LEAVING CUSTOMARY INTERNATIONAL LAW WHERE IT IS: GOLDSMITH AND POSNER'S
THE LIMITS OF INTERNATIONAL LAW

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I. INTRODUCTION

International legal scholarship has long suffered from too much normative theorizing and too little positive analysis about how the international legal system actually works. This inattention to the empirical and descriptive has alienated international legal scholars from their colleagues in political science departments and lent much of international law scholarship an utopian air. Whatever the historical source of this state of affairs, however, it is rapidly fading. A new generation of scholars, steeped in a variety of social scientific methodologies, has turned its sights on international law and is actively employing positive theories of state behavior to enhance legal analyses. These scholars have also begun to undertake empirical studies in an effort to provide support for their theoretical claims. The latest, and certainly the most ambitious, effort is The Limits of International Law,¹ a new book in which Jack Goldsmith and Eric Posner, using game theoretic models and rational choice methodology, claim to offer a “comprehensive” theory of international law.²

The use of rational choice to explain state behavior is not new. International relations theorists have long used game theory and rational choice methodologies to model and explain the conduct of states. In recent years, moreover, they have begun to focus on international law as an important domain of state interaction. Thus far, however, most of their attention has been directed to major multilateral treaty regimes. Perhaps the most original part of Goldsmith and Posner’s book is its extended effort to develop and apply game theoretic models to the less known realm of customary international law and to undertake detailed case studies to determine whether the predictions of their models are borne out in actual state practice.³

I certainly applaud this project. While I am doubtful that rational choice approaches will ever provide a fully satisfactory positive account of international law, the careful deployment of such methodologies can provide useful insights and offer a needed corrective to some of the less grounded normative claims prevalent in contemporary international law scholarship. It is long overdue for the international law academy to take seriously cognate disciplines which have sought to provide systematic accounts of state behavior. Nevertheless, Goldsmith and Posner’s treatment of the subject is seriously

² Id. at 4, 17.
³ This assessment is consistent with their own. See id. at 17.
flawed and incomplete, and I fear that its most lasting contribution will be as
a spur to others.

I focus in this Essay on their treatment of customary international law. Without putting too fine a point on it, Goldsmith and Posner offer a rather bleak assessment of the capacity of customary international law to play a role in stabilizing interstate relations. Indeed, the overall message of the book seems to be that states are well advised not to place much faith in customary international law when determining how to conduct their affairs. This skepticism rests upon two principal hypotheses. The first is that states are exclusively motivated by self-interest and never by a desire to comply with international law or by moral concerns. Their second, which is purportedly entailed by the first, is a combination of specific claims tied to a pervasive sense of pessimism. Roughly speaking, they believe that, because states follow only their self-interest, customary international law can at most enforce—or rather reflect—a weak and fragile equilibrium, which will quickly disintegrate in the face of changes in background conditions or in the distribution of power. According to Goldsmith and Posner, states will not reliably comply with customary international law.

I consider below both the theoretical and the empirical aspects of Goldsmith and Posner’s project. Contrary to conventional wisdom, however, The Limits of International Law is not, at core, a theoretical book. Goldsmith and Posner do develop a game theoretic framework, chock full of technical jargon, for analyzing international law. But, as they implicitly recognize, their game theory models are meaningful only if, and to the extent that, they can be empirically verified. Consequently, they devote the greater part of their discussion to four historical case studies which, they claim, provide the necessary empirical support for their two principal hypotheses.

I begin by addressing the authors’ theoretical apparatus, pointing to a number of reasons to doubt whether their models provide a solid basis for the pessimistic predictions which they draw from them. Because the soundness of their models depends so heavily on the empirical evidence, however, I focus mostly on their case studies. In particular, I offer an in-depth analysis of part of one of their main case studies, which deals with a famous dispute between

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4 Much of what I discuss in relation to customary international law also applies to their discussion of treaties. Nevertheless, because customary international law and treaties have different characteristics, I confine my discussion to the former.

5 The bulk of the game theory applicable to customary international law appears in chapter 2; the case studies appear in chapter 3. The same pattern applies to their discussion of treaties, with chapter 4 devoted to theory and chapters 5 and 6 to case studies.
the United States and Great Britain over the customary international law of neutrality during the U.S. Civil War. My review of the historical materials suggests two main points. First, Goldsmith and Posner's historical account is superficial and incomplete and fails to present a balanced picture of the events they purport to describe. Second, a more thorough—though still preliminary—rendering of the historical sources shows that the actual history is much richer, more complex, and more challenging to their account than they suppose. It is not that this history necessarily resists explanation in terms of self-interest. My point, rather, is that their case studies fail to capture the relevant history and that the actual historical materials suggest that stable forms of cooperation, based on norms of customary international law, are more possible than their pessimistic intuitions allow. In my view, the crucial empirical side of their project fails to support their general hypotheses.

Because I have only looked in depth at one part of one of their case studies, it is theoretically possible that their other historical claims are more persuasive. For several reasons, however, that seems unlikely. First, the flaws in their account of the Civil War are sufficiently serious to call into question whether Goldsmith and Posner are even attempting to provide historically balanced accounts. Second, I have chosen a case study which deals with war. If there is any area of international law where self-interest, rather than law and morality, play a predominant role in state action, it must be here. This case study, then, is the one most likely to support the thrust of Goldsmith and Posner's claims rather than the other way around. If close scrutiny of their own case study—in an area most favorable to their approach—fails to support their claims, it is fair to conclude that the empirical support they have mustered for their overall approach is unconvincing. Finally, it is not just that their specific rendering of the Civil War history is flawed. For reasons that I touch on below, their general methodological approach—reflected not only in their approach to the Civil War but in their approach to all of their case studies—is not sufficiently rigorous to permit them to render sound historical judgments.

II. THE THEORETICAL FRAMEWORK

At the center of Goldsmith and Posner's theoretical framework are four relatively simple game theoretic models which, they claim, comprehensively explain state behavior in relation to international law. They term these models "coincidence of interest," "coercion," "cooperation," and "coordination." Of

6 For their exposition of these models, see GOLDSMITH & POSNER, supra note 1, at 26-34.
course, identifying these highly abstract “models” is only a modest first step. Goldsmith and Posner need to do a great deal more work before their models can be expected to generate specific predictions about the immensely complex universe of state interaction. Indeed, the models are merely formal expressions of some commonly held intuitive ideas. Put in less technical terms, the models describe four types of situations in which a state can be expected to comply with international law: when it is in its interests to comply irrespective of the conduct of other states; when a more powerful state coerces it to comply; when compliance is necessary in order to sustain ongoing mutually advantageous cooperative relations with other states; and when compliance beneficially coordinates its conduct with the activities of other states.

Goldsmith and Posner contend that employing this game theoretic framework facilitates the study of international law by generating predictions which can then be tested against empirical facts about the real world. Although they do not spend a great deal of effort developing their models beyond the mostly intuitive level I have described, they nevertheless believe that their models generate some important predictions, in particular, that, in a world of purely self-interested states, customary international law is apt to be weak and ineffectual, incapable of reliably guiding the conduct of states. They then devote the bulk of their effort to case studies which, they claim, confirm these results.

I follow Goldsmith and Posner’s lead and devote the bulk of my attention to their case studies. Nevertheless, to evaluate whether the case studies in fact support their principal claims, it is useful to begin by focusing on their theoretical discussion. I discuss, first, their claim that states are exclusively self-interested and, second, their claim that customary international law is a weak and unstable legal system.

A. Self-Interested States?

As already noted, Goldsmith and Posner repeatedly and emphatically claim that states are exclusively motivated by self-interest or, as they put it in game theory jargon, that “the payoffs from cooperation or deviation are the sole determinants of whether states engage in the cooperative behaviors that are labeled customary international law,”7 and, in a somewhat different

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7 Id. at 39. Technically, states are exclusively motivated by self-interest only if their “payoffs”—e.g., that which they seek rationally to maximize—are purely self-interested in nature. Game theory, however, does not require that payoffs be defined in terms of self-interest.
formulation, that customary international law "is not an exogenous influence on state behavior." Indeed, they distinguish their approach from other international relations rational choice theories on the ground that their own "methodological assumptions are more consistently instrumental than those found in this literature." 

Given the centrality of this point to their argument, it comes as some surprise that they never explain what they believe constitutes the self-interest of states. The concept of self-interest, however, is hardly self-defining, and it is therefore unclear what their claim actually entails. Indeed, without further specification, their thesis would appear to lack sufficient content to explain much, if anything, about state behavior.

Any rational choice modeling exercise has to start with an assumption about the motivations of the agents under study. Simply to assert that they act rationally to maximize their self-interest is, without more, essentially vacuous, entailing no more than that agents act rationally to further whatever it is they wish to further. That could be to acquire wealth or power, express anger or love, obtain vengeance or glory, or uphold deeply held moral convictions, to name but a few common human "preferences." To avoid tautology, therefore, rational choice modeling ordinarily starts by identifying a parsimonious interest or set of interests which the theory assumes motivates agents, typically, for example, wealth or a desire for power over outcomes in some relevant domain. The theorist then tries to verify the predictions which his models yield by comparing them to the outcomes generated by empirical testing.

Although Goldsmith and Posner acknowledge the importance of specifying state interests, they concede their inability to do so on an ex ante basis. According to Goldsmith and Posner, this inability results from the fact that state interests vary from context to context and from legal regime to legal regime. As a result, it is impossible to provide a general specification of what states seek to maximize. Indeed, the only general limit that Goldsmith and Posner are willing to venture is purely negative: The one thing states are not

Hence, consistently with the premises of game theory, state payoffs could include preferences for moral action and law compliance. Of course, that is not what Goldsmith and Posner have in mind.

8 Id. See also id. at 25, 43.
9 Id. at 17.
10 See id. at 6.
motivated by in any context, they claim, is the desire or “preference” to uphold international law or morality.\footnote{See id. at 9. In addition to asserting their belief that states are not in fact motivated by a preference for compliance with law, Goldsmith and Posner explain this exclusion as necessary to give their models explanatory power: The assumption that states have a preference to comply “says nothing interesting about when and why states act consistently with international law and provides no basis for understanding variation in, and violation of, international law.” Id. at 10. But this has to be wrong. The point is to construct a model that accurately predicts state behavior. If states in fact have a preference for complying with law, then a model which excludes that preference will provide unreliable predictions in at least some cases.}

In view of this acknowledged inability to provide a general definition of self-interest, one wonders in what sense Goldsmith and Posner believe they are offering a “comprehensive theory” of customary international law. What states seek to maximize is at the core of any rational choice account. By leaving it to future scholars to investigate this question on a case by case basis, Goldsmith and Posner appear to concede that their models can do little work on their own.

Be that as it may, the failure to specify what states maximize undercuts the force of their emphatic claim that states act only out of self-interest. It is true, of course, that by eliminating one type of possible motivation—an interest in law compliance—Goldsmith and Posner have narrowed the range of potential state motivations. But they leave open a vast range of alternative possibilities. For all that Goldsmith and Posner are willing to say, states may act, as realists have traditionally claimed, only to advance their economic interests or relative power positions, but they may also act out of a desire for vengeance or glory, or out of habit, pride, honor, desire for consistency, or for any of a number of reasons that are not, strictly speaking, preferences for law compliance or moral action. Indeed, states may simply have a dispositional preference for cooperative over conflictual relations. As a result, the claim that states act solely out of self-interest, even understood in Goldsmith and Posner’s restricted sense, is nearly as vacuous as the claim that they act out of self-interest in an unrestricted sense.

Goldsmith and Posner might reply that the range of possible motivations is narrower than I have suggested, and, indeed, the tenor of their discussion certainly suggests that this is their view. In their case studies, for example, they consistently identify state interests in military, political, and economic terms. If that is the case, however, it is puzzling that they have not simply announced their agreement with the realist account and even more puzzling
that they specifically deny holding the realist view. In any case, if they do, in fact, accept something like the realist view, they ought to acknowledge and defend that approach. Of course, that would subject their argument to a whole new set of criticisms, including doubts about the plausibility of such a reductionist account of state motivation. In the meantime, given their professed inability to specify the nature of states' self-interest, it is impossible to draw much content from their claim.

It may be, however, that Goldsmith and Posner are not really interested in providing an affirmative explanation for state behavior, but, rather, their interest is just in ruling out the possibility that states are ever motivated by a sense that complying with the law is a value in itself. The belief that international law has "compliance pull" seems, indeed, to be one of the main targets of their book. If states never give any independent weight to the existence of a legal obligation, then surely a state—the United States, perhaps?—has no reason to feel that it should behave any differently. It can

12 See id. at 6.
13 For a classic statement of the realist, or neorealist, position, see KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).
14 The difficulties with their claim are exacerbated by their reliance on the at least partly fictional notion of collective intent. Again, Goldsmith and Posner acknowledge this issue but quickly pass over it. See GOLDSMITH & POSNER, supra note 1, at 6-8. I will not pursue the well known problems involved in ascribing intentions (or motivations) to collective bodies, except to underscore the complex character of the modern bureaucratic state with its multilayered institutional structures and competing power centers. Goldsmith and Posner strain credulity when they suppose that state policy is determined—or at least sufficiently so—by a unique state interest or set of interests that are consistently adhered to over time. See id. at 6, 8. Rather, on many, if not most questions, states are internally divided. Indeed, the historical account I present below nicely reveals how high executive officials frequently hold conflicting views about what the national interest is, how it is best pursued, and even on what the law requires. Which view prevails even on highly consequential decisions will depend, at least to some extent, on the exigencies of jurisdictional authority, on personalities and interpersonal relationships, and on momentary political considerations. Policy, moreover, will ultimately represent a more or less stable compromise of many perspectives. This pattern is evident in the often conflicting views, and recurrent clashes, between Secretary of State William Seward and Secretary of the Navy Gideon Welles over U.S. policy towards international law in enforcing the naval blockade of the South during the Civil War. For discussion, see infra notes 82-83, 85, 87 and accompanying text. These complications only grow in magnitude, moreover, once we note that many decisions about international law are made by lower level officials in a highly decentralized state apparatus. The point is not that rational choice modeling premised on the state as a unitary actor cannot produce useful insights, but that it is reckless to proceed on the assumption that these difficulties do not substantially limit the capacity of such an approach to capture fully the phenomena under study.
in good conscience freely consult its interests, paying no heed to international law as such. Or, to put it in the more colorful terms of contemporary discourse, if the United States is from Mars and Europe from Venus, the U.S. Martian has no reason to credit the moral outrage expressed by European Venutians at its violations of international law. Both Martians and Venutians are, after all, equally following their interests. It is just that international law (apparently) is more favorable to European than to U.S. interests.\footnote{See Robert Kagan, Of Paradise and Power: America and Europe in the New World Order (2003).}

I suspect that something like this thinking underlies Goldsmith and Posner's approach. There are several reasons, however, for viewing the broad empirical claim which underlies it with skepticism. Begin with their inability to exclude any other motivation from the wide range of possible state motivations. Viewed in this light, their exclusion of a preference for law compliance seems arbitrary, an arbitrariness which is exacerbated by their failure to offer any theoretical justification for why this is the one motivation which they can say, ex ante, states never have. In the absence of such a theoretical justification, their claim appears to be no more than a brute assertion. Realists, in contrast, root their empirical claims in a well-specified theory of international relations. The structural logic of the international state of nature, they claim, forces states to pursue their military and economic interests and to disregard moral and legal concerns. Unlike Goldsmith and Posner, realists thus offer, in addition to empirical studies confirming their predictions, theoretical grounds to support their positive claims.

In the absence of theoretical support, Goldsmith and Posner have to rest the entire burden of persuasion on their empirical case studies. But this is a weight which their case studies simply cannot bear. I leave aside for now whether the manner in which they have executed the case studies is sufficiently rigorous to permit them to draw from them any empirical support for their hypotheses. Under the best of circumstances, it is extremely difficult to prove that self-interest (suitably specified) provides the sole explanation for state behavior in a given instance. If a case study reveals a state's compliance with an accepted rule, for example, it will be difficult to establish why the state complied. It may have complied out of self-interest, or it may have complied out of a sense of duty to uphold the law. Or, it may have complied for both reasons. Without highly refined tools, the cause will appear to be uncertain or overdetermined, failing to provide a sound basis for any empirical conclusion. Likewise, where a case study reveals a state's violation of an accepted rule, one plausible
inference may be that the state acted in its self-interest, though most often other explanations will also be plausible. Even where self-interest appears to provide the best explanation, however, that will still not be sufficient to establish that the state did not also have a preference for compliance with the law. At most, it can only establish that self-interest trumped in this particular instance. Of course, even if self-interest appears to be the sole motivation in one or more instances, that fact alone will not prove that a preference for law compliance does not exist in other cases. The methodological complexities are extremely demanding.

My point is not to deny the plausibility of the claim, at least in some form, that states generally follow their self-interest. Rather, what I want to emphasize is how little Goldsmith and Posner have actually done to make that claim any more plausible than it will already be to observers of state behavior. It is mysterious, moreover, why they insist so stridently that states have absolutely no preference in any context to comply with international law because of its status as law. This claim is dubious when formulated in such absolutist terms and, once it is conceded that self-interest plays a large role in state motivation, adds little to their overall argument.

In any case, Goldsmith and Posner tie their claim about the self-interested behavior of states to their larger attack on the so-called “compliance pull” which many scholars believe international law exercises on the conduct of states. For Goldsmith and Posner, the compliance pull just describes the degree to which states are motivated to comply with international law because it is law, rather than because it is in their self-interest. If states have no such motivation, as they insist, then international law, by definition, can have no compliance pull. However, this conception of the compliance pull is so overly stringent that it leads Goldsmith and Posner astray. In the context of rational

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16 Additional complexities are introduced, moreover, by Goldsmith and Posner’s reliance on the idea of collective motivation. For example, how is the empiricist supposed to determine whose interests represent those of the “state”? Likewise, what should he do in the face of shifts in political power within the state? If Republicans believe that the use of “coercive” interrogation techniques is in U.S. interests and Democrats believe otherwise, is the use of such techniques in U.S. interests so long as a Republican sits in the White House and not in its interests when a Democrat assumes the presidency? What if the Secretary of Defense believes that the use of coercive interrogations is in U.S. interests but the Secretary of State disagrees? Given the degree of internal conflict over many aspects of foreign policy, these considerations raise daunting theoretical and empirical challenges. For further discussion, see supra note 14.

17 There are many different versions of the compliance pull. As Goldsmith and Posner suggest, some rest heavily on the idea of legitimacy, arguing that states generally view international law or at least some international legal norms as legitimate and are inclined to
choice theory, the important question is not whether states follow their self-interest. Indeed, that is the first premise of a rational choice approach. Rather, the critical question is whether states have standing dispositions to view compliance in many or most instances as in their interests and as not requiring continual reevaluation on an ongoing basis. If so, then international law exercises a compliance pull irrespective of whether states are exclusively self-interested. What is crucial, then, is not whether self-interest is the only motivating force but whether international law can provide states with a reasonably stable equilibrium on which they can rely—thereby giving rise to a "compliance pull"—or, as Goldsmith and Posner contend, it cannot. And this brings us to their second, and more consequential, claim.

B. The Supposed Weakness of Customary International Law

Unfortunately, equally significant problems beset this claim as well. Goldsmith and Posner believe not only that states follow their self-interest but that, as a result, customary international law is apt to be weak and unstable. In constructing their models, however, I fear that they have stacked the deck in a negative direction. Their skepticism is, therefore, at least premature.

Goldsmith and Posner's second claim is really a mixture of specific points and repeated expressions of pessimism about the prospects for cooperative behavior guided by customary international law. The idea is that customary international law—understood as behavioral regularities in which states engage—may sometimes exist (as predicted by their models) but—and this is comply with them for this reason. A variety of accounts have been offered to explain the sources of this sense of legitimacy. Others challenge the idea that states' conceptions of their self-interest are exogenously determined. In this view, international law exercises a substantial influence over how states conceive of their interests, rendering the emphasis in rational choice approaches on state preferences at least to some extent circular. States may follow their self-interest, but international law influences how they perceive what is in their interest, giving rise to a different notion of the nature of the compliance pull.

There are a number of considerations—consistent with rational choice premises—which may explain this standing disposition. Among these are a combination of limited resources, bounded rationality, and the fact that states participate in a dense web of mutually beneficial interactions which, they have reason to fear, will be undermined by noncompliant behavior even in discrete instances. The existence of a stable balance of power may also lead states to view noncompliance in general as risky to important state interests. Likewise, the complex multilayered structure of the modern bureaucratic state may make adoption by high government officials of a default compliance policy a potentially valuable mechanism for controlling the conduct of lower level officials. For further discussion, see infra notes 22-27 and accompanying text.
the important point—is possible only in limited areas and is likely to be weak
and unstable. They do not elaborate much on their theoretical reasons for this
claim. They are most specific when they briefly sketch a general argument for
the view that multilateral, as opposed to bilateral, cooperation in solving
collective action problems is highly unlikely to emerge through the mechanism
of customary international law, or, in their more technical terms, multistate
prisoner's dilemmas will generally not result in cooperative equilibria.19

Beyond that, they repeatedly stress that cooperative action in accordance with
norms of customary international law, where it exists at all, is likely to be weak
and fragile, subject to shocks whenever exogenous changes occur in
technology, the environment, or relative power relations among states.20 "We
are more skeptical about the role of international law," Goldsmith and Posner
declare, "than most (but not all) international relations institutionalists [i.e.,
rational choice international relations theorists] and most rational choice-
minded lawyers."21

It is difficult to reply to this claim in part because it is too squishy to be
easily falsified. Even if one shows that cooperation occurred in one instance,
Goldsmith and Posner can always brush that example aside as falling within
the range of possible cooperation that their models predict (or might predict if
fully specified) and deny that it undermines their general pessimistic
assessment. How many counterexamples are necessary to undermine their
pessimism? The answer is elusive.

Nevertheless, there are reasons to believe that, by failing to incorporate into
their models important features of the international system which have the
potential substantially to enhance the viability of customary international law,

19 Goldsmith & Posner, supra note 1, at 36-37. George Norman and Joel Trachtman offer
a strong technical reply to Goldsmith and Posner on this point, in George Norman & Joel P.
and Posner do not address the role of reputation in encouraging compliance with customary
international law, but they do sketch a generally pessimistic account in relation to treaty
compliance. Goldsmith & Posner, supra note 1, at 102-04. They are also skeptical that
customary international law can reflect universal, as opposed to mere bilateral, behavioral
regularities. See id. at 25. It seems right to claim that bilateral regularities are easier to form or
sustain, but it is difficult to understand what basis Goldsmith and Posner have for doubting the
possibility of wider regional or global regularities as well. Whether these can be sustained
depends entirely upon the structure of state "payoffs" which Goldsmith and Posner have not
attempted to specify. Hence, any conclusion about how widespread they are likely to be seems
premature.


21 Id. at 17.
Goldsmith and Posner have effectively cooked the books. Consider, most importantly, how they construct their "games." They focus exclusively on stock single-issue games like the capture of enemy fishing vessels during war. However, the games which states actually play are vastly more complex.\textsuperscript{22} States repeatedly and intensively interact across a wide range of subject areas, and they do so indefinitely into the future. They are, in fact, engaged in a "super game." This means that there are many opportunities for states to impose punishments on, and offer rewards to, other states depending upon the choices they make in the ongoing set of interactions. At one point, Goldsmith and Posner acknowledge this complexity, noting: "Analyses of customs between states should not overlook the influence of future interaction between the states outside the narrow context of the game."\textsuperscript{23} But they never consider the potential implications of this feature of state interaction, preferring instead to focus on simple single-issue games. Moreover, as this quotation reflects, they fail to consider the possibility that reputation may sometimes play a wider role, affecting not only future bilateral relations between the cooperating and defecting states but future interactions between the defecting state and third parties.\textsuperscript{24}

The failure to incorporate these considerations into their theoretical framework means that their models are unlikely to capture the full range of cooperative possibilities that may be sustainable even by states acting solely out of self-interest. This is, of course, a crucial point, suggesting that, even under a rational choice game theoretic analysis, relatively nonconfictual, mutually beneficial cooperation, guided by customary international law, may be possible on a wide basis. If so, game theory would recognize that customary international law can have an important impact upon state behavior, establishing the equilibrium which permits states to cooperate and the baseline which states can use to determine whether other states are cooperating or defecting. Once such an equilibrium is reached, states will use customary international law as a guide for determining what conduct they should or should not engage in.\textsuperscript{25} This does not mean that they will comply with

\textsuperscript{22} For their repeated recourse to the single-issue enemy fishing vessel game, see \textit{id.} at 26-32, 35, 40-42.
\textsuperscript{23} \textit{Id.} at 32.
\textsuperscript{24} For Goldsmith and Posner's pessimistic discussion of reputation in the treaty compliance context, which presumably they would apply to customary international law as well, see \textit{id.} at 102-04.
\textsuperscript{25} For these reasons, it is odd—and arguably misleading—that Goldsmith and Posner insist so strenuously on the claim that customary international law is not an "exogenous influence on
customary international law no matter what, but it does mean that states have strong motives for taking care to follow customary international law so long as they wish to remain in the cooperative game or perhaps in a larger set of linked cooperative games. Depending on how widespread and robust such cooperative games are, therefore, customary international law may have a large role to play in shaping state behavior. This is all the more likely to be so, if contra Goldsmith and Posner, customary international law does have a "compliance pull" because of states' preference to follow international law.

There is another related respect in which Goldsmith and Posner's theoretical discussion underestimates the potential importance of customary international law. Although they develop a model based on "coercion," they seem to envision only the simple case of a predatory powerful state forcing a weak state to comply with its peremptory demands. This is undoubtedly one version of coercive action, and if it were the only way in which coercion were exercised in the international sphere, it would certainly provide grounds for pessimism, at least on normative grounds. It might also provide reasons to doubt the stability of a system based upon the use of bilateral force.

The model of bilateral force, however, does not exhaust the possibilities for the use of coercion to uphold international law. From the early classic writers to contemporary times, international lawyers have recognized the crucial role
played by the balance of power in stabilizing the international legal system. Goldsmith and Posner never discuss the balance of power, presumably because they view it as dependent upon multilateral cooperation, which, they believe, is unlikely to occur. But this skepticism flies in the face of much of world history. In fact, as is well known, competing alliances have been common features of international relations. Perhaps, this circumstance can be explained in terms of the linked games in which states are engaged. Be that as it may, in the past the resulting balance of power systems have enhanced the stability of the international legal system, and they continue to have the potential to do so today. The important questions—in relation to which game theory might be usefully deployed—are, therefore, whether, and the conditions under which, different distributions of power can support a stable system of international law across different domains of state interaction, and how robust such a system might be in the face of changes in the distribution of power over time. Also particularly relevant today: What are the implications for international law of the emergence of a global hegemon? By failing even to consider this larger more complex picture, Goldsmith and Posner have simply ignored important phenomena which need to be incorporated into their models if they are to provide reliable predictions of state behavior.

It is not my aim to offer rigorous arguments about how to construct game theory models like those Goldsmith and Posner offer. I leave that to those who are competent to the task. My point is only that there are reasons to believe that Goldsmith and Posner have failed to incorporate into their models essential features of the international landscape without which their models are apt to underestimate the potential stability of the international legal system.

III. EMPIRICAL METHODOLOGY: GOLDSMITH AND POSNER'S APPROACH TO HISTORY

As we have already seen, game theory models, however mathematically sound, are unhelpful if they fail to predict actual state behavior. Consequently, Goldsmith and Posner's four case studies are of critical importance to their claims. They are supposed to provide empirical confirmation of the

predictions which their theoretical models purportedly generate and thereby to corroborate their two main claims—that states pursue only their self-interest in the processes through which norms of customary international law are formed, change, evolve, and are interpreted and in deciding whether to comply with or violate existing law, and that there are, in fact, far fewer behavioral regularities than has generally been thought and that those which exist tend to be fragile, short-lived, and prone to dissipate in response to exogenous changes in background conditions.\footnote{For the case studies, see \textsc{Goldsmith \& Posner}, \textit{supra} note 1, at 45-78. The studies deal with the law of neutrality, ambassadorial immunity, the territorial sea, and the fishing vessel exemption in the law of war recognized in the famous case, \textit{Paquete Habana}, 175 U.S. 677 (1900).}

This is a tall order for a limited group of case studies, and, for a number of compelling reasons, the studies fail to provide the desired confirmation. As an initial matter, there are serious selection bias issues in Goldsmith and Posner's sample that taint any results that actually emerge from the studies. How do we know that these four case studies are representative of state behavior in other areas? How were they chosen? Why the focus on historical practices rather than more contemporary examples of customary international law norms? Even more problematic, is Goldsmith and Posner's historical methodology, and here I am not (yet) referring to whether they have presented a fair account of the relevant historical events. Rather, the problem is that Goldsmith and Posner make little effort to investigate direct historical evidence—of which there is a great deal—of the actual motivations of the individuals who made the decisions on which they focus and of the background circumstances which informed their actions. Instead, they focus on the events themselves and draw speculative inferences about why states acted as they did.\footnote{\textit{See, e.g.}, \textsc{Goldsmith \& Posner}, \textit{supra} note 1, at 49-50 (discussing the Boer War but failing to consider the internal deliberations that explain Britain's policy decisions and reveal the unusual political context in which those decisions were made and the degree to which the British government generally considered compliance with international law an urgent priority). Goldsmith and Posner also tend to downplay or elide altogether important doctrinal complexities which are part of the explanation for state behavior. \textit{See id.} (describing the Boer War controversy but making it virtually impossible to tell what legal issue was in dispute—the definition of contraband, the continuous voyage doctrine, or the free ships, free goods rule—or the legal basis for the resolution of the dispute). For discussion of these various legal doctrines, see \textit{infra} notes 33-41 and accompanying text.} It is hardly surprising that their speculations confirm their starting hypothesis that self-interest provides the best explanation for state behavior in every instance. But this approach is unsound from a methodological perspective, and it seems
particularly questionable to be insisting on rigorous application of mathematically inspired models on the theory side but to feel free to ignore basic methodological constraints on the empirical side.

These problems are compounded by the breadth of their claims. Goldsmith and Posner broadly assert that states exclusively follow their self-interest not only when deciding whether to comply with customary international law but also when attempting to establish, modify, and interpret those norms. But it is widely accepted that self-interest plays a large role in state behavior, and, though Goldsmith and Posner’s claims are undoubtedly dubious in the extreme form in which they assert them, few would deny that states frequently pursue their interests when seeking to establish, modify, and interpret principles of customary international law. The same is obviously true of individuals within domestic society when it comes to the establishment, amendment, and interpretation of domestic law. (Would it be difficult to pick four pieces of congressional legislation and speculate convincingly about how the self-interest of powerful actors substantially shaped the contours of their provisions? Are we surprised to find that the litigating (or negotiating) positions of parties likewise tend to reflect their self-interest?) As a result, much of Goldsmith and Posner’s discussion seeks to establish what is (relatively) less controversial or, in any case, what is not central to contemporary debates over customary international law.30 Things get more interesting when they claim that existing customary international law has no compliance pull whatsoever, that states comply or not based solely on their self-interest, and, further, that the possibilities for the emergence of stable cooperative equilibria guided by customary international law are minimal. Unfortunately, however, Goldsmith and Posner do not attempt to sort out when the state behaviors they are discussing are of the former and when they are of the latter variety, and much of the rhetorical punch of their discussion comes

30 Indeed, Goldsmith and Posner seem to think that it is evidence of a defect or weakness that customary international law norms in some cases promote the interests of all states or benefit some while harming none. See, e.g., GOLDSMITH & POSNER, supra note 1, at 62 (describing the “innocent passage” rule in maritime law as having this character and quoting—though providing an incorrect citation to—William Hall, a leading British international law authority in the late nineteenth and early twentieth centuries, to the effect that denying innocent passage “is of advantage to no one”). But, from virtually any normative perspective, the law ought to do precisely that, especially in cases where states may, thoughtlessly or out of an overabundance of caution, be tempted to do gratuitous harm. See also id. at 76 (quoting, though again providing an incorrect citation to, Hall in another context making a similar point about the Paquete Habana exemption for fishing vessels). Of course, if that were all the law could accomplish, it could only have a modest impact on state behavior.
from examples of the former, which seem to lend plausibility to the examples of the latter.

These difficulties, however, pale in comparison to the problems which emerge on careful examination of the accuracy and balance with which they present their historical case studies. I will only examine one of these—which traces some of the relevant history pertaining to the customary law of neutrality in the nineteenth and early twentieth centuries—and my focus will be on one part of their discussion, that which deals with the U.S. Civil War. I focus on the Civil War example for several reasons. First, it deals with a topic which seems, at first blush, strongly to support Goldsmith and Posner's claims. It is well known that when the United States unexpectedly became a belligerent in a conflict with an important naval dimension, it suddenly reversed its traditional positions on some of the pertinent customary international law norms, positions which it had strenuously advocated over the course of its entire prior history. If the Civil War provides a more equivocal picture of the empirical evidence than Goldsmith and Posner suggest in their discussion—and if their objectivity in describing the relevant history is in doubt—there are strong grounds for doubting their other case study results. Second, as I alluded to at the outset, this case study deals with an aspect of the laws of war and, hence, is an area where power and interest, rather than law and morality, are most apt to play dominant roles in state behavior and where international law is most likely to be disregarded. If the empirical evidence in this area does not support their claims, it suggests that their larger project is in trouble. Finally, in order to make sound historical claims, it is necessary to undertake a thorough research effort. Even for a relatively limited time frame such as 1861-65, and a relatively discrete historical incident like the Civil War neutrality disputes, substantial efforts are necessary to justify the making of even tentative judgments. Indeed, I do not claim to have mastered the relevant historical materials, but I do feel confident that Goldsmith and Posner have only begun to scratch the surface of what is in fact an immensely rich and promising set of materials with which to work.

IV. CUSTOMARY INTERNATIONAL LAW AND THE CIVIL WAR

A full account of the disputes over the law of neutrality during the Civil War would require a lengthy article. I can sketch only some of the major points here. In my view, Goldsmith and Posner's account fails to present a balanced or accurate picture of the nature of the various disputes that arose and the resolutions which they engendered. Although my conclusions are only
my research strongly suggests that, contrary to Goldsmith and Posner's claims, customary international law played a surprisingly robust role in the disputes which arose between the United States and Great Britain over neutral and belligerent rights under the law of nations. It may be that the disputed "compliance pull" contributed to this outcome—a conclusion for which there is certainly evidence—or, alternatively, it may be that, despite strictly self-interested motivations on both sides, a stable equilibrium was nevertheless in place, a result which would shed considerable doubt on Goldsmith and Posner's pessimism about customary international law's possibilities. Be that as it may, even assuming that a purely interest-based story can account for all of the relevant events, it would certainly be a very different story than the one which Goldsmith and Posner outline in their book. It would point, moreover, in a very different direction. Rather than downgrading the importance of customary international law, which seems to be a central aim of Goldsmith and Posner's book, it would confirm its potential as a tool for stabilizing state interactions and for enhancing the capacity of states to advance their long term interests.

To understand Goldsmith and Posner's claims about the law of neutrality, it is necessary first to suffer through some background remarks on the applicable doctrine. The law of neutrality, which historically was an important part of the laws of war, was the subject of extended controversy and dispute throughout the nineteenth and early twentieth centuries (and indeed before then). In particular, Great Britain, being the dominant naval power and

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31 I have, in fact, only scratched the surface of the relevant historical materials, working principally from secondary sources and some published primary source material. There is a vast amount of additional material—much of it archival—that would need to be digested before any rigorously developed historical claims could be ventured.

32 Following Goldsmith and Posner, I use the phrase "compliance pull" here to refer to states' preference to comply with international law for its own sake or out of sense of moral duty. Nevertheless, contra Goldsmith and Posner, and as discussed above, "compliance pull" also usefully describes self-interested behavior that leads states to adopt a policy of presumptive compliance with international law, subject to being overridden in some circumstances. See supra notes 17-18 and accompanying text.

33 There are a large number of books on neutrality law during the relevant period. For a sampling, see, e.g., 11 J.H.W. VERZIJL, W.P. HEERE, & J.P.S. OFFERHAUS, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE (1992); JOHN W. COOGAN, THE END OF NEUTRALITY: THE UNITED STATES, BRITAIN, AND MARITIME RIGHTS, 1899-1915 (1981); PHILIP C. JESSUP, AMERICAN NEUTRALITY AND INTERNATIONAL POLICE (1928); C. JOHN COLOMBOS, A TREATISE ON THE LAW OF PRIZE (1926); 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW §§ 1166-1336 (1906). Prize law is also treated at length in virtually every major pre-World War II treatise on international law. See, e.g., 2 L. OPPENHEIM, INTERNATIONAL
frequently engaged in war, took a generally narrow view of neutral rights and a broad view of belligerent rights. States which were most often neutral and which had weaker navies—the United States qualifying on both fronts—resisted some aspects of the British approach. There are certainly difficult methodological questions about the extent to which there was customary international law on persistently disputed points. The difficulties are compounded by the move from a more natural law based theory of the law of nations in the eighteenth and early nineteenth centuries to a more positivist conception as the nineteenth century progressed. In any case, there were also many points of more or less widespread agreement, and, in the absence of consensus, British practice tended to prevail since it was, after all, the dominant sea power and its prize courts developed an elaborate body of law in the very large number of prize cases they were called upon to decide. Strikingly, the decisions of the great English admiralty judge Sir William Scott (later Lord Stowell), during the period 1798 to 1828, a period which encompassed the Napoleonic Wars, were remarkably influential and remained so even into the early twentieth century. Indeed, U.S. judges—Chief Justice Marshall and Justice Story among them—routinely relied upon Scott’s decisions in resolving prize cases, even during the War of 1812 when the United States was fighting a war with England in which the very causis belli was British neutrality practice upheld by Scott as consistent with the law of nations.  


34 The controversies between the United States and Great Britain from 1776 to the end of World War I are well canvassed in CARLTON SAVAGE, POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR (1934) (in two volumes) (summarizing history and reprinting extensive diplomatic materials and original source documents). For the leading nineteenth century U.S. treatise on international law, which considers the relevant issues in depth, see HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Richard Henry Dane Jr. ed., 1866).

35 It would be difficult to overstate the influence of Scott’s judgments, which were constantly cited and discussed at length in diplomatic exchanges, court judgments, and learned treatises. For discussion of Scott and his influence, see HENRY J. BOURGUIGNON, SIR WILLIAM SCOTT, LORD STOWELL, JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798-1828 (1987).

36 See BOURGUIGNON, supra note 35, at 280-85 (describing Scott’s influence as reflected in U.S. Supreme Court decisions and in the works of leading U.S. commentators like James Kent and Henry Wheaton). The references in Supreme Court prize cases to Scott’s decisions are pervasive. For examples from the War of 1812, see, e.g., The Julia, 12 U.S. (8 Cranch.) 181 (1814); The Venus, 12 U.S. (8 Cranch.) 253 (1814); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch.) 191 (1815). On Story’s relationship with Scott, see BOURGUIGNON, supra note 35, at 282-83.
The law of neutrality at that time was quite a complex affair. Goldsmith and Posner emphasize the so called "free ships, free goods" doctrine, which I come to in a moment. That emphasis, however, is misleading unless the doctrine is situated in the larger frame of neutrality law of which it was a part. A principal focus of neutrality law was trade by merchant ships of neutral powers with belligerents. When war broke out between two belligerents, neutrals preferred to remain as unaffected by the conflict as possible (or, more cynically, wished to engage in highly lucrative war profiteering). Hence, they favored rules which would protect their merchants in continuing to trade with the belligerent parties. Belligerents, in contrast, wished to cut off trade with their enemy. Most importantly, they wished to prevent "contraband" (weapons or other items useful to the enemy's military) from reaching their enemy via neutral ships. In some cases, moreover, they wished to disrupt the economy of the enemy state and thereby weaken its capacity or will to fight. In order to accomplish this, they needed to prevent neutrals from trading with their enemy.\footnote{37 My sketch of the relevant interests is highly oversimplified. In fact, for example, the interests of some belligerents were favorable to a strong neutral rights regime, because neutral trade was essential to their economy. It was the dominant naval power in a conflict that had the strongest interest in opposing neutral rights.}

The law of neutrality was an attempt to find some reconciliation of these conflicting interests through compromise. The widely accepted rule was that neutral merchants were permitted to trade with belligerents subject to at least three important limitations. The first was that they could not sell contraband to belligerents and, if they attempted to do so, they were subject to seizure and confiscation as lawful prize.\footnote{38 For mid-nineteenth century views on contraband, see, e.g., WHEATON, supra note 34, §§ 476-507, at 607-63.} Second, belligerents were permitted to impose blockades on belligerent ports. When an "effective" blockade was in force—when, that is, the blockading navy posted warships outside of the blockaded port to prevent neutral access and made it dangerous for neutrals to attempt to run the blockade—neutrals were not permitted to trade at that port. If they attempted to do so, they were again subject to confiscation.\footnote{39 For mid-nineteenth century views on blockade, see, e.g., id. §§ 509-523, at 668-87.} Finally, there was a great deal of dispute over whether neutrals could carry "enemy" property. The British took the view that enemy property in a neutral ship was still enemy property subject to confiscation and that the neutral "bottom" did not "cover" the enemy goods. The opposing view, long advocated by the United States and others, was that neutrals could carry enemy goods, that "free
ships" make "free goods." As a practical matter, the British view prevailed—and, indeed, was accepted by the U.S. courts—until sometime after the 1856 Declaration of Paris in which, for the first time, most of the main maritime powers (but not including the United States) agreed to the free ships, free goods rule.\(^4\)

There were, of course, many, many subsidiary rules. These included, for example, rules on when and where belligerents could board and search neutral vessels to determine whether they were carrying contraband or enemy property or were intending to run a lawful blockade; rules concerning convoys; rules of attribution for determining whether property was enemy or neutral; rules dealing with the treatment of neutral crews whose ships were seized and taken in for adjudication by the captor’s prize courts; specialized rules of evidence for prize court proceedings; and rules for determining whether a neutral’s ship and cargo were both subject to confiscation or just its cargo and for damages in the event of an illegal seizure.

One particularly important subsidiary rule for present purposes, was the so-called "continuous voyage" doctrine. This was a controversial doctrine originally developed by the British prize courts. In simplified form, the idea was that neutral ships sailing between neutral ports (and thereby normally immune from capture by belligerents) could be searched and seized if they were carrying contraband items bound ultimately for a belligerent port or, alternatively, if they were intending ultimately to run a lawful blockade. The United States, along with other nations, strongly objected to this doctrine when applied in various forms by the British during the Napoleonic Wars. (The main application of the doctrine by the British admiralty courts at that time was in the context of the colonial trade, an issue too involved to pursue here.)\(^4\)

It remained controversial at the time the Civil War broke out. I caution that I have just outlined some of the more salient rules and that there was ambiguity about the scope of these rules in various respects too complex for discussion here.

With this background in mind, we can now consider Goldsmith and Posner’s account of the U.S. Civil War practice, which is mostly (though not

\(^4\) See, e.g., id. §§ 442-472 n.223, at 612-13.

\(^4\) The much disputed history of the continuous voyage doctrine has been the subject of many books and articles. The best that I have read is HERBERT WHITTAKER BRIGGS, THE DOCTRINE OF CONTINUOUS VOYAGE (1926), which is a comprehensive treatment of the doctrine from its origins in early British prize decisions through World War I. Much of what drove the debate was continuing controversy over whether and, if so, how far the United States courts extended the doctrine beyond the original British precedents from the period of the Napoleonic Wars.
entirely) accurate so far as it goes, but is seriously incomplete. Among other things, it leaves out many important facts which place the Civil War practice in a light quite different from that which they portray and which powerfully challenge their fundamental claims about customary international law. Their story is relatively straightforward: Despite having been a vigorous champion of neutral rights for the first seventy-five years of its history, the United States abruptly changed its views as soon as it became a belligerent and its interests changed. They focus on the free ships, free goods rule, which, they claim, became customary international law after the 1856 Declaration of Paris, and

42 There have been a number of historical treatments of the Civil War neutrality conflicts. The most comprehensive are Stuart L. Bernath, Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy (1970); Sister May Martinice O’Rourke, The Diplomacy of William H. Seward During the Civil War: His Policies as Related to International Law (1963) (Ph.D dissertation, University of California, Berkeley); James P. Baxter, III, Some British Opinions as to Neutral Rights, 1861 to 1865, 23 AM. J. INT’L L. 517 (1929) [hereinafter Baxter, British Opinions]; and James P. Baxter III, The British Government and Neutral Rights, 1861-1865, 34 AM. HIST. REV. 9 (1928) [hereinafter Baxter, British Government]. Another source is Frank L. Owsley, America and the Freedom of the Seas, 1861-1865, printed in Essays in Honor of William E. Dodd by His Former Students at the University of Chicago (Avery Craven ed., 1935). However, Owsley, upon whom Goldsmith and Posner rely, see Goldsmith & Posner, supra note 1, at 47, was an old school southern historian and passionate apologist for the old South who dedicated his career to undermining “the entire Northern myth from 1820 to 1876,” The Tennessee Encyclopedia of History and Culture, Frank Lawrence Owsley 1890-1956, available at http://tennesseeencyclopedia.net/imagegallery.php?EntryID=O024 (last visited Jan. 8, 2006), and his account is, unfortunately, compromised by his evident desire to embarrass the North. All of these accounts were written by historians and suffer to varying degrees from a lack of legal sophistication. Baxter is the most acute from a legal perspective but focuses mostly on the British side. Although sometimes imprecise on legal details, Bernath offers the most recent account. O’Rourke focuses more directly by historians and suffer to varying degrees from a lack of legal sophistication. Baxter is the most acute from a legal perspective but focuses mostly on the British side. Although sometimes imprecise on legal details, Bernath offers the most recent account. O’Rourke focuses more directly than Bernath on the legal problems. Also helpful—and legally beyond reproach—is Moore, supra note 33, §§ 1180, 1195, 1255-1262, 1265-1266, 1268-1271, 1273-1279 (1906). The Civil War precedents, both diplomatic and judicial, are discussed endlessly in the voluminous legal literature on maritime and prize law. Much of the primary source materials—which are voluminous—are archival.

43 For their discussion of the Civil War, see Goldsmith & Posner, supra note 1, at 45-48, 52-53.

44 For reasons they never explain, throughout their discussion of the neutral rights case study, Goldsmith and Posner view the Declaration of Paris as embodying a pro-neutral rights teleology which any other related doctrine limiting the scope of neutral trade somehow illegitimately or hypocritically constricted. In particular, they treat the free ships, free goods rule as a baseline and the various doctrines limiting the scope of neutral rights as derogations from it that reveal something important for their purposes. They never explain exactly what that might be, but it leads them to declare forcefully that the invocation of these doctrines by belligerents demonstrates “that there was no behavioral regularity of not seizing enemy property on neutral
they begin by asserting boldly that the United States "failed [the] test" by not even respecting the free ships, free goods rule itself. They then proceed to stress that the United States subscribed to a liberal blockade rule that it had always opposed in the past and likewise embraced and even broadened, the continuous voyage doctrine, which it had also previously opposed. The consequence of this change of course, they note, was to undermine the free ships, free goods rule, demonstrating that the United States paid no attention to customary international law and simply pursued its interests so far as it could without provoking the British to war. It is a tale of self-interested behavior, constrained only by the threat of coercion, and demonstrates the weakness of customary international law in the face of changes in state “payoffs” and the hypocrisy of international law “cheap talk.”

What, then, is missing from this account? Start with their opening salvo. Goldsmith and Posner begin by boldly asserting that the United States, facing “the first real test of its commitment to neutrality principles,” unequivocally “failed that test.” What is their first piece of evidence? “In the ‘single incident in which the question of free ships, free goods arose during the Civil ships during the period in question.” GOLDSMITH & POSNER, supra note 1, at 53. Even were that correct, however, its significance would be unclear. The question is not whether there was an unqualified behavioral regularity of not seizing enemy property on neutral ships, but whether there was a behavioral regularity which conformed to existing customary international law in all its complexity.

It seems that what underlies Goldsmith and Posner's thinking is an unacknowledged, and presumably unintended, normative preference for neutral rights, the full realization of which was undermined by doctrines like contraband, blockade, and continuous voyage. This same implicit normative preference appears in the passage (written at the end of World War I) which they quote to summarize their views on this very point:

While granting that the letter of the law [of free ships, free goods] has been observed strictly, the conclusion that is forced upon the student of recent practice is that, through unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral ships very nearly approaches nullity.

Id. at 53 (quoting Harold Scott Quigley, The Immunity of Private Property from Capture at Sea, 11 AM. J. INT’L L. 22, 26 (1917)) (emphasis added). For further discussion of the strong normative project among scholars of this period in favor of neutral rights, of which Quigley’s article is a late and notably complex example, see infra notes 74-75 and accompanying text.

GOLDSMITH & POSNER, supra note 1, at 46.

See id. at 46-48.

On cheap talk, see id. at 167-84.

Id. at 46.
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War,' they note, "a U.S. prize court apparently rejected the principle." Unfortunately for Goldsmith and Posner, however, the evidence is precisely to the contrary. Not only did the United States not disregard the free ships, free goods rule in the instance they cite; it embraced and complied with the rule in general. Goldsmith and Posner's implication that the United States refused to recognize the free ships, free goods rule, and thereby "failed" their "test," is simply false.

Begin with the relatively minor incident to which they refer. As Goldsmith and Posner recognize, at the outset of the war, the United States declared that, even though it was not a party to the Declaration of Paris, it would observe the free ships, free goods rule. The incident in question, involving the seizure of a British merchant ship, the Clyde, was an anomaly, the only case of its kind during the war. Apparently, a U.S. naval vessel seized the Clyde and brought it in for adjudication at Key West. According to a diplomatic note from the British Minister, the local prize court had released the ship but—in violation of the free ships, free goods rule—had detained the cargo on the ground that it was enemy property. In reply, Secretary of State Seward reaffirmed U.S. adherence to the free ships, free goods principle; indicated that further instructions would be issued to naval officers to clarify the point; and agreed to have a copy of the British Ambassador's note forwarded to the prosecuting officers of the prize courts in order "to guard against the possibility of misapprehension on the subject." At the same time, however, he expressed skepticism about whether the prize court had actually detained the cargo solely on the ground that it was enemy property.

That is the sum and substance of what is known about the matter, hardly solid evidence of U.S. unwillingness to recognize the free ships, free goods

49 Id., quoting BERNATH, supra note 42, at 7.
50 See GOLDSMITH & POSNER, supra note 1, at 46; WHEATON, supra note 34, § 475 n.223, at 612-13 (8th ed. 1866) (edited, with notes, by Richard Henry Dana, Jr.). On the unsuccessful negotiations during the Civil War looking towards United States accession to the Declaration, which foundered over the impact of U.S. ratification on the Confederacy's obligations, see id. at 608; O’ROURKE, supra note 42, at 63-66.
51 I am aware of only two secondary accounts of the incident. See BERNATH, supra note 42, at 7; O’ROURKE, supra note 42, at 134-35.
52 O’ROURKE, supra note 42, at 135 (quoting from Secretary of State William Seward's diplomatic note of August 13, 1863). See also BERNATH, supra note 42, at 7. For a suggestive explanation for why the prize court may have done so, see infra notes 58-61, 64 and accompanying text.
53 See O’ROURKE, supra note 42, at 135.
54 See BERNATH, supra note 42, at 7; O’ROURKE, supra note 42, at 134-35.
rule. Indeed, although the historical record ends with this brief exchange of diplomatic notes, it seems likely, in fact, that the U.S. government successfully allayed British concerns over the incident. There is apparently no record of the ultimate disposition of the prize court proceedings and, more significantly, no record of any appeal having been taken from an adverse judgment in the local prize court. That alone would seem to undermine any claim that the United States violated neutral rights, since the law of nations clearly required the exhaustion of local remedies. In any case, however, it is reasonable to infer from the apparent lack of an appeal that the matter was, in fact, resolved in a manner acceptable to the British government. This conclusion is further supported, moreover, by the fact that the brief diplomatic correspondence concludes before any final resolution of the case was reached. Presumably, the British would have continued to complain, as they did in numerous other cases, if the prize court had persisted in denying the applicability of the free ships, free goods rule. That the British government apparently let the matter drop suggests that an acceptable outcome had been reached or that the matter was so trivial as not to warrant further pursuit.

In light of these facts—which nowhere appear in Goldsmith and Posner's discussion of the matter—it seems irresponsible for them to assert that United States failed any "test" in the case of the Clyde. Indeed, the incomplete historical record, such as it is, suggests precisely the contrary. However, there is a larger problem lurking here. Goldsmith and Posner presumably single out the Clyde incident from among the scores of neutrality disputes which arose during the Civil War to suggest that it somehow revealed a general unwillingness on the part of the United States to comply with the free ships, free goods rule and, hence, with a principle unambiguously accepted as a rule of customary international law. But this suggestion—obviously, of far greater significance to their general thesis—is also mistaken. It is based, first, upon an unjustified claim about the legal status of the free ships, free goods rule at the commencement of the war and, second, upon an incomplete assessment of the actual U.S. practice.

55 See BERNATH, supra note 42, at 7.
56 Id.; O'ROURKE, supra note 42, at 135.
57 The only other diplomatic note in the historical record is a follow-up sent by the British Foreign Minister, Lord Russell, the following month, inquiring about the status of the matter. See O'ROURKE, supra note 42, at 135. The British aggressively pursued neutrality matters with Seward throughout the war. See, e.g., id. at 125-33, 141-45; BERNATH, supra note 42, at 37-40, 48-56, 71-75, 113, 160.
Begin with the status of the rule circa 1861. Despite the longstanding position of the political branches on the issue, the U.S. courts, as well as the leading U.S. commentators on international law, had long accepted the contrary British view as the correct understanding of existing customary international law. Five years after the Declaration of Paris, and at the time the Civil War commenced, the then leading U.S. authorities still doubted whether the rule had attained the status of customary international law or was binding only on parties to the Declaration of Paris. Indeed, Richard Henry Dana, in his famous 1866 edition of Wheaton’s great treatise, specifically asserted that the U.S. courts, in the absence of a statute or treaty to the contrary, remained bound to apply the traditional rule. Thus, contrary to Goldsmith and Posner’s confident assertion, at the outset of the Civil War, the United States might plausibly have denied that it was, in fact, bound by the free ships, free goods principle. This position was all the stronger, moreover, because of the early collapse of negotiations, conducted at the outset of the war, between the United States, Great Britain, and France over U.S. accession to the Declaration.

Despite these legal niceties—and as the Clyde incident illustrates—the United States announced shortly after the war began that it would comply with the free ships, free goods rule, and, notwithstanding Goldsmith and Posner’s suggestion to the contrary, there is no evidence that it failed to meet this commitment. Goldsmith and Posner recognize that the Clyde was “the single incident” during the war in which any diplomatic issue arose over the free ships, free goods principle, but they fail to notice the apparent significance of this fact, viz., that there were no other incidents because the U.S. government otherwise observed the rule. It is true that much Southern property—mostly

58 See, e.g., The Nereide, 13 U.S. 388, 418-22 (1815); Wheaton, supra note 34, § 471, at 603, § 475 n.223, at 606-07 (discussing, among others, the views of Kent and Wheaton).

59 See Wheaton, supra note 34, § 475 n.223, at 606-13. These authorities included Richard Henry Dana, who edited, and substantially contributed to, the 1866 edition of Wheaton’s classic treatise, as well as Henry Halleck and Theodore Woolsey, who wrote treatises on international law published immediately before and during the war. See id. (with citations). For U.S. diplomatic efforts in the wake of the Declaration of Paris to convince other powers to recognize the free ships rule as a principle of customary international law applicable to all states not only signatories to the Declaration, see 1 Savage, supra note 34, at 77-86, 381-83, 392-93, 396-99, 402-09.

60 Wheaton, supra note 34, § 475 n.223, at 613.

61 For discussion, see supra note 50 and accompanying text. Of course, in view of the traditional U.S. diplomatic position—and U.S. diplomatic activities after the Declaration—the contrary position could certainly have been plausibly maintained as well. See supra note 59.
cotton—found in neutral ships could be confiscated on other grounds, principally for violation of the blockade. At the same time, however, without violating the blockade, neutrals shipped vast quantities of Southern cotton back to Europe—most importantly, via Matamoros, Mexico, which was across the Rio Grande from Brownsville, Texas. \footnote{See, e.g., JAMES W. DADDYSMAN, THE MATAMOROS TRADE: CONFEDERATE COMMERCE, DIPLOMACY, AND INTRIGUE (1984); BERNATH, supra note 42, at 34-36, 70-71; O’ROURKE, supra note 42, at 149-50. Located a short distance above the mouth of the Rio Grande and directly across from Brownsville, Matamoros posed a key strategic difficulty for the Union. Under the Treaty of Guadalupe Hildalgo with Mexico, which provided for free navigation on the Rio Grande, the United States could not lawfully impose a blockade at the mouth of the river, cutting off trade with Matamoros. See The Peterhoff, 72 U.S. 28, 51 (1867); BERNATH, supra note 42, at 36. This legal inhibition, which the United States never challenged and which the Supreme Court affirmed, left a gaping hole in the blockade through which Southern cotton and contraband easily flowed. See The Peterhoff, 72 U.S. at 51. The Confederates shipped cotton and other goods overland to Brownsville and then by boat to Matamoros. British merchant ships, in turn, unloaded munitions and other supplies at Matamoros and took on the Southern cotton for sale in Europe. For accounts of the Matamoros trade, see, e.g., DADDYSMAN, supra, at 29-71; BERNATH, supra note 42, at 34-36, 70-71; O’ROURKE, supra note 42, at 149-50. Moreover, many neutral merchants, exploiting the protection which the neutral Mexican waters outside the mouth of the Rio Grande afforded them to avoid capture, engaged in blockade running up and down the Texas coast when conditions were auspicious. DADDYSMAN, supra, at 163-65, 171. At the outset of the war, Matamoros was a sleepy town visited by a half dozen merchant ships a year. Shortly after the beginning of the war, it became “the great commercial thoroughfare of the Southern states.” BERNATH, supra note 42, at 34. By April 1863, there were a 180 to 200 vessels a month anchored in the vicinity awaiting unloading. By 1864, there were 200 to 300 ships, see id. at 35, and by January 1865, according to a contemporary account, “Matamoros [had become] to the rebellion west of the Mississippi what New York is to the United States—its great commercial and financial center, feeding and clothing the rebellion, arming and equipping, furnishing it materials of war and a specie basis of circulation in Texas that has almost entirely displaced Confederate Paper.” Id. at 35 (quoting contemporaneous internal Union army correspondence). For a full account of the magnitude of the Matamoros trade, see DADDYSMAN, supra note 62, at 22-25, 29-35, 159-61.} It may be that ownership of some, conceivably all, of this property was transferred to neutrals before being loaded onto neutral ships, thereby exempting it from capture as enemy property. Even were this the case, however, the United States, had it been unwilling to recognize the doctrine, would have instructed its naval vessels at least to search for enemy property on board neutral ships.\footnote{On the contrary, however, Secretary of the Navy Welles issued successively narrower and less ambiguous instructions to his officers in the Matamoros area and pointedly refused to authorize the seizure of enemy property on neutral vessels. See, e.g., 1 SAVAGE, supra note 34, 450, reprinting The Secretary of the Navy (Welles) to Flag Officers Commanding Squadrons and Officers Commanding Cruisers, Aug. 18, 1862 (directing that a vessel is not to be seized unless it is reasonable} Moreover, there
would almost certainly have been instances in which it could plausibly have challenged the *bona fides* of the claim to neutral ownership. That it chose not to do so, permitting neutral vessels to return to Europe without challenge on this ground, strongly suggests its determination to abide by the free ships, free goods rule. Why, then, do Goldsmith and Posner focus on the *Clyde* incident to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment, or otherwise violating the blockade; and that if, after visitation and search, it shall appear to your satisfaction that she is in good faith and without contraband, actually bound and passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, then she can not be lawfully seized.)

id.; BERNATH, supra note 42, at 51-56.

Had the United States be unwilling to uphold the free ships rule, Secretary Welles would also presumably have issued general instructions to his naval officers to search neutral ships anywhere in the vicinity of the South for enemy goods, *e.g.*, cotton. As Goldsmith and Posner emphasize, neutral ships successfully ran the blockade in large numbers. At least sometimes it must have been impossible to seize a neutral for lack of sufficient evidence of blockade running. In other cases, the U.S. navy was unable to establish a blockade of a particular port. As a result, neutral ships trading in the port could not be seized for violation of an ineffective blockade. In all these cases, it would have been to the U.S. advantage to have claimed the right to confiscate enemy property onboard neutral ships, but, in accordance with the free ships, free goods rule, it refrained. Indeed, in view of the legal doubts about the effectiveness of the blockade in general, Welles had every reason to supplement the claimed right to seize neutral ships for blockade running with an independent claim to the right to seize their cargo as enemy property.

Without doubt, the Matamoros trade was a major irritant to the United States, and, in a number of cases, U.S. naval officers, acting without legal justification, seized neutral vessels anchored near the mouth of the Rio Grande. For accounts of the various incidents and their diplomatic and legal fallout, see, *e.g.*, BERNATH, supra note 42, at 37-41, 48-61; O’ROURKE, supra note 42, at 125-29; DADDYSMAN, supra note 62, at 161-68. Their aim may have been to disrupt the trade, see BERNATH, supra note 42, at 48-62, although they were certainly concerned as well about blockade running by neutral ships shielded from capture while anchored in nearby Mexican waters. See DADDYSMAN, supra note 62, at 163-65, 171. Be that as it may, if that was their aim, the U.S. officers succeeded, at best, only for short periods of time. As noted above, the Matamoros trade grew exponentially despite these efforts. Moreover, the U.S. government officially disclaimed any right to seize vessels engaged in legitimate neutral trade with Matamoros, and the ships taken as prize were released and, in some cases, damages were awarded for the unlawful conduct of U.S. naval officers. See, *e.g.*, BERNATH, supra note 42, at 37-61; O’ROURKE, supra note 42, at 125-29; DADDYSMAN, supra note 62, at 161-68. For further discussion of the Matamoros incidents, see supra notes 61-62; infra notes 71, 102.

It is noteworthy that, had the executive branch wished to seize enemy property in neutral ships, it could have done so without challenge in the prize courts, at least according to the most knowledgeable authority on the issue. See WHEATON, supra note 34, § 475 n.223, at 613 (note by Richard Henry Dana, lead counsel for the United States in prize matters during the Civil War). As Dana explained, the executive could not rely on the courts to release enemy property.
(never mind their incomplete statement of the facts) and ignore this related but more problematic feature of the U.S. practice for their purposes?

Similar difficulties arise when we turn from the free ships, free goods rule to the core of Goldsmith and Posner's claims. They emphasize that the United States changed positions on the rules pertaining to blockades, embracing a more liberal rule than it had in the past, as well as on the continuous voyage doctrine, which it had previously condemned.\(^5\) They fail to note, however, that the U.S. positions prior to the Civil War on these controversial doctrines were not universally accepted, certainly not by the British. Thus, despite Goldsmith and Posner's insinuations to the contrary, it is far from clear that the U.S. switch caused it to act in violation of existing customary international law. Rather, the United States was, for the most part, simply adopting the British approach, which had in fact prevailed throughout the first half of the nineteenth century and under which the United States had suffered.\(^6\) Indeed, when U.S. diplomats defended U.S. actions, and the U.S. courts upheld them, they relied heavily and sometimes exclusively on British precedents (generally

Instead, it could carry out its commitment not to seize enemy property in neutral ships only "by instructions to the navy not to capture in such cases, and, if captures should be made, by directing a restitution before adjudication." \(\text{Id.}\) He noted, however, that "[n]o case is reported of a condemnation, in opposition to [the free ships rule], during the civil war." \(\text{Id.}\)

\(^5\) For an extended discussion of U.S. views prior to the Civil War, see, e.g., 1 SAVAGE, \(\text{supra}\) note 34, at 1-86. On the continuous voyage doctrine, see, e.g., O'ROURKE, \(\text{supra}\) note 42, at 107-08. The change in the U.S. position in relation to the requirement that blockades be effective and not merely paper was more complex than Goldsmith and Posner's discussion suggests. The United States never deviated, at least as a matter of its official pronouncements, from the widely accepted formulations of the effectiveness requirement and, in particular, from the formulation incorporated into the Declaration of Paris. See, e.g., BERNATH, \(\text{supra}\) note 42, at 11-12; 1 SAVAGE, \(\text{supra}\) note 34, at 87-91 (1934). \(\text{See also supra}\) note 39. Indeed, in commenting on the Declaration of Paris' provision on blockades five years before the Civil War, Secretary of State Marcy acknowledged that it only restated the existing customary international law standard without doing anything to settle longstanding disputes over how to apply the standard in particular settings: "What force is requisite to constitute a blockade remains as unsettled and as questionable as it was before the Congress at Paris adopted the 'Declaration.'" 1 SAVAGE, \(\text{supra}\) note 34, at 381, 383, reprinting The Secretary of State (Marcy) to the French Minister (Sartiges), July 28, 1856. To the extent that the United States adopted a new position during the Civil War, it was reflected, more subtly, in the practical interpretation of the accepted standard, with the United States implicitly endorsing an interpretation that Madison would have rejected at the time of the Napoleonic Wars. For Secretary of State Seward's defense of the effectiveness of the blockade, see \(\text{id.}\) at 440; O'ROURKE, \(\text{supra}\) note 42, at 90.

\(^6\) For an extended treatment of the neutrality disputes between the United States and Great Britain during the Napoleonic Wars, see BRADFORD PERKINS, PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES 1805-1812 (1961). \(\text{See also O'ROURKE, supra}\) note 42, at 83-86.
the opinions of Sir William Scott, which, in fact, they had relied upon throughout the nineteenth century).\(^67\) Thus, while the United States might plausibly be charged with hypocrisy (although it had some powerful replies, as I discuss below), it is less clear that it could fairly be charged with illegality.\(^68\)

More importantly, Goldsmith and Posner neglect to mention that the British government did not object to the U.S. measures. On the contrary, it virtually welcomed the shift in U.S. position and publicly defended the legality of the U.S. blockade of the Southern ports and its use of the continuous voyage doctrine.\(^69\) It is noteworthy, moreover, that the British accepted the legality of the U.S. measures despite the British tilt towards the South during much of the war.\(^70\) There were, in fact, many legal disputes between Great Britain and the United States during the war, but none over the crucial issues which Goldsmith and Posner emphasize. Goldsmith and Posner also fail to mention that the U.S. courts throughout the war frequently found that overzealous naval officers had acted illegally in taking British merchant ships as prize and ordered the ships released and, in some cases, awarded damages for the illegality.\(^71\)

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\(^{67}\) For the reliance of the Supreme Court on British precedents, which occurred in numerous prize cases decided during the Civil War, see, e.g., The Peterhoff, 78 U.S. at 52-56; The Bermuda, 70 U.S. 514, 554-57 (1866). On the importance of the British precedents both in internal U.S. and British discussions and in their diplomatic exchanges during the war, see, e.g., BERNATH, supra note 42, at 71-73, 76-78, 87-94, 123-29; O’ROURKE, supra note 42, at 81-86, 93-97, 124-25, 129-33; Baxter, British Opinions, supra note 42, at 527 & n.40, 529-30. For constant references to the British precedents throughout the first half of the nineteenth century, see supra notes 35-36 and accompanying text.

\(^{68}\) Goldsmith and Posner assert in passing that the United States also adopted “an unprecedentedly broad conception of... contraband.” GOLDSMITH & POSNER, supra note 1, at 47. It is unclear what the basis for this claim is, and they cite no authority on this point. Bernath, the principal authority on which they rely, concludes that “[t]he Union government’s interpretation of goods considered contraband did not, on the whole, deviate from that of England and other Western nations.” BERNATH, supra note 42, at 3 n.*.


\(^{70}\) See BERNATH, supra note 42, at 67-75, 88-89, 151-57; O’ROURKE, supra, at 119, 146-52.

\(^{71}\) For discussion of a number of these cases, including the Labuan, the Will-o’-the-Wisp, the Adela, the Magicienne, the Sir William Peel, the Science, the Volante, the Dashing Wave, the Matamoros, and the Mont Blanc, see, e.g., BERNATH, supra note 42, at 37-40, 48-58, 113; O’ROURKE, supra note 42, at 125-29, 131-33.
Equally significant but unmentioned is the fact that after the war the United States and Britain agreed in the Treaty of Washington to submit disputed cases on both sides to international arbitration. The British chose to submit only a relatively small number of cases, and, in most instances, the actions of the United States were upheld as lawful by the mixed arbitration panels. In only a small number of exceptional cases was the United States found to have acted illegally and then the principal default was the failure of its courts to award adequate damages for seizures which they had found to be illegal. Both sides ultimately paid the judgments rendered against them in full.

It is true that many scholars, especially from countries that were supporters of neutral rights, were outraged by the perceived hypocrisy of the United States and strongly condemned the U.S. switch. They claimed that some of the U.S. measures, particularly the application of the continuous voyage doctrine, were illegal. But in view of the agreement between the affected parties, and the outcome of the international arbitrations, those positions seem overstated at a minimum and would appear to reflect the grave disappointment the scholars felt at the abandonment of the pro-neutral rights position by the United States. Neutral rights had been a kind of cause célèbre among many writers, and they viewed the U.S. measures as a potentially fatal blow to the progress which had been achieved in 1856, when, in the Declaration of Paris, the major maritime powers, including the British, had finally accepted the free ships, free goods principle. Many had hoped that the Declaration was only the first step towards a universal recognition of an immunity for all private property except contraband from capture at sea. In light of Goldsmith and Posner's emphasis

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72 See Treaty between the United States and Great Britain, May 8, 1871, 17 Stat. 863, 867-68. The Treaty of Washington provided for arbitration of U.S. claims against Britain arising out of the sale to the Confederacy of so-called commerce destroyers—most famously, the Alabama—that preyed on U.S. naval and merchant ships during the Civil War and of British claims against the United States arising out of the wartime neutrality disputes.

73 BERNATH, supra note 42, at 43-44, 48-50, 59-61, 82, 94; BRIGGS, supra note 41, at 68; Baxter, British Opinions, supra note 42, at 527 & n.40; 7 MOORE, supra note 33, § 1261, at 725-26.

74 See BERNATH, supra note 42, at 91-93; BRIGGS, supra note 41, at 73-79; 7 MOORE, supra note 33, § 1261, at 727-38 (excerpting extensively from the voluminous critical commentary). The greatest controversy was over the Supreme Court's decision in The Springbok, 72 U.S. 1 (1867), which affirmed the continuous voyage doctrine in the context of a breach of blockade. Among other criticisms, writers pointed to its inconsistency with the principle that blockades must be of specific ports and its evidentiary presumptions, which, they argued, endangered legitimate neutral trade.

75 Indeed, the very reason that the United States refused to ratify the Declaration was its failure to adopt such an immunity, notwithstanding the U.S. proposal to that effect. More
on the purely bilateral character of customary international law norms, moreover, it is noteworthy that these writers clearly perceived the United States' abandonment of the pro-neutral rights position as a major new obstacle to the realization of their project. If we take Goldsmith and Posner seriously, these writers, in fact, had no reason for concern, because the Civil War questions were purely bilateral matters between the United States and Great Britain having no implications for other states.

These additional facts, at a minimum, reveal a radically different perspective on the Civil War history from the one which Goldsmith and Posner offer. But this is only the beginning of the problems which a more serious historical effort would have uncovered. Perhaps most significant are the reasons for the British acceptance of the legality of the U.S. measures. From their public statements as well as from their private correspondence it is clear that high British officials—including Lord Palmerston, the Prime Minister, and Lord Russell, the Foreign Secretary—believed that the precedents established by the U.S. measures would serve British interests in future wars, not only with regard to the United States but also with regard to states more generally.

particularly, the United States viewed the Declaration's first article outlawing privateering as unacceptable unless tied to such a general immunity. See Wheaton, supra note 34, § 475 n.223, at 608.

On Goldsmith and Posner's claim that customary international law is generally bilateral rather than universal in character, see Goldsmith & Posner, supra note 1, at 35-39.

It is also noteworthy that many of these scholars were leading diplomatic figures of the time.

See, e.g., Baxter, British Opinions, supra note 42, at 517-18, 523, 527-29 & n.40, 533-34; Baxter, British Government, supra note 42, at 9-13, 22; Bernath, supra note 42, at 11-12, 67-69, 71-73, 76-78, 87-94. As Baxter put it:

Although Great Britain and the United States had for once exchanged their traditional roles of belligerent and neutral, both governments saw clearly that the precedents they were making would have great weight in a future war, when British prize courts would cite the new American decisions to justify British interference with the rights of American neutral shippers. Both the precedents of the British past, and the future interests of British sea power alike dictated decisions favoring the belligerent who was dominant at sea.

Baxter, British Opinions, supra note 42, at 517-18. The British Solicitor General, Sir Roundell Palmer, offered a similar explanation to Parliament:

England has as strong an interest as any Power in the world in understanding well what she is about, when she is invited to take a step that may hereafter be quoted against herself, and may make it impossible for her, with honour or consistency, to avail herself of her superiority at sea.

Baxter, British Government, supra note 42, at 13. The London Times agreed: "England is too great to be often neutral, and should not forget that the arguments she might now employ against
Their belief that solidifying their interpretation of the law of nations would have a significant impact on future practice strongly suggests the efficacy of customary international law and its capacity to provide the focal point for a long-term and reasonably stable cooperative equilibrium. Moreover, the Prime Minister and his Foreign Secretary did not adopt this position lightly. There was tremendous domestic political pressure on them—in part because of widespread British sympathy for the South, in part because of the tremendous profits at stake, and in part because of British confidence in the strength of the Royal Navy—to condemn the U.S. position and take effective action. They sternly resisted all such pressure, keeping what they believed to be the long run interests of Britain in view.

For accounts of the domestic political situation and the harsh attacks on Palmerston and Russell, both in Parliament, by merchant interests, and by the press, see BERNATH, supra note 42, at 67-69, 73-75, 88-89, 119-20, 151-57; O'Rourke, supra note 42, at 115-19, 145-50, 190-200.

Their assessment, moreover, proved correct. In the decades following the Civil War, including during World War I, the leading decisions of the Supreme Court upholding the U.S. measures were constantly cited by British diplomats and prize courts in defense of British
Nor were the British officials alone in holding this—if we are to take Goldsmith and Posner seriously—delusion. Leading British papers, for example, took the long term view, even while other papers pressed the government hard and voiced their opposition vociferously. For their part, the Americans concurred in this attitude towards the law of nations. Secretary of State Seward and President Lincoln were keenly aware of the potential implications of the precedents they were setting and took care to consider the impact on the post-War position of the United States when it would return to its accustomed state of neutrality. At one crucial juncture, when the U.S. and Britain were on the verge of war over the Peterhoff affair—and Secretary of State Seward and Secretary of the Navy Welles were at loggerheads, a common state of affairs—Seward successfully appealed to Lincoln in a private memorandum to concede the pro-neutral British position. According to Seward, if the United States persisted, it would set “an unanswerable” precedent (in relation to the (lack of) immunity of mail steamers) which would harm future U.S. interests. As we have already seen, this was also the overriding concern of the many writers on the law of nations who criticized the U.S. measures.

Beyond these points, the historical records reveal the power the law of nations had in framing and often in resolving the disputes that arose. To be
sure, the United States, engaged in an existential struggle for its existence, was tempted to push the limits and did so skillfully in many cases, for example by quietly tolerating illegal acts, then promising to correct the mistakes made and prevent future repetitions, but in fact delaying long enough to discourage the more timid British merchants from attempting to supply the South with military hardware and purchase its cotton. Nevertheless, the law of nations

which legal mechanism to use to shut down trade through the Southern ports. There were two options available for achieving the same end: The President could invoke a domestic, or "municipal," law declaring the ports closed or, alternatively, he could impose an international law blockade. The debate largely hung on the different international law implications which would flow from the choice of one or the other method. The municipal law approach would close the ports without any requirement that an effective blockade be established and would allow the United States to impose criminal sanctions on any violators it arrested. However, it would not permit the United States to search and seize neutral vessels on the high seas for having violated, or for intent to violate, the law. Violators would have to be arrested while in U.S. territorial waters. Moreover, this approach would tempt the British and French to recognize the Confederacy as a means of undermining the legal force of the municipal closure. Once the South was recognized, U.S. law, as far as other countries were concerned, would cease to have force over the territory of the Confederacy. In contrast, an international law blockade would permit searches and seizures of neutral vessels on the high seas and, since a blockade was a legitimate act of war whether against a rebellious province or a recognized enemy state, would avoid giving the British and French an incentive to recognize the Confederacy. It would not, however, permit the imposition of criminal sanctions on blockade runners, and it would mean that the United States navy had to achieve at least minimal compliance with the international law effectiveness standard. Ultimately, although repeatedly threatening to adopt the municipal law approach, and obtaining an Act of Congress giving it the necessary authority, the Administration decided to limit itself to the international law blockade instead. For discussion of the sharp internal controversy over the issue, the hostility between Seward and Welles which it generated, and the surrounding diplomatic debates, see O'ROURKE, supra note 42, at 91-101.

At least this is how Bernath—with little direct evidence of either cooperation among the executive and judicial branches or of high level executive branch responsibility for illegal acts of officers on the ground—interprets the relevant events. See, e.g., BERNATH, supra note 42, at 45-46, 57, 62. Nor were these efforts terribly successful. For further discussion of this point, see supra notes 62, 64.

It would be a mistake, moreover, to evaluate the U.S. conduct in this respect in isolation from the larger events of the war. Not only was Great Britain tolerating, and to some extent encouraging, the blockade runners, but it also failed to prevent the construction and sale of powerful warships to Confederate agents, most famously the Alabama and the other so-called ironclads. These ships wreaked enormous damage to U.S. merchant shipping and to the U.S. navy, and the U.S. position was that at least the latter activities constituted abuses of neutrality and violations of U.S. rights under the law of nations, a position that was upheld by the arbitration tribunals established under the Treaty of Washington. Although the U.S. government seems not to have attempted to justify U.S. actions as legitimate retaliatory measures, it would be naive not to view some U.S. actions through this lens.
was a constant concern on both sides and, once its requirements were made reasonably clear, frequently ended further debate.87

The British government was particularly careful to consider the legal implications of any doubtful issue that arose, submitting almost all controversial questions to the Law Officers of the Crown, among whom were leading authorities on the law of nations. The Law Officers, in turn, wrote elaborate confidential opinions which the government generally followed.88 Moreover, Admiral Milne, the British commander in charge of the Caribbean fleet, was deeply knowledgeable about the law of nations and was constantly instructing his officers to comply strictly with the law of nations and insisting that they show restraint even in the face of provocations by zealous American naval officers.89 He also frequently corresponded with the Foreign Office to

87 Citing Bernath and O'Rourke, Goldsmith and Posner assert that Seward was “indifferent to customary international law or tried to manipulate its requirements for strategic purposes” and that Welles was “ignorant or disdainful of customary international law.” Goldsmith & Posner, supra note 1, at 48. These comments, however, are clearly exaggerated at best, and, to the extent they are based upon Bernath and O’Rourke, cannot be properly understood out of the larger context in which they were made. As I have illustrated throughout, the accounts of both authors reveal the considerable weight which both Seward and Welles placed on compliance with international law. In fact, throughout the war, Seward and Welles (often with the involvement of other cabinet officials) engaged in heated and extended debates about the requirements of international law and, on more than one occasion, brought their conflicting views on the legal issues in writing directly to Lincoln’s attention, forcing him to resolve some of the most consequential questions of the war. See Bernath, supra note 42, at 71-73; O’Rourke, supra note 42, at 93-99, 141-45; Baxter, British Opinions, supra note 42, at 523-27. The comments of Bernath and O’Rourke upon which Goldsmith and Posner rely are best understood in light of their starting assumption, which is exactly the opposite of Goldsmith and Posner’s: that states comply with international law because it is law. Their comments reflect their surprise at finding that self-interest sometimes overrides the commitment to comply.

88 For many examples, see Bernath, supra note 42, at 48-49, 71-73, 76, 78, 87-88, 93-94, 123-25; O’Rourke, supra note 42, at 60, 92-93, 95-97, 115-16; Baxter, British Opinions, supra note 42, at 518-22, 529-30, 533-34; Baxter, British Government, supra note 42, at 17-19. One of the Law Officers during much of the Civil War was Sir Robert Phillimore, who was among the leading British publicists on international law. See Baxter, British Opinions, supra note 42, at 518. For Phillimore’s three volume treatise, see Sir Robert Phillimore, Commentaries on International Law (1854).

The British government was willing to recognize the lawfulness of the exercise of some belligerent rights, like privateering, which it had long bitterly opposed. For discussion, see Baxter, British Opinions, supra note 42, at 534-37.

89 On Milne’s consequential role in avoiding war between the United States and Britain and on his insistence on strict compliance with the British understanding of international law, see Baxter, British Opinions, supra note 42, at 518, 523, 527 & nn.40, 41, 527-29; Baxter, British Government, supra note 42, at 17-19, 21-23.
debate and clarify questions concerning the law of nations, expressing worry when he found potentially conflicting opinions taken by the British in previous engagements, including with other states.  

Precedents were also given strong weight on both sides. The existence of prior decisions by the courts, mostly by Sir William Scott, were particularly effective in shifting the balance, but the Americans found themselves in an embarrassing position on a number of occasions when the British brought past U.S. court decisions inconsistent with the current U.S. position to their attention. Seward, for example, found himself in a difficult bind in arguing the illegality of the British government’s recognition of the Confederacy as a belligerent party under the law of nations—a crucial issue in Seward’s mind—when he was informed of past Supreme Court opinions apparently to the contrary, including one written by Justice Story.

Worse still was the serious difficulty he found himself in with regard to France when a diplomatic slip by the U.S. Ambassador to London, Charles Adams, seemed to reveal that the U.S. was taking an inconsistent position on neutral duties in France’s war with Mexico. To save face with both Britain and France, Seward was forced to reprimand Adams and distance the U.S. government from his actions, a highly unpleasant duty. Moreover, a similar problem arose later when U.S. citizens, sympathetic to the Mexican rebellion, wished to provide aid to the Mexicans. Despite intense Republican sympathy in the United States for the Mexican cause, Seward took the political heat and forced a cessation of any activities in relation to Mexico which he was claiming, in the case of British aid to the South, violated the law of nations.

A particularly noteworthy example was Milne’s concern about whether the extent of the territorial sea around the Bahamas was to be measured only from the inhabited islands or also from some uninhabited coral reefs eight miles from shore. Milne pointed out that Palmerston had some years before denied that Spain could lawfully claim a three mile territorial sea around uninhabited caves and rocks off the coast of Cuba. Milne’s intervention led to an extended debate within the British government and a full review of the international law authorities by the Law Officers. See Baxter, British Opinions, supra note 42, at 529-30.

For discussion of Scott’s influence, see supra notes 35-36 and accompanying text.

See O’ROURKE, supra note 42, at 56-58, 86-88 (discussing the diplomatic exchanges over the Supreme Court’s opinions in The Nuestra Señora de la Caridad, 17 U.S. 497 (1819); The Santissima Trinidad, 20 U.S. 283 (1822); and Rose v. Himely, 8 U.S. 241 (1807)).

See O’ROURKE, supra note 42, at 56-58. Seward was forced to argue that the British and French recognition of the South’s belligerent status had been premature rather than illegal per se.

See O’ROURKE, supra note 42, at 146-49; BERNATH, supra note 42, at 73-75. This was a serious diplomatic faux pas and nearly cost the United States dearly.

See O’ROURKE, supra note 42, at 183-88.
Another particularly striking example occurred at the end of a heated diplomatic row between Ambassador Adams and Lord Russell over an incident in which a captured British merchant ship was recaptured by its British crew while it was being taken in for adjudication as prize and then sailed to a hero’s welcome in Liverpool flying the South Carolina flag. The case was a deep embarrassment to the United States, and Adams argued forcefully that international law required the British to return the vessel to U.S. control. In reply, Russell (apparently correctly) rejected Adams’ interpretation of international law and earlier opinions by Sir William Scott and refused to budge. When Adams discovered in the volumes of the American State Papers several similar cases from 1799 in which American crews had recaptured vessels from their British captors and in which the United States had rejected any international law obligation to return the vessel to the British, Adams immediately informed Russell of the precedents and ended the diplomatic exchange.

Before closing, let me return to the charge, which has been made by many, that the United States was hypocritical in abandoning the pro-neutral rights positions which it had earlier championed. Goldsmith and Posner seem only too happy to embrace this view, and they present it as important evidence supporting their claims. For the reasons I have now explained at length, this emphasis only distracts attention from far more important aspects of the Civil War neutrality disputes. Still, it is worth observing that the charge of hypocrisy is, upon reflection, far less compelling than it might seem at first blush.

Because of both special geographical considerations and technological developments, the circumstances of the Civil War were importantly different from those of most past wars and made the U.S. measures, notwithstanding prior U.S. positions, easy to understand and perhaps to endorse as interpretations of the law of nations. Consider first the blockade of the Southern ports, which was a crucial part of the Union war effort. The South was highly dependent on exports of cotton by ship to earn proceeds and imports by ship to obtain weaponry and other materiel essential to its military success. One of Lincoln’s first acts after Fort Sumter was to declare blockades of the Southern ports. However, Lincoln did not claim that the blockades

96 See BERNATH, supra note 42, at 119-29; O’ROURKE, supra note 42, at 129-31.
97 See BERNATH, supra note 42, at 128-29; O’ROURKE, supra note 42, at 130-31. Apparently, Seward agreed that the discovery was a sufficient basis to close the matter. See O’ROURKE, supra note 42, at 131.
became legally effective upon their announcement but, instead, following the law of nations, made them effective only after U.S. warships actually patrolled outside each particular port and gave notice to neutral merchant ships of the initiation of the blockade, leaving any neutral ships in port adequate time to depart. 98 By posting warships in the waters outside each of the blockaded ports, the United States refrained from imposing a "paper blockade" and attempted to comply at least minimally with the requirements of customary international law. 99 In the formulation of the Declaration of Paris, a blockade, to be valid, "must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy," a standard which was generally interpreted as not requiring that access be entirely cut off but that the blockading squadron present an evident danger to neutral vessels attempting to enter the blockaded port. 101

It is true that, especially in the early phases of the war, the blockade was leaky. This was due, in part, to the fact that the Union navy had only a limited (though quickly growing) number of warships which had to be stretched thinly in order to maintain a real blockade of all of the Southern ports. But it was also due in significant measure to accidents of geography and to then recent technological advances which had greatly increased the speed of small ships, propelled by steam engine, and thereby their ability to outrun standard naval warships. The Confederate government, in league with British merchants and shippers, sought to take advantage of the fact that the Confederate states were ringed by neutral offshore islands—most importantly, the ports at Nassau and Bermuda—and the neutral port at Matamoros, Mexico. Before the war, these ports were sleepy outposts, but once war broke out, they quickly became

98 See 1 SAVAGE, supra note 34, at 87-88, 415-28; O'ROURKE, supra note 42, at 91-92, 109-12.
99 See 1 SAVAGE, supra note 34, at 91, 439-42; BERNATH, supra note 42, at 11-12; Baxter, British Government, supra note 42, at 12. See supra notes 39, 65 and accompanying text.
100 Declaration of Paris of 1856, art. 4.
101 For Lord Russell's embrace of this interpretation, see BERNATH, supra note 42, at 11-12; Baxter, British Government, supra note 42, at 12. Lord Russell declared:

assuming that the blockade is duly notified, and also that a number of ships is stationed and remains at the entrance of a port, sufficient really to prevent access to it or to create an evident danger of entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it (as in the particular instances here referred to) will not of itself prevent the blockade from being an effective one by international law. . . .

Baxter, supra, at 12. For further discussion, see supra note 69 and accompanying text.
thrive commercial emporiums. They were, in fact, way stations for the shipment of contraband and cotton to and from the Confederate states. British merchants would ship their goods to these “neutral” ports as a strategic maneuver to enhance the prospects of successfully running the blockade. Frequently, British goods were simply brought to these ports and then transshipped, in neutral waters, onto swift steam propelled blockade runners which, taking advantage of technological advances, specialized in outrunning the blockading squadron.102

In this context, it is certainly reasonable that the U.S. government would not view shipping through these offshore islands as legitimate “neutral” trade and, likewise, would not feel compelled to concede the failure of the blockade, because professional blockade runners launching from nearby islands were able to get past the blockading squadrons with some frequency.103 It is also understandable that it would not view the blockade as violating the spirit of customary international law even if it was arguably in violation of rules for which the United States had advocated in different contexts. This is especially so, because the blockade, even if it could be penetrated by small blockade runners, was actually highly effective in reducing the levels of Southern exports and imports. Moreover, the blockade clearly did make it “dangerous” for neutrals to attempt to enter the blockaded ports. That is presumably why it was generally the blockade runners who were willing to take the risk and why wages for blockade runners were running at phenomenally high levels during the war.104

102 BERNATH, supra note 42, at 34-35, 70-71, 93-98; O’ROURKE, supra note 42, at 116-18, 149-50; DADDYSMAN, supra note 62, at 22-25, 29-35, 151-55, 159-61; JAMES RUSSELL SOLEY, THE BLOCKADE AND THE CRUISERS chapter 2 (1883), available at http://www.civilwarhome.com/blockade.htm. For further discussion, see supra note 62 and accompanying text. The Matamoros trade was effective in undermining the blockade because of the town’s geographical location across the Rio Grande from Brownsville. In contrast to Nassau and Bermuda, however, the United States, at least in theory, had more options for countering the impact of the Matamoros trade. Seward long advocated that the Union army occupy Brownsville as a means of cutting off the trade, and, for a short time, the army did manage to oust the Confederates from the city. However, this success only pushed the trade further up the Rio Grande, and, in any case, it soon proved impossible for the Union army to hold Brownsville. As a result, Confederate rule was restored and, along with it, the Matamoros trade. See BERNATH, supra note 42, at 40-41; O’ROURKE, supra note 42, at 118-19, 125-26; DADDYSMAN, supra note 62, at 91-99.

103 Although it was unwilling to act to prevent blockade running, the British government frequently expressed sympathy for U.S. actions for precisely these reasons. See, e.g., BERNATH, supra note 42, at 95, 163; Baxter, British Government, supra note 42, at 22-23.

104 See 1 SAVAGE, supra note 34, at 439-42; BERNATH, supra note 42, at 3-4; SOLEY, supra
The same background also explains why the United States embraced, and, arguably, extended, the old British doctrine of continuous voyage. Given the geographical and technological advantages held by the blockade runners, the U.S. government decided that it could more effectively enforce the blockade by attempting to capture not only blockade runners coming from offshore ports like Nassau but also neutral merchant ships on their way to these offshore ports. These merchant vessels were laden with goods, including contraband, destined for the Confederacy. Indeed, that was often the whole purpose of their voyage, and their shipments provided the lifeline the Confederacy needed to continue the war effort. Under these circumstances, it hardly seems unreasonable that the United States decided to cease affording them unhindered passage into places like Nassau where they could take advantage of the port’s neutral status to unload their goods onto blockade runners waiting for an opportune moment to sneak past the blockading squadron. From this vantage point, the United States had compelling reasons to claim that the British merchants were engaged in fraud not legitimate neutral trade and that customary international law—whatever the United States had previously claimed in different circumstances—should not be interpreted to grant them immunity for this kind of conduct.105


105 See BERNATH, supra note 42, at 93-94, 97-98; W. ARNOLD-FORSTER, THE NEW FREEDOM OF THE SEAS 31-32 (1942). As Bernath observes:

The change in American legal thinking and the expansion of English doctrine by American courts seemed immoral to some and illegal to others. But what took place was merely the application of a well-established principle to a new state of facts—the doctrine of continuous voyage applied and expanded to meet the needs of the United States during its Civil War.

A change in circumstances, the employment for the first time of fast steam-driven vessels designed to run a blockade, departures of neutral vessels and cargoes from neutral ports close to an enemy, neutral cargoes arriving at a port directly across the border from an enemy and intended for that enemy—all of these factors influenced the decision to utilize advantageously the doctrine of continuous voyage.

BERNATH, supra note 42, at 97-98. "[T]he employment of the doctrine," Bernath concludes, "was only fair to [the United States]." Id. at 96.

Indeed, what is perhaps more surprising than the United States’ adoption of the continuous voyage doctrine is the modesty with which the United States actually employed it. It appears to have been utilized only in a small number of spectacular cases; more often the government did not rely upon it at all. See BERNATH, supra note 42, at 62, 96. Moreover, it is important to recognize the limited scope of the rule as a means of cutting off neutral trade. As interpreted by the Supreme Court, it applied only to goods which were destined to a blockaded port or, in the case of contraband, to the Confederacy as a whole. See The Peterhoff, 72 U.S. 28, 54-59 (1867);
I do not mean to deny that the United States may plausibly be charged with hypocrisy. My point, rather, is that a fuller understanding of the circumstances reveals that the United States had many compelling reasons to alter its position on these legal questions and that the opposite claim—that the United States was fully justified in changing its position—is at least equally plausible. This is especially so because, as previously discussed, the British did not object and because it is far from clear, in view of the longstanding disputes over these doctrines, that the United States was actually acting in violation of customary international law. Few would deny that customary international law does, and should, change in response to changing circumstances. In this connection, it is perhaps worthwhile to note that in the decades following the Civil War, further advances in technology placed increasingly intense pressure on the traditional neutrality regime and that by World War I, with the advent of submarines and industrial total war, the legal regime was almost totally outmoded.

To support their version of events, Goldsmith and Posner quote an historian who notes the irony in the fact that following the Declaration of Paris the United States was the first nation to move towards a more pro-belligerent approach to customary international law: “By [an] irony of fate, the first country to contribute to [the] stultification of the Free Ships rule was the very state which had been the rule’s most consistent champion—the United States.” Goldsmith and Posner neglect to mention that a few sentences later, after briefly reviewing the Civil War history and the famous Supreme Court decisions upholding the continuous voyage doctrine, the same author observes:

In making these reasonable claims, the Supreme Court was only developing that ‘doctrine of continuous voyage’ which had been accepted by Lord Stowell [a.k.a., Sir William Scott] in the English Prize Court during the Napoleonic wars. Realizing the

The Springbok, 70 U.S. 1, 21-27 (1867); The Bermuda, 70 U.S. 514, 551-57 (1866). This limitation meant that neutral trade to, for example, the Bahamas or to Matamoros, even in contraband, could not be claimed as prize so long as there was to be a real intermediate sale to an importer in the neutral port. It did not matter that the only buyer to whom the importer could plausibly sell the imported items—often manufactured specifically to meet the requirements of the Confederate army—was a Confederate agent. Thus, neutral traders would have had little difficulty circumventing the rule. See The Peterhoff, 72 U.S. at 59; The Springbok, 70 U.S. at 25; The Bermuda, 72 U.S. at 551-52.

Goldsmith & Posner, supra note 1, at 48, quoting Arnold-Forster, supra note 105, at 31 (brackets in Goldsmith and Posner).
strength of the American case, the British Government, despite
depressure in England, wisely refused to support a protest against
these seizures. 107

* * *

In view of this more complete historical account, there are several points
which I underscore by way of summary:

First, Goldsmith and Posner’s account of the Civil War is inadequate by
any measure. To put it bluntly: Their account is wrong on some points; is
incomplete and misleading in other crucial respects; fails to present a balanced
picture of the actual events or of their significance; and avoids confronting the
difficult challenges which a fairer presentation of the history raises for their
larger claims.

Second, even without further investigation, these findings are sufficient to
cast grave doubt upon their empirical case studies as a whole. There is simply
no reason to credit the findings of their other case studies in view of the flaws
which are so pervasive in their discussion of the Civil War. This is especially
so, because their methodological approach in general does not provide an
adequate basis upon which to draw historically sound conclusions. In any
case, although I cannot pursue the point here, my own research suggests that
similar flaws pervade other aspects of their case studies.

Third, the success of their project stands or falls upon the soundness of the
case studies. Without empirical confirmation, their models, even if
mathematically sound, are merely unsupported speculations.

Finally, the history recounted here permits some tentative conclusions
about customary international law (in the nineteenth century?). Most
importantly, it suggests the possibility that customary international law can
provide a relatively stable equilibrium which guides state behavior even in
areas where power and interest are most salient. It is possible that this effect
is due in part to international law’s “compliance pull.” Alternatively, it may
just reflect the scope of cooperative behavior that even purely self-interested
states can maintain under certain circumstances. Either way, the historical
evidence poses a profound challenge to Goldsmith and Posner’s pessimistic
claims about the possibilities for customary international law.

107 ARNOLD-FORSTER, supra note 105, at 31-32.
V. CONCLUSION

I have presented my assessment of The Limits of International Law candidly and, in doing so, have perhaps been unduly critical. Certainly, the book has many valuable insights, and its ambition to force international law scholars to take seriously the limits which the real world imposes on their normative reveries is welcome and urgently needed. Indeed, one can only hope that the provocative character of the book will manage to penetrate the powerful shield of denial which surrounds the discipline.

Still, the book's polemical character positively invites close scrutiny and blunt criticism. I have attempted to offer both. I do so, however, in a constructive vein, with the hope that my criticisms will provoke Goldsmith and Posner to deepen their research and shore up the foundations for their project. Undoubtedly, two such capable scholars will produce important advances in the field.