

# FORGOTTEN LINKAGES—HISTORICAL INSTITUTIONALISM AND SOCIOLOGICAL INSTITUTIONALISM AND ANALYSIS OF THE WORLD TRADE ORGANIZATION

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Institutionalism has become firmly entrenched in legal scholarship.<sup>1</sup> In particular, institutionalism has become a powerful and alluring theoretic for international law scholarship.<sup>2</sup> Given the use of institutionalism in international law scholarship, and the importance of international economic organizations to theory and practice, it is natural that institutionalism has been prominently used to scrutinize international economic organizations, including the World Trade Organization.

When international law scholars utilize the tools of institutionalism, however, they tend to draw only from two sources. International relation's regime theory<sup>3</sup> has entered the mainstream of international law discourse, and has been applied directly to the World Trade Organization. Institutional economics,<sup>4</sup> particularly transaction cost analysis, has also appeared in international law discourse, and has been directly applied to organizations that include the World Trade Organization.

Regime theory and institutional economics, however, do not exhaust the universe of sources of institutional analysis. Virtually

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<sup>1</sup> See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1393 (1996) (predicting that institutionalism may bring a rapprochement between law and economics and "outsider" schools such as feminist legal theory, which will create a unified theory for legal scholarship).

<sup>2</sup> See William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 229 (noting the increasing use of institutionalism in international law scholarship); see also *infra* notes 9-60 and accompanying text (discussing the use of institutionalism in international law scholarship).

<sup>3</sup> See discussion *infra* notes 9-36 and accompanying text.

<sup>4</sup> See discussion *infra* notes 36-60 and accompanying text.

all of the social sciences are experiencing a revival in institutionalism.<sup>5</sup> In particular, this Article examines two schools of institutionalism: historical institutionalism,<sup>6</sup> which is a product of political science; and sociological institutionalism,<sup>7</sup> which is a product of sociology. Each of these iterations of institutionalism differs in critical ways from regime theory or institutional economics. Each also provides a rigorous framework for analyzing international law and for scrutinizing the World Trade Organization. To date, however, neither international law scholars nor trade scholars have availed themselves of these two means of inquiry.

This lack of use raises an interesting question, which is analyzed in this Article: why have international law scholars and trade scholars not utilized historical institutionalism or sociological institutionalism? Ironically, historical and sociological institutionalism themselves provide insights. Historical institutionalism emphasizes path dependency: a brief review of the unfolding of institutional thought in international law scholarship reveals how regime theory and institutional economics obtained an advantage over rival schools. Similarly, sociological institutionalism emphasizes cultural factors in the creation or alteration of institutions: the culture of legal scholarship may not be conducive to these versions of institutionalism.

The implications for both trade scholarship and the World Trade Organization as institutions are significant. Understanding why trade scholarship has not incorporated historical and sociological institutionalism may explain why trade scholarship has not established linkages with other potentially instructive schools of thought, such as business ethics. Moreover, understanding the World Trade Organization as an institution<sup>8</sup> with a history and embedded in culture may explain why practical linkages, such as

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<sup>5</sup> See Vivien Lowndes, *Varieties of New Institutionalism: A Critical Appraisal*, 74 PUB. ADMIN. 181, 181-82 (1996) (noting the revival in and plethora of institutionalisms).

<sup>6</sup> See discussion *infra* notes 62-90 and accompanying text.

<sup>7</sup> See discussion *infra* notes 91-120 and accompanying text.

<sup>8</sup> An institution not in the sense of an institute but rather as a bundle of rules and procedures. See Douglass C. North, *Institutional Change: A Framework for Analysis*, in SOCIAL RULES: ORIGIN; CHARACTER; LOGIC; CHANGE 189, 190 (David Braybrooke ed., 1996) (distinguishing institutions—"the rules of the game" from organizations—"the players").

the linkage between trade and human rights, are difficult to accomplish.

Before discussing the possibilities that accrue from understanding the relationship between trade scholarship and historical and sociological institutionalism, the current 'linkage between trade scholarship and institutionalism must be explained. This article begins with a discussion of institutionalisms that have been used to analyze the World Trade Organization.

## 1. INSTITUTIONALISM AND ANALYSIS OF THE WORLD TRADE ORGANIZATION

Two iterations of institutionalism predominate in international law scholarship, and these two have resulted in the only significant institutional analysis of international economic organizations such as the World Trade Organization. These two are regime theory and institutional economics. Each is distinct from the other, and each shall be discussed in turn.

### 1.1. *Regime Theory*

Kenneth Abbott introduced the international relations school of regime theory<sup>9</sup> to international law scholarship in an article published in the *Yale Journal of International Law* in 1989.<sup>10</sup> Abbott noted the schism between international relations theory and international law theory, and attributed this schism to differences in the theoretical approaches dominating each discipline.<sup>11</sup> International relations theory was, at that time, dominated by the school of realism, which "see[s] a world of states obsessed with

<sup>9</sup> Regime theor sometimes also uses the appellation "institutionalism." John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 140 (1997). Given the number of different types of institutionalism that are discussed in this Article, this Article will use the older appellation "regime theory" when discussing international relations theor, so as to avoid confusion with other types of institutionalism.

<sup>10</sup> Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); see Anne-Marie Slaughter [Burley], Book Review, 89 AM J. INT'L L. 454, 454 (1995) (reviewing VOLKES RITTBERGER, *REGIME THEORY AND INTERNATIONAL RELATIONS* (1993)) (stating that Kenneth Abbott "first broached the connection between regime theory and international law").

<sup>11</sup> See Abbott, *supra* note 10, at 337-38; see also FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 58-60 (1985) (discussing the schism and criticizing international law scholarship).

their power vis-à-vis other states,” and in which international law is mere “window dressing.”<sup>12</sup> International law, on the other hand, was dominated by a rather moribund positivism, with a goal to describe international law as it is rather than as a theoretical construct.<sup>13</sup>

Abbott perceived the possibility of rapprochement between international relations theory and international legal scholarship in a new school of thought within the discipline of international

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<sup>12</sup> Abbott, *supra* note 10, at 337-38; see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4-5 (4th ed. 1967) (arguing that the only relevant law is the “law of politics”); Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133, 138 (Karl W. Deutsch & Stanley Hoffman eds., 1968) (criticizing international law as a “repository of legal rationalizations”); see also Ann-Marie Slaughter [Burley], *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 721-22 (1995) (noting that the realist school dominated international relations theory for “virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau”).

Slaughter [Burley] summarizes realism in three principles: states are the pertinent actors in international relations, states are rational actors who seek power, and the organizing principle of international relations is anarchy. *Id.* at 722. She cautions, however, that this simple summary does not fully capture the complexities or varieties of the school of realism. *Id.* at 727. More fulsome discussions can be found in classic realist texts such as GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900-1950* (1951) or MORGENTHAU, *supra*.

<sup>13</sup> Positivism in international law posits three principles: all sovereign states are equal and independent, international law consists only of those rules that states have consented to follow, and states are the only actors in the international arena. See L. OPPENHEIMER, *INTERNATIONAL LAW* 20-21 (4th ed. 1928) (setting out the principles of positivism in international legal scholarship); H. Lauterpacht, *Spinoza and International Law*, 8 BRIT. Y.B. INT’L L. 89, 106-07 (1927) (same); see also Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemma of Neo-Liberalism*, 17 J. INT’L L. & BUS. 1014, 1018 (1996) (noting that both legal positivism and international relations theory realism are state centered). Positivism has long been castigated for its detrimental effect on international legal theory. See, e.g., Roscoe Pound, *Philosophical Theory and International Law*, I BIBLIOTECA VISSERIANA 73, 87-88 (1923) (launching a blistering attack on positivism in international legal scholarship); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 819 (1990) (decrying “sterile positivism” in international law scholarship). Nonetheless, positivism “still dominates the profession.” BOYLE, *supra* note 11, at 18. David Kennedy notes the predominance of positivism, but also calls attention to “new streams” of international law scholarship. David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT’L L.J. 417, 418 (1994) (noting “a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social, and legal theory”).

relations theory. That school of thought is regime theory. Regime theory originated as a reaction to an explanatory failure of realism. Realism posits a chaotic and competitive world.<sup>14</sup> The realist explanation for the existence of international organizations in such a hostile environment is that such organizations are imposed on other states by the most powerful states.<sup>15</sup> Under such a construct, however, the decline of U.S. hegemony in the 1970s and 1980s should have meant the end of international organizations. However, it did not.<sup>16</sup> This explanatory gap was filled by a subgroup of international relations theorists who study international organizations.<sup>17</sup> These subspecialists recognized that it is not simply states that determine international outcomes; states operate and interact through the rules and procedures of regimes. These regimes are maintained by the states because they are valuable to the states. They reduce the costs of making transactions among states, increase the quality and availability of information, legitimize and delegitimize behaviors of states, and facilitate reciprocity among states.<sup>18</sup> In short, regimes matter, and offer an analytic through which international behavior can be studied.

Abbott saw in regime theory "a long-overdue opportunity to re-integrate [international legal scholarship] and [international relations theory]."<sup>19</sup> International legal scholarship brings to the relationship its experience in rules and institutions. International relations theory, on the other hand, offers international legal scholarship an analytic by which it can escape the "narrow posi-

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<sup>14</sup> See MORGENTHAU, *supra* note 12, at 25-26 (describing international politics as "a struggle for power").

<sup>15</sup> ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 8-10 (1984) ("[F]or Realists . . . the early postwar regimes rested on the *political hegemony* of the United States."); see also Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985) (setting out and refuting the realist hegemony explanation).

<sup>16</sup> See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 859 (1995) (pointing out that the GATT and IMF continued to exert great influence after the decline of U.S. hegemony).

<sup>17</sup> See Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986) (recounting a history of the study of international organizations).

<sup>18</sup> KEOHANE, *supra* note 15, at 244 (attributing accord to "complementary interests, which make certain forms of cooperation potentially beneficial").

<sup>19</sup> Abbott, *supra* note 10, at 338.

tivism" in which it is trapped.<sup>20</sup> Each school obviously has potential benefits for the other.

Anne-Marie Slaughter Burley amplified Abbott's ideas in an article published in 1993.<sup>21</sup> Burley's approach is much different than Abbott's. Abbott explains, in extreme detail, the concept and mechanics of regime theory.<sup>22</sup> Burley, on the other hand, concentrates on a detailed intellectual history of the relationship between international relations theory and international law scholarship.<sup>23</sup> Burley reaches two conclusions. First, she notes that the convergence of regime theory and international law scholarship creates opportunities for interdisciplinary collaboration.<sup>24</sup> Second, Burley concludes that regime theory "remains theoretically inadequate in many ways."<sup>25</sup> Specifically, she faults regime theory for its inability to explain the creation of regimes, and for its failure to account for the relationship between the individual and the state.<sup>26</sup> She offers the "Liberal Theory" as a doctrinal alternative to both realism/positivism and regime theory.<sup>27</sup>

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<sup>20</sup> *Id.* at 339-40.

<sup>21</sup> See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993). Burley's article evokes a reaction similar to that elicited by Abbott's article. See, e.g., Setear, *supra* note 9, at 139 n.1 (1997) (noting that Burley's article represents "the best summary of the trends and counter-trends in the relationship between international relations theory and international legal scholarship"); Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 CORNELL INT'L L.J. 71, 76 n.8 (1995) (discussing Burley's article as "an excellent analysis of contemporary international relations theory").

<sup>22</sup> See Abbott, *supra* note 10, at 342-404.

<sup>23</sup> See Burley, *supra* note 21, at 207-20 (describing the 'postwar trajectory' of international relations theory).

<sup>24</sup> See *id.* at 222. Specifically, Burley suggests collaboration on distinguishing legal regimes from nonlegal regimes, studying organizational design, studying the phenomenon of compliance with international rules, and undertaking a normative inquiry into international ethics. See *id.* at 222-24.

<sup>25</sup> *Id.* at 225.

<sup>26</sup> See *id.* at 225-26. Burley also specifically faults regime theory for its failure to explain peace among democratic nations; this, however, is more an example of regime theory's weakness than a general criticism. See *id.*; see also Bruce Russett, *Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World*, in ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE 107, 111 (Burns H. Weston ed., 1990) (discussing a number of studies that show that democratic nations rarely go to war with one another).

<sup>27</sup> Burley, *supra* note 21, at 227. Burley recognizes that the school of liberalism encompasses a number of constructs, but suggests that three core assump-

Notwithstanding Burley's criticism, Abbott's suggestion that international legal scholarship borrow from regime theory has created a cottage industry in institutionalism. Scholars such as Abbott, Burley, Jutta Brunnée and Stephen Toope, Frank Garcia, John Setear, and Edwin Smith have used institutionalism to explain and analyze a variety of public international law issues.<sup>28</sup> Indeed, Michael Reisman has characterized institutionalism as "the current rage in the United States."<sup>29</sup> It is important to note, however, that although many legal scholars use the broad term institutionalism, the roots of their analyses lie in the regime theory of international relations.<sup>30</sup>

Regime theory has also been used to analyze the World Trade Organization. In an article published in 1995, Richard Shell extensively utilizes realism, regime theory and liberalism to scrutinize the World Trade Organization.<sup>31</sup> In particular, Shell uses re-

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tions are common to the school: the fundamental actors in politics are members of society (whether individuals are privately constituted groups), all governments represent some segment of domestic society, and the behavior of states depends not on power relationships or institutional constraints but instead on what the state wants. *See id.* at 227-28. Burley relies heavily on an unpublished manuscript by Andrew Moravcsik. For accessible versions of Moravcsik's writing, see Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473 (1993), in which Moravcsik particularly applies the concept that a state's actions are determined more by its goals and preferences than by relative power distributions among states or by institutional constraints upon them, and Andrew Moravcsik, *Liberal Intergovernmentalism and Integration: A Rejoinder*, 33 J. COMMON MKT. STUD. 611 (1995), in which Moravcsik defends liberalism as a theory, and posits that it is necessary for understanding European integration.

<sup>28</sup> See Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993); Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26 (1997); Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997); Setear, *supra* note 9; Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549 (1991). The writings of Abbott, Burley and Smith are summarized in Setear, *supra* note 9, at 142-47.

<sup>29</sup> W. Michael Reisman, Book Review, 85 AM. J. INT'L L. 205, 206 (1991).

<sup>30</sup> Each of the scholars discussed in footnote 28 mention Abbott's 1989 article as a starting point for institutional analysis. *See* Brunnée & Toope, *supra* note 28, at 33 n.43; Garcia, *supra* note 28, at 361 n.15, Setear, *supra* note 9, at 140 n.1; Smith, *supra* note 28, at 1584 n.156.

<sup>31</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995). Shell makes explicit the lineage of his analysis by acknowledging his article's "particular

gime theory to explain one of the most intriguing aspects of the World Trade Organization: the potential legalism of its dispute settlement process.<sup>32</sup> In an interesting comparison and application of both realism and regime theory, Shell explains the transformation of dispute settlement in the global body as a paradigm shift from realism to regime theory. He convincingly demonstrates how this paradigm shift reflected real world changes that caused states to transform the dispute settlement process into a more legalistic institution.<sup>33</sup> Shell is not, however, completely satisfied with regime theory as an explanation for the World Trade Organization, because he finds regime theory lacking in its ability to explain the relationship between institutions and the preferences of individuals.<sup>34</sup> Therefore, he accepts regime theory as an explanation of the World Trade Organization as it is but turns to liberalism for an explanation of the World Trade Organization as he predicts, and hopes, that it will become.<sup>35</sup> Shell's facile use of the

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debt to the work of Kenneth Abbott and Ann-Marie Slaughter [Burley]." *Id.* at 834 n.21.

<sup>32</sup> The dispute settlement process of the World Trade Organization has evoked a significant amount of scholarly attention. See, e.g., Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111; Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161 (1996); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996); Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ, & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 129 (1995); David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 14-16 (1995); Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479 (1994); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996); Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?*, 11 ST. JOHN'S J. LEGAL COMMENT. 307 (1996); C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209 (1997).

<sup>33</sup> See Shell, *supra* note 31, at 895-98. Shell also discusses an efficient market model, which he discards in favor of regime theory. See *id.* at 897.

<sup>34</sup> *Id.* at 901-903; cf. *supra* notes 25-27 and accompanying text (relating to Slaughter [Burley]'s criticism of regime theory).

three schools is an excellent example of theoretical international law scholarship, and also demonstrates the value of a regime theory based analysis of the World Trade Organization.

In short, the essence of regime theory is that in international or transnational<sup>36</sup> relations, regimes matter. Institutions facilitate the prediction, planning and execution of international actions and form the basis on which states or other international actors may cooperate. They constrain the actions of international actors, who voluntarily adhere to institutions because it is easier or more effective to do so than not to do so. Institutions persist in a self-interested world because they have value to international actors. As a theoretic framework, international law scholars have borrowed from the regime theory. The use of regime theory has included analysis of the World Trade Organization, where regime theory has been used productively and plausibly, but not to the complete satisfaction of the scholar who first applied it as an analytical tool.

### 1.2. *Institutional Economics*

The second form of institutionalism that has worked its way into legal scholarship is institutional economics. Given the predominance of law and economics and the nominal fealty paid by most legal scholars to efficiency,<sup>37</sup> it may not seem surprising that economic institutionalism has found a niche in legal scholarship. However, in the realm of international law, this development is actually noteworthy. Unlike other branches of legal scholarship,

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<sup>35</sup> Shell, *supra* note 31, at 911-15 (explaining an international law developed by "citizen-sponsored, nongovernmental organizations").

<sup>36</sup> A small number of regime theorists argue that the theory is applicable to non-state as well as state actors. See, e.g., SUSAN STRANGE, STATES AND MARKETS 200 (1988); Virginia Haufler, *Crossing the Boundary Between Public and Private International Regimes and Non-State Actors*, in REGIME THEORY AND INTERNATIONAL RELATIONS 94 (Volker Rittberger ed., 1993); see also Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 876-77 (1996) (suggesting that international legal scholarship does not need to limit itself in the application of regime theory to state actors).

<sup>37</sup> See Richard A. Westin, *When One-Eyed Accountants are Kings: A Primer on Microeconomics, Income Taxes and the Shibboleth of Efficiency*, 69 MINN. L. REV. 1099 (1985) (noting the use and overuse of economic concepts in legal scholarship).

international law scholarship has not been the subject of large amounts of economic analysis.<sup>38</sup>

Institutional economics<sup>39</sup> is a response to a perceived flaw in neo-classical economics. Neo-classical economics bases its theoretical models on the actions of rational individuals who act to maximize their own well-being (often spoken of as wealth).<sup>40</sup> In reality, however, consumption decisions are usually made by households and production decisions are usually made by firms.<sup>41</sup>

<sup>38</sup> See Abbott, *supra* note 10, at 337. Abbott attributes this to the predominance of positivism in international legal analysis and the corresponding lack of interest in explanatory models. *Id.* Of course, the analytical landscape is not as bleak as Abbott depicts. In addition to the use of institutional economic analysis, others have explored the usefulness of economic analysis of international law. See, for example, the essays collected in *ECONOMIC DIMENSIONS ON INTERNATIONAL LAW* (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

<sup>39</sup> Institutional economics is sometimes referred to as “neo-institutional economics” in order to distinguish it from the earlier works of Thorstein Veblen and John R. Commons. See Douglass C. North, *The New Institutional Economics*, 142 J. INSTITUTIONAL & THEORETICAL ECON. 230 (1986). Ironically, the earlier institutional economics also had a powerful influence on contemporary legal theory. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 19 (1986) (discussing the influence of institutional economics, and of Veblen in particular, on legal realism).

<sup>40</sup> See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2115 (1996). These assumptions, of course, have been criticized as inaccurate, unverified, or unverifiable. See, e.g., *id.* at 2117-18 (stating that the assumptions made by the law and economic movement are unverifiable and unfalsifiable); John J. Donahue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 812 (1987) (criticizing law and economic's “clean assumptions”); John J. Flynn, *The “Is” and the “Ought” of the Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORNELL L. REV. 1095, 1128-29 (1986) (stating that law and economics “patterns its methodology after an outmoded notion of ‘scientific analysis’” and is based “upon a series of unrealistic notions”); Judith Schenck Koffler, *Forged Alliances: Law and Literature*, 89 COLUM. L. REV. 1374, 1382 (1989) (book review) (“law and economics rests on assumptions about human nature that many, especially trained humanists, find disturbing”); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 285 (1989) (“Many assumptions of normative law and economics are either untested or called into doubt by empirical testing.”). *But see* Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 293 (1992) (responding to some of the criticisms of law and economics’ assumptions). Radical individualism has also been the target of criticism by legal ethicists. See, e.g., Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987) (arguing that the organic community has priority over individuality).

<sup>41</sup> See Robert B. Bates, *Social Dilemmas and Rational Individuals*, in *ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS* 43, 44 (James M. Acheson ed., 1994) (“Given the centrality of radical individualism, it has been pro-

Neo-classical economics is forced to treat these collectives as if they were individuals and to ignore the process that occurs within the collective.<sup>42</sup> Ultimately, such “black box” treatment is theoretically unsatisfying. Institutional economics is one aspect of the resulting interest in how individual choices are made.<sup>43</sup>

The school of institutional economics has not yet sorted out its principles.<sup>44</sup> Nonetheless, its basic assumptions and theory can be described. Institutional economics begins with the individual, whose behavior is opportunistically rational—“rational” meaning that the individual seeks to maximize his or her wealth and to minimize costs. Rationality, however, is bounded by the information that is available.<sup>45</sup> Obtaining information imposes transaction costs on actors.<sup>46</sup> Institutions facilitate the gathering and communication of information, thereby reducing transaction costs.<sup>47</sup> Indeed, “[t]he discriminating alignment hypothesis to which transaction cost economics owes much of its predictive content holds that transactions, which differ in their attributes, are aligned with governance structures, which differ in their costs and competencies, in a discriminating (mainly, transaction cost economizing) way.”<sup>48</sup>

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foundly embarrassing to modern economics that in its models market forces did not rest on the choice of individuals.”).

<sup>42</sup> See Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 15 (1953) (defending “as if” arguments).

<sup>43</sup> Bates, *supra* note 41, at 45.

<sup>44</sup> See James M. Acheson, *Introduction*, in *ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS*, *supra* note 41, at 1, 6 (“Institutional economics is moving so rapidly that no commonly agreed set of principles has emerged.”).

<sup>45</sup> See MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* 198 (1992) (stating that institutional economics “characterizes individuals in the marketplace as weakly rational and weakly moral”).

<sup>46</sup> See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 31-32 (1975) (stating that obtaining information is one of the most important transaction costs). Carl Dahlman identifies the time, effort and expense of obtaining the “information necessary to make an exchange, negotiate the exchange and enforce the exchange” as transaction costs. See Carl Dahlman, *The Problems of Externality*, 22 J. L. & ECON. 141, 149 (1979).

<sup>47</sup> Anthony Obershall & Eric M. Leifer, *Efficiency and Social Institutions: Uses and Misuses of Economic Reasoning in Sociology*, 12 ANN. REV. SOC. 233, 237 (1986).

<sup>48</sup> Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 277 (1991).

Thus, an understanding of the relationship between transaction costs and institutions is thought to be critical to an understanding of economic exchange, the existence of institutions, and the existence of international institutions.<sup>49</sup> Moreover, institutional economics predicts that individuals will seek out and utilize institutions that minimize transaction costs, and may endeavor to create alternative institutions if suitable institutions do not exist.<sup>50</sup>

Institutional economics has been criticized in a number of ways.<sup>51</sup> One criticism deals with the assumption that rational behavior is self-centered. In his writing, Amartya Sen has noted that “[t]he economic man is a social moron.”<sup>52</sup> Other social scientists also criticize institutional economics’ humans as “under socialized” and point out that economic relations are shaped by a multitude of cultural interests that have nothing to do with self-interest.<sup>53</sup> Indeed, some institutional economists feel that their

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<sup>49</sup> See THRÁIN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS: PRINCIPALS OF NEO-INSTITUTIONAL ECONOMICS* (1990); NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994); Bruno Frey, *The Economic Approach to Institutions: Institutions Matter: The Comparative Analysis of Institutions*, 34 EUR. ECON. REV. 443 (1990); Werner Pommerehne, *The Empirical Relevance of Comparative Institutional Analysis*, 34 EUR. ECON. REV. 458 (1990); Beth V. Yarbrough & Robert M. Yarbrough, *International Organizations and the New Economics of Organizations*, 44 INT’L ORG. 235 (1990) (book review).

<sup>50</sup> See Douglass C. North, *Institutional Change: A Framework of Analysis*, in *INSTITUTIONAL CHANGE: THEORY AND EMPIRICAL FINDINGS* 35, 35-46 (Sven-Erik Sjöstrand ed., 1993) (discussing theory of institutional change); Andrew Stone et al., *Public Institutions and Private Transactions: A Comparative Analysis of the Legal and Regulatory Environment for Business Transactions in Brazil and Chile*, in *EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE* 95, 98-100 (Lee Alston et al. eds., 1996) (discussing and applying theory of institutional change).

<sup>51</sup> An emotional response to the general criticism is found in WILLIAM M. DUGGER, *UNDERGROUND ECONOMICS: A DECADE OF INSTITUTIONALIST DISSENT* xviii (1992) (“So our realism will continue to be a threat to academic complacency as long as the real world exists, for the real world is insistent and can push its surprises into the most cloistered of academic sanctuaries.”). The responses of Ronald Coase (1991), Gary Becker (1992) and Douglass C. North (1993) to general critics of institutional economics were less emotional but probably more effective: each of these institutional economists won the Nobel prize.

<sup>52</sup> Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 336, 336 (1977).

<sup>53</sup> Mark Granovetter, *Economic Action and Social Structure: A Theory of Embeddedness*, 91 AM. J. SOC. 481, 502-05 (1985).

discipline can only overcome these barriers by borrowing from other social sciences.<sup>54</sup>

Despite these criticisms, many social sciences have found the transaction cost analysis contained in institutional economics to be valuable. The law and economics movement has an obvious interest in this school of thought.<sup>55</sup> Indeed, Ronald Coase's transaction cost explanation for the existence of firms has become the dominant paradigm in corporate legal theory.<sup>56</sup>

<sup>54</sup> See Bates, *supra* note 41, at 54-59 (calling for a "new anthropology"); see also Christian Knudsen, *Equilibrium, Perfect Rationality and the Problem of Self-Reference in Economics*, in RATIONALITY, INSTITUTIONS AND ECONOMIC METHODOLOGY 133, 134 (Uskali Mäki et al. eds., 1993) (arguing that solving basic problems in institutional economics "seems to require a broadening of the behavioural foundation of economics insofar as one has to emphasize not only the substantive, but also the procedural and the epistemic aspects of rationality"). But see Thráin Eggerston, *A Note on the Economics of Institutions*, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE, *supra* note 50, at 6, 17-20 (defending the assumption of self-interested, rational behavior).

<sup>55</sup> See generally Steven G. Medema, *Discourse and the Institutional Approach to Law and Economics: Factors that Separate the Institutional Approach to Law and Economics from Alternative Approaches*, 23 J. ECON. ISSUES 417 (1989); Richard Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 73 (1993).

<sup>56</sup> See Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 659 (1996) (stating that economic theories are "now the dominant paradigm in corporate law"); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), reprinted in RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988); Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 515 (1993) (stating that offspring of Coase's analysis "still reigns supreme in the academic literature"); Jason S. Johnston, *The Influence of the Nature of the Firm on the Theory of Corporate Law*, 18 J. CORP. L. 213, 213 (1993) (stating that Coase's theory dominates theoretical work in corporate law). Oliver Williamson has expanded Coase's original theory in a manner that has particular application to institutional economics. See OLIVER E. WILLIAMSON, *ECONOMIC ORGANIZATION: FIRMS, MARKETS AND POLICY CONTROL* (1986); Oliver E. Williamson, *Economics and Organizations: A Primer*, 38 CAL. MGMT. REV. 131 (1996).

It should be noted that the dominance of Coase's theory of firms does not mean that there is only one economic model of firms. Michael Jensen and William Meckling, for example, define a firm not in terms of agency costs but instead as a "nexus for contracting relationships." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976). But see William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 415 (1989) (criticizing Jensen and Meckling's and related theories). Oliver Hart, on the other hand, emphasizes not contracts but instead the ownership of property by the firm. See OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* 57 (1995). Other economists proffer an employment

Joel Trachtman has used institutional economics as the foundation for comparison of international economic organizations, including the World Trade Organization. Trachtman hypothesizes that “states use and design international institutions to maximize the members’ net gains,” which are the gains from a transaction minus the losses from and costs of that transaction.<sup>57</sup> Trachtman makes the important distinction between the markets to which institutional economics is usually applied<sup>58</sup> and the international arena: the commodities exchanged in the international arena are “agreements regarding the allocation of power.”<sup>59</sup> After thoroughly working through the details of institutional economic theory and applying them to international economic organizations, Trachtman concludes that, although additional theoretical and empirical work needs to be done, institutional economics provides a useful means of scrutinizing and comparing international economic organizations. The metric for scrutiny and comparison, in Trachtman’s theory, is how efficient an international economic organization is in maximizing states’ preferences.<sup>60</sup> Trachtman’s excellent analysis illustrates the potential of an institutional economic analysis of the World Trade Organization.

In short, institutional economics uses institutions to explain the actions of rational, self-interested actors. These actors create or modify institutions on the basis of the extent to which the institutions enhance efficiency in obtaining the actors’ preferences. Institutional economics has influenced legal scholarship, and will probably make inroads in international law scholarship. Indeed, it has been used as an analytic for the comparison of international economic organizations such as the World Trade Organization.

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theory of the firm. See, e.g., Samuel Bowles & Herbert Gintis, *Contested Exchange: New Microfoundations for the Political Economy of Capitalism*, 18 POL. & SOC. 165 (1990); Bengt Holmstrom & Paul Milgrom, *The Firm as an Incentive System*, 84 AM. ECON. REV. 972 (1994); Louis Putterman, *Ownership and the Nature of the Firm*, 17 J. COMP. ECON. 243 (1993).

<sup>57</sup> Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT’L L. & BUS. 470, 473-74 (1997). The statement obviously resonates with aspects of regime theory in that institutions are designed by their users and serve rational, means-end utilities.

<sup>58</sup> That is, the market for goods or services.

<sup>59</sup> Trachtman, *supra* note 57, at 487. Trachtman notes that in legal analysis power is called jurisdiction. See *id.* at 498.

<sup>60</sup> See *id.* at 555.

## 2. ALTERNATIVE INSTITUTIONALISMS: HISTORICAL INSTITUTIONALISM AND SOCIOLOGICAL INSTITUTIONALISM

To label historical institutionalism and sociological institutionalism as “alternative” forms of institutionalism may be somewhat misleading. Both are firmly established schools of thought in other disciplines: historical institutionalism has been a part of political science since the 1960s and sociological institutionalism has been a growing part of sociology for almost as long.<sup>61</sup> The term “alternative” is used in this Article only to emphasize that these schools of thought have not yet been mined by international legal scholarship.

Because some legal scholars may be unfamiliar with either historical or sociological institutionalism, each is briefly discussed in the following subsections.

### 2.1. *Historical Institutionalism and Sociological Institutionalism*

#### 2.1.1. *Historical Institutionalism*

Historical institutionalism<sup>62</sup> is a reaction to and extension of the group theory and structural functionalist approaches to political science that dominated the 1960s and 1970s. Group theory emphasizes power and conflict, arguing that politics is a balancing “of various forces contending for power and the making of decisions.”<sup>63</sup> Structural functionalism compares social entities to or-

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<sup>61</sup> An especially informative discussion of historical and sociological institutionalism from which this Article benefits substantially is Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 49 POL. STUD. 936 (1996).

<sup>62</sup> Kathleen Thelen and Sven Steinmo use the appellation “historical institutionalism.” See Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 2 (Kathleen Thelen & Sven Steinmo eds., 1992). They, in turn, attribute the phrase to Theda Skocpol. See *id.* at 28 n.4. It is not always identified as such by members of the school.

<sup>63</sup> RONALD H. CHILCOTE, THEORIES OF COMPARATIVE POLITICS: THE SEARCH FOR A PARADIGM 35 (1981). Obviously, group theory cannot be summarized in one sentence. A chapter length explanation of group theory can be found in JAMES A. BILL & ROBERT L. HARDGRAVE, JR., COMPARATIVE POLITICS: THE QUEST FOR THEORY 117-141 (1973). In particular, “[g]roup scholars view the political system as a gigantic network of groups in a constant state of interaction with one another. This interaction takes the form of pressures and counterpressures, the outcome of which defines the state of the politi-

ganic entities,<sup>64</sup> and by studying how structures work together, tries "to provide a consistent and integrated theory from which can be derived explanatory hypotheses relevant to all aspects" of a given system.<sup>65</sup> From group theory, historical institutionalism

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cal system at any given time." *Id.* at 120. Moreover, "[i]n an attempt to uncover the 'real' or 'basic' forces of political life, group scholars ruthlessly cut through the formal and institutional trappings of government and focus[] their attention upon structures of competition." *Id.* at 134. Bill and Hardgrave attribute the introduction of concepts such as "power," "interest," and "conflict" into mainstream political science to group theorists. *Id.* at 134-35; see John G. Gunnell, *The Genealogy of American Pluralism: From Madison to Behavioralism*, 13 INT'L POL. SCI. REV. 253 (1997) (discussing the influence of group theory on political science); cf. CHILCOTE, *supra*, at 350 (giving John Locke, Jeremy Bentham, and James Madison credit for providing the intellectual basis for group theory). Group theory continues to dominate American political science. See Paul H. Brietzke, *Administrative Law and Development: The American "Model" Evaluated*, 26 HOW. L. J. 645, 659 (1983); see, e.g., Marie Hojnacki, *Interest Groups' Decisions to Join Alliances or Work Alone*, 41 AM. J. POL. SCI. 61 (1997) (using group theory concepts).

<sup>64</sup> Cf. A.R. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 178 (1952) (stating that the understanding of social function is based on "an analogy between social life and organic life").

<sup>65</sup> William Flanigan & Edwin Fogelman, *Functional Analysis, in CONTEMPORARY POLITICAL ANALYSIS* 72, 76 (James C. Charlesworth ed., 1967). Again, this school of thought cannot be fully explicated in one sentence. For a longer treatment, see BILL & HARDGRAVE, *supra* note 63, at 201-17; see also CHILCOTE, *supra* note 63, at 162-82 (analyzing the work of Gabriel Almond, an important early figure in structural functionalism). In particular, structural functionalists perceive society as "a tightly integrated system of inter-related elements or structures. These structures exist because they perform functions: one can explain various structures . . . by discovering their function." David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 32 (1990). Analytically, "[t]he principal objective of functional analysis is to determine the contribution which a social item (a structure or process) makes to the persistence of the system in which it occurs, that is, the role it plays in maintaining the system within specified limits." BILL & HARDGRAVE, *supra* note 63, at 203. The most glaring weakness of structural functionalism is its requirement that all systems perform functions: in reality there are many dysfunctional systems. See John H. Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 445 (1989) (book review) (attributing the demise of structural functionalism to the discovery of dysfunctional systems). Given these and other explanatory weaknesses, the predominance of structural functionalism has waned. See NICHOLAS C. MULLINS, *THEORIES AND THEORY GROUPS IN CONTEMPORARY AMERICAN SOCIOLOGY* 66-67 (1973) (stating that structural functionalism stopped being the majority view in 1968). Nonetheless, structural functionalism continues to exert influence on political science. See Ruth Lane, *Structural-Functionalism Reconsidered: A Proposed Research Model*, 26 COMP. POL. 461 (1994) (advocating use of the structural functionalist model for theoretical research); Susan A. Mann et al., *Paradigm Shifts in Family Sociology? Evidence from Three Decades of Family Textbooks*, 18 J. FAM. ISSUES 31 (1997) (arguing

draws the concept of rivalry; from structural functionalism, historical institutionalism draws an image of the polity as an integrated system. The primary difference between historical institutionalism and its intellectual forebears is that while structural functionalists often argued that external factors drive the functioning of a system, historical institutionalists hold that the system structures collective behavior and thus shapes external events.<sup>66</sup>

Historical institutionalists perceive institutions as the formal or informal rules or procedures embedded in a formal organization. Peter Hall defines institutions as

the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy. As such, they have a more formal status than cultural norms but one that does not necessarily derive from legal, as opposed to conventional, standing. . . . [T]he term "organization" will be used here as a virtual synonym for "institution."<sup>67</sup>

Because historical institutionalism has not yet coalesced as a doctrinal school, it is difficult to summarize in a few short paragraphs; nonetheless, some of the basic characteristics of historical institutionalism can be highlighted. The most striking, and perhaps definitive, characteristic of this school of thought is its emphasis on the historical "path" taken by an institution in its creation and development.<sup>68</sup> These pathways are marked by critical

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that structural functionalism is so deeply embedded in political science discourse that it continues to govern significant issues and debates).

<sup>66</sup> Hall & Taylor, *supra* note 61, at 937.

<sup>67</sup> PETER A. HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* 19 (1986).

<sup>68</sup> See Seymour M. Lipset & Stein Rokkan, *Cleavage Structures, Party Systems, and Voter Alignments: An Introduction*, in *PARTY SYSTEMS AND VOTER ALIGNMENTS: CROSS-NATIONAL PERSPECTIVES* 1, 37 (Seymour M. Lipset & Stein Rokkan eds., 1967). Paul David refers to this as "path dependent" change. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. PAPERS & PROC. 332, 332 (1985). Path dependency, of course, has become an analytical tool used by other social sciences, albeit in slightly different forms. Path dependency has even been used in purely legal analysis. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309

junctures, or cleavages, which present new paths or opportunities for change. "A critical juncture may be defined as a period of significant change, which typically occurs in distinct ways in different countries and which is hypothesized to produce distinct legacies."<sup>69</sup> A critical juncture is measured against a baseline of antecedent conditions. Ruth Collier and David Collier explain that there are three claims made of a purported critical juncture: that significant change took place, that the change took place in a distinct way, and that the change produced a legacy.<sup>70</sup> The legacy is critical to historical institutionalism because it becomes the new antecedent condition, conditions what choices can be made at future critical junctures, and determines the range of choices that can be made on a day to day basis.<sup>71</sup> Stephen Krasner makes explicit this core assumption of historical institutionalists:

Historical developments are path dependent; once certain choices are made, they constrain future possibilities. The range of options available to policymakers at any given point in time is a function of institutional capabilities that were put in place at some earlier period, possibly in response to very different environmental pressures.<sup>72</sup>

Historical institutionalists emphasize the role of power, competition, and coalitions in analyzing how an institution operates. This, of course, is a legacy of historical institutionalism's group theory roots. Margaret Weir's discussion of U.S. economic policy

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(1995) (using path dependency to analyze standing); Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (using path dependency to analyze justiciability).

<sup>69</sup> RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 29 (1991) (footnote omitted).

<sup>70</sup> See *id.* at 30. Collier and Collier also break the legacy down into three components: "mechanisms of production of the legacy," "[m]echanisms of reproduction of the legacy," and "stability of the core attributes of the legacy." *Id.* at 30-31. Each of these attributes bears directly on whether the purported legacy is in fact a legacy, that is, whether the critical juncture effectuated a real and lasting change in extant conditions. See *id.*

<sup>71</sup> Cf. JAMES GLICK, *CHAOS* 8 (1987) (emphasizing the "sensitive dependence on initial conditions").

<sup>72</sup> Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 67 (1988).

is a striking example of this preoccupation. She demonstrates that the structure of the political system leads to certain types of coalitions and precludes others.<sup>73</sup>

Historical institutionalism exhibits a nonparochial approach to the causal forces in politics. Although the role of institutions is emphasized and thoroughly explored, it is not given an exclusive role. "They typically seek to locate institutions in a causal chain that accommodates a role for other factors, notably socioeconomic development and the diffusion of ideas. In this respect, they posit a world that is more complex than the world of tastes and institutions often postulated by" self-interest based theories.<sup>74</sup> An example that is of particular pertinence to this Article is an analysis by Judith Goldstein, in which she demonstrates that the structure for formulating trade policy in the United States reinforces the influence of certain types of ideas and diminishes the influence of others; the ideas themselves are significant factors in producing the outcome.<sup>75</sup>

Similarly, historical institutionalism does not posit one exclusive means by which institutions affect individual behavior.<sup>76</sup> Hall and Taylor set out two competing theories of how institutions affect behavior: the calculus approach and the cultural approach.<sup>77</sup> The calculus approach assumes that behavior is strategic. According to the calculus approach, institutions "provide information relevant to the behavior of others, enforcement mechanisms for agreements, penalties for defection, and the

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<sup>73</sup> See Margaret Weir, *Ideas and the Politics of Bounded Innovation*, in STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS, *supra* note 62, at 188; see also SVEN STEINMO, TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE (1993) (explaining cross-country differences in tax systems by examining the way that political structure affects access to—and therefore power over—the political decisionmaking system).

<sup>74</sup> Hall & Taylor, *supra* note 61, at 942.

<sup>75</sup> See Judith Goldstein, *Ideas, Institutions and American Trade Policy*, 42 INT'L ORG. (1988).

<sup>76</sup> Hall and Taylor state: "Central to any institutional analysis is the question: how do institutions affect the behaviour of individuals? After all, it is through the action of individuals that institutions have an effect on political questions." Hall & Taylor, *supra* note 61, at 939. It should be recalled that both Burley and Shell criticize regime theory for its inability to explain how institutions relate to individuals. See *supra* notes 26 & 33 and accompanying text.

<sup>77</sup> See Hall & Taylor, *supra* note 61, at 939.

like.”<sup>78</sup> Institutions, therefore, allow individuals to calculate rationally and persist because they are useful to individual actors.<sup>79</sup>

The cultural approach recognizes that behavior is purposeful, but emphasizes the fact that it is bounded by established routines, existing patterns, and worldviews.<sup>80</sup> According to the cultural approach, institutions “provide moral or cognitive templates for interpretation and action.”<sup>81</sup> Institutions thus allow an individual to filter and make meaningful the morass of information not only concerning the situation, but also concerning the individual himself or herself.<sup>82</sup> Institutions persist because they are deeply ingrained and because they shape the choices that an individual makes about reforming institutions.<sup>83</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> See Randall L. Calvert, *The Rational Choice Theory of Social Institutions*, in MODERN POLITICAL ECONOMY 216, 216 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995); see also Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in POLITICAL SCIENCE: THE SCIENCE OF POLITICS 51, 74-75 (Herbert F. Weisberg ed., 1986) (arguing that individuals are hesitant to alter institutions even for short term gain because change creates a great deal of future uncertainty). This analysis is similar to that of the institutional economist Douglass C. North. See North, *supra* note 8, at 189.

<sup>80</sup> See, e.g., John L. Campbell, *The State and Fiscal Sociology*, 19 ANN. REV. SOC. 163, 164 (1993) (acknowledging that rational incentives are important but stating that cultural restraints are equally important).

<sup>81</sup> Hall & Taylor, *supra* note 61, at 939.

<sup>82</sup> See James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 738 (1984). A study conducted in Hungary provides interesting, and unintentional, empirical verification of this construct. The study found that a change in institutions, specifically, the advent of advertising, changed the manner in which individual Hungarians expressed their cultural identity. See Beverly James, *Learning to Consume: An Ethnographic Study of Cultural Change in Hungary*, 12 CRITICAL STUD. MASS COMM. 287 (1995).

<sup>83</sup> See ROBERT GRAFSTEIN, *INSTITUTIONAL REALISM: SOCIAL AND POLITICAL CONSTRAINTS ON RATIONAL ACTORS* (1992). Interestingly, some legal scholars have made the same observation about the relationship between law and society: that law is defined by, but at the same time defines, society. Mary Ann Glendon, in particular, has explored this aspect of law. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 311 (1989) (“A country’s law . . . both affects and is affected by the culture in which it arises . . .”); see also Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1087 (1995) (“Law shapes and defines who we are as a culture while reinforcing the belief system that undergirds it.”); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 83 (1993) (“The law is a powerful conceptual—rhetorical, discursive—force. It expresses conventional understandings of value, and at the same time influences conventional understandings of value.”); Lawrence Rosen, *A Con-*

Regime theory and institutional economics both clearly postulate a calculus approach to explore the relationship between individuals and institutions. Historical institutionalists, on the other hand, have used both of these approaches.<sup>84</sup> A striking example is Victoria Hattam's analysis of labor movements. In discussing the U.S. labor movement, she speaks of the movement analyzing and adopting or avoiding certain strategies—in particular, moving away from strategies that were susceptible to review by the entrenched judiciary.<sup>85</sup> On the other hand, when comparing the U.S. labor movement to the British labor movement, she contrasts the different institutions available to each movement, and discusses how these institutions created different worldviews that led to different actions.<sup>86</sup>

Historical institutionalism *qua* historical institutionalism<sup>87</sup> has made virtually no inroads into legal scholarship. Ronald Kahn, who is educated as a political scientist rather than as a lawyer, recently published an article on presidential appointment power that explicitly suggests historical institutionalism as a valuable model for legal scholarship.<sup>88</sup> Kahn particularly emphasizes historical institutionalism's ability to describe and interpret the roles of power, conflict, and cooperation.<sup>89</sup> Kahn's admonition, however, has not been heeded by legal scholarship. In fact, Kahn chided his fellow panelists in the symposium from which his article was published for not taking advantage of historical institutionalism.<sup>90</sup>

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*sumer's Guide to Law and the Social Sciences*, 100 YALE L.J. 531, 542 (1990) (book review) ("[L]aw is preeminently an artifact of culture: it is influenced by and constitutive of the way in which the members of a society comprehend their actions towards one another and infuse those actions with an air of immanent and superordinate worth.").

<sup>84</sup> See Hall & Taylor, *supra* note 61, at 940.

<sup>85</sup> See VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993).

<sup>86</sup> See *id.* at 180-203.

<sup>87</sup> That is, historical institutionalism as a school of thought rather than the simple concept of path dependency.

<sup>88</sup> See Ronald C. Kahn, *Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419, 1449-50 (1997).

<sup>89</sup> See *id.* at 1446. Kahn relies heavily on Stephen Skowronek, *Order and Change*, 28 POLITY 91 (1995).

<sup>90</sup> See Kahn, *supra* note 88, at 1445.

In short, historical institutionalism is a vibrant school of thought within the realm of political science. The definitive characteristic of historical institutionalism—an attenuated path dependency—has been used in other social sciences, including legal scholarship. Historical institutionalism as a whole, however, has not been imported into legal scholarship or international law scholarship in the manner of regime theory or institutional economics. In particular, no legal scholar has used historical institutionalism as a model for critically analyzing the World Trade Organization.

### 2.1.2. *Sociological Institutionalism*

Just as in international relations theory, economics, political science, and so many other of the social sciences, a new institutional school has appeared in sociology. Hall and Taylor label this school “sociological institutionalism.”<sup>91</sup> The school of sociological institutionalism first appeared within the subspecialty of organization theory.<sup>92</sup> The impetus for the creation of this school was discomfort with a distinction—drawn since the time of Max Weber—between rational, formal, modern organizations (such as bureaucracy) and the parts of social life associated with culture.<sup>93</sup> Some sociologists found this distinction to be artificial, and argued against the notion that a certain class of institutions are chosen or created simply because they are the most effective at accomplishing a desired end. Rather, they argued, institutions are chosen, created and transmitted in the same manner as any other cultural artifact, such as ritual or myth.<sup>94</sup> Thus, the underlying

<sup>91</sup> Sociologists themselves seem to refer to this school of thought simply as “institutionalism.” See, e.g., Paul J. DiMaggio & Walter W. Powell, *Introduction*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1 (Walter W. Powell & Paul J. DiMaggio eds., 1991). This is similar to legal scholars who refer to their theory simply as institutionalism.

<sup>92</sup> This resulted in important works such as *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS*, *supra* note 91, and JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983); *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS* (W. Richard Scott & John W. Meyer eds., 1994).

<sup>93</sup> This distinction is drawn and emphasized in Frank R. Dobbin, *Cultural Models of Organization: The Social Construction of Rational Organizing Principles*, in *THE SOCIOLOGY OF CULTURE* 117 (Diana Crane ed., 1994).

<sup>94</sup> See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); see also MEYER & SCOTT, *supra* note 92. Niel Fligstein particularly argues that markets

question for sociological institutionalists asks not what utilities caused an institution to be created, but instead what cultural factors led to its creation.<sup>95</sup> Indeed, Neil Fligstein and Robert Freeland argue that theories that take into account political, institutional and cultural factors as causal elements explain empirical data better than do economic theories.<sup>96</sup>

Sociological institutionalists may have the broadest definition of institutions of any of the social sciences. Institutions, to a sociological institutionalist, include not only formal and informal rules and procedures, but also symbols, cognitions, norms, and any other templates that organize or give meaning to the human condition.<sup>97</sup> This definition explicitly blurs the distinction between culture and institutions; in fact, under such a definition, culture itself may be an institution.<sup>98</sup> The definition is broad, however, only in terms of what *types* of structures it will include; it is quite rigorous in terms of what *qualities* are required of these structures. A rule or pattern is only considered an institution by sociological institutionalists if there is an unspoken sense that the rule or pattern must be followed or adhered to.<sup>99</sup> In this sense,

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and culture are inseparable. See Niel Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656 (1996).

<sup>95</sup> See Hall & Taylor, *supra* note 61, at 947. Thus, John Campbell differentiates sociological institutionalism from other approaches by focusing explicitly on "the complex social interactions and institutional and historical contexts that link state and society in ways that shape fiscal policy and their effects." Campbell, *supra* note 80, at 164; see also Paul J. DiMaggio & Helmut K. Anheir, *The Sociology of Nonprofit Organizations and Sectors*, 16 ANN. REV. SOC. 137 (1990) (stating that the emergence of nonprofit organizations is caused by institutional factors as well as the individual utility functions emphasized by economists, and that to understand nonprofit organizations one must use an industry level ecological perspective).

<sup>96</sup> See Neil Fligstein & Robert Freeland, *Theoretical and Comparative Perspectives on Corporate Organization*, 21 ANN. REV. SOC. 21, 40 (1995).

<sup>97</sup> See W. Richard Scott, *Institutions and Organization: Toward a Theoretical Synthesis*, in INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS, *supra* note 92, at 55, 56.

<sup>98</sup> See Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 86, 143, 150-51; John Meyer et al., *Ontology and Rationalization in the Western Cultural Account*, in INSTITUTIONAL ENVIRONMENTS AND THE ORGANIZATION, *supra* note 92 at 9; Lynne Zucker, *The Role of Institutionalization in Cultural Persistence*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 83.

<sup>99</sup> See Jepperson, *supra* note 98, at 143, 145 (noting that "institutions represent a social order or pattern that has attained a certain state or property" and providing an explanation of that state or property); Lynne G. Zucker, *Organi-*

Paul DiMaggio and Walter Powell argue that the definition used by sociological institutionalists is actually more restrictive than that used by institutional economists, who consider mere rules of convenience to be institutions.<sup>100</sup>

Sociological institutionalism is no more unified than historical institutionalism.<sup>101</sup> Nonetheless, broad themes can be discerned. Sociological institutionalism emphatically embraces a cultural approach to the relationship between institutions and individual behavior.<sup>102</sup> Sociological institutionalism “emphasize[s] the way in which institutions influence behavior by providing the cognitive scripts, categories and models that are indispensable for action, not least because without them the world and the behaviour of others cannot be interpreted.”<sup>103</sup> Institutions and individual be-

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*zations as Institutions, in* RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 1, 2 (S.B. Bacharach ed., 1983) (stating that “institutionalism is fundamentally a cognitive process”). Public international lawyers will note the similarity to custom, which is considered a source of international law that is binding, in part, because there is a sense that it is binding. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (stating that to constitute custom, a country’s behavior must not only consist of a general practice but must also be accepted by that country as obligatory); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-5 (4th ed. 1990) (discussing custom).

<sup>100</sup> See DiMaggio & Powell, *supra* note 91, at 9; see also MARY DOUGLAS, HOW INSTITUTIONS THINK 46-48 (1986). Whether one definition actually is more restrictive than another is not a question with an objective answer, and has much to do with the underlying perspective of each school of thought. The instrumentalist orientation of institutional economics requires a definition that includes rules of convenience, whereas the cultural orientation of sociological institutionalists requires a definition that includes constructs that often are not scrutinized by other schools.

<sup>101</sup> DiMaggio and Powell begin their introduction to sociological institutionalism by noting that “it is often easier to gain agreement about what it is not than about what it is.” DiMaggio & Powell, *supra* note 91, at 1.

<sup>102</sup> See *supra* notes 80-83 and accompanying text (discussing the cultural approach).

<sup>103</sup> Hall & Taylor, *supra* note 61, at 948; see also DiMaggio & Powell, *supra* note 91, at 3 (“[T]hought of self, social action, the state, and citizenship are shaped by institutional forces.”). Hall and Taylor note that “[i]nstitutions influence behaviour not simply by specifying what one should do but also by specifying what one can imagine oneself doing in a specific context.” Hall & Taylor, *supra* note 61, at 948; see also Neil Fligstein, *Social Skill and Institutional Theory*, 40 AM. BEHAVIORAL SCIENTIST 397, 397 (1997) (noting that sociological institutionalism “treats shared meanings as constraints on action that limit and determine what is meaningful behavior”); Zucker, *supra* note 98, at 2 (noting that shared cognitions define “what has meaning and what actions are possible”).

havior, therefore, are mutually constitutive and mutually reinforcing.<sup>104</sup> Moreover, even though an individual may be acting rationally or out of self interest, perceptions of rationality or self interest are framed through—and thus shaped by—institutions.<sup>105</sup>

Sociological institutionalism also propounds a cultural account for the origination and alteration of institutions. This is most easily understood when contrasted with institutional economics. Institutional economics places the creation or alteration of institutions in the hands of entrepreneurs who act when the benefits of creation or alteration will outweigh the costs.<sup>106</sup> In other words, institutional economics proffers a voluntaristic, means-end oriented explanation. Sociological institutionalism, on the other hand, does not proffer a utilitarian explanation; instead, it argues that institutions are created or changed because the new institution will confer greater social legitimacy on the organization or its individuals. "In other words, organizations embrace specific institutional forms or practices because the latter are widely valued within a broader cultural environment."<sup>107</sup> Legitimate institutions should not be confused with laudable institutions, the adjective that is more accurate is "plausible"<sup>108</sup>—institutions are accepted if they are considered "appropriate."<sup>109</sup> Once created or

<sup>104</sup> See *supra* note 83 (discussing the mutually reinforcing roles of actions and institutions and similarities with law); see also Jepperson, *supra* note 98, at 146 ("institutions simultaneously empower and control").

<sup>105</sup> See DiMaggio & Powell, *supra* note 91, at 10 ("[T]he very notion of rational choice reflects modern secular rituals and myths that constitute and constrain legitimate actions."); see also Ann Swidler & Jorge Arditi, *The New Sociology of Knowledge*, 20 ANN. REV. SOC. 305 (1994) (arguing that patterns of knowledge in organizations shape both the content and structure of knowledge). Interestingly, the prominent regime theorist Robert Keohane agrees: "institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power." Robert O. Keohane, *International Institutions: Two Research Programs*, 32 INT'L STUD. Q. 379, 382 (1988).

<sup>106</sup> See North, *supra* note 8, at 191-92.

<sup>107</sup> Hall & Taylor, *supra* note 61, at 949.

<sup>108</sup> See ROBERT WUTHNOW ET AL., CULTURAL ANALYSIS 49-50 (1984) (stating that legitimation means "explaining or justifying the social order in such a way as to make institutional arrangements subjectively plausible"); see also W. Richard Scott, *Unpacking Institutional Arguments*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 164, 169-70 (discussing legitimacy).

<sup>109</sup> See March & Olsen, *supra* note 82, at 741 (stating that "actors connote certain actions with certain situations by rules of appropriateness"). In *Limits of Citizenship*, Yasemin Soysal concludes that states adopted certain policies to-

altered, institutions persist not because they are useful but instead because institutions constrain the manner in which individuals are able to consider changing institutions.<sup>110</sup>

Sociological institutionalism has not been completely voiceless in mainstream legal scholarship. Edward Rubin, who advocates a “new institutionalism” as a unifying theoretic for law,<sup>111</sup> incorporates the work of James March and Johan Olsen as well as those of Paul DiMaggio and Walter Powell in his explanation of institutionalism.<sup>112</sup> Rubin’s is a very limited use of sociological institutionalism—he suggests a microanalysis of courts as institutions.<sup>113</sup> Nonetheless, his approach—in which he examines societal motivations of judges in an institutional context—resonates with the general tenets of sociological institutionalism.<sup>114</sup> Rubin’s use of sociological institutionalism stands virtually alone in legal scholarship, and has not been replicated in international legal scholarship.

In short, although sociological institutionalism is an emerging school of thought, its concept of how institutions inform individual behavior and how institutions are created and altered can be

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wards immigrants not because those policies were functional or beneficial to the state but instead because those policies conformed to evolving concepts of human rights. YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP* 164 (1994). The concept of appropriateness may be vaguely reflected in Richard Posner’s concept of intuition. For example, Posner has defended slavery contracts as a matter of economic theory and of legal theory. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 86 (1981) (economic theory); Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 134 (1979) (legal theory). He does not countenance slave y contracts, however, because they fail “the ultimate test” of a moral theory, which he describes as conformity to intuition. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 376-77 (1990). Similarly, even if some utility argument in favor of slavery could be fabricated, sociological institutionalism predicts that slavery would not be instituted because it is not considered appropriate and certainly does not enhance the legitimacy on an organization.

<sup>110</sup> See DiMaggio & Powell, *supra* note 91, at 10-11, 14-15. With an interesting turn of a phrase, DiMaggio and Powell state “[i]n other words, some of the most important sunk costs are cognitive.” *Id.* at 11.

<sup>111</sup> See Rubin, *supra* note 1.

<sup>112</sup> See Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 CAL. L. REV. 265, 280 n.41 (1997) (reviewing CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996)). Rubin also refers to institutional economists such as Douglass North and Oliver Williamson. See *id.*

<sup>113</sup> See *id.* at 281.

<sup>114</sup> A particularly excellent example is Edward Rubin & Malcom Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

sketched out. Nonetheless, even though these analytical principles are available, they have barely entered the realm of legal scholarship and have not been imported into international legal scholarship.<sup>115</sup> In particular, sociological institutionalism has not been used as a model for analysis of the World Trade Organization.

### 2.1.3. *Historical Institutionalism and Sociological Institutionalism Differ*

Historical institutionalism and sociological institutionalism differ from one another. At the level of first principles, which is the level at which this Article scrutinizes the various theoretical schools, they differ on at least two points: the creation and alteration of institutions, and the role of institutions in affecting individual behavior.

With respect to the creation and alteration of institutions, the difference might be summarized as one of perspective; historical institutionalism looks inward while sociological institutionalism looks outward. In other words, historical institutionalism examines factors pertinent to the institution under scrutiny—its past and the decision constraints that flow from the past—when asking how an institution came into existence. Sociological institutionalists, on the other hand, examine factors that are exogenous to the institution under scrutiny—institutions already existing in the cultural milieu act as the constraints on the creation and alteration of institutions.

With respect to the role of institutions in affecting individual behavior, the difference is one of scope. Both historical and sociological institutionalism accept the cultural approach to this relationship. Historical institutionalism, however, also accepts the

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<sup>115</sup> It should be noted that the Yale School of international law did borrow concepts from the sociology of the time. The Yale School portrayed international law as process, and emphasized the interrelatedness of legal and other social processes. Unlike current sociological theory, however, the Yale School displayed a distinctly realist posture. For example, the test of international decisions was whether they conformed with certain values critical to a world order among nations. Similarly, the Yale School posits that enforcement of decisions is shaped by social, moral and political relations among nations. See MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); Myres S. McDougal & W. Michael Reisman, *The Prescribing Order: How International Law is Made*, 6 *YALE J. WORLD PUB. ORDER* 249 (1980).

calculus approach, thus evidencing a wider or perhaps more eclectic perspective on the relationship between institutions and individual behavior. An equally meaningful difference with respect to the role of institutions in affecting individual behavior is in the quality of the treatment of the relationship between individual behavior and institutions. Taylor and Hall chide historical institutionalism for its lack of detailed attention to the relationship.<sup>116</sup> A great amount of sociological institutionalism, in contrast, focuses on the relationship between institutions and individual behavior, particularly on the cognitive role of institutions; this attention shapes a version of the cultural approach that is both detailed and unique to sociological institutionalism.

## 2.2. *Alternative Institutionalisms can be Distinguished from Other Institutionalisms*

Just as differences can be found between historical institutionalism and sociological institutionalism, critical differences can be discerned between the “alternative” institutionalisms and the two types of institutionalism that have entered the mainstream of international law scholarship. Again on the level of first principles, differences exist in the explanation each theoretical school offers for the creation and alteration of institutions, and for the role of institutions in affecting individual behavior.

Perhaps the greatest contrast is with respect to the creation or alteration of institutions. Regime theory and institutional economics offer little theoretical substance on this subject.<sup>117</sup> Individuals or states choose an institution from a wide menu of possibilities based on how well (or efficiently) that institution will effectuate the individuals’ or states’ preferences. Neither regime theory nor institutional economics explain how the menu is created, and the only constraint placed on the behavior of self-interested actors is informational. In contrast, historical institutionalism and sociological institutionalism, as discussed above, of-

<sup>116</sup> See Hall & Taylor, *supra* note 61, at 950. Their criticism is all the more credible given that Peter Hall is a leading historical institutionalist.

<sup>117</sup> Robert Keohane admits that regime theory, the school of which he is a prominent member, “leave[s] open the issue of what kinds of institutions will develop, to whose benefit, and how effective they will be.” Keohane, *supra* note 105, at 388.

fer elaborate explanations of how that menu is created, and suggest a great number of constraints on actors' behavior.<sup>118</sup>

Regime theory and institutional economics do have elaborate explanations for the role institutions play in ordering behavior, although in the case of regime theory the analysis often deals with the behavior of states rather than individuals or voluntary associations.<sup>119</sup> Institutions are used as tools to accomplish ends, and are used in a voluntary and rational manner. Institutional economics in particular offers the most detailed explanation of individual behavior, although it is an explanation that rests uncomfortably on stark assumptions about state and individual behavior.<sup>120</sup> In contrast, historical institutionalism and sociological institutionalism offer a far less detailed explanation for individual behavior. In the case of historical institutionalism, the lack of detail may be attributable to a preoccupation with other aspects of institutionalism; nonetheless, historical institutionalism offers the insight that the calculus approach and the cultural approach may both be plausible in different times and situations. In the case of sociological institutionalism, the lack of detail is probably attributable to the enormous task that the theory takes on, which is to fit behavior into the context of entire cultures.

Each of the four iterations of institutionalism discussed in this Article have analytical strengths and weaknesses, and each has aspects that the others could profitably borrow. The insights of regime theory and institutional economics, as well as instances of their application to the World Trade Organization, are discussed above. What is equally interesting is that historical institutional-

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<sup>118</sup> In a similar vein, DiMaggio and Powell suggest that a dividing line among the various forms of institutionalism is whether a particular form of institutionalism's definition of institutions reflects the preferences of individuals or collective outcomes that are not the simple sum of individual interests. See DiMaggio & Powell, *supra* note 91, at 9. In this context it is interesting to contrast the common economic meaning of entrepreneur—to whom North attributes the changing of institutions, with the definition proffered by Fligstein—an actor with well developed social skills, particularly the ability to motivate cooperation among other actors. See Fligstein, *supra* note 103 *passim*.

<sup>119</sup> But see *supra* note 36 (noting that a small number of regime theorists argue for the application of regime theory to non-state actors).

<sup>120</sup> See Donohue & Ayres, *supra* note 40, at 812 (noting the limitations caused by the "clean assumptions" of law and economics); Thelen & Steinmo, *supra* note 62, at 12 (describing the "ruthless elegance" of economic explanations).

ism and sociological institutionalism also offer insights into the World Trade Organization.

### 2.3. *Historical Institutionalism and Sociological Institutionalism are Instructive to the Legal Analysis of the World Trade Organization*

These differences between regime theory and institutional economics on the one hand, and historical institutionalism and sociological institutionalism on the other, suggest that the alternative institutionalisms offer new perspectives to the legal scholar, and as a corollary offer trade scholars a means of sharpening their analysis of the World Trade Organization. Three short examples indicate that this is in fact the case.<sup>121</sup>

The first example is the dispute settlement process of the World Trade Organization. Several scholars have intuited that the dispute settlement process cannot be understood without understanding the process under the GATT. Their intuition is evidenced by the fact that prior to discussing dispute settlement within the World Trade Organization, these scholars often provide lengthy discussions of the process under the GATT.<sup>122</sup> As a purely technical matter, such discussion is not required because the World Trade Organization is distinct from and is not the technical successor to the GATT.<sup>123</sup> Institutional economics does not require such a discussion, because institutions are created by rational actors free from the burden of prior institutions. Similarly, regime theory has no place for such a discussion. In the ab-

<sup>121</sup> These examples, of course, are not exhaustive. The question asked by this Article is not how alternative institutionalisms may be applied to analysis of the World Trade Organization, but instead why these iterations of institutionalism have not to date been used in such analysis.

<sup>122</sup> See, e.g., Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 J. INT'L L. & BUS. 775 (1996-97).

<sup>123</sup> See Agreement Establishing the World Trade Organization art. 2, cl. 4, 33 I.L.M. 1144, 1145 (1994) [hereinafter the "Charter"] ("The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as 'GATT 1994') is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 . . . as subsequently rectified, amended or modified (hereinafter referred to as 'GATT 1947')."); Amelia Porges, Introductory Note to the General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1, 4 (1994) (quoting then Director-General Peter Sutherland as emphasizing that the World Trade Organization "will not be a successor agreement to GATT, as defined in the Vienna Convention").

sence of a theoretical framework, the intuitions of scholars analyzing dispute settlement become nothing more than interesting background information.

Historical institutionalism provides a theoretical perspective in which understanding dispute settlement under the GATT is of critical importance to understanding dispute settlement within the World Trade Organization. Dispute settlement under the GATT constituted the antecedent conditions from which dispute settlement within the World Trade Organization arose. John Croome's insightful history of the Uruguay Round of multilateral trade negotiations reveals several points during the seven years of negotiation that might be considered critical junctures;<sup>124</sup> alternatively, the entire negotiations could be considered a cleavage in the governance of international trade.<sup>125</sup> In either case, historical institutionalism posits that the antecedent conditions impose constraints on the choices that are available now—constraints that must be understood in order to truly effect analysis of the dispute settlement process.<sup>126</sup> Examples of aspects of dispute settlement under the World Trade Organization that are best understood in historical context include the allowance of multiple complainants in one proceeding,<sup>127</sup> which is an extension of several proceedings in the 1980s and a 1989 decision by the parties to the General

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<sup>124</sup> See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995). The four years of preparation for and seven years of negotiation of the Uruguay Round cannot be summarized in one footnote—even a law review footnote. Croome, who participated in the entire span of the Uruguay Round, recalls “the days and nights of efforts, the clashes of policies and personalities, the national pressures on negotiators, the repeated solemn declarations of heads of state and government, the frustrations and breakthroughs.” *Id.* at 4. Examples of critical junctures might include the 1985 clash between developed and developing countries over the need for a new round of negotiations (which fundamentally changed perceptions of the Multi fibre Arrangement), *id.* at 24-25; the circulation by Arthur Dunkel of his Draft Final Act Embodying the Results of the Uruguay Round of Negotiations in 1991 (which jelled negotiators’ opinions and became the new point of reference for negotiators), *id.* at 291-94; and the collapse of the Blair House accords on agriculture (which very nearly resulted in the failure of the Uruguay Round), *id.* at 341.

<sup>125</sup> See COLLIER & COLLIER, *supra* note 69, at 29-30 & n.14 (discussing such cleavage).

<sup>126</sup> See Thelen & Steinmo, *supra* note 62, at 3 (arguing that historical constraints must be understood).

<sup>127</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 9, Charter, *supra* note 123, Annex 2 [hereinafter Understanding].

Agreement;<sup>128</sup> rules governing the participation of third parties,<sup>129</sup> which expand, in interesting ways, the rights given to third parties in two Decisions by parties to the General Agreement;<sup>130</sup> and even the much condemned secrecy of dispute settlement panels,<sup>131</sup> which was the emphatic practice of panels convened by the GATT.<sup>132</sup> The trade scholars' intuitions are correct, and are given a theoretical niche in historical institutionalism.

Historical institutionalism gives voice to questions that are outside the theoretical constructs of regime theory or institutional economics. For example, regime theory and institutional economics posit a world of autonomous, roughly equal actors. In the World Trade Organization, however, there are marked gradations of power. The "quad countries," consisting of Canada, the European Union, Japan and the United States, are the most powerful members.<sup>133</sup> Emerging economies and developing countries, on

<sup>128</sup> See United States—Taxes on Petroleum and Certain Imported Substances, GATT B.I.S.D. (34th Supp.) at 136, 136-37 (1987); United States—Customs Users Fees, GATT B.I.S.D. (35th Supp.) at 245, 245-46 (1988); Conciliation on Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61, 64 (1989) [hereinafter 1989 Decision].

<sup>129</sup> See Understanding, *supra* note 127, art. 10.

<sup>130</sup> See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210, 213 (1979); 1989 Decision, *supra* note 128, at 65. The rules of the World Trade Organization give third parties access to the submissions of the primary parties, a right that they did not enjoy under the rules for dispute settlement under the GATT.

<sup>131</sup> See Understanding, *supra* note 127, art. 13(1) & art. 14(1); see also Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1066 (1994) (castigating closed decisionmaking process as "inimical" to sound decisionmaking); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 711 (1994) ("The application of these ironclad rules of secrecy is perhaps most troubling in the area of GATT dispute resolution."); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1255 (1992) ("For purposes of gaining a broader constituency among the various policy interested communities in the world . . . the GATT could go much further in providing 'transparency' of its processes.").

<sup>132</sup> See, e.g., Panel on Japanese Measures on Imports of Leather, May 15-16, 1984, GATT B.I.S.D. (31st Supp.) at 94, 95 (1984) (recording a decision made by a GATT panel). For a more full discussion of these and many other aspects of the dispute settlement process under the World Trade Organization that stem from practices that evolved under the General Agreement, see Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 399-418 (1996).

<sup>133</sup> See *Uruguay Round: Quad Countries Deliver Ratification of Uruguay Round World Trade Agreement*, Int'l Trade Daily (BNA) (Jan. 3, 1995).

the other hand, have entered into a series of shifting alliances.<sup>134</sup> Historical institutionalism, with its roots in the political scientific analysis of power, is well situated to provide a theoretical framework for analysis of this aspect of the World Trade Organization.<sup>135</sup>

Similarly, sociological institutionalism allows scholars to frame questions that do not arise under regime theory or institutional economics. Of these, one of the more interesting has to do with sociological institutionalism's observation that institutions are a product of and are affected by the culture in which they are embedded.<sup>136</sup> The World Trade Organization is a global institution.<sup>137</sup> Sociological institutionalism would suggest that it is the product of a global culture. The existence of a global culture, however, is an issue that is greatly contended but little explored.<sup>138</sup> The insight that culture informs institutions raises several questions with respect to the World Trade Organization, such as whether, if there is no global culture, the World Trade Organization or the rules that it promulgates can truly persist; whether the rules issued by the World Trade Organization and

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<sup>134</sup> See ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987); Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67.

<sup>135</sup> See Hall & Taylor, *supra* note 61, at 954 (extolling the ability of historical institutionalism to analyze power).

<sup>136</sup> See *supra* notes 93-96 and accompanying text.

<sup>137</sup> See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 322-23 (1996) (distinguishing the European Union as a federation of culturally related nations from the World Trade Organization as a global organization). As of October, 1997, the World Trade Organization had 132 members and 32 observers from all parts of the world.

<sup>138</sup> See, e.g., ANTHONY D. KING, *THE BUNGALOW: THE PRODUCTION OF A GLOBAL CULTURE* (2d ed. 1995) (using similarities of architectural style in India, Britain, North America, Africa, Australia and continental Europe to argue in favor of the inter-relatedness of worldwide social phenomena); William Alonso, *Citizenship, Nationality and Other Identities*, 48 J. INT'L AFF. 585, 588-592 (1995) (describing a study that finds some identification with a global culture, but closer identification with local factors); Jason Clay, *Global Culture is Globaloney*, UTNE READER, Jan./Feb. 1996, 36 at 37 (arguing that the putative global culture is really a profit-oriented manipulation by those with an interest in marketing the concept); Mel van Elteren, *Conceptualizing the Impact of U.S. Popular Culture Globally*, 30 J. POPULAR CULTURE 47 (1996) (stating that the spread of U.S. culture is due to an increase in capitalistic consumerism rather than a global culture, but noting that the spread has the effect of homogenizing culture worldwide).

other international economic organizations will engender a global culture; and how a thin global culture would constrain the functioning and enforcement of the World Trade Organization's rules and policies. Unfortunately, sociologists have only begun to scratch the surface of international institutions, and offer little guidance.<sup>139</sup> Nonetheless, the questions raised by sociological institutionalism are of obvious interest to trade law scholars.

### 3. THE QUESTION OF SCHOLARLY LINKAGE

#### 3.1. *Institutional Explanations of Historical Institutionalism's and Sociological Institutionalism's Lack of Influence on the Analysis of the World Trade Organization*

It is apparent that regime theory and economic institutionalism do not exhaust the universe of institutionalisms. It is also apparent that other forms of institutionalism can provide a useful prism for the scrutiny of international law in general, and for analysis of the World Trade Organization in particular. The obvious question, therefore, is why these alternative forms of institutionalism are not widely used. Interestingly, the alternative institutionalisms themselves provide possible answers to this question. In order to embark upon this analysis, it is necessary to accept that legal scholarship is itself an institution, replete with formal and informal rules, motivated actors, and shared cognitions.<sup>140</sup>

The first means by which to examine the scholarly linkages that have already occurred is through historical institutionalism. Historical institutionalism emphasizes path dependency. Future direction is conditioned by the past; significant change occurs at critical junctions or points of cleavage. Against this background, it is interesting to turn to a story related by the comparative legal scholar Alan Watson. Watson is not a historical institutionalist,

<sup>139</sup> But see, e.g., David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, in INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS, 100 (W. Richard Scott & John W. Meyer eds., 1994) (analyzing how institutions affect cultural diffusion).

<sup>140</sup> See Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CINN. L. REV. 95, 148 (1994) (stating that the development of legal scholarship is like that of "any institution"); see also Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 479-81 (1997) (discussing the functions of legal scholarship).

but he too is interested in how laws develop and change.<sup>141</sup> Watson attributes one factor in the development and change in legal systems to accident and "chance."<sup>142</sup> He relates a story concerning the development of law in South Africa. A South African physician happened upon one of Watson's books, *Legal Transplants*, in a bookstore shortly before a return flight to South Africa. The physician, who assumed that the book dealt with the law of medical transplants, purchased the book. Although the book actually deals with the transplant and reception of laws, the physician enjoyed the book and, after a series of letters with Watson, provided Watson with funds to edit a translation of Justinian's *Digest*. The translation was made available in South Africa, where it resulted in a measurable increase in the use of Roman law in South African legal decisions.<sup>143</sup> In relating this story, Watson revels in discussing the chance or accidental nature of this line of legal development.<sup>144</sup> What is most interesting for the purposes of the present analysis, however, is Watson's observation that the introduction of a single text into South African jurisprudence had tremendous impact on the formulation of South African law.<sup>145</sup>

Abbott's article on regime theory was not accidentally purchased on the way to an airport. The lesson of Watson's story, however, is apparent. Abbott's article shaped the direction of international legal scholarship, and conditioned its path toward acceptance and use of regime theory.<sup>146</sup> Burley's synthesis further constrained international law scholarship.<sup>147</sup> Had Abbott written

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<sup>141</sup> See, e.g., ALAN WATSON, *THE EVOLUTION OF LAW* (1985).

<sup>142</sup> Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 341 (1996). Altogether, Watson suggests four factors: utility of the transplanted law, accident and chance, difficulties of clear sight, and the authority enhancing effect of the transplanted law. See *id.* at 335-45.

<sup>143</sup> See *id.* at 340.

<sup>144</sup> It should be noted that neither economic institutionalism nor regime theory are equipped to interpret this story. Indeed, Watson himself is reduced to labeling this factor "chance." *Id.* at 339. He also notes that "[p]urists will object and say that I am relying on anecdotal evidence. Yes, I am. But that in no way impairs my argument. . . . [c]hance cannot systematically be factored into any development." *Id.* at 341. Historical institutionalism provides a theoretical means of categorizing this critical junction in the development of South African law.

<sup>145</sup> See *id.* at 340-41.

<sup>146</sup> See *supra* note 30 (noting that scholars who used regime theory analysis acknowledged Abbott).

<sup>147</sup> See *supra* note 21 (relating plaudits for Burley).

an article expounding the application of historical institutionalism to legal theory, or had Burley explicated a detailed history of sociology rather than international relations theory, it is probable that the landscape of international law scholarship in general and of analysis of the international trade regime in particular would be quite different today.

Such a story may seem incomplete—it begins abruptly with the publication of Abbott's article. A lingering question remains: from where did this article arise? While only Abbott can fully answer that question, he does provide a clue in the article itself. That clue, in turn, can be placed within the structure of sociological institutionalism. Abbott opines that international relations theory, from which regime theory is taken, is the closest of the social sciences to international law scholarship.<sup>148</sup> In sociological institutionalism terms, Abbott is culturally predisposed, perhaps even constrained, to borrow from international relations theory. This is true both cognitively and with respect to legitimization. Cognitively, Abbott's writings indicate that he is steeped in knowledge of institutionalism and that he is a profound researcher. As a scholar trained in international law and international relations, however, he simply may not have "seen" historical or sociological institutionalism. With respect to legitimization, Abbott may, consciously or unconsciously, have considered borrowing from a related social science to be more appropriate than borrowing from political science or sociology.<sup>149</sup>

<sup>148</sup> Abbott, *supra* note 10, at 342; see also Burley, *supra* note 21, at 205 ("Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another.").

<sup>149</sup> Cf. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 900 (1992) (noting that methodological commitment tends to bind legal scholars and diminish acceptance of alternatives). Indeed, some aspects of historical institutionalism and sociological institutionalism may seem to some legal scholars to resonate with the deconstructionist allies of the school of critical legal studies, which is anathema to many U.S. scholars and thus would not be considered institutionally appropriate. In addition to criticism of its logic, deconstructionism is criticized as contributing to excessive cynicism and nihilism while contributing nothing positive to legal theory. See, e.g., DAVID C. HOY & THOMAS MCCARTHY, *CRITICAL THEORY* (1994) (criticizing deconstructionism); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 743 (1994) (criticizing deconstructionism); Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 540-41 (1984) (questioning whether deconstruction adds anything to legal analysis); see also Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1 (1994)

A similar story can be told with respect to economic institutionalism, although not quite as directly. The modern law and economics movement probably began when Aaron Director, an economist at the University of Chicago, introduced several members of that university's law faculty to economic theory.<sup>150</sup> From that beginning, law and economics has gone through several intellectual generations, becoming more broadly distributed throughout legal scholarship.<sup>151</sup> Thus, it is not possible to draw a straight line from Director to Trachtman, as it is from Abbott to Shell.<sup>152</sup> Nonetheless, a historical institutionalist might argue that at a critical juncture, when legal scholarship was receptive to a new paradigm, Director's protégées sent legal scholarship along the path of law and economics, and that the choices available to legal scholarship are now constrained by that choice.<sup>153</sup> Under this line of reasoning, it would be considered institutionally likely that a scholar would apply institutional economics to the World Trade

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(outlining criticisms of deconstructionism, from a perspective sympathetic to deconstructionism). The difference, of course, is that while deconstructionism simply posits that words have no objective meaning, historical institutionalism and sociological institutionalism posit that the meaning attributable to various cognitions may be attributable to several sets of rules, including self-referential rules.

<sup>150</sup> See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 316-30 (1995) (discussing the beginning and early history of law and economics). Among the first law faculty that Director worked on were Robert Bork and Richard Posner. See *id.* An interesting history, albeit recounted very subjectively by actual participants, of the nascence of the modern law and economics movement is Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983) (reproducing a transcript of a discussion among a number of members of the law and economics school). Intellectually, modern law and economics may have its roots in Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). See RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 19-20 (3d ed. 1986) (discussing the influence of the two articles).

<sup>151</sup> See POSNER, *supra* note 150, at 19-20 (outlining a history of the law and economics school); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 604-13 (1989) (same); Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics or Philosophy*, in LAW AND ECONOMICS 233 (Nicholas Mercuro ed., 1989) (explaining the basic ideas of the 'Chicago' and 'Reformist' schools of law and economics).

<sup>152</sup> Shell himself draws that line. See *supra* note 31.

<sup>153</sup> Robert Ellickson reports that the percentage of law faculty with Ph.D.'s in economics grew considerably from 1960 to 1970. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI-KENT L. REV. 23, 26-27 (1989).

Organization,<sup>154</sup> and unlikely that institutionalism from another school of thought would be applied.

Again, this story seems incomplete—its conclusion of inevitability seems rather self-fulfilling. And again, sociological institutionalism may offer a more satisfying explanation. Sociological institutionalism argues that institutions will be created or changed in ways that are considered appropriate.<sup>155</sup> Law and economics is wildly controversial as a theoretic for legal scholarship,<sup>156</sup> but it nonetheless has earned a position as a legitimate heuristic.<sup>157</sup> Just as importantly, law and economics analysis has become a proven route for ensuring publication and obtaining tenure and promotion.<sup>158</sup> It is difficult to make the same claim for political science or sociology, particularly in recent years.<sup>159</sup> Thus, culturally, it is more legitimate and appropriate to borrow from institutional

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<sup>154</sup> Recounting this line of reasoning is not meant to imply that Trachtman's analysis is neither original nor well executed. It is both, in abundance.

<sup>155</sup> See Scott, *supra* note 97, at 169-70.

<sup>156</sup> See Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2260 (1996) ("The tension among efficiency, equity, and other aspects of justice remains as controversial as ever in public discourse."); see also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 8 (1986) (noting that law and economics is controversial because it makes radical assumptions and because it reduces values to preferences).

<sup>157</sup> See Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1045 (1992) (noting that while the assumptions of law and economics are controversial, the methodology is not, because it is simply the methodology of economics); see also Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 231-32 (1991) (discussing the influence of law and economics).

<sup>158</sup> See Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 765 (1988) ("In his Maccabean lecture on jurisprudence in 1981, Guido Calabresi reported the current opinion that law and economics was the only sure route to promotion and tenure."); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1519 n.18 (1991) ("I am hard-pressed to identify a leading law faculty that has denied tenure to someone prominently identified as a . . . law and economics person, and find it absurdly easy to identify law faculties that have denied tenure to [critical legal studies] people.").

<sup>159</sup> An exception might be the Yale School of International Law, which professed to borrow from sociology (although now a dated sociology), and which occasionally is itself explicitly borrowed from. See, e.g., David J. Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 543 n.125 (1988) (borrowing from the Yale School, albeit in a domestic context). The Yale School is discussed *supra* note 115.

economics than from historical institutionalism or sociological institutionalism.

Regime theory and institutional economics are singularly unhelpful in explaining why they are the dominant institutionalisms used to analyze the World Trade Organization. Regime theory is inapplicable to a question of the institution of scholarship, but its principles would suggest that a number of autonomous scholars with relatively equal power selected regime theory and institutional economics as the most effective means of obtaining their preferences (which, hopefully, would be a clearer theoretical and practical understanding of the World Trade Organization). Institutional economics would make a similar argument, substituting efficient for effective. These self-congratulatory arguments, however, are wrong; it has already been demonstrated that historical institutionalism and sociological institutionalism offer unique and valuable insights into the World Trade Organization.<sup>160</sup> Clearly, the explanations suggested by historical institutionalism and sociological institutionalism are the more persuasive.

### 3.2. *Why Other Analytical Linkages May Not Exist*

The inquiry into why historical institutionalism and sociological institutionalism have not been used in the analysis of the World Trade Organization sheds light on another area of interest to trade scholars. Why have certain analytical linkages not been drawn? This question is of particular interest, because trade scholars should not assume that their repertoire for analysis, simply because it is bulky, is complete.

An example of a linkage that has not been drawn, for example, is that between the World Trade Organization and ethics. What is particularly puzzling is the fact that trade scholars have not drawn from the rapidly growing body of literature concerning business ethics,<sup>161</sup> particularly that branch of business ethics that concerns international business.<sup>162</sup>

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<sup>160</sup> See *supra* notes 121-139 and accompanying text.

<sup>161</sup> The field of business ethics is rapidly becoming big business. Among other developments, the last fifteen years have seen the proliferation of a great number of books and articles on ethical problems in business; the emergence of several centers and institutes at least partly devoted to the subject or to related problems like the role of values in scientific, technological or public policy work; the spread of business ethics courses in both college and business school curricula; and even,

Integrated social contract theory, as explicated by Thomas Dunfee and Thomas Donaldson, for example, has become a widely explored analytical tool in the field of business ethics.<sup>163</sup> It has also found expression in general management literature. In legal literature on trade, however, there are no references to this school of thought.<sup>164</sup>

Integrated social contract theory is based on, but radically extends, the tradition of social contract theorists such as Locke and Rousseau.<sup>165</sup> Integrated social contract theory adopts the appellation "integrated" because it unites two distinct types of social con-

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in some corporations, the development of seminars in ethics for executives.

Robert Jackall, *Business as Social and Moral Terrain*, in PERSPECTIVES IN BUSINESS ETHICS 77, 77 (Laura Pincus Hartman ed., 1998).

<sup>162</sup> See, e.g., BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993); THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (1989).

<sup>163</sup> See Jeffrey Nesteruk, *The Moral Dynamics of Law in Business*, 34 AM. BUS. L.J. 133, 133 (1996) (stating that "virtue ethics and social contract theory . . . are increasingly influencing our understanding of ethical issues in business"); Robert Phillips, Stakeholder Theory, Social Contracts, and a Principle of Fairness 1 (1997) (unpublished manuscript on file with the author) ("Prominent among the myriad proposed models of business ethics are stakeholder theory and social contract theory. The latter has, in fact, been suggested as a normative grounding for the former."). A very clear explanation of integrated social contract theory can be found in DAVID J. FRITZCHE, BUSINESS ETHICS: A GLOBAL AND MANAGERIAL PERSPECTIVE 43-47 (1997).

<sup>164</sup> In legal literature as a whole there are virtually no references to integrated social contract theory. Moreover, the only two references found by the author of this Article are brief, and do not attempt to borrow from or integrate the theory into legal theory. In corporate law, Timothy Fort borrows Dunfee and Donaldson's criticism of stakeholder theory. See Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 188-89 (1997). Steve Salbu refers to the concept of moral free space, but does not present integrated social contract theory as a model. See Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 348 n.73 (1994). It should be noted that Professor Fort teaches at the University of Michigan's business school, and that Professor Salbu received his Ph.D. partially under the supervision of Dunfee. Both facts reinforce the path dependency of legal scholarship.

<sup>165</sup> See Michael Keeley, *Continuing the Social Contract Condition*, 5 BUS. ETHICS Q. 241 (1995) (stating that Donaldson and Dunfee's work extends the work of the Sophists and of Locke to modern organizations).

tracts.<sup>166</sup> The first type is a hypothetical macrosocial contract among all of the members of a given society, the contents of which are all of the economic rules to which all of the members would agree.<sup>167</sup> Obviously, this will not be a great number of rules. The result is moral free space within that hypothetical macrosocial contract. Inside that moral free space, communities are free to enter into the second type of social contract: explicit contracts that provide more detailed rules concerning ethical behavior in economic life.<sup>168</sup> These microsocial contracts are bounded only by hypernorms, which are "principles so fundamental to human existence that they serve as a guide in evaluating lower level moral norms,"<sup>169</sup> and by a requirement that individual members have consented to the contract.<sup>170</sup> Because membership in different economic communities may overlap, thus creating overlapping systems of rules within the moral free space of the macrosocial contract, Dunfee and Donaldson have devised a set of priority rules to determine which set should apply in a given situation.<sup>171</sup>

Dunfee defines communities as "all coherent groupings of people capable of generating ethical norms . . . includ[ing] a corporation, a department or other subgroup within a corporation, a social club, an industry association, a faculty senate, a church or synagogue, a city government, an association of trial lawyers and

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<sup>166</sup> See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 254 (1994) (explaining the appellation).

<sup>167</sup> See Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 ECON. & PHIL. 85, 93 (1995) (explaining the hypothetical macrosocial contract).

<sup>168</sup> See Donaldson & Dunfee, *supra* note 166, at 260-62 (discussing moral free space); Donaldson & Dunfee, *supra* note 167, at 93-95 (discussing microsocial contracts that fill in the moral free space).

<sup>169</sup> Donaldson & Dunfee, *supra* note 166, at 265; see also Thomas W. Dunfee, *The Role of Ethics in International Business*, in BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY, *supra* note 162, at 63, 69 ("Hypernorms are defined as norms so fundamental to human existence that they will be reflected in a convergence of religious, political, and philosophical thought. Hypernorms thus represent core or fundamental values common to many cultures.").

<sup>170</sup> Donaldson & Dunfee, *supra* note 167, at 98. Consent can be indicated by, among other means, not taking advantage of an opportunity to exit. See *id.* at 99.

<sup>171</sup> See Donaldson & Dunfee, *supra* note 166, at 268-71 (outlining priority rules for determining which community's rules apply).

so on.”<sup>172</sup> Clearly, the World Trade Organization constitutes a community under this definition. Just as clearly, legal scholarship on the World Trade Organization could benefit from the discipline that integrated social contract theory brings to consideration of the issue of ethics in an economic setting, and from a theory that “allows for moral diversity among various cultures while maintaining certain universal norms.”<sup>173</sup> And yet, it does not.

That legal scholarship has not availed itself of this or other analytics from the discipline of business ethics may be explained by the insights of historical institutionalism and sociological institutionalism. Historically and culturally, there has been little intellectual exchange between legal scholarship and business scholarship.<sup>174</sup> An example is illustrative. The concept of “core competencies” is a staple in management sciences and other sciences related to the study of businesses.<sup>175</sup> Out of the estimated *five thousand* law review articles published each year,<sup>176</sup> however, a search of the LEXIS electronic database reveals only *sixteen* references to core competencies. Of these, *five* could in no way be construed as a reference to business theory,<sup>177</sup> four were made by

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<sup>172</sup> Dunfee, *supra* note 169, at 68. “Thus defined, communities are groups that determine their own membership and apply their own preferred forms of rationality.” *Id.*

<sup>173</sup> FRITZSCHE, *supra* note 163, at 43.

<sup>174</sup> See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 303-05 (1984) (castigating legal scholarship and education for its lack of integration with business theory).

<sup>175</sup> For an early and often-cited discussion of core competencies, see C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, HARV. BUS. REV., May-June 1990, at 79.

<sup>176</sup> Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990).

<sup>177</sup> See Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989, 1000 (1997) (discussing clinical experience at the University of Tennessee); Teresa V. Carey, *Credentialing for Mediators—To Be or Not To Be?*, 30 U.S.F. L. REV. 635, 640 (1996) (discussing the attributes necessary for a mediator); Rob Frieden, *Privatization of Satellite Cooperatives: Smothering a Golden Goose?*, 36 VA. J. INT’L L. 1001, 1007 (1996) (discussing the language of the INMARSAT Convention); Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 U. PA. J. INT’L BUS. L. 559, 591 (1995) (discussing attributes of traders); Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 767 (1996) (discussing training in the basic attributes of a mediator).

attorneys who were employed in business settings,<sup>178</sup> one was made by a businessperson who authored a very short comment,<sup>179</sup> and two were made by students.<sup>180</sup> Out of all sixteen, only one actually used the concept at length.<sup>181</sup> By contrast, a search in the same database of the term "efficiency" yields 17,792 references; of the term "efficient allocation," 1,056 references; of "Coase Theorem," 707 references; of "elasticity of demand," 684 references. Even the term "David Ricardo" yields ninety references. Clearly, management theory is not part of the culture of legal scholarship in any meaningful way, whereas economic theory appears in abundance.

The insights of historical institutionalism and sociological institutionalism—that legal scholarship's past and present culture lead it to certain linkages and away from others—reflects neither well nor poorly on legal scholarship, it is simply an observable phenomenon. Awareness of possible institutional limitations on

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<sup>178</sup> See Craig Becker, *Labor L w Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1530 n.8 (1996) (Becker was Associate General Counsel of the Service Employees International Union, AFL-CIO); Ward Bower, *L w Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 529 (1996) (Ward was a principal of a management consultant group); Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871, 887 (1994) (Piraino was a Vice-President of Parker-Hannifan Corporation); Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 17 (1993) (Verkuil was President and CEO of the American Automobile Association).

<sup>179</sup> See Ronald Mitsch, *Innovation as Part of the U.S. Corporate Culture: Innovation Working for You*, 21 CAN.-U.S. L.J. 171, 174 (1995) (Mitsch was Executive Vice President of the 3M Company).

<sup>180</sup> See William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379, 399 n.65 (discussing law firms' competitive strategies); Nicholas A. Widnell, Comment, *The Crystal Ball of Innovation Market Analysis in Merger Review: An Appropriate Means of Predicting the Future?*, 4 GEO. MASON L. REV. 369, 393 (1996) (suggesting an approach for measuring market concentration for innovation).

<sup>181</sup> See Jeffery Atik, *Complex Enterprises and Quasi-Public Goods*, 16 U. PA. J. INT'L BUS. L. 1, 30 (1995). Mark Lemley also briefly explains the term, and Ann E. Conaway Stilson mentions it in a way that implies part of the underlying concept. See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1049 n.279 (1997); Ann E. Conaway Stilson, *The Agile Virtual Corporation*, 22 DEL. J. CORP. L. 497, 527 (1997). The remaining reference is made by the former Vice Chairman of the Zambia Privatization Agency. See Benjamin Lubinda Ngenda, *Comparative Models of Privatization: A Commentary on the African Experience*, 21 BROOK. J. INT'L L. 179, 182 (1995). This survey of legal literature is, of course, subject to the limitations of any electronic database search.

scholarly linkages creates the opportunity to transcend those barriers in innovative ways.<sup>182</sup> Awareness of the institutional difficulties inherent in scholarly linkage also sheds light on problems of practical linkage between societal issues and the World Trade Organization.

#### 4. THE TRIALS OF SCHOLARLY LINKAGE SHED LIGHT ON ISSUES OF PRACTICAL LINKAGE

The importance of theory and of scholarly analysis of the World Trade Organization cannot be gainsaid. Arguably, the World Trade Organization owes its very existence to scholarly analysis of the international trade regime.<sup>183</sup> Nonetheless, it is important to consider the implications of the preceding section, discussing scholarly linkages, on practical linkages that are asked of the World Trade Organization in the real world. Those linkages are considerable, and growing. The World Trade Organization is not yet five years old, but it has already been suggested as the appropriate forum for the promulgation of rules concerning labor, investment, transnational bribery, human rights, antitrust, the environment, gender and racial discrimination, taxation, and the development of democracy.<sup>184</sup> While it is clear that not all of

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<sup>182</sup> See Rubin, *supra* note 149, at 901 (discussing the benefits that accrue from shifts in mainstream scholarship).

<sup>183</sup> At the outset of the Uruguay Round of multilateral trade negotiations, of course, the creation of an international organization was not contemplated. While, however, the Uruguay Round was proceeding, the Royal Institute of International Affairs commissioned Professor John Jackson to conduct a study of the international trade regime. Jackson suggested that only the creation of an international organization would bring coherency to the management of international trade regulation. His study was embraced by the European Community, which formally proposed the creation of such an organization. See Gardner Patterson & Eliza Patterson, *The Road from GATT to WTO*, 3 MINN. J. GLOBAL TRADE 35, 41-42 (1994); see also JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 91-103 (1990) (Chapter 8 entitled "Reforming the GATT System"). It is interesting to note that at the time he wrote his study, Jackson considered the creation of an actual international organization "improbable" and suggested that analyzing it as a hypothetical "might further stimulate thought about some of the difficult institutional problems of the GATT system." *Id.* at 93.

<sup>184</sup> See, e.g., William Diebold, *Some Second Thoughts*, 10 AM. U. J. INT'L L. & POL'Y 1251, 1257 (1995) (suggesting that the World Trade Organization issue rules for international investment); Claus Dieter-Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 840 (1994) (suggesting that the World Trade Organization promulgate rules on competition policy); John H. Jackson, *Reflections on International Economic Law*, 17 U.

these linkages are desirable,<sup>185</sup> it is equally clear that some are.<sup>186</sup> The alternative institutionalisms may shed light on two questions concerning practical linkages: how to discern which linkages are desirable, and how to effectuate those desirable linkages.

The author of this Article has published an article on determining what issues are proper subjects for consideration by the World Trade Organization.<sup>187</sup> That article suggests four criteria that must be satisfied for an issue to fall within the World Trade Organization's mandate: that the issue be within the legal competency of the World Trade Organization, that the issue significantly involve trade, that the World Trade Organization be capable of enforcing any guidelines related to the issue, and that the issue require international coordination.<sup>188</sup> These criteria are explicitly drawn from the nature of the World Trade Organization as an international institution and from the purposes of its creators.<sup>189</sup> In that sense, these criteria reflect the rational and utilitar-

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PA. J. INT'L ECON. L. 17, 23-24 (1996) (suggesting that the World Trade Organization will be called upon to issue rules concerning the environment, anti-trust and competition, labor standards, human rights, distributional issues, gender and other discrimination, and democratic structure); Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 L. & POL'Y INT'L BUS. 305 (1996); Asif H. Qureshi, *Trade Related Aspects of International Taxation—A New WTO Code of Conduct?*, J. WORLD TRADE, Apr. 1996, at 161 (suggesting the World Trade Organization as a forum for the promulgation of uniform trade-related tax regulations); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 394 (1994) (suggesting that the World Trade Organization take up the issue of antitrust regulation); James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 836 (1994) ("Over time it may be possible to explicitly link membership in the WTO to adherence to [human rights conditions].").

<sup>185</sup> See Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711, 714-18 (1996) (arguing that excessive linkage would dilute the clarity of the World Trade Organization's mandate, undermine its credibility, and place issues in its hands that would best be considered elsewhere).

<sup>186</sup> The author of this Article has argued, for example, that the World Trade Organization should deal with the issue of transnational bribery. See Nichols, *supra* note 184.

<sup>187</sup> See Nichols, *supra* note 185.

<sup>188</sup> See *id.* at 722-40.

<sup>189</sup> See *id.* at 719 ("Specifically, the question requires an understanding of what type of international organization the World Trade Organization is, and what it is intended by its creators and members to accomplish."). The analysis relies on the taxonomy of international organizations created by Paul Taylor in its effort to define and characterize the World Trade Organization. See Paul Taylor, *A Conceptual Typology of International Organization*, in FRAMEWORKS

ian orientation of regime theory (as well as institutional economics,<sup>190</sup> although that iteration of institutionalism is not explicitly referred to in the article). In other words, these criteria examine intrinsic characteristics of the World Trade Organization as a regime and apply them outward. They do not reflect the historical or cultural orientation of historical institutionalism or sociological institutionalism. They do not examine constraints imposed upon the World Trade Organization through past decisions at critical junctures. They do not examine the culture in which the World Trade Organization is embedded to determine if linkage with some issues would be more appropriate than linkage with other issues. These types of analysis are not typical to mainstream trade scholarship, but nonetheless would provide interesting insights into the question of the scope of the World Trade Organization's authority.

An example of a practical linkage that might be excluded under regime theory is a linkage between trade and human rights.<sup>191</sup> Trade and human rights have not been linked in the status quo.<sup>192</sup> Particularly given regime theories' assumptions that actors in the international arena are autonomous and equal, regime theory might lead to a conclusion that such a linkage would render the international trade regime inadequate in effectuating members' preferences.<sup>193</sup> Because regime theory predicates institutional

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FOR INTERNATIONAL CO-OPERATION 12 (A.J.R. Groom & Paul Taylor eds., 1990).

<sup>190</sup> See Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 807 (1994) (stating that regime theory can be compared to economics because it treats states as unitary, rational, maximizing actors).

<sup>191</sup> Patricia Stirling, for example, advocates the creation of a human rights body within the World Trade Organization that will oversee the administration of multilateral enforcement of human rights through trade sanctions. See Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 4 (1996).

<sup>192</sup> See Smith, *supra* note 184, at 819 n.95 (noting that in the real world, human rights regimes and commercial regimes are wholly independent of one another, and using the separation of the World Trade Organization and the United Nations as an example).

<sup>193</sup> The criteria for determining which issues are proper for consideration by the World Trade Organization that are discussed *supra* notes 187-189 and accompanying text almost certainly would exclude this proposal. This proposal would not be considered within the scope of the World Trade Organization's authority because it would fail tests number two (that is, resolution of this issue would not significantly increase trade) and number three (that is, it would be very difficult for the World Trade Organization to supervise enforcement of

change on how *effective* the change in the institution would be,<sup>194</sup> upon receiving a negative answer it would resist the change.

Sociological institutionalism asks a different question. Rather than concerning itself with the utilitarian *effectiveness* of the institution, sociological institutionalism asks whether the contemplated change would render the institution more legitimate, that is, whether it would be considered more appropriate for the World Trade Organization to establish linkage with human rights than it would be for the Organization not to do so. While this Article does not delve into the myriad debates over human rights, there is a body of international law scholarship that concludes that human rights principals have achieved almost universal acceptance.<sup>195</sup> Interestingly, some of that scholarship suggests that the increased acceptance of human rights principles has proceeded hand in hand with increased acceptance of the globalization of commerce.<sup>196</sup> If indeed it can be demonstrated that a demand for core human rights forms part of the cultural context in which the World Trade Organization is embedded, and if it can be shown that a connection between those core rights and international commercial regulation is considered appropriate, then sociological institutionalism, unlike regime theory, might provide a theoretical justification for linkage.<sup>197</sup>

The alternative institutionalisms might also provide instruction in how to effectuate linkage. Regime theory and institu-

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any rules that it promulgated on the subject). These criteria, it should be recalled, reflect a regime theory orientation toward institutions.

<sup>194</sup> See *supra* note 18 and accompanying text.

<sup>195</sup> See, e.g., Jost Delbrück, *A More Effective International Law or a New "World Law"?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 713 (1993) ("Human dignity, as the anchor point for the normative validity of international human rights law and as a basic guiding principle for their interpretation and application, has become more firmly established within the international community than ever before."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM J. INT'L L. 554, 554 (1995) (noting the general acceptance of human rights as a subject for international regulation); Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 447 (1997) (noting that "the rhetoric of human rights has gained universal acceptance").

<sup>196</sup> See Delbrück, *supra* note 195, at 713 (stating that "individual rights and fundamental freedoms are accepted, in principle, along with economic . . . rights"); Seita, *supra* note 195, at 447 (arguing that the acceptance of human rights goes hand in hand with economic globalization).

<sup>197</sup> This hypothetical is provided only as an example, and should not be construed as a fully developed argument for, or against, such a linkage.

tional economics rely on the self-interest of actors to effectuate a change in institutions; clearly, however, this theoretical device is not perfectly applicable in the real world.<sup>198</sup> An actor cannot simply demonstrate that a particular linkage is more effective or efficient in satisfying World Trade Organization members' preferences and expect the members to fall in line. On an intuitive level, it is understood that historical and cultural barriers must be overcome; such barriers are the lifeblood of historical and sociological institutionalism.

An example of linkage that might be instructed by historical institutionalism and sociological institutionalism is a linkage between trade and the environment.<sup>199</sup> Parsing the mass of literature on trade and the environment would overwhelm this Article;<sup>200</sup> therefore, a single, discrete example is used. Steve Charnovitz, who has written prodigiously and insightfully about

<sup>198</sup> An obvious criticism is that the ineffective or inefficient institutions that are created, often persist, or are resistant to change, while more suitable alternatives do not come into effect.

<sup>199</sup> Reconciliation of trade policy with environmental policy is probably of some relevance to the survival of the international trade regime. See Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, in ECONOMIC DIMENSIONS OF INTERNATIONAL LAW, *supra* note 38, at 2 (suggesting that popular support for the international trade regime will evaporate if the trade regime does not address concerns); Nichols, *supra* note 32, at 702 ("Placing primacy on trade thus imperils popular and sovereign support for a trade regime, and endangers all of free trade."). The infamous Tuna/Dolphin decisions, which were not even adopted by the GATT, is indicative of the tensions. The mere release of these decisions, which exalted trade concerns over environmental concerns, led to calls for the United States to withdraw from the trade regime. See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 751-52 (1993) (describing reactions to the Tuna/Dolphin decisions). For descriptions of the Tuna/Dolphin proceedings and decisions, see Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992). For a respected discussion of the many issues concerning trade and the environment (the mention of which is not intended to slight the many other excellent discussions), see the essays contained in THE GREENING OF WORLD TRADE ISSUES (Kym Anderson & Richard Blackhurst eds., 1992).

<sup>200</sup> Cf. Nichols, *supra* note 32, at 673 ("To bundle all of the many values regarding environment into one cohesive scheme would be a monumental, and probably impossible, task."); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1230 (1995) ("Just listing some of the many pressing environmental issues can lead to despondency: species extinction, deforestation, desertification, toxic waste, acid rain, global climate change, and severe air and water pollution in large cities and poor countries.").

the relationship between law and trade,<sup>201</sup> has advocated a fundamental change in the rules of the World Trade Organization—a change that would lead to greater participation by nongovernmental organizations<sup>202</sup> in the Organization's rulemaking process.<sup>203</sup> Charnovitz and others forcefully argue that nongovernmental organizations have demonstrably aided other international organizations in the creation of effective trade policy and linkages.<sup>204</sup> In other words, Charnovitz offers a utilitarian argument.<sup>205</sup> Despite this argument, the institutional alteration that Charnovitz calls for has not been effected.<sup>206</sup>

Regime theory and institutional economics have little to say about the failure of a proposed alteration other than that if the de-

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<sup>201</sup> See, e.g., Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994); Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299 (1994); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257 (1994).

<sup>202</sup> Charnovitz uses the term "nongovernmental organizations" in a manner that does not include businesses. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 187 (1997).

<sup>203</sup> See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 331 (1996).

<sup>204</sup> See *id.* at 341 (citing NGO participation in GATT Uruguay Round); A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI. KENT L. REV. 61 (1992). But see Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 856-60 (1996) (cautioning against relying on the results of nongovernmental participation in other international organizations unless it is demonstrated that that organization is comparable to the World Trade Organization).

<sup>205</sup> See Charnovitz, *supra* note 203, at 341 (arguing that nongovernmental organization participation would facilitate negotiations). Of course, to those who are ideologically predisposed to discount environmental concerns, ignoring any attempts to reconcile the two issues might seem to have the greatest utility; given the plasticity of economic assumptions it is even possible that they could construct mathematical proofs for their position. See Cotter, *supra* note 40, at 2114, 2117-18 (discussing the falsifiability problem with economics). The point, however, is not that the World Trade Organization must embrace environmental issues, but instead, that failure to consider environmental concerns endangers the continued viability of the trade regime. Cf. Howse & Trebilcock, *supra* note 199, at 3 ("If international trade law simply rules out of court any trade response to the policies of other countries, however abhorrent, then there will be an understandable, and dangerous, temptation to declare that the international trade law is an ass [sic].").

<sup>206</sup> See Steve Charnovitz, *A Critical Guide to The WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 341-42 (1997).

sired institutional alteration did not occur, it must not have been perceived as effective or efficient by international actors.<sup>207</sup> Historical institutionalism and sociological institutionalism, on the other hand, speak to historical constraints that must be overcome, cognitions that must be expanded or changed, and cultural legitimations that must be elicited and made explicit. While this Article does not purport to engage in the laborious task of applying the alternative institutionalisms to a specific linkage, the usefulness of these theoretical schools to those who advocate practical linkages should be clear.

Charnovitz does point out that the proposed International Trade Organization, which would have joined the World Bank and the International Monetary Fund as the third Bretton Woods institution if its charter had been ratified by the United States in 1948,<sup>208</sup> had provisions for the participation of nongovernmental organizations. He suggests that this means the World Trade Organization should do the same.<sup>209</sup> As a purely legal matter, of course, the actions of one international organization have little bearing on the requirements to be made of another.<sup>210</sup> Historical institutionalism, on the other hand, does provide a theoretical justification for exploration of the history of nongovernmental organization participation. This theoretical construct, however, requires more rigor than simple iteration of the history of the International Trade Organization. Rather, it suggests examination of at least two critical junctures: the point at which the International Trade Organization was not created, and the point at which the drafters of the World Trade Organization's charter discarded any plans to deeply involve nongovernmental organizations. Scrutinizing these critical junctures for the purpose of de-

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<sup>207</sup> See North, *supra* note 8 (noting that entrepreneurs change or do not change institutions based on their perceptions of the benefits).

<sup>208</sup> See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 11-12 (2d ed. 1990) (discussing the history of the International Trade Organization); Nichols, *supra* note 132, at 389-91 (same).

<sup>209</sup> See Charnovitz, *supra* note 203, at 338-39. Charnovitz has also written the definitive article on the history of nongovernmental organization participation in international organizations. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

<sup>210</sup> In general, the authority and requirements of an international organization are bounded by its organic documents, or by a limited number of powers that are implied to international organizations. See Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, 816-21 (1965); Nichols, *supra* note 185, at 723-24.

termining how the choices made at those cleavage points possibly constrain future institutional choices could provide guidance for those who wish to effect institutional alteration.

## 5. CONCLUSION

Institutionalism is an increasingly useful tool in the repertoire of international law scholarship. Among other uses, institutionalism has been used to scrutinize the World Trade Organization. Institutionalism, as it is used in international law scholarship, however, reflects only two sources: regime theory from international relations theory, and institutional economics from the social science of economics. Regime theory and institutional economics, however, do not exhaust the universe of possible sources for models of institutional analysis. This Article offers two examples of other models for institutional analysis: historical institutionalism from political science, and sociological institutionalism from sociology. Neither school of institutionalism has been used to analyze the World Trade Organization.

Historical institutionalism and sociological institutionalism differ from regime theory and institutional economics in fundamental ways. To the international trade law scholar who is seeking models for analysis, these differences should not be looked upon as reasons to discredit one school or another, but instead as opportunities to examine international law from a variety of perspectives, or even to hybridize in legal analysis the strengths of several other disciplines while pruning their weaker analytical principles. As this Article briefly demonstrates, historical institutionalism and sociological institutionalism can lead to new insights concerning the World Trade Organization.

While trade scholars should appreciate the possibility of new tools of analysis, the existence of these tools raises an interesting question concerning why some forms of institutionalism have been used in trade scholarship and others have not. In order to answer that question, scholars must recognize that trade scholarship itself is an institution, and is subject to the same scrutiny as the World Trade Organization. By examining how analytical linkages occur or do not occur in trade scholarship, lessons can be learned that have applicability to the broader questions of theoretical and practical linkage to the World Trade Organization.