DEMOCRACY AND THE COMMITMENT TO INTERNATIONAL LAW

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I. THE NORMATIVE AMBITIONS OF THE LIMITS OF INTERNATIONAL LAW

Jack Goldsmith and Eric Posner attempt to provide a purely "instrumental" theory of international law. There is some lack of clarity as to exactly what the instrumentalist position is. However, it includes at least two types of claims, one descriptive-explanatory, the other normative. The key descriptive-explanatory claim is that international law is best understood according to a rational choice model in which states act according to their self-interest. The instrumental theory, as I understand it, also includes the normative claim (1) that states have only self-interested reasons to comply with or help create international law. However, some of what the authors say in chapter 7, as I shall show below, suggests two additional normative claims: (2) that individuals have no moral obligation to try to cause their states to comply with international law as such, and (3) that individuals have no moral obligation to try to promote the rule of law in international relations by prevailing on their states to engage with international law in ways that are not purely instrumental, that is, not simply means for maximizing state interest.

Chapter 7 sets out the authors' views on the moral obligation—or rather lack of obligation—to comply with international law. In chapter 8 they argue that the commitment to "strong cosmopolitan state action cannot easily be reconciled with . . . [a] strong commitment to liberal democracy. . . ."\(^1\)

My focus in this Essay is on Goldsmith and Posner's normative conclusions in chapters 7 and 8, more specifically on the weakness of the arguments they offer for them and on the authors' tendency to conflate distinct normative issues and to equivocate on exactly what their normative conclusions are. However, my aim is more than criticism; I want to show how an understanding of the limitations of The Limits of International Law brings to the fore a question that has hitherto received too little attention: How should those who embrace a cosmopolitan moral perspective regard international law?

Given that most of the book is devoted to the descriptive-explanatory project, two questions inevitably arise: Why does the book include the two normative chapters, and what is the relationship between the descriptive-explanatory and normative claims?

The first thing to note in this regard is that the descriptive-explanatory chapters are not wholly non-normative. In these chapters the authors say that they are "skeptical" of the possibility of multilateral cooperation. This statement clearly has normative implications. In particular, it suggests that

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efforts at multilateral cooperation are likely to be futile and that it is therefore unreasonable to engage in them—unless perhaps there is some strong moral imperative to do so. The point of the latter qualification is that, although morality cannot require us to do the impossible ("ought" implies "can"), in some cases it may require us to attempt to do something that is very unlikely to succeed, if the moral stakes are high enough. (For example, we might have a moral obligation to try to rescue a lost hiker, even though we think it is unlikely he will still be alive, or we may be morally obligated to resist a genocidal regime, even if we have reason to believe that we are unlikely to prevail against it.) One connection between the "skeptical" conclusions of the descriptive-explanatory chapters and the normative claims of chapters 7 and 8 may, then, be this: The former tell us that multilateral cooperation generally, and in particular the use of international law to achieve multilateral cooperation, is very unlikely to succeed, while chapter 7 tells us that there is no moral reason to buck the odds and try to achieve multilateral cooperation through international law. Chapter 8 proposes that, at least so far as we have a moral commitment to democracy, we actually have a strong moral reason not to pursue international cooperation through international law.

In the symposium for which this Essay was written, Goldsmith and Posner adamantly denied that they have any conscious "normative agenda" in the book. Whether the authors have a normative agenda—conscious or not—is in my judgment irrelevant to the evaluation of the book. However, it is not irrelevant to ask what the normative import of the book is or is likely to be taken to be. Given that they do not rest content with the descriptive-explanatory account they offer, but go on to include the two normative chapters, and imply that an attitude of "skepticism" about international cooperation through international law is appropriate, if one accepts their descriptive explanatory account, the book as a whole can be seen as a justification for a particular normative orientation toward international law. And given the current political context, it would be naïve to think that readers will not ask whether that normative orientation supports what many take to be the current U.S. government's policy of treating international law as only of instrumental value, as something to be complied with when it is in the interest of the United States to do so, but as having no normative weight at all when it does not. Without claiming that this book is an attempt to provide an intellectual basis for Bush administration policy, it is accurate to say that its normative claims, if valid, would lend support to the view that it is wholly permissible for the U.S. government to take a purely instrumental stance
toward international law, and that its citizens do not have a moral obligation to try to prevent their government from doing so.

II. CONFLATING SEVERAL DISTINCT OBLIGATION ISSUES

Goldsmith and Posner do not distinguish clearly between four quite different normative questions—but rather proceed as though by answering one they had answered the others.

1. Is there a moral obligation to obey international law as such (that is, to obey a norm simply because it is an international law)?

2. Do states have content-independent, “epistemic” reasons to comply with international laws generally? (One has a content-independent reason to comply with a norm if one has reason to comply with it independently of a positive evaluation of its content).

3. Do states have content-independent, “epistemic” reasons to comply with the rules of some international legal norms?

4. Is there a moral obligation on the part of individuals to try to cause their states to promote the rule of law in international affairs and to act sometimes in ways that do not maximize state interests?

At various points in the discussion in chapter 7, it is clear that the authors would respond negatively to the first two questions, though they fail to distinguish between them clearly. Whether they are attempting to provide a negative answer to the third and fourth questions is unclear. I shall argue that it is important for them to answer the third and fourth questions negatively, given the general normative thrust of chapters 7 and 8 taken together, namely, the view that it is appropriate for both citizens and states to regard international law as having merely instrumental value. I shall also argue that the arguments Posner and Goldsmith present in the two normative chapters, when considered in conjunction with the descriptive-explanatory parts of the book, fail to establish a negative answer to the third and fourth questions.

A. Is There a Moral Obligation to Comply with International Law as Such?

At times it appears that the goal of chapter 7 is only to show that states have no moral obligation to comply with international law as such. However, a good deal of the argument in this chapter explicitly tries to show that individuals have no moral obligation to try to cause their states to comply with
all or most international legal norms. Consider first the claim about the lack of obligation on the part of states. To establish this claim Posner and Goldsmith offer a somewhat patchy appeal to the work of philosophers, including A. John Simmons, that purports to show that individuals have no moral obligation to comply with the law as such. They suggest, not unreasonably, that at present the dominant philosophical view is that there is no moral obligation to obey the law as such, in other words that the mere fact that something is a law provides no significant moral reason to comply with it. They note that the doubts philosophers such as Simmons have about the capacity of individual consent to ground a moral obligation to comply with law as such become magnified in regard to the proposal that states have a moral obligation to comply with international law as such because they have consented. One obvious problem, as I have noted elsewhere, is that a considerable portion of international law is not grounded in state consent.

Let us assume that their analysis is correct so far. The question becomes, to put it bluntly, “So what?” This question is apropos because, as the philosophers upon whom the authors draw explicitly say, it is unclear that the truth of the claim that there is no moral obligation to obey the law as such has much practical significance. That is why Simmons and others refer to the claim as “philosophical anarchism.” It does not show, for example, that individuals do not have strong moral obligations to comply with various laws. Nor should we assume that if most people do not believe that they have a moral obligation to comply with law as such the legal order will collapse—and Posner and Goldsmith provide no evidence about attitudes toward law that would back such a prediction.

The authors have two answers to the “So what?” question. First, they state that the dominant position among international legal scholars is that states have a moral obligation to comply with law as such. I am not sure that this is the dominant position, or even the majority position, among legal scholars at

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2 For example, the authors indicate that they are going to try to answer the question of “why individuals and governments should feel obligated to cause the state to comply with its legal obligations.” GOLDSMITH & POSNER, supra note 1, at 189. Similarly, they ask whether “citizens have a moral obligation to cause the state to comply with its obligations,” and go on to rule out as implausible various bases for saying that they do have such an obligation. Id. at 188. Also, the authors query whether “members of the public really have an obligation to pressure their government to maintain adhere to a treaty that could only have disastrous effects for the state and its citizens. . . .” Id. at 192.

present. But if it is, then the authors are to be commended for joining others who have already pointed out that this is an error. However, nothing of interest follows in the text regarding states' or citizens' general normative stance toward what international law should be. It certainly does not follow either that there are no content-independent reasons for states to comply with the rules of certain international legal institutions or that there is no moral reason for individuals to try to cause their states to promote the rule of law in international affairs or to act, on occasion, in ways that do not maximize state interests. Second, Posner and Goldsmith say that:

There is a practical reason why it matters whether states have a moral obligation to comply with international law [as such]. International law scholars who believe that states have such an obligation are, as a result, optimistic about the ability of international law to solve problems of international relations, and they attribute failures to the poor design of international treaties and organizations.\(^4\)

It is not obvious why anyone (international law scholars or otherwise) would infer from the claim that states have a moral obligation to comply with international law as such the optimistic conclusion that international law can solve “problems of international relations” if only treaties are written more carefully. One might think that the problem is that states have powerful incentives not to fulfill their obligations. It may be true that if one thought that states have a moral obligation to comply with international law as such, then it would be important to establish publicly that a given state has such an obligation, in order to try to marshal pressure to ensure that it fulfills the obligation.

In my judgment, however, the question of whether states have a moral obligation to comply with international law as such is not really the central question, quite apart from the difficulties of working out a coherent account of the state as a moral agent, capable of having moral obligations. It may be the case that states have no obligation to comply with international law as such and yet it may still be true that the project of promoting the rule of law in international affairs is morally important and that, in certain areas of international law, states have content-independent reasons to comply with international law—that is to comply irrespective of a positive evaluation of the

\(^4\) Goldsmith & Posner, supra note 1, at 203.
content of the particular laws in question. It is to these other questions that I
now turn. The answers to these questions do have important implications for
how citizens should try to cause their states to act vis-à-vis international law.

B. Do States Have Content-Independent Reasons to Comply with International
Laws Generally?

Posner and Goldsmith set the stage for this question by referring, without
much explanation, to Joseph Raz’s view of authority, saying that “For Raz
(1987), domestic law can have authority on epistemic grounds: the law might
incorporate knowledge not available to citizens.”\(^5\) Put more accurately, Raz’s
view is this: One has content-independent reasons to comply with a norm if the
source of the norm is such that in acting in accordance with the norms it issues
we act better than we would by following reasons that apply directly to us.\(^6\)
For example, we have reason to treat the norms of the Department of Motor
Vehicles (traffic laws) as “authoritative,” that is, to comply with them
independently of whether we evaluate their content positively, if we do better
by complying with them than with deciding, in each particular case, whether
to drive on the right or the left, etc.

Remarkably, Posner and Goldsmith’s consideration of the relevance of
Raz’s notion for international law consists of just one sentence: “But, however
plausible this argument may be for domestic law, it is unlikely to be true for
international law.”\(^7\) This is hardly satisfactory. First of all, Raz denies that
domestic law generally is such that complying with it enables us to act better
than we would by acting on reasons that directly apply to us; his aim is not to
use this conception of authority to show that there is an obligation or even a
reason to comply with all or even most domestic laws. Second, even though
it is no doubt true that states do not have content-independent reasons to
comply with international laws generally (just as individuals do not have
content-independent reasons to comply with domestic laws generally), states
may have content-independent reasons to comply with the norms of some
international legal institutions. This would be the case, for example, where the
institution performs a valuable coordinating function by providing credible
information to states, or supplies more accurate and impartial assessments

\(^5\) Goldsmith & Posner, supra note 1, at 195 (citing Joseph Raz, Government by
Consent (1987)).


\(^7\) Goldsmith & Posner, supra note 1, at 195.
regarding compliance with human rights treaties than states could achieve on their own. Nothing the authors have said so far rules out this possibility, and there may be a number of international legal institutions that fit this description. Consequently, Posner and Goldsmith have not established their central "instrumentalist" claim, if this is understood as the assertion that whether a state should comply with any particular international legal norm depends solely on whether doing so would maximize its interests.

Of course, the fact that states have content-independent reasons to comply with the norms of some international institutions is compatible with the authors' "instrumentalist" thesis, if "better" (in "enabling the state to act better than it would if it acted on reasons to apply directly to it") is restricted to better serving the state's long-term interest. However, the Razian conception of authority is not limited to reasons of self-interest; its notion of reliance on institutional rules (independently of a positive evaluation of the content of the particular rules) as enabling us to "act better" leaves open whether "better" means only "better serve one's own interest" or "better" should be understood to accommodate other-regarding values. That is why I included the example of an international legal institution providing better assessments of human rights violations. Although Posner and Goldsmith argue in the descriptive-explanatory chapters of the book that states do generally act solely to maximize their own interests, they cannot merely assume, in the normative chapters, that states ought to act only in a way that maximizes self-interest and then use this assumption to try to argue that a purely instrumental attitude toward international law is appropriate for citizens or for states. Thus, they have neither shown that states do not have content-independent reasons to comply with the norms of some international institutions, nor that when they do this it is merely an instance of the instrumental value of international law, where "instrumental" means "valuable for advancing state interests."

C. Do Individuals Have a Moral Obligation to Try to Cause Their States to Promote the Rule of Law in International Affairs?

Let me briefly recapitulate why I think the authors need to answer this question negatively. Their descriptive-explanatory account leads them to conclude that it is appropriate to be "skeptical" about the prospects for cooperation through international law. Indeed, they claim that the beneficial developments attributed to international law, such as improvement in the protection of human rights, are due to factors other than cooperation. In other words, Goldsmith and Posner try to give us reason to believe that the prospects
of successful cooperative international action through international law are very poor. Then, in chapter 7, they try to block the possible rejoinder that even if the prospects for success are poor, we should try to prevail on our states to "enter into more treaties," create more international law, etc., because we have a moral obligation to try to cause our states to promote the rule of law in international relations, or because we believe that international law can be a significant instrument for attaining cosmopolitan goals. The point here is that there are some people who believe in the rule of law and think that they have a moral obligation to do what they can to help promote it in international relations. There are also others who believe that international law can play a significant role in helping to achieve moral progress, whether or not they attribute this to the notion of the rule of law or not. Because states are still, for the most part, the creators of international law, both groups will conclude that they have an obligation to prevail on their states to engage in a constructive—and not merely instrumental—way, even if they think that the odds of success are not good, if they believe the potential moral payoff is high and if they believe that the costs of investing energy in the project of influencing their states in this way, including the opportunity costs, are not too high. If Posner and Goldsmith could show that individuals have no moral obligation to try to cause their states to promote the rule of international law—or that the commitment to democracy provides a moral reason not to try to promote it—then they would close this loophole in the argument that because cooperation under international law is unlikely to succeed, we should not be concerned if our states take a purely instrumental posture toward international law. In current political terms, they would have shown that we should have no objection to what some say the Bush administration policy is, namely using international law when it furthers our state interests, ignoring it when it does not.

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8 There are two reasons to think that the authors believe themselves to be establishing a negative answer to (2) as well. First, they describe their task in the book as advancing an "instrumental" theory of international law, and they clearly think that their instrumental view has an important normative component. From a normative point of view, an instrumental theory of international law is one according to which international law has only instrumental value, and this presumably means that the proper attitude toward not just individual international laws but also the enterprise of international law—the attempt to extend the rule of law to international affairs—is purely instrumental. In other words, not just compliance with particular international laws, but the enterprise of international law should be regarded as being valuable only to the extent that engagement with it furthers state interests. Second, the following passage, at the beginning of chapter 8, summarizes what Goldsmith and Posner claim to have established in chapter 7, and this summary refers not just to the proper attitude toward this or that particular
The main point I want to make is that nothing that Posner and Goldsmith say in chapter 7 supports the conclusion that the answer to question (4) is negative. Even if they have shown that states do not have a moral obligation to comply with international law as such, it does not follow that individuals have no moral obligation to try to cause their states to promote the rule of law in international relations or to use international law to promote moral progress in the world. Nor does the pretty obvious fact that not all areas of international law have Razian authority support a negative answer to question (4). Whether the answer to question (4) is negative or affirmative depends upon the resolution of complex issues concerning the importance of the project of establishing the rule of law which Posner and Goldsmith do not engage in this book.

More specifically, the authors do not consider why it is that some people apparently believe that there are moral reasons to promote the rule of law in international relations. To put the same point differently: Posner and Goldsmith indicate no awareness of the moral attractiveness of the ideal of the rule of law; so it is not surprising that they conclude that there is no moral obligation to try to promote the rule of law and that international law has only instrumental value.

It is beyond the scope of this Essay to provide anything approaching a satisfactory account of what is morally compelling about the ideal of the rule of law or to show that the rule of law should be promoted not only domestically, but in international relations as well. Instead, I will only sketch some of the elements of the ideal of the rule of law that have led some people to find it morally compelling. Even if I succeed in making a good *prima facie* case for why individuals ought to try to promote the rule of law, this would not be enough to show what a commitment to doing so implies for how we should try to get our states to act in their foreign relations. For one thing, the best accounts of the morally compelling features of the ideal of the rule of law are geared toward what *domestic* law can be like, as I shall presently show.9 In my judgment, the most morally compelling features of the ideal of the rule of law international law but toward the enterprise of international law.

Chapter 7 analyzed a state's moral duty to comply with international law. This chapter analyzes the state's moral duty to enter into more treaties that would benefit third-party states, give up sovereignty to institutions which promote justice such as the International Criminal Court (ICC), and, in general, act on the basis of global welfare rather than state welfare.

GOLDSMITH & POSNER, *supra* note 1, at 205.

9 I am indebted to Jack Goldsmith for prompting me to take this point seriously.
have to do with the ways in which a legal system can protect individuals' interests and respect individuals' autonomy; but much of international law concerns the relations among states and in many cases states do not represent the interests of some or even most of their citizens. So it is not clear just how the commitment to the rule of law is to be cashed out in the international arena. Secondly, and equally importantly, it is crucial not to confuse a commitment to the rule of law with support for existing law and legal institutions, and this is especially true in the case of existing international law and existing international legal institutions—which are extremely defective in many cases from the standpoint of the ideal of the rule of law.

For example, it seems that some believe that the rule of law in international affairs requires strict adherence to the principle of "state equality"—that international law should stringently avoid discriminating among types of states, at least so far as the most important rights of sovereignty are concerned. Robert Keohane and I have argued that this is a mistake, that those who hold this view are confusing a commitment to the rule of law, that is, a commitment to lawfulness as a normative ideal, with one particular feature of the current international legal system. We have argued that under certain conditions a rule-governed coalition of at least minimally liberal states would be the appropriate venue for making some especially problematic decisions concerning the use of force. Such an arrangement would violate the "equality of states" principle in the latter's application to decisions to use force. Yet it might be better from a moral point of view and a better approximation of the ideal of the rule of law.

Before pursuing these complications further, however, let me clarify the general point that whether individuals have a moral obligation to try to ensure that institutions promote the rule of law does not depend upon whether they (or the state) have a moral obligation to comply with law as such. There can be

10 Allen Buchanan, Between International Law Fetishism and International Law Instrumentalism (unpublished paper, on file with the author).
12 It is ironic that those who have rejected the proposal for a liberal coalition to make decisions concerning the use of force almost invariably say that the Security Council is the only legitimate venue for making such decisions, given that the permanent member veto is a clear (and, one might add, morally arbitrary) violation of the principle of the "equality of states."
a moral obligation to promote the rule of law in spite of the fact that there is no moral obligation to obey any particular law solely because it is the law, because whether the enterprise of law is morally compelling is independent of the moral quality of any particular law and indeed independent of the particular characteristics of a given legal system. Those who believe that there are moral reasons to engage in the enterprise of law find the ideal of the rule of law morally compelling, but this does not commit them to the view that the fact that a norm is an international legal norm creates an obligation to comply with it.

Here I can only begin to indicate some of the features of the ideal of the rule of law that are thought to make it morally compelling, drawing heavily on Lon Fuller's conception of the inner morality of law as well as on H.L.A. Hart's work. The ideal of the rule of law is usually understood to include several elements, each of which is only approximated in actual legal systems, whether domestic or international: (1) laws are to be general, (2) they are to be relatively stable, thereby making possible and sustaining a framework of expectations within which individuals can plan their actions, coordinate with one another, etc., (3) to the extent that law addresses individuals, it should address them as choosers, as individuals capable of autonomy, and when it addresses corporations or other collective entities such as states, it should do so in ways that are compatible with respect for individual autonomy, (4) the basis of legal determinations is to be principled and deliberative, and the principles invoked, as well as the deliberative processes themselves, are to be both public and accessible, (5) the interpretation and administration of law are to be impartial, (6) all persons are to be equal before the law, (7) although the law may be ultimately backed by coercion, it is to provide a mode of conflict resolution that does not rest primarily on power, but on the principled and inclusive consideration of interests, and (8) over time, the process of principled deliberation should aid in the establishment of a body of rules that is coherent, that satisfies the preceding six conditions, and that can serve as a basis for making future legal determinations.

Given this rudimentary sketch of the ideal of the rule of law, it should be clear that it bears two intimate connections with justice. First, the ideal of the rule of law includes some important elements of justice, in particular the notions of impartiality, nondiscrimination, and respect for persons as autonomous beings who can give and accept justifications for acting. Second, although the ideal of the rule of law does not exhaust the content of justice, an institution that does a credible job of approximating the ideal will provide valuable resources for the pursuit of justice more comprehensively understood,
especially insofar as justice requires protection of every person's most basic interests and a commitment to oppose discrimination.

Notice that I have not said that justice requires equal consideration of persons' interests, but only that it requires protection of everyone's basic interests. This distinction is important, because I want to emphasize that one can appreciate the moral importance of the rule of law because of its connections with justice, and therefore recognize that there is a moral obligation to promote the rule of law, without in any way being committed to the very strong, strictly egalitarian view that everyone's interests—their well-being as a whole, not just their basic interests—ought to be given equal consideration. This point will be important when we examine Posner and Goldsmith's normative claims in chapter 8. Even if they succeed there in establishing that strong cosmopolitanism is incompatible with democracy, this will do nothing to show that there is no moral obligation to try to promote the rule of law, because the ideal of the rule of law does not include the egalitarian commitments that are distinctive characteristics of strong cosmopolitanism.

I have suggested that the morally compelling character of the ideal of the rule of law is most easily grasped in its application to systems of law that take individuals to be the primary addressees of legal claims, and that it is therefore more difficult to ascertain what the ideal of the rule of law demands in the case of international law, given that the primary addressees of international law are states, not persons. Nevertheless, some of the elements of the ideal, such as generality and impartiality, as well as the notion that legal determinations should be made through publicly accessible, deliberative processes, and should contribute to the development of a consistent, coherent body of rules, apply directly to international law as well.

It is worth noting that the morally compelling character of the ideal of the rule of law actually provides a reason for thinking that there can be no moral obligation to comply with law as such: If an actual law falls far enough short of the ideal of the rule of law, there may be no moral reason to comply with it at all, much less a moral reason to comply with it simply because it is law. According to an even moderately positivist conception of what the law is, something can be a law and yet depart significantly from the ideal of the rule of law.

As I have argued elsewhere, a commitment to the rule of law in international relations may, under certain circumstances, require not only noncompliance with particular international legal norms, but even the creation of new institutions that may further weaken some existing international legal
institutions. Precisely the same is true for domestic laws and domestic legal institutions. For example, it was respect for the ideal of the rule of law, among other things, that supported not only voiding many laws created in the Third Reich, but also restructuring German legal institutions. A commitment to the rule of law, then, whether in the domestic or international sphere, is not the same as a commitment to the status quo, especially when the status quo falls far short of the ideal of the rule of law.

Let me hasten to say that I do not believe that many areas of international law even approximate the constituent conditions of the ideal of the rule of law. That is not the point. The point, rather, is that a proper appreciation of the ideal of the rule of law implies that we have moral reasons to promote the enterprise of law and that, therefore, it is not the case that international law is only of instrumental value.

The last statement requires an important qualification: Given the morally compelling character of the ideal of the rule of law, we have a moral obligation to promote the rule of law, internationally as well as domestically—unless it can be shown that the rule of law cannot be approximated to any valuable extent in international relations, or that the attempt to approximate it would involve excessive moral costs. Of course, more extreme proponents of the realist tradition have argued that the rule of law, precisely because it includes moral elements, cannot be established in international relations, because international relations are characterized by a massive and insoluble assurance problem that makes moral behavior irrational and unsustainable. Moreover, some realists, including Hans Morgenthau and E.H. Carr, have held that the moral costs of attempting to extend the rule of law to international relations are excessive. However, in my view and that of many others, the extreme empirical assumptions on which such a realist view rests are so implausible that we are not forced to conclude that the attempt to promote the rule of law in international relations is either futile or morally counterproductive. Be that as it may, Goldsmith and Posner do not present an extreme realist view, defend it against its legion critics, and then conclude that the enterprise of international law is doomed and that, therefore, there can be no moral obligation to promote the rule of law in international relations (because “cannot” implies “not ought”). Instead, they simply argue that there is no moral obligation to obey international laws as such, suggest that international

13 Allen Buchanan, From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, 111 ETHICS 673 (2001); Buchanan, Justice, supra note 3.
law as a whole does not have authority in Raz's sense, and then erroneously suggest that individuals have no moral obligation to try to cause their states to promote the rule of law in international relations.

It should not be surprising that chapter 7 yields only these conclusions, given that the authors do not engage the issue of what is morally compelling about the ideal of the rule of law, either in this chapter or anywhere else in the book. If law generally, including international law, has noninstrumental value, this is presumably because the enterprise of the rule of law embodies important moral values and, more specifically, because some of the features of a legal system both partly embody justice and also make the law a valuable resource for the pursuit of justice. There is, in fact, a remarkable absence, in Limits of any appreciation for why some people value the rule of law and why those that do are likely to find unconvincing the thesis that international law is only valuable to the extent that it advances the interests of states.

III. CONFUSING DIFFERENT COSMOPOLITANISMS

In chapter 8, Posner and Goldsmith first claim they will argue against strong cosmopolitanism, which they define on the first page of the chapter as the very extreme view that states should “act internationally on the basis of global welfare rather than state welfare.” However, on the very next page, they claim to have refuted the quite different view that states ought sometimes to act internationally in ways that do not maximize state welfare. (They say that the claim that states should perform international acts that do not pass a cost-benefit test where costs and benefits considered are only those attaching to that state itself is “misplaced.”) Of course, strong cosmopolitanism (the view that states should pursue global interests rather than their own) and extreme statism (the view that states should exclusively pursue the maximization of their interests) are not the only alternatives. There is also a range of views that are usually called moderate cosmopolitanism, according to which states may give priority to the interests of their own people, but nonetheless sometimes ought to act to protect the basic interests of foreigners. In chapter 8, as with their treatment of the moral obligation to comply with international law in chapter 7, the authors’ arguments are plausible only against the more extreme, already heavily criticized strong cosmopolitan view,

15 GOLDSMITH & POSNER, supra note 1, at 205.
16 Id. at 206.
and are entirely ineffective against the more plausible and increasingly widely held, moderate cosmopolitan position.

Before establishing the latter claim, however, let me note that, although the chief aim of chapter 8 is to show that strong cosmopolitanism is in "deep tension" with the commitment to democracy, there is no attempt to clarify exactly what sort of view strong cosmopolitanism is, and therefore it is difficult to tell exactly what is being argued for. Unfortunately, the authors do not avail themselves of some very useful distinctions that have been made in the burgeoning philosophical literature on cosmopolitan normative theory.

The authors fail, for example, to distinguish between cosmopolitanism as a moral view and cosmopolitanism as an institutional view.\textsuperscript{7} Cosmopolitanism as a moral view is usually described as the claim that every person is in some fundamental sense of equal moral worth and that, consequently, fundamental moral status is not dependent on citizenship or nationality.\textsuperscript{8} As an institutional view, cosmopolitanism is the claim that there should be a world government or some other sort of all-encompassing institutional structure in which all persons have equal membership rights. There are few takers these days for the institutional view.

Posner and Goldsmith target a view about what states should do; they want to argue that the claim that states should promote global interests rather than their own interests is both wrong-headed, because states will never do so ("cannot" implies "not ought"), and because it is in "deep tension with democracy." There are two ways one might interpret the claim that states should promote global interests "rather than" their own and hence two ways to understand what the authors mean by strong cosmopolitanism. Following the first interpretation, one takes the "rather than" literally: call this utterly self-abnegating cosmopolitanism, the view that states should disregard their own interests entirely and only pursue the global good (whatever that might be). Since nobody seems to hold this view, I will not consider it further. According to the second interpretation, strong cosmopolitanism is an impartialist view about how states ought to act: each state should give equal weight to its own interests (or rather, the interests of its citizens) and to the interests of every other state (the interests of their citizens).


For a number of reasons, I and many other contributors to the recent literature on cosmopolitanism reject the impartialist view and instead embrace a moderate cosmopolitan view when it comes to our prescriptions for how citizens should try to get their states to act.\textsuperscript{19} Our view is that individuals have a moral obligation to try to get their states to do more to protect the basic interests of foreigners who are at risk, but that it is perfectly appropriate for states to act with partiality toward their own citizens.\textsuperscript{20} Notice that being a moderate cosmopolitan in this sense does not mean that one rejects cosmopolitanism as a moral view; rather, it is because we believe that every person has fundamental moral worth—that every individual's basic interests deserve protection—that we hold that a proper appreciation of the state's rightful priority of its own citizens' welfare should not be confused with the quite different idea that the only legitimate function of the state is to serve its own citizens' welfare, which I earlier characterized as extreme statism. Later I will argue that extreme statism is a very implausible view of legitimate state functions.

With these distinctions among different kinds of cosmopolitan views in mind, we can now begin to assess Posner and Goldsmith's claim that it is wrong to expect states to act in a more cosmopolitan manner than they are presently doing and hence that it is wrong to hold that citizens have a moral duty to try to cause their states to do so (because "cannot" implies "not ought"). It may be true that some (moral) cosmopolitans underestimate the difficulty of changing states so that they act in more cosmopolitan ways. This can hardly be said, however, of many human rights activists (some of whom

\textsuperscript{19} See, e.g., BUCHANAN, JUSTICE, supra note 3, at 1-232; DAVID MILLER, CITIZENSHIP AND NATIONAL IDENTITY 161-79 (2000).

\textsuperscript{20} Goldsmith and Posner quote only one theorist, Michael Green, who seems to hold that existing institutions, as they are, rather than individuals, have cosmopolitan moral obligations. GOLDSMITH & POSNER, supra note 1, at 207. They then proceed to mischaracterize what some have called the "institutional turn" in ethics and international affairs, lumping a number of other theorists together with Green. Contrary to Goldsmith and Posner, the "institutional turn" is not that cosmopolitans have come to the conclusion that institutions rather than individuals have obligations to alleviate poverty in other countries; it is that they have come to realize that significant amelioration of world poverty will require institutional action. Neither Thomas Pogge nor Martha Nussbaum, to take only two prominent examples, hold the view that Goldsmith and Posner attribute to Green; yet both are prominent figures in the "institutional turn." So, because many cosmopolitans do not say that institutions, rather than individuals have cosmopolitan obligations, a convincing argument against cosmopolitanism cannot focus exclusively on the question of whether states have cosmopolitan obligations. The key question is whether individuals have a moral obligation to try to get their states to act in a more cosmopolitan manner.
may be strong cosmopolitans in the impartialist sense and some of whom may be moderate cosmopolitans). They know, from tough experience how hard it is, and often say as much.

Nevertheless, to enlighten those cosmopolitans who underestimate the difficulties, the authors correctly point out that there are several considerations that work against democratic states engaging in costly cosmopolitan action. The first thing to notice, however, is that, taken together, these factors do not support the conclusion that states cannot engage in more cosmopolitan action than they presently do.

For example, Posner and Goldsmith note that it has been argued on the basis of evolutionary theory that altruism is largely an intragroup phenomenon. But there is a large gap between the latter claim and the conclusion that states cannot engage in more cosmopolitan action than at present and that therefore it is wrong for their citizens to expect them to do so. The difficulty with such slides from "is" to "cannot" to "not ought" is two-fold.

First, from the standpoint of the simple evolutionary view on which Posner and Goldsmith rely, it is not just cosmopolitan attitudes that are hard to explain; the existence of the modern state itself is almost incomprehensible. In virtually all modern states there are many laws that are designed to provide benefits for some citizens by taking resources from others, and such laws have had considerable stability, in spite of the fact that the totality of citizens, the population of the state, is nothing like the sort of primary group whose altruistic behavior evolutionary theory is supposed to explain. There seem to be two possibilities: either (a) the existence and effectiveness of such laws within the state rely importantly on altruism toward one's fellow citizens or (b) it is made possible by institutional arrangements in the absence of such altruism. If (a) is the case, then the big question for Posner and Goldsmith is this: If individuals' altruism can be extensive enough to encompass hundreds of millions of people one will never meet and with whom one has virtually no interaction, simply because they are one's fellow citizens, what reason is there to believe that altruism's limits happen to coincide with those of current state borders? If (b) is the case, then Posner and Goldsmith need to explain why institutional arrangements can compensate for lack of altruism in the case of states, but not in the case of larger domains.

The authors suggest that within states there are "thicker" forms of association and that this explains the fact of genuine domestic cooperation and the existence of domestic laws that are designed to produce results that do not benefit all but provide special assistance to some. The obvious problem with this response is that the "thicker" forms of association that exist within states
typically do not encompass all citizens, but instead only exist among various subgroups (religions, ethnic groups, classes, etc.). Given how far current evolutionary theories are from explaining large-scale social cooperation, much less the modern pluralistic, multi-ethnic, and often multi-national state, it is not very persuasive to say that evolutionary theory tells us that we cannot expect any increase in cosmopolitan action. If evolutionary theory comes to be able to explain the existence of large modern states, it will presumably have to incorporate a larger and more complex role for institutions than it currently does. But there is no reason to think that if this is accomplished, the result will be support for the conclusion that genuine cooperation or other-regarding sentiments cannot extend across national borders.

Second, there are historical examples of people undertaking what certainly appear to be cosmopolitan actions even when it is not in their best interest to do so, and where they succeeded in enlisting large and powerful institutional resources, including those of the state, to achieve their cosmopolitan ends. One of the most remarkable is the movement first to stop the trans-Atlantic slave trade and then to abolish slavery. Individuals who largely objected to slavery on moral-religious grounds succeeded in creating a highly organized, politically savvy mass movement that eventually won over the British government and enlisted the force of the British navy. A significant feature of anti-slavery political discourse was the insistence that African slaves were moral equals, when it came to the protection of their basic interests, or at least their interest in liberty. Few abolitionists if any were egalitarians; the vast majority were probably better characterized as moderate cosmopolitans.

In response to this apparent counterexample, one might try to save the hypothesis that altruism is exclusively or primarily an intragroup phenomenon by saying that antislavery agitators succeeded in convincing people that African slaves were members of our own group, namely, humanity—recall the popular antislavery medal that depicted an African in chains, with the inscription, "Am I not a man and a brother?" But of course this would be a Pyrrhic victory, since adopting the thesis that altruism exists only within groups is vacuous if humanity counts as a group. The point is that it is one

21 See, e.g., ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES (2005). This book makes the case that the abolition of slavery was generally not thought to be in Britain's interest at the beginning of the movement and that the cost of using the British navy (which was otherwise heavily occupied with fighting in the Napoleonic Wars) to destroy the trans-Atlantic slave trade and the cost to the Empire of abolishing slavery in the West Indies (due to an anticipated decline in profits from sugar production) were thought to be quite high at the time.
thing to say that our evolutionary past or something else about our psychology creates obstacles to cosmopolitan sentiment and action, but quite another to draw the shamelessly convenient conclusion that we are already at the limit and that the limit cannot be moved outward.

The closest that Goldsmith and Posner come to arguing that we are already in fact at the psychological limits of altruism occurs in an instance of the rhetorical strategy of bait and switch, as when they say they will criticize an interesting position that they ascribe to prominent theorists and then attack a quite different, less plausible position that the theorists they cite do not hold. They mention Martha Nussbaum as a contemporary cosmopolitan who explores the possibility that a broadly humanistic education (along with modern electronic media and the greater interaction that globalization facilitates) can extend our sentiments to people we formerly regarded as alien. But then they quickly characterize this kind of view, quite dismissively, as "perfectibilist." This, of course, is a serious misuse of the term; to believe that people can become more cosmopolitan than they presently are is not to affirm the perfectibility of man. Here the authors substitute pejorative rhetoric for argument, falsely implying that anyone who favors more cosmopolitan education is a (wide-eyed) perfectibilist.

It is crucial to understand where the burden of argument lies in this instance. Goldsmith and Posner are advancing the very strong thesis that we are presently at the limit, motivationally and institutionally, of cosmopolitan action. Setting out a list of factors that tend to make it more difficult to engage in cosmopolitan action than in self-interested action, other things being equal, is a far cry from establishing this very strong thesis.

For example, the authors assert that the people of the United States are not willing to expend wealth and lives for humanitarian intervention, without even considering recent empirical literature on the subject. That literature is complex and not univocal in its conclusions, but some studies indicate that the U.S. public will in fact tolerate considerable costs of military interventions, including humanitarian interventions, under certain conditions that are far from fanciful. For example, some studies indicate that how many casualties or what other costs the public will tolerate depends in part upon whether the respondents think it was right to undertake the intervention and believe that the goal of the intervention is being successfully pursued. Similarly, Goldsmith

\[\text{22 GOLDSMITH \\ POSNER, supra note 1, at 220.}\]
\[\text{23 Id. at 214.}\]
\[\text{24 PETER D. FEAVEY \\ CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-}\]
and Posner flatly state that humanitarian interventions have not increased in recent years.\textsuperscript{25} Again, this is an empirical question that requires both careful definitions (what counts as humanitarian intervention?) and recourse to data, neither of which the authors even begin to provide. Without engaging this complex issue, one can say, however, that U.N.-sanctioned interventions that have been justified on humanitarian grounds increased significantly in the 1990s, including interventions in Bosnia, Haiti, Somalia, East Timor, and Kosovo. To summarize, the first part of chapter 8, the attempt to show that we should not expect any increase in cosmopolitan action on the part of states, is analytically confused (because it fails to distinguish between whether there are limits to altruism and whether we have reason to believe we have reached the limits), rhetorically disingenuous (because it portrays progress as perfection), and empirically weak (because it fails to engage the relevant empirical literature and instead merely asserts controversial sweeping generalizations, whose key terms, such as "humanitarian intervention," are left wholly unspecified).

IV. WHY THE COMMITMENT TO DEMOCRACY SUPPORTS COSMOPOLITANISM

The second part of chapter 8 attempts to show that there is a "deep tension" between strong cosmopolitanism and the commitment to democracy. Once again we must ask: What is strong cosmopolitanism? If it is the impartialist view that individuals should try to get their states to act so as to count equally the interests of their own citizens and those of citizens of other states, then I agree with the authors that it is highly unlikely that most citizens will in fact recognize or act on this putative obligation. But, contrary to what Posner and Goldsmith say, this does not show that citizens should not try to get their states to act in a more cosmopolitan manner than they are doing now. If, as I have suggested, the more plausible form of cosmopolitanism is moderate cosmopolitanism, then the more interesting question to ask is whether moderate cosmopolitanism is "in tension" with the commitment to democracy. My conclusion will be that moderate cosmopolitanism is not in tension with democracy as a matter of principle or theory. I think this point is worth

\textsuperscript{25} Goldsmith & Posner, supra note 1, at 220.
making, because, although Posner and Goldsmith say they are trying to show how problematic strong cosmopolitanism is for those committed to democracy, at times they seem to be rejecting moderate cosmopolitanism, for example, when they say that it is wrong for citizens of a democracy to expect their states to act in a more cosmopolitan manner than they do now, by ratifying more international treaties that serve the interests of foreigners, supporting the International Criminal Court, etc.

Before we proceed further, it is important to understand that even if it is true that there is a tension between the commitment to democracy and the commitment to moderate cosmopolitanism, it is not clear what follows from this. In particular, it does not follow that the citizens of a democracy should not try to get their governments to act in a more cosmopolitan manner than they presently do; nor does it even follow that government officials in a democracy should absolutely refrain from cosmopolitan action unless authorized to do so by the public. After all, there are lots of tensions in democracies: between individual autonomy and the common good, between the right to freedom of the press and the right to a fair trial, between the commitment to stable property rights and the need to rectify past injustices, for example. Furthermore, one should not assume that it is never morally permissible for state leaders to act without authorization, if the action in question would further an important moral goal or, more plausibly, avert a human catastrophe.

The tension the authors want to call to our attention exists, they believe, at both the institutional level and the level of theory or principle. With regard to the former level, they mention several institutional obstacles to the U.S. government taking cosmopolitan action. The most important obstacle, they contend, is the overarching requirement that "foreign policy must be justified on terms acceptable to voters [or, rather, to the majority of them]." Because Posner and Goldsmith believe that cosmopolitan sentiments are "weak" among American voters (and other democratic publics), they believe that this is a serious obstacle. As to how "serious" they think it is, that is unclear. The authors' statement, cited above, that it is a mistake to expect states to act in a more cosmopolitan fashion than they presently do, suggests that they think it is an insurmountable obstacle. They first present certain institutional features as serious obstacles, but then slide toward the unwarranted conclusion that they are insurmountable obstacles.

26 Id. at 212.
Part of the problem, as I noted earlier, is that they remain content to operate with the very vague, undifferentiated notion of "cosmopolitan sentiment," neither drawing on empirical work to try to determine the conditions under which different kinds of cosmopolitan action may be supported by publics nor telling us what counts as "weak" in this context. In addition, as I have also already observed, they too readily dismiss as "perfectibilist" the prospect that cosmopolitan sentiment might be strengthened, through education and institutional change. In summary, the authors' discussion of institutional obstacles to cosmopolitan action does not support the broad claim that it is very likely to be futile for citizens of a democracy to try to get their governments to engage in more cosmopolitan action than they now do, so it does nothing to show that citizens have no moral obligation to pressure their governments to do so (on the grounds that "cannot" implies "not ought").

Exactly what the tension between democracy and cosmopolitanism derives from at the level of theory or principle is perhaps not quite so clear. The following passage suggests that Goldsmith and Posner are uncritically assuming that any departure from the purpose for which a state was founded is either unfeasible or illegitimate.

Another crucial difference between a liberal democratic state and, say, Oxfam International, is that the state does not organize itself for the purpose of engaging in acts of cosmopolitan charity. The dominant purpose of any state is to create a community of mutual benefit for citizens and other members, and more generally to preserve and enhance the welfare of compatriots. The U.S. Constitution, for example, was designed to create a more perfect domestic order, and its foreign relations mechanisms were crafted to enhance U.S. welfare.\(^{27}\)

Notice, first, that the authors' thesis that the "dominant" purpose of any state is to preserve and enhance the welfare of its own citizens only rules out strong cosmopolitanism (understood either as the utter self-abnegation or the impartialist view); it is quite compatible with moderate cosmopolitanism, and it certainly does not rule out the possibility that states can act in a more cosmopolitan manner than they currently do and still accord a proper priority to their own citizens' welfare. Second, and more importantly, the fact that a state was created for a particular purpose may tell us that there are likely to be

\(^{27}\) Id. at 211.
institutional obstacles to pursuing other purposes, but it does not show that the pursuit of other purposes is unfeasible, much less inconsistent in principle or theory. The United States and other states currently pursue many activities that were not envisioned by their founders. The question is whether they ought to. The issue of when institutional goals should be expanded or otherwise revised is a very important one, but Goldsmith and Posner do not engage it. To summarize my argument thus far: Posner and Goldsmith have not shown that it is futile to expect democratic states to engage in more cosmopolitan action than they do, and they have not shown that moderate cosmopolitanism is incompatible with democracy in principle or theory. They have, however, given those cosmopolitans who underestimate the difficulty of getting democratic states to act in a more cosmopolitan manner good reason to reconsider their optimism.

I would suggest that there is a theoretical or in-principle tension worth considering, but that it is a tension between a certain view of democracy that Posner and Goldsmith may hold and the justifications for democracy. Since I have developed this line of thought in some detail elsewhere, I will only sketch it here.\(^{28}\) The core ideas are that the more plausible justifications that are given for having democratic government rely on universalistic moral values, and that these universalistic moral values not only impose limits on majority rule domestically (in the form of entrenched individual rights, for example), but also give us reason to regard the state as something more than merely an instrument for our mutual benefit. If this is the case, then there is something deeply wrong with the assumption that the only legitimate function of the democratic state is to realize the preferences of its own citizens or to maximize their welfare. The same reasons that we have for insisting on having a democratic state also require us to acknowledge that our state should not be regarded simply as an instrument for realizing our preferences or maximizing our welfare. Just as the values that undergird democracy justify internal limitations on democratic policy, in the form of entrenched individual rights that constrain majority rule, so they also impose limitations on how democracies should act regarding foreign relations.

Goldsmith and Posner seem to assume a commitment to democracy, while saying almost nothing about the justifications for democracy. The more plausible justifications for democracy typically fall into two classes: arguments to show that democracy is the most reliable form of government for

constraining abuses of government power and helping ensure that government effectively serves the interests of all citizens; and arguments to show that when individuals are subject to a system of coercively-backed laws, a proper regard for equality requires that in some sense each must have an "equal say" in determining what the laws will be. When fleshed out, both types of arguments appeal to certain morally relevant characteristics that are universal among people, not possessed exclusively by those who happen to be our fellow citizens. For example, when we try to spell out why government ought to serve the welfare of all citizens, we must appeal, ultimately, to the moral importance of each citizen's basic interests; but in doing so, we will, in the end, rely on something like the idea that any individual who possesses certain characteristics is deserving of protection. To take only one example: when John Locke argues that government is legitimate only when it protects life, liberty, and property, he appeals to what he takes to be generic features of human beings—their capacity for rationality in particular. He says they have these rights because they are men, not because they are Englishmen. If the basic interests, protection of which justifies the existence of the state and determines the conditions of its legitimacy, are human interests common to all persons, then surely a way of thinking about the nature of the state that provides no basis for obligations to help ensure that the basic interests of all persons are protected is fundamentally flawed. Similarly, attempts to flesh out the argument that everyone subject to a system of coercively backed laws ought to have a say in determining what the laws are must appeal, ultimately, to a principle of equality or of respect for autonomy that is universal in scope.

It does not follow, of course, that everyone is entitled to participate in some sort of "world-democracy." But it is hard to see how our commitment to the values of equality and autonomy that underlie our commitment to democracy in our own state could have no implications for our conception of the legitimate functions of the state, given that in our world states are the most powerful institutional resources we possess for implementing such fundamental moral values. In brief, the same values that support the commitment to democracy at least establish a prima facie case for regarding the state as a resource for implementing those values. But if this is so, then we cannot simply assume that as a matter of principle democracies are only legitimately concerned with realizing their own citizens' preferences or maximizing their interests. And we cannot, therefore, conclude that for this reason democracy is in tension with cosmopolitan state action as a matter of principle or theory. Simply to assume such a view of the legitimate functions of the state—to assume the validity of extreme statism—in an argument
against cosmopolitanism is to beg the fundamental question at issue. Yet without this assumption, Posner and Goldsmith's discussion of democracy in chapter 8 cannot show that cosmopolitanism, at least in moderate forms, and democracy are in tension as a matter of principle or theory.

I will mention briefly one other reason for rejecting extreme statism, the view that the only legitimate function of the state is to realize its own citizens' preferences or to maximize their interests. This view is incompatible with some very stable and apparently widely held moral intuitions about our negative moral duties to foreigners. Taken literally, extreme statism implies that the state ought to undertake an unprovoked attack on another state, if doing so would serve its citizens' interests, unless the majority of the citizens happen to disapprove of its doing so. Thus, the view that the state ought only to act to realize its own citizens' preferences or to maximize their welfare is in direct conflict with the intuition that it is wrong to harm the innocent and that it is wrong to engage in aggressive war.

A proponent of this view of the legitimate functions of the state might attempt to avoid this unsavory implication by saying that the government's mandate to do only what serves the best interests of its citizens (or realizes the preferences of the majority of citizens) is limited by a general negative duty not to harm. The problem is that this move appears to be wholly ad hoc. In other words, once it is conceded that the state is not properly conceived as being exclusively an instrument to advance the interests of its citizens (or to realize their preferences), we must face the question of why our obligations to foreigners are limited to the duty not to harm. The objection, then, can be formulated as a dilemma. Either the proponent of this view of the legitimate functions of the state must stick to it, denying that states have any obligations whatsoever to foreigners, including negative duties not to kill or injure them in the pursuit of maximizing their own citizens' interests or realizing the citizens' preferences; or he must acknowledge that states have such negative duties, but then face the charge that he provides no basis for not recognizing some positive duties as well. And note that here, once again, the choice is not between strong cosmopolitanism, understood as the extreme view that we ought to treat the interests of foreigners as equal to ours, on the one hand, and rejecting positive duties to foreigners altogether, on the other. A third, more reasonable alternative is that we have some positive duties to foreigners, and that our conception of legitimate state functions should take this into account.

I conclude that Posner and Goldsmith have not shown that there is a "deep tension" between democracy and moderate cosmopolitanism as a matter of principle or theory, and that they have given us no reason to think that the
institutional obstacles that they describe preclude a significant increase in cosmopolitan action relative to the status quo. I have also argued that the commitment to democracy in fact pushes us toward, not away from cosmopolitanism, insofar as the most plausible justifications for democracy rely on premises about the equal fundamental moral worth of all persons.

If the authors reply that their only aim was to show that there is a tension between democracy and strong cosmopolitanism, then two points are apropos. First, as I have already emphasized, by restricting their argument to an attack on strong cosmopolitanism, the authors would fail to engage what may now be the dominant type of cosmopolitan view—moderate cosmopolitanism. Second, restricting their attack to strong cosmopolitanism fails to support their central contention that we should not expect democracies to develop more cosmopolitan policies.

V. CONCLUSIONS

The Limits of International Law advances a number of provocative theses. Given the political context in which it occurs—and given the intellectual debate about international law that the current political context has stimulated—it is appropriate to ask not only whether the book succeeds in its intellectual aims, but also whether those aims, if attained, would lend support to the present posture of the U.S. government regarding international law.

The authors do argue that it is a mistake for U.S. citizens to expect their state to act in a more cosmopolitan manner. They also argue that the proper attitude toward international law—the only reasonable attitude, given their theory of how international law works—is purely instrumental, that international law is valuable only to the extent that it serves state interests. Finally, Posner and Goldsmith also suggest that there is some sort of incompatibility in principle between cosmopolitan commitments—at least serious ones—and the commitment to democracy. If all of these theses were true, then current U.S. policies that disregard certain fundamental international legal norms, including those prohibiting torture and the rendition of prisoners to countries where they will be tortured, would be more defensible than they are. This is not to say that the fact that the authors advance these theses shows that they support the policies in question. There are good moral and prudential arguments against such policies that are quite independent of the issue of what the proper posture toward international law is, and endorsing these arguments may be compatible with everything the authors say in Limits. Nevertheless, given the political context, it is important to understand that Posner and
Goldsmith do not succeed in establishing any of the foregoing theses and that, therefore, those who believe that this book provides support for the policies in question are mistaken.

Nonetheless, in the normative chapters of their book, Posner and Goldsmith have succeeded in performing two commendable services: they have helped to make clear the magnitude of the political task facing those who regard the democratic state as a valuable resource for realizing cosmopolitan principles, and they have challenged those who are committed to the rule of law in international relations to articulate more clearly the basis and nature of that commitment.