Do International Norms Influence State Behavior?

David Sloss
Santa Clara University School of Law, dlsloss@scu.edu

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BOOK REVIEW

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DAVID SLOSS*


I. INTRODUCTION

For the past few decades, lawyers and social scientists have been trying to explain why states do or do not comply with international law. Broadly speaking, prevailing theories on the issue of compliance can be divided into three groups. One group of theorists focuses on state interests as the key determinant of state behavior in the international system. Within this group, neorealists assume that states are primarily interested in maximizing power whereas neoliberals take a broader view of state interests, viewing both wealth and power as important state interests. Both groups, however, take state interests as a given, and seek to explain state behavior in the international system in terms of state interests.

The other two groups of theorists, by contrast, believe that state interests themselves require explanation. Instead of taking state interests as a given, these theorists examine the forces that shape states’ preferences. One group of theorists focuses on domestic political forces that shape states’ foreign policy decisions. Another group focuses on the ways in which international norms and institutions influence state interests and state behavior.

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Though a variety of labels attach to different schools of thought, this Review will refer to the three types of theories as "state interest" theories, "domestic politics" theories, and "international norms" theories.\(^5\)

International legal scholars who have attempted to explain why states comply with international law typically endorse some variant of international norms theory.\(^6\) By contrast, Professors Goldsmith and Posner's recent book, *The Limits of International Law* (*Limits*), falls squarely within the long tradition of state interest theories.\(^7\) *Limits* contends that states comply with international law when it is in their interest to do so, and that "international law emerges from states acting rationally to maximize their interests."\(^8\) *Limits* combines some new material with revised versions of several previously published articles.\(^9\) By integrating these materials in a single volume, *Limits* constitutes Goldsmith and Posner's first attempt to articulate a comprehensive theory of international law.

*Limits* contends that most state behavior associated with international law can be explained in terms of four basic models, which are labeled "coercion," "cooperation," "coordination" and "coincidence of interest."\(^10\) The simplicity of this theory is one of the book's greatest strengths. *Limits* uses these four models to explain an extraordinarily wide range of state behavior, including the crea-

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6. *See*, e.g., Thomas M. Franck, *The Power of Legitimacy Among Nations* 26 (1990) (asserting that "legitimacy exerts a pull to compliance which is powered by the quality of the rule or of the rule-making institution and not by coercive authority"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2645–46 (1997) (claiming that "the key to better compliance is more internalized compliance," and that norm internalization is the product of transnational legal process).


8. *Id.* at 3.


tion, modification, and subsequent compliance with both treaty law and customary international law.

The simplicity of the theory presented in Limits, however, is also the book’s greatest weakness. Limits assumes that “state interests at any particular time [are] an unexplained given.” By adopting this simplifying assumption, Limits largely ignores the insights developed by domestic politics theorists. Whereas the authors are merely indifferent to domestic politics theories, they are openly hostile to international norms theories. Indeed, one of the authors’ main goals is to persuade readers that international norms do not influence state behavior. They fail to accomplish that goal.

This Review presents a critical assessment of the theory presented in Limits. Part I provides a brief summary of Goldsmith and Posner’s theory. Part II tests the theory by analyzing the evolution of international law and state practice, especially U.S. practice, related to the juvenile death penalty. Part III tests the theory by analyzing the evolution of China’s policy and practice related to nuclear proliferation. The analysis in Parts II and III demonstrates that the United States and China have both altered their policies and practices to conform to international norms. If powerful states such as these modify their behavior to conform to international norms, one may infer that weaker states are even more likely to be influenced by international law. Therefore, contrary to one of the central claims advanced in Limits, this Review suggests that international norms do influence the behavior of states.\textsuperscript{12}

\section{A Summary of Goldsmith and Posner’s Theory}

The analysis in Limits is divided into three parts. Parts I and II present Goldsmith and Posner’s core theory of international law. Part I addresses customary international law; Part II addresses treaties. As Part III is primarily a response to critics of Goldsmith and Posner’s earlier work, this Review will focus primarily on the theory presented in Parts I and II.

\begin{footnotesize}
\begin{enumerate}
\itemides\textsuperscript{11} Id. at 8–9.
\itemides\textsuperscript{12} There is a substantial body of empirical evidence showing that international norms and institutions influence state behavior. See, e.g., Finnemore, supra note 4, at 94–127 (presenting case studies in three different issue areas where international norms and institutions have influenced state behavior); Ryan Goodman & Derek Jinks, Toward an Institutional Theory of Sovereignty, 55 Stan. L. Rev. 1749, 1762–80 (2003) (summarizing empirical evidence that states exhibit a variety of institutional and organizational similarities resulting from global forces that induce states to imitate other states). The case studies presented in this essay are intended to make a small contribution to an already large body of literature.
\end{enumerate}
\end{footnotesize}
Goldsmith and Posner set forth three assumptions that frame their theory of international law. First, they assume that states are the primary actors in the international legal system. Second, they assume that states have interests; they define "state interests" as the preferences of the state's political leadership. They do not equate state interests with welfare maximization. If the state's political leadership prefers an outcome that is not welfare maximizing, that outcome is still the state interest because it is the outcome preferred by the political leadership. Third, borrowing heavily from rational choice theory, they assume that states act rationally to achieve their preferred outcomes. While they concede that, as a practical matter, states sometimes behave irrationally, Goldsmith and Posner claim that overall their "assumptions lead to better and more nuanced explanations of state behavior related to international law than other theories do."

Although they generally refrain from making assumptions about the content of state interests, they do "exclude one preference from the state's interest calculation: a preference for complying with international law." One of Goldsmith and Posner's central aims in this book is to explain state compliance with international law solely by reference to state interests. If they admitted that states have an interest in complying with international law, the explanation of compliance in terms of state interests would be tautological. Hence, they explicitly assume that states do not have an interest in complying with international law.

After setting forth these central assumptions, Limits presents four models of state behavior: coincidence of interest, coercion, cooperation, and coordination. Goldsmith and Posner's central claim is that these four models explain virtually all state behavior related to international law, including both treaty law and customary law. Specifically, they contend that their four models explain state decisions involving creation of international law, modification of international law, and compliance or non-compliance with international law. Since the four models play a central role in their analysis, a brief discussion of each is necessary.

14. *Id.* at 6.
15. *Id.* at 7–10.
16. *Id.* at 7–8.
17. *Id.* at 9.
18. *Id.* at 10–14.
Coincidence of interest describes a situation in which states behave in a manner consistent with international norms simply because it is in their interest to do so. According to *Limits*, much of the content of traditional customary international law can be explained by a coincidence of interest model.\(^{19}\) For example, *Limits* provides a detailed analysis of the so-called *Paquete Habana* rule.\(^{20}\) At the end of the nineteenth century, customary law generally permitted the capture of enemy ships during times of war. In *The Paquete Habana*, the Supreme Court, after conducting a thorough review of international custom, held that coastal fishing vessels were exempt from the right of capture.\(^{21}\) Goldsmith and Posner claim “that coincidence of interest accounts for most, but probably not all, of the behavioral patterns associated with the *Paquete Habana* rule.”\(^{22}\) States refrained from capturing coastal fishing vessels when they had no interest in doing so. The rule permitted capture, however, where states had an interest in capturing fishing vessels—e.g., where those vessels posed a military threat.\(^{23}\)

Coercion describes a situation in which a weak state behaves in accordance with a “rule” because a strong state forces the weak state to behave in accordance with the strong state’s interests.\(^{24}\) For example, *Limits* analyzes the “free ships, free goods” principle, which holds that enemy property on a neutral power’s ship is immune from seizure during wartime.\(^{25}\) During the Russo-Japanese War, “the Russian Navy harassed, seized, and sometimes sank U.S., German, and British ships” in apparent violation of the “free ships, free goods” rule.\(^{26}\) When Britain and the United States threatened retaliation, however, Russia modified its behavior to conform to the rule.\(^{27}\) According to *Limits*, Russia’s compliance with the “free ships, free goods” principle is best explained by the coercion model.

Cooperation, under Goldsmith and Posner’s theory, explains states responses to a bilateral repeated prisoner’s dilemma.\(^{28}\) A

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19. *Id.* at 27–28.
20. *See id.* at 66–78. *See also* The *Paquete Habana*, 175 U.S. 677 (1900).
22. *LIMITS OF INTERNATIONAL LAW*, *supra* note 7, at 76.
23. *Id.*
24. *Id.* at 28–29.
25. *See id.* at 45–54.
26. *Id.* at 50–51.
27. *Id.* at 51.
28. *See id.* at 29–32.
prisoner's dilemma arises when two states, each rationally pursuing its own interests, would achieve an outcome that makes both of them worse off. In contrast, if the states cooperate, they can achieve an outcome that benefits both.\(^2\) A bilateral arms race is a classic example. The preferred outcome for each state is to build enough weapons to achieve military superiority, but if each state independently seeks to attain military superiority, both states will be worse off because they will both spend a lot of money without attaining their goal.\(^3\) Both states, therefore, are better off if they cooperate by agreeing to arms control limitations. From each state's perspective, a negotiated arms control agreement is a worse outcome than military superiority, but it is a better outcome than would result from independent action. *Limits* contends that many international agreements result from cooperative efforts to avoid the unwanted effects of prisoner's dilemmas.\(^4\)

Coordination is Goldsmith and Posner's fourth model.\(^5\) The concept of coordination is best illustrated by using a domestic example. All automobile drivers have a rational self-interest in ensuring that there is a clear, consistent rule specifying whether they should drive on the left side or the right side of the road. This is a classic coordination problem because drivers have a strong interest in ensuring that there is a uniform rule, but they have no preference for any particular rule.\(^6\) The "battle of the sexes" game is a variant of a coordination game where "one party might do better in one equilibrium while the other party does better in a second equilibrium."\(^7\) Goldsmith and Posner cite the example of a treaty on wireless communications.\(^8\) This issue presents a coordination problem "because all states preferred coordinating on some standard rather than on none."\(^9\) Treaty negotiations, however, presented a battle of the sexes problem because "some standards benefited certain states more than others."\(^10\)

\(^{29}\) *Id.* at 30–32.

\(^{30}\) This assumes that neither state has the capability to achieve military superiority by out-spending its rival.

\(^{31}\) *See Limits of International Law*, *supra* note 7, at 85–88.

\(^{32}\) *See id.* at 32–35 (summarizing the coordination model).

\(^{33}\) *Id.* at 12.

\(^{34}\) *Id.* at 33.

\(^{35}\) *Id.* at 33–34

\(^{36}\) *Id.*

\(^{37}\) *Id.* at 34.
III. The United States and the Juvenile Death Penalty

It is now widely agreed that customary international law prohibits the "juvenile death penalty"—the practice of imposing capital punishment on individuals who committed crimes when they were less than eighteen years of age. As of this writing, every country in the world except for the United States has undertaken a treaty obligation banning the juvenile death penalty. Despite having refused to undertake such a treaty obligation, the United States recently incorporated this norm into its domestic law by means of a Supreme Court decision that reinterpreted the Eighth Amendment to prohibit the juvenile death penalty. This section tests Goldsmith and Posner's theory by applying it to the juvenile death penalty issue. The analysis is divided into three parts: First, does their theory explain why states entered into treaties that prohibit the juvenile death penalty? Second, does their theory explain the emergence of the customary norm? Third, does their theory explain why the United States ultimately internalized the norm after resisting domestic incorporation for many years?


40. Roper v. Simmons, 125 S. Ct. 1183 (2005). For further discussion of Simmons, see infra notes 74-77 and 103–34 and accompanying text.
A. Treaties That Prohibit the Juvenile Death Penalty

The norm prohibiting the juvenile death penalty is embodied in several treaties, including the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the Convention on the Rights of the Child (CRC). According to Limits, the decision to incorporate a norm such as this into a treaty cannot be explained solely by coincidence of interest; “[i]f each state would engage in the same action for self-interested reasons regardless of what the other state does, then there would be no reason to invest resources to enter an agreement codifying the behavior.” According to Limits, therefore, “[t]he basic logic of international agreements . . . follows directly from the models of cooperation and coordination.”

Specifically, Limits contends that multilateral human rights treaties generally solve coordination problems by establishing a “‘code of conduct’ that powerful liberal democracies deem important to establish.” Goldsmith and Posner assume that liberal states link various incentives and disincentives to other states’ compliance with human rights standards. Given this assumption, they argue, “it is to the benefit of all liberal states to agree with some specificity on the actions that are permitted under the standard . . . and actions that are not permitted.”

This explanation makes sense if—but only if—liberal states are concerned about the human rights practices of other states. If liberal states were not concerned about the human rights practices of other states, they would have no reason to provide incentives for other states to comply with human rights norms or disincentives for non-compliance. Moreover, if liberal states did not link various incentives and disincentives to compliance with human rights standards, there would be no benefit to reaching agreement on the actions that are permitted and prohibited. The validity of the coordination theory set forth in Limits, therefore, depends critically on the assumption that liberal states are concerned about the human rights practices of other states.

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41. ICCPR, supra note 39.
43. CRC, supra note 39.
44. Limits of International Law, supra note 7, at 88.
45. Id. at 84.
46. Id. at 128.
47. Id. at 130.
48. Id.
Recognizing this point, *Limits* suggests two reasons why states are interested in the human rights behavior of other states. First, some people have altruistic concerns about the well-being of persons in other states, and those concerns sometimes influence government policy. 49 Second, “an important school of thought holds that liberal democracies do not go to war with one another, and are better trading partners.” 50 Accordingly, some states “have an interest in improving the way other states treat their citizens in order to expand trade, minimize war, and promote international stability.” 51 In short, states are motivated by altruistic concerns and instrumental interests. 52

Even if one assumes that the creation of multilateral human rights treaties was motivated in part by instrumental interests in trade and security, it is implausible to claim that these types of instrumental concerns were the primary motivation for states to enter into human rights treaties. Altruism is clearly an important part of the story. The altruism rationale, however, poses a dilemma for Goldsmith and Posner’s overall theory because the authors cannot decide whether to classify altruism as a “state interest.” If altruism is not classified as a “state interest,” then they are forced to admit that states are motivated by factors other than state interests, which would be contrary to one of the central assumptions of their theory. 53 But, if altruism is classified as a “state interest,” their concept of state interests is so broad that it is virtually meaningless. 54 The explanatory power of the theory derives from the fact that it purports to explain a wide range of state behavior in terms of states’ rational pursuit of their interests. If the concept of “state

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49. *Id.* at 110.
50. *Id.*
51. *Id.*
52. Goldsmith and Posner also suggest a third reason why states are interested in the human rights practices of other states: “people who live in one state care about the well-being of coreligionists, coethnics, and conationals living in other states, and this concern can translate into governmental interest and action.” *Id.* at 109. Identification with conationals in neighboring states was clearly a prime motivation for the bilateral minority rights treaties that European states concluded in the early twentieth century. See *Henry J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals* 93–103 (2d ed. 2000) (discussing minority rights treaties that were common in Europe after World War I). This identity rationale, however, does not explain states’ motivation for entering into multilateral human rights treaties because those treaties are designed to protect individuals of all religions and nationalities.
53. See *Limits of International Law, supra* note 7, at 7 (“Our theory of international law assumes that states act rationally to maximize their interests.”).
54. Goldsmith and Posner define state interests as the preferences of the state’s political leadership. See *id.* at 6. Under this definition, it would seem that altruism does qualify as a state interest if the political leadership chooses to act altruistically.
interests" is sufficiently broad to include altruism, then "state interests" effectively includes all factors that motivate state behavior. In that case, the central thesis of Limits reduces to the claim that state behavior can be explained in terms of the factors that motivate state behavior. While that is undoubtedly true, it is not very illuminating.

In sum, Goldsmith and Posner claim that states enter into multilateral human rights treaties, including treaties prohibiting the juvenile death penalty, in order to solve coordination problems. That claim depends critically on the assumption that states have an interest in the human rights behavior of other states. Analysis of that assumption reveals that Goldsmith and Posner’s concept of “state interests” is so broad that it vitiates the explanatory power of their theory.

B. Emergence of Customary International Law

Customary international law is defined as a “general and consistent practice of states followed by them from a sense of legal obligation.” There are two elements to this definition: 1) the general and consistent practice of states (which Goldsmith and Posner call “behavioral regularity”); and 2) the sense of legal obligation, or opinio juris.

With regard to the juvenile death penalty, as of 2005, there is little doubt that the behavioral regularity element is satisfied. According to a 2003 report by Amnesty International, only six countries other than the United States have executed juvenile offenders since 1990: Yemen, Saudi Arabia, Pakistan, Nigeria, Democratic Republic of Congo, and Iran. All six have either terminated the practice of executing juvenile offenders, or have denied that they engage in the practice. Yemen enacted legislation in 1994 to raise the minimum age of eligibility to eighteen; Pakistan enacted similar legislation in 2000. Saudi Arabia ratified the CRC
in 1996 and has not executed a juvenile offender since 1992. Amnesty International reports that Nigeria carried out a single execution in 1997, but a Nigerian representative told the UN Sub-Commission on the Promotion and Protection of Human Rights "that the offender was well over eighteen at the time of the offense and . . . any juveniles convicted of capital offenses have their sentences commuted."58 Congo executed a 14-year-old child soldier in 2000. In response to appeals from representatives of the United Nations and the European Union, however, Congo commuted the sentences of four other child soldiers in 2001. Moreover, Congo reported to the Committee on the Rights of the Child that "children guilty of offences punishable by the death sentence were admitted to rehabilitation centres."59 Iran testified as follows before an international committee: "[I]n the past 20 years death sentences had been handed down for three people who had been under eighteen at the time of their crimes; in all three cases the Supreme Court had ruled against execution."60 Finally, as noted above, a recent U.S. Supreme Court ruling effectively terminated the U.S. practice of executing juvenile offenders.61 It thus appears that the juvenile death penalty has been abolished everywhere.

Given that the behavior regularity element is satisfied, Goldsmith and Posner's theory questions whether state practice fulfills the *opinio juris* element. They claim that many of the behavioral regularities in the international system do not result from states acting out of a sense of legal obligation. Rather, observed behavioral regularities are better explained by reference to the four models of coercion, cooperation, coordination, and coincidence of interest.62 Although they do not explicitly discuss the juvenile death penalty in this context, they would presumably explain the observed behavioral regularity in this area in terms of coincidence of interest. States generally do not have an interest in executing individuals who committed crimes as juveniles; accordingly, they refrain from executing such individuals. There is no rule of customary law in cases where a behavioral regularity results from coincidence of

58. De la Vega, supra note 38, at 1048.
60. Id. at 24. Since publication of the Amnesty Report, Iran has allegedly executed one additional juvenile offender. See Nazila Fathi, Rights Advocates Condemn Iran for Executing 2 Young Men, N.Y. TIMES, July 29, 2005.
61. Simmons, 125 S. Ct. 1183.
62. See, e.g., LIMITS OF INTERNATIONAL LAW, supra note 7, at 39 ("States do not act in accordance with a rule that they feel obliged to follow; they act because it is in their interest to do so. The rule does not cause the states' behavior; it reflects their behavior.")
interest because the *opinio juris* element is not satisfied.\textsuperscript{63} Goldsmith and Posner’s theory, therefore, leads to the conclusion that the prohibition on the juvenile death penalty is not actually a rule of customary international law.

The preceding analysis is inadequate in three important respects. First, Goldsmith and Posner’s theory creates an untenable dichotomy between law and the moral norms embodied in the law. For example, consider their analysis of genocide. While they agree that genocide and crimes against humanity are “morally abhorrent” they insist that “the law does not supply the motivation” for states’ decisions to refrain from acts of genocide.\textsuperscript{64} This argument is misleading because it fails to acknowledge that many laws are expressions of widely shared moral commitments. This is especially true of international human rights law. The laws prohibiting genocide and the juvenile death penalty, for example, are both expressions of norms that are generally accepted within the international community. The laws exist because those norms are widely accepted and state behavior conforms to the law because the norms are widely accepted. The authors’ claim that “the law does not supply the motivation,” therefore, is true only insofar as there is a distinction between the law itself and the norm that the law expresses. But, that is a distinction without a difference. The law is an expression of moral norms. The best explanation of the observed behavioral regularities in these areas is that states do not engage in genocide or the juvenile death penalty because they are morally committed to the norms embodied in international human rights law.\textsuperscript{65}

Second, the theory presented in *Limits* fails to distinguish between a state’s interests and a state’s moral commitments. *Limits* suggests that states do not commit acts of genocide and do not execute children because they have no interest in doing so. This is analogous to saying that individuals do not commit incest because they have no interest in doing so. Such an explanation of the common practice of refraining from incest is misleading because it fails

\textsuperscript{63} See id. at 38 (contending that “a behavioral regularity that arises from” coincidence of interest, coercion, cooperation, or coordination, is not “an example of customary international law”).

\textsuperscript{64} Id. at 111.

\textsuperscript{65} This statement is not meant to imply that every state is morally committed to every norm embodied in every international human rights treaty. That is obviously not true. At this point in time, though, every state, or almost every state, is committed to the norms prohibiting genocide and the juvenile death penalty. The widely shared moral commitment to these norms satisfies the *opinio juris* element of customary international law.
to account for the fact that the prohibition against incest is a deeply held and widely shared moral principle. States, like individuals, have moral commitments; it is a mistake to confuse those moral commitments with state interests. Goldsmith and Posner's theory is descriptively inaccurate because it treats states' moral commitments as another variant of state interests.

Finally, one must consider the evolution of state practice related to the juvenile death penalty. Historical data is sparse, but it is reasonable to assume that the practice of executing individuals who committed crimes at age fifteen, for example, was fairly widespread fifty years ago. Assuming that many states engaged in the practice fifty years ago and that no states engage in the practice today, the question arises: "Why did state practice change?" Goldsmith and Posner's answer is that state practice changed because state interests changed. That answer is unsatisfactory because Limits does not offer any theory as to why state interests change, except to insist that state interests do not change in response to changes in international law.

In the case of the juvenile death penalty, however, the evidence suggests that state practice has changed in response to international law. There is disagreement about when the international norm prohibiting the juvenile death penalty crystallized as a rule of customary international law, but the rule began to emerge in the

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66. Those who doubt that states have moral commitments should consider the common usage of the term "American values." Democracy is an "American value," not a state interest. National security is a "state interest," not an American value.

67. Execution of juvenile offenders who were less than eighteen at the time they committed their crimes has been a consistent feature of U.S. criminal law since the country gained independence from Great Britain. See infra note 77. Data about the age limits applied by other countries at different points in time is not available. A report by the U.N. Secretary General, however, lists 77 countries that are completely abolitionist, 15 countries that are abolitionist for ordinary crimes only, and 37 countries that are "de facto" abolitionist. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Status of the International Covenants on Human Rights, Question of the Death Penalty, Report of the Secretary-General Submitted Pursuant to Commission Resolution 2003/67, U.N. Doc. E/CN.4/2004/86 (Jan. 23, 2004), available at http://www.unodc.org/pdf/crime/capital/E-CN-4-2004-86.pdf (last visited Oct. 18, 2005). A substantial majority of the abolitionist countries did not halt the practice of capital punishment until after 1960. See id. at 8-10. Thus, prior to 1960, most countries in the world practiced capital punishment. There is no reason to think that their laws on execution of juvenile offenders were more restrictive than the laws in the United States.

68. See supra notes 57–61 and accompanying text.

69. Goldsmith and Posner do not make this claim explicitly, but it follows logically from their view "that states act rationally to maximize their interests." Limits of International Law, supra note 7, at 7.

70. See id. at 8–10.
The Geo. Wash. Int'l L. Rev. 1950s or 1960s, and was firmly established by the late 1990s, if not earlier. As of 1990, there were only seven countries in the world that retained the juvenile death penalty. Since that time, all seven have abolished the practice. Limits explains this development as a "coincidence of interest." It suggests that these states changed their interests, for independent reasons, and that it is merely coincidental that these changes occurred over the course of a decade. That explanation defies credulity. The fact that all these states changed their behavior in a relatively brief time period while the norm was crystallizing—or after the norm had already crystallized, depending upon one's view of the timing issue—provides compelling evidence that they changed their behavior in order to conform to the international norm. While space limits preclude a detailed defense of that proposition with respect to all seven countries, the next section of this Review demonstrates that international law had a substantial impact on the U.S. decision to halt the execution of juvenile offenders.

C. The United States and the Juvenile Death Penalty

The Supreme Court recently held that the Eighth and Fourteenth Amendments prohibit the execution of criminals who were less than eighteen years old at the time they committed their crimes. The Court's decision in Roper v. Simmons (Simmons) effected a dramatic reversal of the U.S. position in at least three


72. Professor Bradley contends that the rule prohibiting the juvenile death penalty did not crystallize until the mid-to-late 1990s. See Bradley, supra note 38, at 518-20. Other commentators contend that the rule was established earlier. See, e.g., Hartman, supra note 71, at 665-82 (contending that customary rule was established by 1983); Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1311, 1332-39 (1993) (contending that both state practice and opinio juris were established by 1993). For purposes of this article, it is unnecessary to resolve the debate over when the norm crystallized.

73. See supra notes 57-61 and accompanying text.
74. See supra notes 62-63 and accompanying text.
respects. First, Simmons expressly overruled a 1989 decision in which the Supreme Court held that the Constitution does not prohibit execution of juvenile offenders who were sixteen or seventeen at the time they committed their crimes. Second, Simmons reversed more than two hundred years of practice; execution of juvenile offenders had been a consistent feature of U.S. criminal law since the country gained independence from Great Britain. Third, Simmons effectively terminated a national policy that was applied by both Democratic and Republican administrations for almost thirty years. Indeed, at least since 1977, the United States has consistently expressed its unwillingness to be bound by the international norm prohibiting the juvenile death penalty.

The Simmons decision raises an important question: Why did the United States suddenly incorporate the international norm into its own Constitution after consistently resisting the domestic application of the norm since 1977? This section presents a two-part analysis of that question. The first part summarizes U.S. opposition over the past few decades to the domestication of the international norm. The second part contends that Goldsmith and Posner's theory cannot explain the U.S. decision to accept the prohibition on the juvenile death penalty. One of the central claims advanced in Limits is that states do not alter their behavior to conform to international norms. The case study of the United States and the juvenile death penalty demonstrates that international norms do influence state behavior, at least in some cases.

1. U.S. Opposition to Domestic Application of the International Norm

This Review assumes that the international norm prohibiting the juvenile death penalty is now an established rule of customary

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76. Stanford v. Kentucky, 492 U.S. 361 (1989). The Court had previously held that the Constitution prohibits the execution of juvenile offenders who were less than sixteen at the time they committed their crimes. Thompson v. Oklahoma, 487 U.S. 815 (1988).


78. See infra notes 79–103 and accompanying text.
Whether the United States was bound by that norm prior to the Supreme Court decision in *Simmons* is a more controversial question. The answer to that question depends upon two variables: when the rule of customary law ceased to be an emerging norm, and became an established rule; and whether the United States expressed its opposition to the rule early enough and often enough to satisfy the requirements of the "persistent objector" rule. For the purposes of this Review, it is not necessary to answer these questions. The key point for present purposes is that the United States consistently expressed its opposition to the domestic application of the international norm, beginning at least as early as 1977 and continuing until the *Simmons* decision. This point is important because the history of U.S. opposition shows that the U.S. political leadership had a strong, consistent preference for preserving the U.S. prerogative to execute juvenile offenders.

In 1977 President Carter transmitted four human rights treaties to the Senate. Two of those treaties, the ICCPR and the ACHR, contained provisions prohibiting the juvenile death penalty. When President Carter transmitted those treaties to the Senate, he recommended reservations to both treaties to preserve the U.S. right to execute juvenile offenders. The Senate deferred action on both treaties for more than a decade. In 1991 President George H. W. Bush urged the Senate to renew its consideration of

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79. *See supra* note 38.

80. *Compare de la Vega,* *supra* note 38, at 1050–52 (arguing that the United States is bound by the international norm), *with Bradley,* *supra* note 38, at 516–35 (arguing that the United States is not bound because it has been a persistent objector).

81. The persistent objector rule provides generally that a state is not bound by a rule of customary international law if that state consistently objected to the rule before it became firmly established as a rule of customary international law. *See Restatement,* *supra* note 55, § 102 cmt. d.

82. There is some evidence of U.S. opposition to the juvenile death penalty rule prior to 1977, but that evidence is weak and inconsistent. *See Bradley,* *supra* note 38, at 520–25 (discussing reaction of the United States to various treaty provisions dealing with the death penalty during the period from the late 1940s to the late 1970s).


84. ICCPR, *supra* note 39.

85. ACHR, *supra* note 42.

86. *See Carter Message,* *supra* note 83, at XII (recommending a reservation to article 6 of the ICCPR because "United States law is not entirely in accord" with the standards for capital punishment contained in that article); *id.* at XVIII (recommending a reservation to article 4 of the ACHR for similar reasons).
the ICCPR.\textsuperscript{87} The United States ultimately ratified the ICCPR in 1992, with a reservation preserving the U.S. right to execute juvenile offenders.\textsuperscript{88} The United States has still not ratified the ACHR or the CRC. Thus, the United States has consistently refused to accept a treaty obligation prohibiting the juvenile death penalty.

Similarly, the United States has consistently argued either that customary law does not prohibit the juvenile death penalty, or that it is not bound by the asserted norm. Since the 1980s various transnational actors have presented arguments before different international bodies alleging that the United States is legally bound by the international norm prohibiting the juvenile death penalty. The United States has consistently contested these arguments.\textsuperscript{89} For example, in 1985 two juvenile offenders from the United States presented claims before the Inter-American Commission on Human Rights (IACHR),\textsuperscript{90} asserting that the application of capital punishment in their cases would violate U.S. obligations under the American Declaration of the Rights and Duties of Man.\textsuperscript{91} The United States vigorously contested the merits of their claims, arguing that it had no international legal obligation to refrain from executing juvenile offenders.\textsuperscript{92} The United States executed both


\textsuperscript{88} See Multilateral Treaties, \textit{supra} note 39, at 174.

\textsuperscript{89} While space limitations preclude a detailed exposition of U.S. objections, this section does provide a brief summary of the history of U.S. objections. For a more comprehensive presentation, see Bradley, \textit{supra} note 38, at 520–35.


\textsuperscript{91} American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, at 7, O.A.S. Doc. OEA/ser.L/V./I.4, rev. XX (1948). The American Declaration was originally adopted as a non-binding declaration of principles. OAS member states later amended the OAS Charter to give the IACHR authority to oversee national implementation of the human rights principles embodied in the American Declaration. \textit{See} Thomas Buergenthal, \textit{The Revised OAS Charter and the Protection of Human Rights}, 69 Am. J. Int'l L. 828 (1975). Since that time, the IACHR has maintained that the American Declaration imposes binding obligations on OAS member states. \textit{See} Pinkerton and Roach, \textit{supra} note 90, ¶ 44–49. The U.S. has consistently disagreed with the view that the American Declaration imposes binding obligations on the United States.

\textsuperscript{92} For a summary of the U.S. argument, see Pinkerton and Roach, \textit{supra} note 90 ¶ 38; Bradley, \textit{supra} note 38, at 527–30.
petitioners while their claims were still pending before the IACHR.\textsuperscript{93}

Several years later, the continued use of the juvenile death penalty in the United States became a subject of controversy in the Human Rights Committee (HRC).\textsuperscript{94} In accordance with Article 40 of the ICCPR, the United States submitted its initial report to the HRC in 1994.\textsuperscript{95} The HRC reviewed the report in the spring of 1995.\textsuperscript{96} In its comments on the U.S. report, the HRC stated expressly that the U.S. reservation to the juvenile death penalty provision was "incompatible with the object and purpose of the treaty."\textsuperscript{97} A reservation that fails the "object and purpose" test is invalid.\textsuperscript{98} The United States vigorously defended the validity of its reservation, contending that customary international law does not establish "a clear prohibition at the age of 18," and that "there was no basis in international law for the view that a reservation could not be made to a provision of a treaty which reflected customary international law."\textsuperscript{99}

Since the United States became a party to the ICCPR, there have been several domestic court cases in which capital defendants have invoked international law in support of the argument that state laws authorizing the juvenile death penalty are invalid.\textsuperscript{100} The Justice Department intervened in at least one such case to defend the validity of state laws and to contest the argument that the interna-

\begin{thebibliography}{99}


\bibitem{94} The Human Rights Committee is a treaty monitoring body established by the ICCPR. See ICCPR, \textit{supra} note 39, art. 28, 999 U.N.T.S. at 179.


\bibitem{97} See id. ¶ 279.


\end{thebibliography}
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International standard is binding on the United States. Prior to the Missouri Supreme Court's decision in Simmons, state and federal courts had consistently upheld the authority of state governments to execute juvenile offenders, notwithstanding international law arguments to the contrary.

In sum, prior to the decision in Simmons, U.S. behavior since at least 1977 manifested a strong, consistent policy preference for preserving the U.S.' freedom to execute juvenile offenders.

2. Application of Goldsmith and Posner's Theory

As noted above, the Supreme Court decision in Simmons constituted a sudden change from U.S. resistance to U.S. acceptance of the international norm regarding the juvenile death penalty. In terms of the models set forth in Limits, neither the cooperation nor the coordination model applies because the United States did not act jointly with another country. Goldsmith and Posner, however, might attempt to explain this sudden about-face on the juvenile death penalty either in terms of coercion or coincidence of interest.

Coercion occurs when "[o]ne state, or a coalition of states with convergent interests, forces other states to engage in actions that serve the interest of the first state or states." In this case, a coalition of states, international organizations and other transnational actors applied pressure on the United States for many years to alter its behavior. Numerous states have urged the United States in private diplomatic exchanges to halt the practice of executing juvenile offenders. An amicus brief in the Simmons case, filed by a

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102. State ex rel. Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (holding execution of an individual who was under eighteen at time of the crime as a violation of the Eighth and Fourteenth Amendments).

103. See Beazley, 242 F.3d at 266-67; Ex Parte Burgess, 811 So.2d at 628-629; Ex Parte Pressley, 770 So.2d at 475-50; Servin, 32 P.3d at 1285-86; Domingues, 961 P.2d at 1279-80.

104. Limits of International Law, supra note 7, at 28.

105. The participation of a number of non-state actors illustrates another weakness of the theory set forth in Limits. Limits focuses almost exclusively on states. In the modern world, a variety of non-state actors can potentially have a significant impact on global politics. See, e.g., Koh, supra note 6, at 2646-48 (analyzing the role of private "norm entrepreneurs" and nongovernmental organizations in the debate over reinterpretation of the Anti-Ballistic Missile Treaty).

106. See Brief for U.S. Diplomats et al. as Amici Curiae Supporting Respondent, State ex rel. Simmons, 125 S. Ct. 1183 (2004) (No. 03-633), available at 2004 WL 1636448 at *23-*24 (stating that "U.S. diplomats abroad are increasingly called into meetings to answer foreign
group of retired U.S. diplomats, noted that the continued practice of executing juvenile offenders "strains diplomatic relations with close American allies [and] increases America's diplomatic isolation." Both the UN General Assembly and the Economic and Social Council have urged states to halt the practice of executing juvenile offenders. In 1998 the UN Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions issued a detailed report that was highly critical of U.S. capital punishment practices, especially with regard to juvenile offenders. The UN Human Rights Commission has adopted resolutions every year since 1997 condemning states that continue to execute juvenile offenders. The Inter-American Commission on Human Rights has also condemned the U.S. practice of executing juvenile offenders.

In light of the above facts, Goldsmith and Posner might try to explain Simmons in terms of their coercion model. There are three reasons, however, why Simmons is best explained in terms of a persuasion model, not a coercion model. First, coercion alters a
state's behavior through a combination of threats and promises, whereas persuasion alters a state's behavior through rational argumentation.\textsuperscript{113} The key U.S. decision-maker in this case was the United States Supreme Court. There is no evidence whatsoever that the Supreme Court decided 	extit{Simmons} in response to threats or promises. Rather, the Court was persuaded by rational argument that the juvenile death penalty contravenes the Eighth Amendment ban on "cruel and unusual punishments."\textsuperscript{114}

Second, states that are coerced are responding to external constraints. In contrast, "[p]ersuaded actors 'internalize' new norms and rules of appropriate behavior."\textsuperscript{115} Assuming that the United States will change its behavior in response to the Supreme Court decision in 	extit{Simmons}, that behavioral modification will not be the result of an external constraint. To the contrary, the Supreme Court internalized the international norm when it held that the juvenile death penalty is unconstitutional.\textsuperscript{116}

Third, a key difference between persuasion and coercion is that persuasion alters a state's preferences, whereas coercion modifies behavior without changing those preferences.\textsuperscript{117} Since a coerced state's preferences remain unchanged, a state that has been forced by external threats to refrain from certain action will resume that action once the threat is removed.\textsuperscript{118} In this case, the external pressure on the United States will undoubtedly cease as a result of the Supreme Court's decision in 	extit{Simmons}.\textsuperscript{119} Yet, once the external pressure ceases, there is no reason to believe that the United States will resume the practice of executing juvenile offenders. To the contrary, the Supreme Court decision has effectively put an end to

\textsuperscript{113} See id. at 633–38.
\textsuperscript{114} U.S. CONST. amend. VIII.
\textsuperscript{115} Goodman & Jinks, \textit{supra} note 112, at 635.
\textsuperscript{116} Indeed, the story of 	extit{Simmons} and the juvenile death penalty provides a textbook illustration of Dean Koh's transnational legal process theory. According to Koh, "the key to better compliance is more internalized compliance." Koh, \textit{supra} note 6, at 2645–46. Norm internalization results from a three-step process involving "interaction," "interpretation," and "internalization." \textit{Id.} at 2646. That is precisely what happened with the United States and the juvenile death penalty. Various states and non-state entities provoked a series of interactions with the United States related to the juvenile death penalty. See \textit{supra} notes 89–99 and 104–111 and accompanying text. One such interaction between a death row prisoner and the State of Missouri yielded an authoritative interpretation by the Supreme Court, which internalized the norm. 	extit{Simmons}, 125 S. Ct. 1183. Internalization will lead to U.S. compliance.
\textsuperscript{117} See Goodman & Jinks, \textit{supra} note 112, at 633–38.
\textsuperscript{118} This proposition is implicit in Goldsmith and Posner's coercion model. See \textit{Limits of International Law}, \textit{supra} note 7, at 28–29.
\textsuperscript{119} The United States will continue to be subject to external pressure regarding the death penalty, but not the juvenile death penalty.
the practice for all time. If the external pressure is removed and the United States continues to act in accordance with the norm, then the coercion model set forth in *Limits* does not apply.

Since the coercion model is inapplicable, Goldsmith and Posner might explain U.S. behavior in terms of the coincidence of interest model. Although they "take state interests at any particular time to be an unexplained given," they acknowledge that "various domestic groups and institutions influence the political leadership's decisions related to international law." Here, the U.S. Supreme Court is a domestic institution that, by means of its decision in *Simmons*, has influenced the political leadership's preferences (i.e. state interests) regarding the juvenile death penalty. Goldsmith and Posner, therefore, might argue that state interests have changed in response to domestic legal developments. The fact that Supreme Court decisions influence U.S. preferences related to international law is consistent with the theory in *Limits*, provided that Supreme Court decisions are not influenced by international law. On the other hand, if international law influences the Supreme Court, and state interests change in response to Supreme Court decisions, then international law shapes state interests. While *Limits* emphatically denies that international law shapes state interests, that is precisely what happened in *Simmons*.

Justice Kennedy's majority opinion in *Simmons* offers three separate arguments in support of the Court's holding that the juvenile death penalty is unconstitutional. First, the majority contends that there is a national consensus against the juvenile death penalty. Second, the majority cites a variety of psychological and sociological evidence to show "that juvenile offenders cannot with reliability be classified among the worst offenders." Third, the majority reviews international law and practice to demonstrate "that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." International law thus features prominently in the majority opinion.

120. *Limits of International Law*, *supra* note 7, at 9.
121. *Id.* at 6.
122. *See id.* at 9 ("Constructivists . . . seek to show that the preferences of individuals, and therefore state interests, can be influenced by international law and institutions. To the extent this is true, it would call into question our theory's ability to explain international law in terms of state interests. We doubt it is true to any important degree.")
124. *Id.* at 1194–98.
125. *Id.* at 1198–1200.
Granted, the majority is careful to state that "the opinion of the world community" does not control the outcome in *Simmons*. Despite this obligatory statement, however, there are grounds to believe that international law and practice may have been the decisive factor that tipped the scales against the juvenile death penalty. Just sixteen years before *Simmons*, the Court held in *Stanford v. Kentucky* (*Stanford*) that the Constitution does not prohibit the execution of juvenile offenders who were sixteen or seventeen years of age when they committed their crimes. At least two of the five justices comprising the majority in *Simmons* have previously endorsed the view that constitutional precedent is entitled to great weight, and should be overruled only in rare cases. And, as the dissent points out, the evidence of a national consensus in *Simmons* was not substantially stronger than it had been in 1989 when the Court decided *Stanford*. Moreover, scientific knowledge about the social and psychological development of teenagers has not changed appreciably since 1989. In contrast, between 1989 and 2005, almost one hundred states assumed an international treaty obligation prohibiting the juvenile death penalty. Thus, of the three main prongs of the Court's analysis, international law is the only one that has changed dramatically since the Court decided

126. Id. at 1200.
128. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (stating that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable") (joint opinion of Justices O'Connor, Kennedy and Souter). Justices Souter and Kennedy both joined the majority opinion in *Simmons*.
129. See *Simmons*, 125 S. Ct. at 1210–12 (O'Connor, J., dissenting); id. at 1218-21 (Scalia, J., dissenting).
130. Indeed, the evidence cited by the majority in *Simmons* is quite similar to the evidence cited by the majority in *Thompson*, where the Court held that the Eighth Amendment bars execution of juvenile offenders who were less than sixteen years old at the time of the crime. See *Thompson v. Oklahoma*, 487 U.S. 815, 834–38 (1988).
131. As of December 1989, there were ninety states parties to the ICCPR. See Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1989, 134, U.N. Doc. ST/LEG/SER.E/8 (1990). All ninety states, as parties to the ICCPR, had assumed a treaty obligation prohibiting the juvenile death penalty. See ICCPR, *supra* note 39, art. 6, ¶ 5. As of December 1989, there were twenty-one states parties to the ACHR. See *American Convention on Human Rights, Signatures and Current Status of Ratifications* (n.d.), at http://www.cidh.org/Basics/basic4.htm (last visited Oct. 28, 2005). All twenty-one states, as parties to the ACHR, had assumed a treaty obligation prohibiting the juvenile death penalty. See ACHR, *supra* note 42, art. 4, ¶ 5. Sixteen of the states who were parties to the ACHR in December 1989 were also parties to the ICCPR at that time. Thus, as of December 1989, ninety-five states had assumed a treaty obligation prohibiting the juvenile death penalty. At present, 193 states have undertaken such a treaty obligation. See *supra* note 39.
Therefore, the international law argument is the only one that justifies overruling a constitutional precedent.

Suppose, though, one accepts at face value the majority’s assertion that international law did not “control” the outcome in Simmons. Even so, it is beyond dispute that international law influenced the outcome. As noted above, the majority opinion advances three separate rationales supporting its conclusion; international law and practice comprise the core of one of those rationales. The majority opinion cites four different amicus briefs that focus almost exclusively on international law and practice. In his dissent, Justice Scalia observes that “the views of other countries and the so-called international community take center stage” in the majority’s analysis.

In sum, there is no doubt that international law and practice had a significant influence on the Court’s decision in Simmons, even if they did not “control” the outcome. Moreover, there is no doubt that the United States will modify its behavior—both domestically and internationally—as a result of the Court’s decision. The case study of the United States and the juvenile death penalty, therefore, belies one of the central claims advanced in Limits. Whereas Limits contends that international law does not influence state behavior to any significant degree, this case study demonstrates that international law was a crucial factor that caused the United States to reverse its foreign policy posture from resistance to acceptance of the international norm regarding the juvenile death penalty. Realists, however, may downplay the significance of this example because there were no vital national security interests at stake. Accordingly, the next case study addresses a situation that has a direct bearing on national security.

IV. CHINA AND NUCLEAR PROLIFERATION

The nuclear nonproliferation regime comprises a set of formal treaties, informal agreements, official international organizations

132. See Simmons, 125 S. Ct. at 1198 (stating that the practice of other states is not “controlling”); id. at 1200 (“[t]he opinion of the world community [is] not controlling”).
133. See id. at 1199 (citing amicus briefs filed by the European Union, President Carter and other nobel peace prize winners, former U.S. diplomats, and the human rights committee of the Bar of England and Wales, all presenting arguments based on international law and practice).
134. Id. at 1225 (Scalia, J., dissenting).
135. See Limits of International Law, supra note 7, at 8–9 (stating that authors “doubt” the assumption that state interests can be influenced by international law and institutions).
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and unofficial "supplier clubs," all of which share the goal of curbing the spread of nuclear weapons to additional states. Prior to 1984 China was openly hostile to the main objective of the nuclear nonproliferation regime; it actively promoted nuclear proliferation in both word and deed. Over the past two decades, though, China’s posture has undergone a gradual transformation. In 1984 China changed its declaratory policy: Premier Zhao Ziyang stated that China “by no means favored nuclear proliferation, nor would China engage in such proliferation by helping other countries to develop nuclear weapons.” In 1992 China acceded to the Nuclear Non-Proliferation Treaty (NPT). Between 1997 and 2004, China joined the two main nuclear "supplier clubs" and internalized their export control guidelines in its domestic export control regulations. Thus, over the course of two decades, China went from being a rogue state that actively encouraged proliferation to a responsible supplier whose nuclear export activities largely conform to international norms.

Part Three is divided into four sections. The first section describes the development of the nuclear nonproliferation regime, with an emphasis on nuclear export controls. The next three sections trace the evolution of China’s nuclear export control policies and practices in three stages. Stage one covers the period from signature of the NPT in 1968 until the mid-1980s. Stage two addresses the mid-1980s through the mid-1990s. Stage three covers the mid-1990s to the present. Limits’ models of cooperation and coordination can explain much of the evolution of the nuclear nonproliferation regime. Similarly, Limits’ rational choice theory

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137. See infra notes 178-187 and accompanying text.


140. This statement requires two caveats. First, although China’s recent nuclear export practices are generally consistent with international norms, that is not true for China’s missile-related exports. See China’s Proliferation Practices and the North Korean Nuclear Crisis: Hearing Before the U.S.-China Econ. and Sec. ReviewComm’n, 108th Cong. 7–18 (2003) (statement of Paula A. DeSutter, Assistant Secretary of State for Verification and Compliance, Department of State) [hereinafter DeSutter Testimony] (providing a brief overview of the history of U.S. nonproliferation discussions with China), available at www.state.gov/t/vc/rls/rm/24518.htm (visited July 1, 2005). Second, although China’s laws and regulations governing nuclear exports generally conform to international standards, there are still some minor implementation problems. See infra notes 268–271 and accompanying text.
accounts reasonably well for China’s willful non-compliance with international norms during stage one. China’s subsequent non-compliance, however, is best explained by a bureaucratic politics model, not a rational choice model. Moreover, Goldsmith and Posner’s theory cannot adequately explain China’s gradual transformation from rogue state to responsible supplier over the past two decades.

A. The Nuclear Nonproliferation Regime

In the 1950s and early 1960s, states with developed nuclear technology often transferred that technology to other states without requiring International Atomic Energy Agency (IAEA) safeguards as a condition of supply.\textsuperscript{141} For example, France provided Israel with a nuclear research reactor that Israel later used to produce unsafeguarded plutonium for its nuclear weapons program.\textsuperscript{142} Canada also supplied India with an unsafeguarded nuclear research reactor that produced the plutonium for India’s first nuclear test.\textsuperscript{143} In the early 1960s the United States became increasingly concerned about the prospect of widespread nuclear proliferation. A classified assessment prepared by the Pentagon in 1963 “listed over ten countries that could acquire nuclear weapons . . . in less than a decade.”\textsuperscript{144} Both the United Kingdom and the Soviet Union shared U.S. fears about the dangers of nuclear proliferation.\textsuperscript{145} These fears gave impetus to negotiation of the NPT, which was signed in 1968, and entered into force in 1970.\textsuperscript{146}

1. The Nuclear Non-Proliferation Treaty (NPT)

The NPT divides states into two groups: nuclear-weapon states (NWS) and non-nuclear-weapon states (NNWS). The NPT obligates NWS “not to transfer to any recipient whatsoever nuclear

\textsuperscript{141} The IAEA is an international organization created by the Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 5 (entered into force July 29, 1957). Under the Statute, the Agency is empowered to conduct inspections and maintain an accounting of nuclear material in member states to help ensure that such material is used only for peaceful purposes. \textit{See id.} art. XII, 8 U.S.T. at 1105–08 (explaining the rights and responsibilities of the Agency). The Agency’s accounting and inspection system is referred to as “IAEA safeguards.”


\textsuperscript{144} \textit{George Bunn, Arms Control by Committee: Managing Negotiations with the Russians} 67 (1992).

\textsuperscript{145} \textit{See id.} at 66–72.

\textsuperscript{146} \textit{See id.} at 59–105 (providing detailed history of treaty negotiations).
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According to Limits, the primary reason why states enter into treaties “is that they gain more than they lose, on balance, from the agreement.” This statement succinctly describes the incentives of almost all the original parties to the NPT. There were forty-three original parties to the NPT, including three nuclear-weapon states and forty non-nuclear weapon states. The three NWS—the United States, the Soviet Union and the United Kingdom—all wanted to limit the acquisition of nuclear weapons by additional states. Thus, the Article I restriction that prohibited them from transferring nuclear weapons to other states served their interests. Moreover, they presumably calculated that the Article VI obligation “to pursue negotiations in good faith” on nuclear disarmament was a price they were willing to pay in order to get the benefit of treaty limitations on acquisition of nuclear weapons by NNWS.

The vast majority of the NNWS that were original parties to the NPT had no realistic prospect of acquiring nuclear weapons. As

147. NPT, supra note 139, art. I. The NPT defines a nuclear-weapon state as “one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967.” Id. art. IX, ¶ 3. Under this definition, the United States, the United Kingdom, Russia (formerly the Soviet Union), France and China are nuclear-weapon states. All other states are non-nuclear-weapon states.

148. Id. art. VI.

149. Id. art. II.

150. Id. art. III, ¶ 1.

151. LIMITS OF INTERNATIONAL LAW, supra note 7, at 89.


154. See BUNN, supra note 144, at 72–80.
Goldsmith and Posner wryly note, "[w]hen Burkina Faso, Costa Rica, Gabon, the Holy See, and Malta ratified the Comprehensive Test Ban Treaty, they did not have to alter their pre-ratification behaviors."\textsuperscript{155} The same applies to the majority of NNWS who were original parties to the NPT. Their decision to ratify can thus be explained by Goldsmith and Posner's "coincidence of interest" model: the treaty prohibited the states from engaging in activity that they had no interest or capacity to pursue.

However, Goldsmith and Posner's theory seems inadequate to explain the ratification decisions of all the original NPT NNWS. For example, Sweden maintained an active nuclear weapons program in the 1950s and most of the 1960s, which it did not finally terminate until 1972.\textsuperscript{156} In 1963 a classified Pentagon document ranked Sweden as one of the United States' top proliferation concerns, estimating that Sweden would be able to conduct a nuclear test within two to three years.\textsuperscript{157} Goldsmith and Posner contend that states do not ratify treaties unless "they gain more than they lose, on balance, from the agreement."\textsuperscript{158} Yet Sweden clearly incurred a cost by ratifying the NPT: it was forced to dismantle its nuclear weapons program.\textsuperscript{159} Granted, Sweden did not have a huge incentive to develop nuclear weapons because it did not confront any serious external nuclear threat. On the other hand, though, ratification of the NPT did not provide Sweden any offsetting security benefit.\textsuperscript{160} Thus, if one focuses narrowly on security interests, Sweden's ratification decision presents a puzzle for Goldsmith and Posner's theory because ratification appears to impose a cost with no offsetting benefit.

\textsuperscript{155} Limits of International Law, supra note 7, at 89.


\textsuperscript{157} BUNN, supra note 144 at 67-68.

\textsuperscript{158} LIMITS OF INTERNATIONAL LAW, supra note 7, at 89.

\textsuperscript{159} It is not entirely clear why Sweden pursued a nuclear weapons program in the first place. If it wanted the geopolitical power that often accompanies a nuclear weapons program, the cost of dismantling the program was non-trivial. According to one estimate, if Sweden had decided to proceed with its nuclear weapons program, as of the mid-1990s it might have had a nuclear stockpile comparable to China's. Williamson, supra note 156, at 122, n.207. A nuclear force of that magnitude would presumably have given Sweden substantial geopolitical power.

\textsuperscript{160} One might argue that Sweden derived a security benefit insofar as the NPT restricted the spread of nuclear weapons to other countries. Assuming, though, that Sweden wanted to restrict the spread of nuclear weapons, there is no reason to think that Sweden's ratification decision had a significant influence on the ratification decision of any other state.
In this author's view, the best explanation for Sweden's ratification decision is that law often serves an expressive function. Sweden ratified the NPT primarily to express its support for the emerging non-proliferation norm. Goldsmith and Posner acknowledge that the "rhetoric" of international law is an important aspect of the international legal system, but they insist that the rhetoric of international law is entirely self-serving. The Swedish example, however, suggests that international rhetoric is not always self-serving. States sometimes undertake legal obligations for the purpose of expressing their support for an international norm, even when that obligation imposes a cost without any offsetting benefit, other than the moral satisfaction of expressing one's support for a normatively appealing position. Goldsmith and Posner's theory fails to account for this type of behavior.

2. Nuclear Export Controls

The NPT creates two different types of obligations with respect to nuclear exports. The first obligation applies only to NWS. Under Article I, they agree not to transfer nuclear explosives or to help any NNWS acquire nuclear explosives. The second obligation applies to all NPT parties. Under Article III, both NWS and NNWS are obligated "not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material" is subject to IAEA safeguards.

At the time the NPT entered into force, there was no common understanding about what constituted "EDP" equipment—that is, equipment or material "especially designed or prepared" for pro-

161. See generally Limits of International Law, supra note 7, at 167–84 (presenting a theory of international rhetoric).
162. Id. at 168–70.
163. In the final chapter of their book, Goldsmith and Posner present an argument against what they call "strong state cosmopolitanism." Id. at 205. They tacitly concede, though, that states sometimes engage in weak cosmopolitan action. Therefore, the authors might argue that Sweden's ratification of the NPT is an example of weak cosmopolitan action. Regardless of whether one characterizes the ratification decision as "weak" or "strong" cosmopolitanism, though, it is difficult to explain Sweden's ratification decision in terms of Goldsmith and Posner's models of coincidence of interest, coercion, cooperation and coordination, because all four models assume that states are motivated by self-interest, rather than a sense of cosmopolitan duty.
164. NPT, supra note 139, art. I.
165. Id. art. III, ¶ 2 (emphasis added).
duction and processing of nuclear materials. Beginning in 1971, representatives from fifteen states held a series of discussions to reach agreement on a list of EDP equipment and materials. The group came to be known as the “Zangger Committee,” named after its Swiss chairman Claude Zangger. The list they developed is referred to as a “trigger list” because the export of listed items triggers the NPT requirement for IAEA safeguards. The Zangger Committee trigger list was initially published in 1974.

In addition to the Zangger Committee, there is another nuclear export body known as the Nuclear Suppliers Group (NSG). The NSG was formed following India’s detonation of a nuclear explosive device in 1974, “which demonstrated that nuclear technology transferred for peaceful purposes could be misused.” The NSG produced its own trigger list, first published in 1978. The original NSG trigger list was quite similar to the original Zangger list. The original Zangger list, however, covered only “equipment and materials,” as specified in NPT Article I. In contrast, the original NSG list was somewhat broader because it included controls on “equipment, materials, and technology.” Additionally, the NSG list included a set of “guidelines for nuclear transfers” that was more detailed and more restrictive than the supply conditions in the original Zangger list.

Neither the Zangger Committee nor the NSG codified its trigger list in a formal treaty. Rather, the “agreements” amounted to a set


168. International Atomic Energy Agency, Communication of 10 May 2005 received from the Government of Sweden on behalf of the participating Governments of the Nuclear Suppliers Group, Doc. INFCIRC/559/Rev.3, at *5 (May 30, 2005) [hereinafter NSG Origins], http://www.iaea.org/Publications/Documents/Infcircs/2005/infcirc559r3.pdf (last visited Oct. 20, 2005). There is substantial overlap between the membership of the two organizations. Unlike the Zangger Committee, however, the original NSG membership included France, which was not then an NPT party.


170. See INFCIRC/209, supra note 167.

171. See INFCIRC/254, supra note 169.

172. Compare INFCIRC/209, supra note 167, with INFCIRC/254, supra note 169 (emphasis added).
of parallel "unilateral declarations that the Understandings would be given effect through respective domestic export control legislation." Both trigger lists have been updated and expanded several times since the 1970s. Additionally, both groups have expanded their membership substantially.

In 1992 the NSG made two major policy decisions to strengthen its nuclear export controls. First, NSG members agreed "[t]o make a full-scope safeguards agreement with the IAEA a condition for the future supply of Trigger List items to any non-nuclear-weapon State." The prior guidelines required safeguards for all exports of trigger list items, but permitted NSG members to export safeguarded uranium, for example, to a state that also operated unsafeguarded nuclear facilities. The full-scope safeguards policy codified an agreement by NSG members to refrain from exporting any trigger list items to states, such as Pakistan, that maintained unsafeguarded nuclear facilities. The Zangger Committee has never adopted a full-scope safeguards policy.

The second major policy decision was to develop "guidelines for transfers of nuclear-related dual-use equipment, material and technology (items which have both nuclear and non-nuclear applications) that could make a significant contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity." Whereas the original trigger list focused on EDP items, the new dual-use controls were specifically intended to cover equipment, materials, and technology that were not "especially designed or prepared" for production or processing of nuclear materials. When the NSG adopted the dual-use guidelines, the original trigger list became "Part 1" of the NSG Guidelines and the dual-use guidelines became "Part 2." The Zangger guidelines do not address dual-use items because they are outside the scope of NPT Article III.

In sum, the Zangger and NSG trigger lists both provide a list of EDP items and require safeguards on exports of EDP items, as stipulated in NPT Article III. In that respect, both trigger lists are textbook examples of Limits' coordination model. The NSG goes beyond NPT requirements by controlling dual-use items and

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175. Id.
176. See LIMITS OF INTERNATIONAL LAW, supra note 7, at 85 ("In coordination games, when the agreement sets out what the coordinating action is, it becomes less likely that a failure of coordination will occur because of error."). The trigger lists "set out what the
requiring full-scope safeguards for exports of EDP items. These additional requirements exemplify Limits' cooperation model. In the absence of an agreement on dual-use exports, economic incentives would drive supplier states to continue selling dual-use items to nuclear proliferant states, thereby contributing to nuclear weapons programs in those states and making everyone worse off.177 The agreement on dual-use exports solves this prisoner's dilemma.


Recall that the NPT was signed in 1968. For the next fifteen years, China regularly "condemned the NPT because it bestowed a nuclear monopoly on the five declared nuclear weapons states and relegated other nations to permanent non-nuclear weapons status."178 Indeed, "China repudiated such discrimination as a vestige of colonialism and advocated the overthrow of the NPT regime."179 During this period, China was not a party to the NPT, nor was it a member of the IAEA, the Zangger Committee or the NSG.

China's nuclear export practices were consistent with its declaratory policies. For example, "China is believed to have sold unsafeguarded enriched uranium to such countries as South Africa and Argentina" in the early 1980s.180 At the time, neither South Africa nor Argentina was an NPT party, and both were engaged in nuclear activities that were not subject to IAEA safeguards. Any sale of enriched uranium in the absence of IAEA safeguards would be a direct contravention of NPT Article III, which requires IAEA safeguards for all exports of "source or special fissionable material" to a non-nuclear-weapon state.181

During this period, China also supplied the bulk of the 250 metric tons of "heavy water" that India received in order to operate its unsafeguarded nuclear reactors.182 Heavy water was included in

177. This is basically what happened in Iraq in the 1980s prior to Desert Storm and prior to agreement on the dual-use guidelines. See Barry Kellman, Bridling the International Trade of Catastrophic Weaponry, 43 AM. U. L. REV. 755, 787–89 (1994) (discussing exports to Iraq in the late 1980s).
179. Id.
181. NPT, supra note 139, Art. III, ¶ 2.
182. SPECTOR, NUCLEAR AMBITIONS, supra note 180, at 56–57.
the original Zangger and NSG trigger lists because it is "especially designed or prepared" for the production of nuclear material.\textsuperscript{183} China provided heavy water to India through a West German broker.\textsuperscript{184} Chinese authorities may not have known that the material was destined for India, but they did not bother "to verify the ultimate destination of the heavy water exports, nor was the requirement for safeguards applied."\textsuperscript{185} The export of heavy water without any requirement for IAEA safeguards contravened NPT Article III.

The nuclear exports that caused greatest concern during this period, though, were China's exports to Pakistan. According to one commentator, China "provided essential weapons-related nuclear aid directly to Pakistan, including the design of the nuclear device detonated in China's fourth nuclear test . . . and—according to stories in the British press—quantities of weapons-usable highly enriched uranium sufficient for Pakistan to build two nuclear devices."\textsuperscript{186} If these reports are true, Chinese assistance to Pakistan would be a direct contravention of Article I of the NPT, which obligates nuclear weapon states not "to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices."\textsuperscript{187} Since China was not an NPT party at the time, it could not be accused of violating any treaty obligation. Its aid to Pakistan, however, manifested contempt for the key norm that is the foundation of the nuclear non-proliferation regime.

Goldsmith and Posner's rational choice theory well explains China's behavior during this period. China presumably calculated that the costs of the NPT outweighed the benefits. Accordingly, China made no effort to conform its conduct to the requirements of the NPT.

\textsuperscript{183} INFCIRC/209, \textit{supra} note 167; INFCIRC/254, \textit{supra} note 169. "Heavy water" contains significantly more deuterium than ordinary water. Heavy water is used as a "moderator" in certain nuclear reactor designs. Nuclear reactors that use heavy water as a moderator are typically fueled with natural uranium. In contrast, reactors that use ordinary water as a moderator require enriched uranium fuel. Enriched uranium is more expensive and harder to obtain than natural uranium.

\textsuperscript{184} SPECTOR, \textit{Nuclear Ambitions}, \textit{supra} note 180, at 36–37.

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.} at 42–43. \textit{See also} Kellman, \textit{supra} note 177, at 782 (describing Chinese assistance to Pakistan's nuclear weapons program in the early 1980s).

\textsuperscript{187} NPT, \textit{supra} note 139, art. I.

Whereas China was openly hostile to nuclear nonproliferation norms before 1984, China abandoned its hostility over the next ten years and gradually embraced the nuclear nonproliferation regime. In the period before 1984, China’s exports manifested willful disregard for nuclear export control rules. In contrast, from the mid-1980s to the mid-1990s, China’s nuclear exports contravened international norms only intermittently, and to some extent inadvertently.

1. Positive Developments

China’s nuclear non-proliferation policies began to change in 1984. First, China became a member of the IAEA in 1984. Additionally, Chinese leaders made several public statements that expressed a significant change in declaratory policy. During a visit to the United States in January 1984, Premier Zhao Ziyang said that “China does not engage in nuclear proliferation ourselves, nor do we help other countries to develop nuclear weapons.” Later that year, the Sixth National People’s Congress endorsed this policy. Then in January 1985, Vice Premier Li Peng stated that “China has no intention, either at the present or in the future, to help non-nuclear countries develop nuclear weapons.” Several years later, in August 1991, China announced its decision “in principle” to join the NPT. China ultimately became a party to the NPT on March 9, 1992.

Goldsmith and Posner might explain the change in China’s declaratory policy in 1984 and 1985 in terms of their coercion model. In 1981 the United States and China began discussions about the possibility of concluding a nuclear cooperation agreement. China wanted an agreement with the United States because China was seeking foreign assistance to develop its nuclear power industry. One of the U.S.’ key goals in the negotiation was to use the “carrot” of future nuclear cooperation to secure China’s commitment to nonproliferation norms. Key statements

188. Davis, supra note 178, at 589.
189. Tan, supra note 138, at 879 (quoting Chinese Premier Zhao Ziyang).
190. Id.
191. Id. (quoting Vice Premier Li Peng).
192. Davis, supra note 178, at 592.
193. Tan, supra note 138, at 875.
194. See id. at 870–72 (discussing China’s interest in using foreign equipment and services for most of its nuclear projects).
195. Id. at 873.
indicating China's changed declaratory policy were made in the context of negotiations over the nuclear cooperation agreement. One could thus argue that China's new declaratory policy was merely a quid pro quo for the U.S. decision to enter into a nuclear cooperation agreement.

This explanation is accurate, but incomplete, because it ignores the domestic political changes that preceded China's efforts to seek foreign assistance for its nuclear power industry. Throughout the 1960s and most of the 1970s, China's economy was largely closed to foreign investment. In the late 1970s, China began an economic modernization drive that led to increased interaction with the global economy. One empirical study has shown that "ruling coalitions pursuing economic liberalization" are more likely to conform to nonproliferation norms "than their inward-looking, nationalist . . . counterparts." If China had not been pursuing economic liberalization, the U.S.' "carrot" of nuclear cooperation would probably not have induced China to change its nuclear policies. Thus, the domestic political decision to pursue market-oriented reforms was arguably a key underlying factor contributing to China's willingness to accept nonproliferation norms.

Whereas domestic politics and U.S. pressure were the key factors leading to a change in China's declaratory policy in the mid-1980s, China's decision to join the NPT was largely the result of acculturation. "Acculturation" refers to "the general process of adopting the beliefs and behavioral patterns of the surrounding culture . . . Acculturation induces behavioral changes . . . by changing the actor's social environment." In 1991 two key changes in China's "social environment" prompted its decision to join the NPT. First, revelations about Iraq's clandestine nuclear program generated renewed concerns about the dangers associated with nuclear proliferation. Second, President Mitterand's June 1991

196. See id. at 876-77 (discussing how China redefined its position on the international nonproliferation regime).
198. Etel Solingen, The Political Economy of Nuclear Restraint, 19 INT'L SECURITY, Fall 1994. Professor Solingen's analysis focuses on decisions by potential nuclear proliferant states whether to acquire nuclear weapons. The general observation, however, applies also to decisions by potential suppliers whether to conform to nuclear export norms. The more that a state's national economy is integrated into the global economy, the greater incentive it has to conform its conduct to global norms of international trade, including nuclear trade.
200. See Davis, supra note 178, at 591.
announcement that France would join the NPT left China isolated as the only nuclear weapon state holdout.\textsuperscript{201} At that point, the "normative pull" of the NPT was irresistible. In August 1991, just two months after France's announcement, Li Peng announced China's decision "in principal" to join the NPT.\textsuperscript{202}

Goldsmith and Posner deny that states respond to the "normative pull" of international law.\textsuperscript{203} Accordingly, they might argue that China joined the NPT because it feared a reputational loss if it refused to join.\textsuperscript{204} While the claim that China's action was motivated by a fear of reputational loss seems right, it begs the question: Why did China's fear of reputational loss suddenly increase in the summer of 1991? The only plausible answer is that reputation is a function of the surrounding social environment, and changes in the surrounding social environment affect the reputational loss associated with a particular course of action. As a norm becomes more widely accepted by the international community, a state's continued refusal to accept the norm exacts mounting reputational costs. By the summer of 1991, the nuclear nonproliferation norm was so entrenched that China could no longer tolerate the reputational cost of refusing to join the NPT.\textsuperscript{205} This, however, is just another way of saying that China reacted to the "normative pull" of the NPT. Thus, although Goldsmith and Posner deny that states respond to the normative pull of international law, the argument that China joined the NPT to avoid reputational costs uses the rhetoric of "reputation" to describe the processes of "acculturation" and "normative pull."

2. Ongoing Problems

During the period from 1984 to 1995, China's export control practices did not fully conform to its declaratory policies. For example, China did not terminate its exports of unsafeguarded heavy water to India until 1987.\textsuperscript{206} As noted above, both the Zangger and NSG trigger lists required safeguards on exports of heavy

\begin{footnotes}
\item 201. See id. at 591–92.
\item 202. Id. at 592.
\item 203. See Limits of International Law, supra note 7, at 14-15.
\item 204. According to Limits, the fact that some state action is motivated by a fear of reputational loss is entirely consistent with the book's rational choice theory. See id. at 100–04.
\item 206. See Spector, Nuclear Ambitions, supra note 180, at 36–37.
\end{footnotes}
In the late 1980s, China was reportedly “assisting Iraq to manufacture special magnets for a uranium enrichment plant essential to that country’s apparent bid for nuclear arms.” The nature of this assistance is unclear. The magnets themselves would be included under both the Zangger and NSG trigger lists as equipment “especially designed or prepared for the separation of isotopes of uranium.” If China merely provided technological assistance, and did not supply the magnets, safeguards would be required under paragraph 5 of the NSG guidelines, but the transfer of technology would not be covered by Zangger.

Even after China joined the NPT in 1992, its nuclear exports to Iran and Pakistan continued to raise concerns. As an NPT party, Iran has made a commitment to subject all of its nuclear activities to IAEA safeguards. Even so, there have long been suspicions that Iran was trying to acquire nuclear weapons, in violation of its NPT obligations. In or around 1995, PRC technicians built an electromagnetic isotope separation (EMIS) unit in Iran, otherwise known as a “calutron.” The calutron was apparently “similar to the one used in Iraq’s secret uranium enrichment program.” China probably did not violate its NPT obligations by supplying the EMIS unit to Iran, but that is a debatable question.

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207. See supra note 183.
208. SPECTOR, NUCLEAR AMBITIONS, supra note 180, at 43.
209. INFCIRC/209, supra note 167, Memorandum B, item 2.5.1; INFCIRC/254, supra note 169, Annex A, item 2.5.1.
210. INFCIRC/254, supra note 169, Appendix, ¶ 5.
211. See supra notes 170–171 and accompanying text (explaining that the NSG is broader than the Zangger list because, inter alia, it encompasses technology).
212. NPT, supra note 139, art. III, ¶ 1.
215. Id.
216. Whether China violated its NPT obligations depends upon two subsidiary issues. First, if a state supplies EDP equipment to a NNWS party to the NPT, and the recipient state fails to declare the equipment to the IAEA, as Iran was obligated to do under its safeguards agreement with the IAEA, is the exporting state legally responsible for the recipient state’s safeguards violation? Second, it is unclear whether the EMIS unit was considered EDP equipment, within the meaning of NPT Article III, at the time the export occurred. EMIS technology was not added to the Zangger trigger list until 2000. See International Atomic Energy Agency, Communications of 15 November 1999 Received From Member
China “was suspected in 1994 of helping Pakistan to build an unsafeguarded, plutonium-producing reactor at Khushab.”\textsuperscript{217} Public sources do not reveal the nature of the assistance provided. Accordingly, it is unclear whether the alleged assistance violated China’s NPT obligations. It is clear, however, that at least one export to Pakistan during this period did violate China’s NPT obligations. According to a U.S. State Department report, “between late 1994 and mid-1995, a Chinese entity transferred a large number of ring magnets to Pakistan for use in its uranium enrichment program.”\textsuperscript{218} The export of ring magnets violated China’s NPT obligation not to supply EDP equipment for use in unsafeguarded nuclear activities.\textsuperscript{219} Even so, the Clinton Administration did not impose sanctions on China because “PRC leaders insisted they were not aware of the magnet transfer” and “there was no evidence that the PRC government had willfully aided or abetted Pakistan’s nuclear weapon program through the magnet transfer.”\textsuperscript{220}

\textsuperscript{217} CRS Report, \textit{supra} note 214, at 4.

\textsuperscript{218} Id. at 3 (quoting State Department report on nonproliferation).

\textsuperscript{219} Ring magnets are key components of the centrifuges used in gas centrifuge uranium enrichment plants. The original Zangger and NSG trigger lists did not specifically mention ring magnets. The Zangger list referred generally to equipment “especially designed or prepared for the separation of isotopes of uranium.” INFCIRC/209, \textit{supra} note 167, Memorandum B, \S 2.5.1. The NSG list was slightly more specific, referring to “gas centrifuge assemblies, corrosion-resistant to UF6.” INFCIRC/254, \textit{supra} note 169, Annex A, Part B, Sec. 2b. The Zangger and NSG lists were upgraded in 1990 and 1992, respectively. The upgraded lists both refer to “magnetic suspension bearings” for gas centrifuge assemblies, and provide technical specifications for ring-shaped magnets. See International Atomic Energy Agency, \textit{Communications Received from Members Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material}, Doc. INFCIRC/209/Rev.1, Annex, item 5.1.2(a) (Nov. 1990), http://www.iaea.org/Publications/Documents/Infircs/Others/inf209r1.shtml (last visited September 2, 2005); International Atomic Energy Agency, \textit{Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology}, Doc. INFCIRC/254/Rev.1/Part 1, Annex B, item 5.1.2(a) (July 1992), http://www.iaea.org/Publications/Documents/Infircs/Others/inf254r1p1.shtml (last visited Oct. 18, 2005).

\textsuperscript{220} CRS Report, \textit{supra} note 214, at 3–4.
In sum, although China engaged in a number of troublesome nuclear export activities during this period, the only clear NPT violation was the export of ring magnets to Pakistan. Moreover, assuming that some of China's other nuclear exports during this period also violated international nonproliferation norms, Goldsmith and Posner's rational choice model does not really explain those violations. To understand why, it is helpful to review the history of Chinese export controls.

Prior to China's economic modernization program, which began in 1978, there was virtually no private sector in China. Government entities were responsible for almost all significant exports, so it was easy for the government to regulate exports. Economic modernization, however, brought privatization, including a burgeoning military-industrial complex.\textsuperscript{221} Throughout the 1980s, semi-privatized firms with close ties to the military pursued export markets to generate income. During the 1980s, China did not have formal export control regulations; rather, exports were regulated, if at all, "through the informal clan networks to which the heads of the relevant industries and top Communist party officials belong\[ed\]."\textsuperscript{222} China's first real export control regulations, promulgated by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in 1991 and 1992, were designed primarily to empower MOFTEC to acquire information about what the ever-growing private sector was exporting, not to implement China's nonproliferation commitments.\textsuperscript{223} It was not until the mid-1990s that China enacted export control regulations that were intended to stem the flow of proliferation-related exports.\textsuperscript{224}

In light of this history, it seems very unlikely that Chinese violations of nonproliferation norms during this period resulted from the type of rationalistic cost-benefit analysis that, according to \textit{Limits}, drives state decision-making related to international law. The better view is that, prior to the mid-1990s, China had not enacted the domestic laws and regulations necessary to block exports of

\begin{itemize}
\item \textsuperscript{221} See Davis, \textit{supra} note 178, at 595–97 (explaining the evolution of export controls in China).
\item \textsuperscript{222} Id. at 598.
\item \textsuperscript{223} Id. at 596–97.
\end{itemize}
items of proliferation concern.\textsuperscript{225} Moreover, the delay in enacting such laws and regulations was largely the product of institutional inertia, not rational choice.


Since the mid-1990s, China has internalized nuclear nonproliferation norms by enacting export control laws and regulations that largely track international control lists. China has also become a member of the Zangger Committee and the Nuclear Suppliers Group. Chinese export practices during this period have been fully compliant with the NPT obligation not to export EDP equipment and materials in the absence of IAEA safeguards. However, despite China's vastly improved export control regulations, Chinese firms continue to provide unspecified assistance and dual-use items to entities associated with Iran and Pakistan's nuclear programs.

1. Domestic Export Controls

In May 1997 the Chinese government issued a "Circular on Strict Implementation of China's Nuclear Export Policy."\textsuperscript{226} In September 1997, the government published "Regulations on Nuclear Export Control." The list of controlled items was identical to the list included in Part I of the NSG guidelines.\textsuperscript{227} In June 1998 China issued regulations governing dual-use exports.\textsuperscript{228} Over the past several years, China has continued to amend its export control regulations in an effort to keep pace with changes in multilateral export controls. For example, China amended its domestic nuclear export control regulations in June 2001 to incorporate recent

\textsuperscript{225} The ad hoc system that existed in the 1980s and early 1990s probably blocked some exports of proliferation concern. According to one knowledgeable commentator, the top leaders were "not normally excluded from decision making on sensitive exports." Davis, supra note 178, at 599. But the political leadership would not know about "sensitive exports" unless private sector firms notified their contacts in relevant government ministries and the bureaucrats within those ministries notified their political superiors. It is reasonable to assume that the political leadership would be informed if all the relevant players knew what was "sensitive." But without any formal regulations listing "sensitive" items, there were undoubtedly numerous cases where private sector firms exported items without the knowledge of the political leadership, and those items were later found to be "sensitive" because U.S. diplomats complained to officials in the foreign ministry. On the other hand, one cannot exclude the possibility that there were also cases where the political leadership was informed in advance about "sensitive exports" and gave its approval.

\textsuperscript{226} Yuan, supra note 224.

\textsuperscript{227} Id. Part I of the NSG guidelines addresses EDP equipment and materials. Part II addresses dual-use items. See supra note 174 and accompanying text.

\textsuperscript{228} Yuan, supra note 224.
amendments to the Zangger Committee trigger list. A Chinese government “white paper” published in December 2003 stated that China’s export control lists “are almost the same as those of the Zangger Committee, Nuclear Suppliers Group, CWC, Australia Group, and MTCR.”

The recent internalization of international norms into China’s export control regulations raises two questions: First, why did China enact nuclear export control regulations? Second, why did China choose to adopt regulations that are essentially identical to international control lists?

China’s decision to enact formal export control regulations is largely attributable to revelations about the export of ring magnets to Pakistan. U.S. news media first published stories about the ring magnets in February 1996. These stories prompted some members of Congress to call for sanctions on China. The Clinton Administration resisted the pressure for sanctions, in part because Chinese leaders “insisted they were not aware of the magnet transfer.” Instead of sanctions, the United States extracted a new promise from China. On May 10, 1996, U.S. officials announced “that China promised to provide future assistance only to safeguarded nuclear facilities.” This promise went beyond China’s NPT obligations “by expanding them to cover dual-use nuclear items or any nonnuclear goods to unsafeguarded facilities.” The desire to follow through on this

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230. CRS Report, supra note 214, at 2. The “CWC” is the Chemical Weapons Convention. The “Australia Group” is an international supplier group that deals with exports of equipment and materials relevant to chemical weapons proliferation. The “MTCR,” or missile technology control regime, is an international supplier group that deals with exports of materials and equipment relevant to missile proliferation. The Australia Group and the MTCR, like the NSG, are groups of like-minded supplier countries whose actions are guided by informal agreements, not treaty obligations.

231. Id. at 3.

232. Id.

233. Id.

234. Id.

235. Evan S. Medeiros, The Changing Character of China’s WMD Proliferation Activities, in NATIONAL INTELLIGENCE COUNCIL CONFERENCE REPORT, CHINA AND WEAPONS OF MASS
promise, in addition to its NPT obligations, was one of the key factors underlying China’s decision to enact nuclear export control regulations.

Goldsmith and Posner might explain this as a simple case of coercion: the threat of U.S. sanctions prompted China to enact export control regulations. While coercion is certainly part of the story, it is not the whole story. China’s commitment not to provide dual-use items to unsafeguarded facilities went beyond what was necessary to avoid U.S. sanctions, or to comply with its NPT obligations. This suggests that Chinese leaders were persuaded that it would be contrary to China’s security interests to permit continued exports of dual-use items to unsafeguarded nuclear facilities. As noted in Part III, the process of persuasion is different from the process of coercion. The coercion model set forth in Limits does not really account for the way in which persuasion can be used to transform a state’s perception of its own interests.

Moreover, the coercion model cannot explain why Chinese export control regulations are virtually identical to international control lists. The United States has imposed sanctions on Chinese entities for exports of items that are not subject to international controls, and it has refrained from imposing sanctions for exports of items that are subject to international controls. If


236. Over the years, Congress has enacted a variety of statutes that impose sanctions for various types of proliferation-related behavior. For a brief summary of relevant legislation, see CRS Report, supra note 214, at 25–27, 31–34. A detailed analysis of all the relevant sanctions legislation is beyond the scope of this Review. To the best of this author’s knowledge, though, Congress has never enacted legislation to impose sanctions for exports of nonnuclear goods to unsafeguarded facilities in countries other than Iran and Iraq.

237. See, e.g., Leonard S. Spector, Testimony Before the U.S.-China Economic and Security Review Commission, Hearing on China’s Proliferation Policies and Practices (July 24, 2003) [hereinafter Spector Testimony] (noting that there has been “a significant shift in Chinese views about the potential for WMD proliferation to have a negative impact on regional stability and on China’s own security”), http://www.cns.miis.edu/research/congress/testim/testlsp.htm (last visited July 1, 2005).

238. See supra notes 112–119 and accompanying text.

239. See Spector Testimony, supra note 237, (“The most recent U.S. sanctions against China . . . appear to be for transfers of dual-use goods that are not specifically included on international control lists.”). Most of the recent U.S. sanctions against China have been for missile proliferation, not nuclear proliferation. See CRS Report, supra note 214, at 21–24. However, Bush Administration officials indicated that sanctions imposed in April 2004 for exports to Iran also involved some nuclear-related items. See id. at 10 (discussing testimony of Assistant Secretary of State John Wolf).

240. For example, the United States did not impose sanctions on China for the export of ring magnets to Pakistan, even though the magnets are controlled items under both the Zangger and NSG lists. See supra notes 218–220 and accompanying text.
China’s primary interest was to avoid U.S. sanctions, the rational choice would be to tailor its domestic export control lists to U.S. sanctions legislation. Instead, China incorporated internationally agreed-upon lists into its domestic export control regulations, and it did so even before it joined the groups that promulgated those lists.241 China’s “mimicry” of international lists strongly suggests that internalization of nuclear nonproliferation norms is being driven by the forces of acculturation, not coercion.242

2. Membership in International Groups

China joined the Zangger Committee in October 1997;243 it joined the NSG in May 2004.244 China’s decision to join the Zangger Committee did not require any significant change in China’s behavior. The primary commitment associated with Zangger membership is to adhere to the NPT requirement not to export EDP items to unsafeguarded facilities. China had already joined the NPT several years earlier, in 1992.245 Furthermore, China had published detailed nuclear export control regulations that essentially implemented its commitments as a Zangger Committee member.246 Thus, once China published nuclear export regulations in September 1997, it was an easy decision to join the Zangger Committee. Goldsmith and Posner can explain this development as a rational choice that offered China modest benefits without any real offsetting costs.

In contrast, the decision to join the NSG in 2004 did entail significant costs for China. During the 1990s, China built a safeguarded nuclear power plant for Pakistan at Chashma.247 In May 2004, “China signed a contract to build a second nuclear power

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242. See Goodman & Jinks, supra note 112, at 638 (identifying “mimicry” as one of several acculturation processes), 645–46 (distinguishing acculturation from coercion).


244. Pinkston Testimony, supra note 229.

245. See supra note 192.

246. China’s September 1997 nuclear export control regulations tracked part 1 of the NSG guidelines, rather than the Zangger guidelines. See supra note 224 and accompanying text. Because the NSG and the Zangger Committee are independent, and both groups have amended their trigger lists several times, the two lists are not necessarily identical. Even so, the Zangger list is very similar to the list contained in part 1 of the NSG guidelines. Therefore, by incorporating part 1 of the NSG guidelines into its domestic laws, China effectively incorporated the Zangger list as well.

reactor (Chashma-2) in Pakistan.\textsuperscript{248} Since these reactors are subject to IAEA safeguards, China’s work on the reactors is fully consistent with its NPT obligations and with Zangger Committee guidelines. NSG members, however, agreed in 1992 to require “full-scope safeguards” as a condition of supply.\textsuperscript{249} Full-scope safeguards means that all nuclear activities in the recipient state must be subject to IAEA safeguards. Pakistan does not satisfy that condition. China joined the NSG shortly after signing the contract to build Chashma-2 for Pakistan.\textsuperscript{250} Under the current NSG guidelines, new NSG members are allowed to fulfill pre-existing contracts with states that do not have full-scope safeguards.\textsuperscript{251} China, therefore, is expected to complete construction of the new power reactor in Pakistan. By joining the NSG, however, China effectively agreed not to supply any additional power reactors to Pakistan.\textsuperscript{252} That agreement entails significant economic costs in the form of lost revenues. Perhaps more importantly, it entails significant political costs because Pakistan is one of China’s closest allies, and nuclear cooperation between China and Pakistan has been an important part of that political relationship for more than two decades.

China incurs additional costs by joining the NSG because NSG members have agreed to control exports of dual-use items.\textsuperscript{253} Export controls on dual-use items are costly in two senses. First, Chinese firms lose revenue whenever the government blocks exports of dual-use items that raise proliferation concerns. Second, in order for export controls over dual-use items to be effective, China must expend substantial government funds to create and maintain the bureaucracy necessary to enforce compliance with those export control regulations.\textsuperscript{254} These costs are similar to

\textsuperscript{248} Id. at 5.
\textsuperscript{249} See supra note 168 and accompanying text.
\textsuperscript{250} See CRS Report, supra note 214 at 5–6. See also Pinkston Testimony, supra note 229 (stating that China joined the NSG in May 2004).
\textsuperscript{252} This assumes that Pakistan will not join the NPT. Pakistan has said that it would join the NPT, or accept full-scope safeguards, if India does so. India, however, refuses to join the NPT as long as the five nuclear weapon states retain their nuclear weapons. Hence, it is likely that Pakistan will not join the NPT for the foreseeable future.
\textsuperscript{253} See supra note 168 and accompanying text.
\textsuperscript{254} As noted above, China first enacted domestic export controls over dual use items in 1998, several years before it joined the NSG. Technically, these costs are associated with domestic export controls over dual-use items, not with NSG membership. Regardless, the commitment to control dual-use exports goes beyond China’s NPT obligations, and entails significant costs in addition to the costs inherent in NPT membership.
the costs associated with implementing export controls for EDP items, but controlling exports of dual-use items is more difficult, and hence more costly.\textsuperscript{255}

Limits suggests that states do not make international commitments unless the benefits outweigh the costs.\textsuperscript{256} Given the costs associated with NSG membership, what are the offsetting benefits for China? There appear to be three distinct benefits. First, implementation of dual-use export controls may help China avoid U.S. sanctions.\textsuperscript{257} Second, China may have been persuaded that the NSG’s full-scope safeguards policy and dual-use export controls promote China’s security interests. Third, China probably believes that there are significant reputational benefits associated with NSG membership.\textsuperscript{258}

The first explanation is entirely consistent with Limits’ coercion model. The second explanation, however, implies that China has internalized nuclear nonproliferation norms through a process of persuasion, rather than coercion. As noted above, Limits’ rational choice theory does not adequately account for the way in which persuasion modifies a state’s perception of its interests.\textsuperscript{259} Finally, the third explanation assumes that China gains a reputational benefit by complying with NSG guidelines. Assuming that is true, the

\textsuperscript{255} There are two reasons why controlling exports of dual-use items is more difficult. First, there are more firms involved in exports of dual-use items than EDP items. The greater number of firms makes it more difficult and costly for the government to monitor their exports. Second, most suppliers of EDP items are aware of nuclear export control regulations because they are in the “nuclear business.” Since they are aware of the regulations, they know they are supposed to apply for an export license. By contrast, dual-use nuclear export controls include controls over a variety of industrial equipment, such as robots and machine tools. \textit{See International Atomic Energy Agency, Communications Received From Certain Member States Regarding Guidelines of Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology}, Doc. INFCIRC/254/Rev.6/Part 2 (Feb. 23, 2005) (current NSG dual-use guidelines), http://www.iaea.org/Publications/Documents/Infcircs/2005/infcirc254r6p2.pdf (last visited Sept. 2, 2005). Many of the firms that export these types of items are not in the “nuclear business,” and hence are less likely to be aware of nuclear export control regulations. It is difficult and costly for the government to monitor the behavior of firms who do not know that they are supposed to apply for an export license before they export their products.

\textsuperscript{256} \textit{Limits of International Law}, supra note 7, at 89.

\textsuperscript{257} \textit{See Pinkston Testimony}, supra note 229, at 5 (noting that the Chinese Ministry of Foreign Affairs “has been particularly concerned about avoiding U.S. sanctions, and has reportedly stopped transfers from occurring where no Chinese law would have been broken but where U.S. sanctions may have occurred”).

\textsuperscript{258} \textit{See Spector Testimony}, supra note 237, at 5 (“Beijing is actually sensitive to international opinion and wary about being isolated in international settings. China does not want to be viewed as violating established international norms by proliferating weapons of mass destruction.”).

\textsuperscript{259} \textit{See supra} notes 117–119 and accompanying text.
benefit exists because the international community believes that the norms embodied in the NSG guidelines are important. If other states and transnational actors did not think those norms were important, China could not possibly gain a reputational benefit by complying with them. The reputational benefit associated with NSG membership, therefore, derives from the normative force of the NSG guidelines. Since Goldsmith and Posner deny that states respond to the normative pull of international law, their theory fails to account for the relationship between international norms and a state's reputational interests.

3. Recent Chinese Nuclear Exports

The overall record of Chinese nuclear exports since the mid-1990s is quite positive in three respects. First, since the export of ring magnets to Pakistan in the mid-1990s, there have not been any published reports alleging Chinese exports of EDP items to unsafeguarded nuclear facilities. It thus appears that China has complied fully with its obligations under NPT Article III for the past decade. This suggests that basic NPT norms have been internalized into China's nuclear export practices.

Second, in response to U.S. pressure, China has terminated some proposed nuclear cooperation with Iran that would have been legal under the NPT and permissible under the NSG guidelines. China has also blocked exports of items that are not listed on any multilateral nuclear export control list. These actions demonstrate China's willingness to go beyond its NPT and NSG commitments, at least in some cases, in order to satisfy U.S. non-proliferation concerns. Insofar as China is willing to take actions that go beyond its international commitments, these actions are best explained in terms of coercion, rather than norm internalization.

260. See Limits of International Law, supra note 7, at 14-15.

261. In the early 1990s, China signed several contracts for nuclear exports to Iran, including contracts to supply two nuclear power reactors and a uranium hexafluoride production facility. See Medeiros, supra note 235. These proposed exports complied with NSG guidelines because Iran, as an NPT party, has a full-scope safeguards agreement with the IAEA. Even so, in response to U.S. pressure, China agreed in 1997 to cancel these projects and “to halt all future nuclear cooperation with Iran.” Id.

262. For example, in 1998 a Chinese firm was negotiating with an Iranian nuclear research center to supply “hundreds of tons of anhydrous hydrogen fluoride (AHF).” CRS Report, supra note 214, at 9. AHF is not listed on any nuclear control list, but it could be used in the production of uranium hexafluoride, which is a feed material for uranium enrichment facilities. In response to pressure by the United States, “Beijing stopped the sale.” Id.
Third, some reported Chinese exports that have raised nuclear proliferation concerns appear to be consistent with multilateral export control regulations. For example, in 2002 a Chinese company reportedly sold “North Korea 20 tons of tributyl phosphate (TBP), a dual-use chemical that U.S. intelligence reportedly believed would be used in the North Korean nuclear weapons program.”\textsuperscript{269} TBP is not one of the dual-use materials listed in the current version of the NSG’s dual-use guidelines.\textsuperscript{264} Similarly, a 1999 report indicated that a Chinese company “‘revived’ negotiations with the Iranian Atomic Energy Organization on the construction of a plant to produce graphite.”\textsuperscript{265} Nuclear grade graphite is one of the materials listed in the original Zangger and NSG trigger lists\textsuperscript{266} because it can be used as a moderator in a nuclear reactor. Neither the Zangger Committee nor the NSG, however, lists graphite production plants as an item subject to multilateral export controls.\textsuperscript{267}

Although the overall picture is quite positive, government officials have made a variety of statements over the past several years revealing ongoing concerns about Chinese nuclear cooperation with Iran and Pakistan. In July 2003 the Assistant Secretary of State for Verification and Compliance testified that “China continues to contribute to the nuclear programs of both Pakistan and Iran.”\textsuperscript{268} Similarly, in an unclassified report to Congress covering the period from January to June 2003, the Central Intelligence Agency stated: “We cannot rule out, however, some continued contacts . . . between Chinese entities and entities associated with Pakistan’s nuclear weapons program.”\textsuperscript{269} In April 2004 the Bush Administra-

\textsuperscript{263} Id. at 17.


\textsuperscript{265} CRS Report, supra note 214, at 9.

\textsuperscript{266} See INFCIRC/209, supra note 167; INFCIRC/254, supra note 169.


\textsuperscript{268} DeSutter Testimony, supra note 140.

tion imposed sanctions on several Chinese firms under the Iran Nonproliferation Act. "Assistant Secretary of State John Wolf testified . . . that 'most' of the sanctions related to non-nuclear transfers, but there were concerns in the nuclear area as well."270

It is difficult to know how best to construe these statements because the details underlying these general expressions of concern have not been made publicly available. U.S. concerns may be partially attributable to the fact that the United States is pressing China to block exports of items that are not subject to multilateral controls, and China is resisting that pressure.271 Alternatively, it is possible that some Chinese firms are exporting controlled, dual-use items in contravention of export control regulations, and U.S. concerns reflect the Chinese government's inability to control private sector exports. A third possibility is that some officials within the Chinese government are condoning or encouraging ongoing nuclear exports.

Whichever explanation is correct, there is no doubt that China's nuclear export practices have improved considerably over the past twenty years. In the early 1980s, China was actively assisting Pakistan's nuclear weapons program and exporting EDP items to unsafeguarded nuclear facilities in several countries. In the past few years, even if one assumes the worst, it appears that Chinese firms may still be supplying some dual use items to nuclear related end users in Iran and Pakistan.

V. CONCLUSION

At the outset of this Review, I suggested that theories of compliance with international law can be divided into three groups: state interest theories, domestic politics theories, and international norms theories.272 The Limits of International Law falls squarely within the state interest camp. It presents a theoretically elegant model that explains state behavior related to international law in terms of state interests.

The examples presented in this Review analyze cases where powerful states have internalized international norms after many years of opposing those norms. Despite more than two decades of con-

270. CRS Report, supra note 214, at 10.
271. See Spector Testimony, supra note 237 (noting that "[a]s the United States pushes China to move beyond compliance with international standards to accommodate specific U.S. security interests, tensions with China over nonproliferation issues are likely to increase . . .").
272. See supra notes 1–5 and accompanying text.
sistent opposition to the international norm prohibiting the juvenile death penalty, the United States internalized that norm by incorporating it into domestic constitutional law. Similarly, after fifteen years of persistent opposition to nuclear nonproliferation norms, China gradually abandoned its opposition and incorporated international norms into its domestic export control regulations. Other scholars have documented numerous other cases of norm internalization. Dean Koh has persuasively argued that norm internalization is the key to compliance with international law. The Limits of International Law does not adequately account for the process of norm internalization. The book’s failure to address the connection between compliance and norm internalization weakens the explanatory power of Goldsmith and Posner’s theory.

For a theory of international law to be truly comprehensive, it must account for at least three things: 1) how state interests shape the international legal system; 2) how the international legal system shapes state behavior; and 3) how domestic political forces influence the interaction between states and the international legal system. The authors of Limits deserve praise for presenting a sophisticated analysis of the first point. Their theory is not nearly as comprehensive as they claim, however, because they largely ignore the influence of domestic politics, and they stubbornly deny the fact that international norms actually do influence state behavior.

273. See supra Part III.C.
274. See supra Part IV.
275. See supra note 12.
276. See Koh, supra note 6.