but he then tells a story about how it was weaker and less stable and more manipulable than we imagined at the outset of the Civil War, and did not survive World War I. If this is what Golove means by "leaving customary international law where it is," we concur.

Golove's second major theme is more of a challenge to the theory articulated in *Limits*. While our empirical analysis focused on the United States side of the war, Golove also looked at the British side. And what he found was that leaders in Great Britain, in deciding how to respond to the United States' "switch" to embrace something closer to the traditional British view of neutrality, cared about the effects of their actions on disputes with third parties in future wars. It is no surprise to our theory that British leaders were thinking instrumentally about the future. Nor is it a surprise to our theory that the law of nations was relevant in "framing and often in resolving" disputes, a point that we emphasize throughout *Limits*. But what does raise an interesting question for our theory is the fact that British officials "believed

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[45] Such changes happen not only when a regime fails altogether, as in the neutrality case, but also in cases (such as with the U.N. Charter) where treaty terms stay constant but practices associated with treaties change dramatically as the political situation in the world changes.

[46] Golove, *supra* note 33, at 337.

that the precedents established by the U.S. measures would serve British interests in future wars, not only with regard to the United States but also with regard to states more generally."[47]

What might explain this fact? It is possible, as Golove suggests, that "reputation may play a wider role [than we claim], affecting not only future bilateral relations between the cooperating and defecting states but the future interactions between the defecting state and third parties."[48] British worries about the third-party effects of switching (or maintaining) certain neutrality rules might be evidence of a more robust role for reputation, just as (as we suggested above) evidence of deep and widespread multilateral treaty cooperation would. This possibility would not represent a challenge to our instrumental framework, but would weaken our claim that bilateralism predominates and suggest a more robust role in our framework for reputation.

Another possibility, however, is that Britain was attempting to maintain its traditional policy stance as the focal point for what counted as cooperation in independent bilateral encounters. Neutrality is a classic example of international law that reflects multiple pairwise relationships rather than a genuine collective good. Britain was constantly at war during the nineteenth century, and it no doubt wanted the rest of the world to know what its policy on neutrals was, so that small wars would not inadvertently become big wars. Embracing a different rule with the Americans would have ambiguated the content of its policy and weakened its ability to "cooperate" in future conflicts with different states. As discussion in *Limits* of diplomatic immunity and multilateral treaties suggests, states will often (for the sake of convenience) promote or agree to uniform rules but violate them bilaterally and selectively, depending on the degree of conflict of interest with the various other states to which the rules nominally apply.[49]

We do not know whether Golove is right or we are. One way to decide would be to examine whether Britain adopted *uniform* neutrality policies, *in practice*, vis-à-vis all (or, we would accept, most) states, regardless of whether they are more or less powerful, or more or less important for British strategic interests. If Britain talked the same game, but sometimes acted differently depending on the nature of the bilateral relationship, that would support our view—indeed, it would be consistent with other case studies in our book, especially the one concerning the rules governing ambassadorial immunity.

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[47] *Id.* at 365.

[48] *Id.* at 345.

[49] GOLDSMITH & POSNER, *supra* note 1, at 54-59, 87-88, 130, 144-60.

If Britain's deeds matched its words regardless of the bilateral pairing, that would support Golove's view.

VII. NORMATIVE ISSUES

Buchanan focuses on chapters 7 and 8 of *Limits*, where we argued that nations have no moral obligation to comply with international law, and that liberal democratic nations have no duty to engage in strong cosmopolitan action like ratifying treaties that do not promote national welfare or engaging in humanitarian intervention. Buchanan does not believe these arguments are important, and thus he does not engage them.[50] Instead, he changes the subject to focus on the moral obligations of *individuals*. In particular, he maintains that our state-centered claims do not adequately address a point that he takes to be fundamental, namely: that individuals have a moral obligation to cause their nations to promote the rule of law in international affairs. Buchanan thinks that if individuals do in fact have such obligations, and if they act on those obligations, then states that represent them might not act merely instrumentally, but rather might act in ways to achieve moral progress or to attain cosmopolitan goals.[51]

Buchanan is confused about what international law, conceived in purely instrumental terms, might accomplish. If morally motivated citizens convince a government (perhaps on penalty of non-reelection) to engage in cosmopolitan action or further the international rule of law, then the nation would be acting instrumentally to further its interests. Nothing in our instrumental approach

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[50] Buchanan asserts that the claim that nations lack a moral obligation to comply with international law is obvious and hardly worthy of discussion. Buchanan, *supra* note 5, at 309. The point may be obvious to Buchanan, but it has not been obvious to many law professors and advocates, and thus we welcome Buchanan's concurrence. Buchanan further maintains that cosmopolitan theorists do not, as we suggest, ascribe cosmopolitan duties to institutions. *Id.* at 321, n.20. On this point he is simply wrong. In addition to the prominent scholars cited in *Limits* whom Buchanan does not discuss, see GOLDSMITH & POSNER, *supra* note 1, at 207-08, Martha Nussbaum's recent book *Frontiers of Justice* (to take yet one more example) expressly ascribes cosmopolitan duties to institutions. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 306-10 (2006). Buchanan claims that Nussbaum does not ascribe cosmopolitan obligations to institutions, see Buchanan, *supra* note 5, at 321, n.20, but in *Frontiers* and elsewhere she clearly does. Moreover, Buchanan complains that *Limits* indiscriminately lumps together cosmopolitan theorists like Nussbaum with Michael Green, whose work ascribing cosmopolitan obligations to institutions Buchanan does not seem to take seriously. *Id.* But Nussbaum explicitly relies upon Green's work in attributing cosmopolitan duties to institutions. NUSSBAUM, *supra*, at 308, 444.

[51] Buchanan, *supra* note 5, at 312-13.

to international law rules out the types of moral state action that Buchanan is so eager to preserve, and indeed, *Limits* discussed examples of such state behavior.[52] Buchanan is right to say that *Limits* provides many descriptive and normative reasons to be skeptical of his robust moralistic conception of what international law might accomplish, but (as Anderson's essay at times suggests) nothing in an instrumental approach to international law rules out this conception *per se*. (Indeed, Buchanan assumes that his moral individuals will cause their governments to serve their preferences on the international stage—an instrumental state-centered conception.)

Setting aside for a moment the degree to which Buchanan engages the arguments in *Limits*, what about his central claim that individuals have a moral obligation to cause their nations to promote the rule of law in international affairs? The first thing to notice about Buchanan's argument is that he says nothing concrete about what it means to promote the international rule of law. He suggests vaguely that the ideal rule of international law would protect individuals' interests and autonomy.[53] He then lists standard elements of the domestic rule of law—generality, stability, impartiality, publicity, equality before the law, conflict resolution that does not rest primarily on power, and principled deliberation.[54] How do these elements apply to the international rule of law, and what relationship do they bear to individuals' interests and autonomy?

We have no idea. Buchanan says that commitment to the international rule of law does not require adherence to international law, and indeed he advocates violation of international law in humanitarian intervention and other contexts. But what, then, is the international rule of law? Is it the idea that international law should apply to states generally and impartially? Regardless of their relative power, or domestic form of governance? Are states supposed to engage in principled deliberation in designing international institutions? Does this mean that relative power and self-interest should be off the table in international negotiations? How, in a decentralized world of necessarily quite different nation-states (an assumption Buchanan embraces, as he pooh-poohs world government), are we supposed to establish this international rule of law? Does Buchanan have in mind the rule-of-law idea that a person should have the chance to defend herself before an impartial forum prior to conviction for a crime? It is not clear how this idea might be applied to states that are accused

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[52] GOLDSMITH & POSNER, *supra* note 1, at 109-10.

[53] Buchanan, *supra* note 5, at 309.

[54] *Id.* at 316.

of violating international law. There is no neutral international forum; and it is not clear that a neutral international forum is possible, or that the type of forum that might be realistic should have the power to resolve disputes between states, or that states would comply with the decisions of such a forum, or that states should be punished for violating international law that reflects the interests of powerful nations or that is made by non-democratic nations; and so on. Finally, would Buchanan's international rule of law better promote individual freedom and autonomy more than the current international system does? How, realistically?[55]

Buchanan does not address these or scores of other obvious issues that must be addressed in order to assess whether the international rule of law is an attractive ideal. Rather than pursue these considerations, he simply asserts that the ideal is possible and attractive and asserts that individuals have a moral obligation to achieve it. Buchanan is right that *Limits* does not address the ideal of the international rule of law. It does not address this ideal because the ideal is inadequately defined—in Buchanan's work and more generally.

In addition to arguing that individuals have a duty to cause their states to further the international rule of law, Buchanan argues that individuals have a duty to cause their states to engage in more cosmopolitan action. Individuals should cause states to engage in more humanitarian intervention, to give away more wealth to poor countries, to enter into treaties that further global welfare even at the expense of local welfare, and the like. This is an idea that we at least understand. But as far as the project of *Limits* is concerned, it suffers from two problems.

The first is that, as a matter of descriptive fact, individuals usually do not live up to the obligations that Buchanan says they have. Even liberal democracies with populations that are by reputation much more other-regarding than the United States are not much interested in humanitarian intervention, and give away only a pittance (and a diminishing pittance) of their GDP to poor countries (and even then in self-regarding ways).[56] And the validity of Buchanan's optimistic take on the possibilities of human development to support more humanitarian action must be considered in light of the failures in the Sudan following the supposedly important lessons learned

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[55] For a philosophically skeptical take on the possibility of global justice, see Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005); *see also* Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS (2003), *available at* 2003 WLNR 6542939.

[56] GOLDSMITH & POSNER, *supra* note 1, at 221-23.

in Rwanda.[57] The second and related point is that Buchanan's entire argument turns on individuals both possessing moral duties to cause states to engage in more cosmopolitan action, and acting on these duties successfully. If individuals do not in fact have the obligations that Buchanan posits, or if they violate their obligations, or if they are members of a disempowered minority, then, as we argued in *Limits*, there is little legitimate basis, within democratic governments, for leaders to engage in cosmopolitan action of the type Buchanan wants to preserve.

VIII. CONCLUSION: THE NEW INTERNATIONAL LAW SCHOLARSHIP

By way of conclusion, we return to where we began, to the emerging consensus about the appropriate path of international law scholarship. The consensus is reflected not only in the essays of most of the contributors; it is also reflected in much recently published work by authors not present at the symposium. The consensus marks a decisive rejection of the old style of international law scholarship, and therefore we think it appropriate to recognize the emergence of a "New International Law Scholarship."

The New International Law (NIL) scholars are a diverse group, and it is always difficult to generalize. Nonetheless, we claim that NIL scholars differ from traditional scholars along one—or more frequently, more—of the following dimensions.

Positive v. Normative. NIL scholars distinguish normative and positive claims, and state positive claims as hypotheses that can, in principle, be tested. Traditional scholars tended to confuse normative and positive claims.

Empiricism. NIL scholars are interested in doing empirical scholarship, including both quantitative and qualitative studies. NIL scholars try to evaluate evidence that might contradict their theories. Traditional scholars tend to choose anecdotes that best support their arguments.

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[57] Ironically, in other work Buchanan distances himself from what he regards as the woolly-headed reform-the-U.N. style of scholarship, and claims that reform for the sake of advancing the international rule of law must be consistent with international realities. *See* ALLEN E. BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004). However, lacking a theory of the limits of state behavior, he proposes institutions—such as an EU-operated military force that would intervene in humanitarian crises—that are themselves no less dubious. For a discussion and critique of his views on these grounds, see Eric A. Posner, *International Law: A Welfarist Approach*, U. CHI. L. REV. (forthcoming 2006).

Skepticism. The scholarly attitude is one of skepticism toward received wisdom and easy answers. NIL scholars take a skeptical attitude toward the efficacy of international law and institutions. Traditional scholars defend international law and seek to "advance" international law, which usually means both subjecting more of international relations to it and revising it in order to make it consistent with liberal internationalism. As noted above, the historical sense of international law scholars is Whiggish rather than scholarly.

Anti-doctrinalism. NIL scholars focus on doctrinal scholarship less than traditional scholars. Although doctrinal scholarship is important, traditional international legal scholars spend too much time on it, and not enough on understanding the theoretical underpinnings of doctrine.

Social Science. NIL scholars are influenced by social scientific theory and, especially, rational choice theory. Traditional scholars do not completely ignore theory, but they use theory mainly as a source of rationalizations, and in some cases rely on philosophical rather than social scientific theories. However, much of traditional scholarship is devoid of theoretical underpinnings.

Most of our critics at this symposium share our commitment to most of these values. This is a good sign. Another good sign can be found in law school hiring trends, which reflect increasing impatience among non-international law scholars for the type of scholarship that they left behind decades ago.

Our optimism about the trend in international law scholarship is only partly tempered by the politically charged atmosphere of this field. As so many of the commentators in this symposium make clear, some of the hostility toward our book reflects the anxiety that more rigorous methodological approaches of the type that the academy values are incompatible with the traditional liberal internationalist agenda that has long dominated the international law academy, and that continues to dominate it today.[58] Younger scholars with liberal internationalist leanings do not want to be identified with the older tradition

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[58] As Raustiala notes, "from the vantage point of political science, some of [*Limits'*] conclusions are straightforward, and even obvious at times." Raustiala, *supra* note 21, at 443. As we noted in *Limits*, our approach to international law is indeed deeply influenced by political science (and economics), though we differ from the mainstream of these approaches in our focus on custom, the depth of our commitment to instrumentalism, a few analytical details about treaties, and our normative arguments. *See* GOLDSMITH & POSNER, *supra* note 1, at 15-17. The quite different reactions to the book by political scientists, who think we are saying little new on the positive front, and international law scholars, who find the book to be shocking or radical in some dimensions, is revealing.

of international law scholarship, of which the legal academy is appropriately contemptuous, and they are committed to methodological rigor. But they also do not want to abandon their liberal internationalist ideals, and a great deal of hostility toward our book is, we suspect, a reflection of their anxiety that methodological rigor and liberal internationalism are mutually exclusive. We predict, with some misgivings, that much of the NIL scholarship over the next decade will reflect this tension. It will work hard to demonstrate, in a methodologically rigorous fashion, that international law can foster robust multinational cooperation and that the United States and other countries should create more international law and organizations. Whether it will succeed remains to be seen.