

TOWARD A RICHER INSTITUTIONALISM FOR INTERNATIONAL LAW AND POLICY

A COMMENT ON KENNETH ABBOTT'S RECENT WORK

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Scholarship in public international law could profit immensely from linking up systematically with international relations theory. Most serious scholars in public international law know this—and more or less openly admit it.¹ In order to apply the law, one must understand the political, social, and economic context in which it applies—but understanding such a context is not mastered with purely legal instruments. Legal scholarship thus must necessarily rely on theoretical assumptions (and empirical knowledge) that legal work alone cannot provide.² But how can lawyers avoid intuitively relying on their own “social constructions of reality,” their own everyday knowledge of the workings of the international system? Many times that everyday knowledge may suffice, and an explicit debate on underlying theoretical models and assumptions would confuse legal debate in such cases and create enormous transaction costs for legal scholarship. But all too often a critical debate of underlying models and assumptions is nevertheless needed if lawyers want to avoid becoming entrapped in their own prejudices and unreflected assumptions. The analytical tools for a critical reconstruction of the underlying theoretical models and assumptions, however, must be taken from fields of scholarship other than the legal discipline—fields that offer an arsenal of critical reflections on how to model the workings of the international system. This explains the clear preference for international relations theory expressed in modern writings on public international law.

International relations theory—and institutionalist strands of social science theory in general—may deliver a suitable framework for analyz-

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1. See, e.g., KNUT IPSSEN & EBERHARD MENZEL, *VÖLKERRECHT: EIN STUDIENBUCH* 42–50 (4th ed. 1999).

2. From the perspective of philosophical hermeneutics see FRIEDRICH MÜLLER, *JURISTISCHE METHODIK* 162 (6th ed. 1995).

ing the workings of the international legal system.³ This need not lead to a partial fusion of both branches, as happened with “law and economics.” As Kenneth Abbott recently admitted, the “emergence of a new joint discipline” has failed to materialize during the last ten to fifteen years, despite all intensified interaction between both disciplines—and perhaps may never come into being.⁴ The theoretical tools (and empirical insights) gained during the evolution of international relations as a scholarly discipline might enlighten international lawyers tremendously, and might form an international law “method,”⁵ but it will not reconstruct international law as a whole.

In the sense outlined above, it is difficult to disagree fundamentally with the lines of argument underlying Kenneth Abbott’s paper⁶—at least amongst the circle of scholars assembled in a conference dedicated to “public international law and economics.” In particular, Abbott’s basic point, that public international law, even in doctrinal terms, could profit significantly from a systematic linkage with international relations theory, is beyond doubt. This is not a new insight; other scholars, such as Anne-Marie Slaughter, have been discussing it for some time.⁷ Most international lawyers will share the assessment that integrating international relations (IR) and international law (IL) “can make”—to cite Anne-Marie Slaughter’s famous line—“international lawyers better lawyers.”⁸ The central line of this argument—as was briefly mentioned in the introductory remarks—goes towards the problem of (often hidden, implicit) theoretical assumptions that guide to a certain degree every form of legal work. The diverse theoretical perspectives of IR help lawyers recognize the (often unspoken) assumptions that underlie their own and others’ legal arguments, readings of texts, and doctrines.⁹ This function of making aware, lying open theoretical assumptions and normative prescriptions, which is of utmost importance already in the context of usual doctrinal analysis characteristic for traditional “positivist” inter-

3. See Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367, 370–73 (1998).

4. Kenneth W. Abbott, *Towards a Richer Institutionalism for International Law and Policy*, 1 J. INT’L L. & INT’L REL. 9, 9 (2005) [hereinafter Abbott, *Towards*]. Professor Abbott originally suggested the possibility of a new joint discipline in Kenneth W. Abbott, *International Law and International Relations Theory: Building Bridges*, 86 AM. SOC’Y INT’L L. PROC. 167, 168 (1992) [hereinafter Abbott, *Building Bridges*].

5. See OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 1–3 (2005).

6. This Comment responds primarily to Professor Abbott’s paper presented at the Bonn conference, Abbott, *Towards*, *supra* note 4. Professor Abbott has built upon and extended his arguments there as a part of this symposium issue. Kenneth Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5.

7. See Abbott, *Building Bridges*, *supra* note 4, at 167; Slaughter et al., *supra* note 3, at 367; see also Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361 (1999); Abbott, *Towards*, *supra* note 4, at 9; Anne-Marie Slaughter, *International Law and International Relations*, 285 REC. DES COURS 9 (2000).

8. See generally Slaughter et al., *supra* note 3.

9. *Id.* at 377–81.

national law scholarship, is of even greater value as far as international lawyers are involved in the business of policy formulation¹⁰—and this is not such a rare thing that it would not deserve mention. Here IR theory might help lawyers analyze the problems of policy making in theoretically informed ways and to develop suitable responses which are not restricted to mere legal aspects. International lawyers as well as IR scholars seek—as Robert Keohane expressed—“knowledge in order to improve the quality of human action.”¹¹

But which IR theory should inform lawyers? Here things become tricky. There is not a single IR theory, but a wide range of such theories.¹² Kenneth Abbott has informed us well on this point and has given a solid survey of the array of existing theoretical approaches.¹³ I largely agree with the picture he paints.

In a very rough, binary distinction, we can distinguish rationalist and constructivist theories. The rationalist schools of thought, which are rather divergent in their details, share at least one basic methodological assumption—they assume in their models individual and collective actors that are oriented towards a rational pattern of maximizing their own positions and gains—a kind of political *homo oeconomicus*.¹⁴ Some of these theories are older than rational choice theory itself—think of traditional “realism” founded by Hans Morgenthau in the late 1940s and early 1950s.¹⁵ Traditional “realism” tended to perceive the state as a kind of “black box” that acts on the international plane as a unified actor, with a coherent “national interest” defined by its position in the international system. More recent versions of “neo-realism,” however, have incorporated strong doses of rational choice, even game theory.¹⁶

Liberal institutionalism is based on rational choice paradigms anyway, while recognizing that states (and national interests) are legal fic-

10. See Abbott, *Towards*, *supra* note 4, at 10–11.

11. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379, 380 (1988).

12. See, e.g., IAN CLARK, *GLOBALIZATION AND INTERNATIONAL RELATIONS THEORY* (1999); *CLASSICAL THEORY IN INTERNATIONAL RELATIONS* (Beate Jahn ed., 2006); ANDREW P. DUNNE, *INTERNATIONAL THEORY: TO THE BRINK AND BEYOND* (1996); *INTERNATIONAL RELATIONS THEORY TODAY* (Ken Booth & Steve Smith eds., 1995); *INTERNATIONAL THEORY: CRITICAL INVESTIGATIONS* (James Der Derian ed., 1995); *NEW THINKING IN INTERNATIONAL RELATIONS THEORY* (Michael W. Doyle & G. John Ikenberry eds., 1997); *REGIME THEORY AND INTERNATIONAL RELATIONS* (Volker Rittberger ed., 1993); CYNTHIA WEBER, *INTERNATIONAL RELATIONS THEORY: A CRITICAL INTRODUCTION* (2d ed. 2005).

13. See Abbott, *Towards*, *supra* note 4, at 12–16 (providing a brief but informative survey of the various schools of thought).

14. See, e.g., Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 762 (2001).

15. On the origins of “realist” thinking in international relations theory, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 436–80 (2001).

16. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1–28 (1995); Duncan Snidal, *Rational Choice and International Relations*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 73–74 (Walter Carlsnaes et al. eds., 2002).

tions that must be set into context by incorporating international institutions and nonstate actors into the framework of analysis.¹⁷ The relevance of the state as a central actor becomes relativized, with individuals, business firms, NGOs, and other nonstate actors entering the scene as more or less equally important actors. Collective preferences (the traditional “national interest”) are modeled here as depending not primarily on objective conditions, but on demands of private actors on the national plane. States in this perspective tend to become collective agents that further the aggregate interests of their members.¹⁸ The “black box” of the state is opened in these analytical models. This enables scholars to focus on the relevance of internal governance structures for international relations, the input factors influencing the actions of government officials and agencies, the importance of agency-driven cooperation below the level of formal diplomacy, and the interaction between domestic and international politics.¹⁹ Informal cooperation structures beyond traditional forms of diplomacy and activities of nonstate actors across states and nations²⁰ are discovered in liberal institutionalism as important forces shaping the workings of international politics, as well as traditional interstate relations and power struggles determined by “objective” state interests that tended to dominate classical “realist” models of international relations.²¹

Constructivist models do not easily merge with rationalist schools.²² This is not to say that constructivism denies the importance of rational calculus. It simply works with the understanding that real life patterns of social behavior are not clinically rational, but that the rationality of real life actors is to a large degree dominated by context-specific “social constructions of reality,” by cognitive patterns that give the rationalities of different actors a very distinct shape.²³ Such ideational structures of

17. See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996); see also Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507–08 (1995); Andrew Moravcsik, *Liberal International Relations Theory: A Social Scientific Assessment 4–9* (Weatherhead Ctr. for Int'l Affairs, Working Paper No. 01–02, 2001), available at http://www.wcfia.harvard.edu/sites/default/files/607_Moravcsik.pdf.

18. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 518–20 (1997).

19. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

20. As to the growing interest in the changing role of international NGOs, see Thomas Risse, *Transnational Actors and World Politics*, in HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 16, at 255; Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 WORLD POL. 579 (2003); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

21. See generally BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995); ROBERT O. KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977).

22. See James Fearon & Alexander Wendt, *Rationalism vs. Constructivism: a Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS *supra* note 16, at 52.

23. See ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 139–90 (1999).

“meaning and social value,” which may find expression in particular social constructs of a given “national interest,” are identified as being prior to individual actors or “agents” and the rational calculations that they employ in order to pursue certain objectives.²⁴ The “anarchical society of states” in this view is not an “objective” phenomenon as such, but a meaning structure governing the relations of states that is intersubjectively construed and learned—and that could be modified by creating new understandings.²⁵ To perceive state agents as rational actors pursuing a mere means-ends rationality seems—in the eyes of constructivist scholars—to be a self-delusion; actors, even when acting as agents of states, are driven primarily by their inclination to behave in conformity with the identities, values, and norms to which they have been socialized and which they have internalized.²⁶ The primordial driving force is less a rational calculus, but rather a push to be consistent with their values and identities—values and identities that find expression in legal and social norms and orders of preferences. Social and legal norms in such a perspective are much more important than interests,²⁷ since interests reflect mostly the values that underlie such norms. The dynamic interdependence of interests, values, preferences, and legal and social norms have become an important focus of constructivist models, in the sense of a dynamic construction of identities and preferences, the modes of which can be modified through social interaction.

The theoretical focus of traditional institutionalists and constructivist models is rather different. But is it impossible to combine rationalist models with constructivist theories? Kenneth Abbott’s paper shows a marked skepticism towards this combination.²⁸ However, I am not certain that both currents do not fit together. It is true that one cannot simply merge both lines of thought in a hybrid theory. But I think both models can coexist in a quite productive division of labor.²⁹ Rationalist models usually work at a much higher level of abstraction than constructivist studies. “Realism,” classical institutionalism, and all rational-choice-based theories construe patterns of social interactions in terms of typical model interactions. To a certain degree, these models are necessarily decoupled from a specific context, because they are oriented towards constructing models of “decontextualized” patterns of behavior. They usually do not explain individual, context-specific behavior, but

24. See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2–3, 14–22 (1996).

25. See Alexander Wendt, *Anarchy Is What States Make of It*, 46 INT’L ORG. 391, 394–95 (1992); see also WENDT, *supra* note 23, at 113–35.

26. See Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 206 (Robert J. Beck et al. eds., 1999).

27. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 871–74 (1998).

28. See Abbott, *Towards*, *supra* note 4, at 16–21.

29. *Id.* at 19.

typical patterns of such behavior. They are helpful for social sciences, as well as all forms of behavior-oriented disciplines, because they help explain general patterns of interest and average behavioral routines, irrespective of any individual variation.³⁰ These models help lawyers understand why certain institutions of law are necessary in a given social setup, which types of institutional arrangements (and legal rules) a rational actor will prefer, and what choices we have in designing social institutions (such as law). It would be completely misleading if we would use such models as analytical tools to explain specific individual action—they tell us more how law typically operates and why people usually obey the law, without always conducting a calculus on the probability and gravity of sanctions for the instances in which they would not obey. People abide by the law because it reflects society's interests, and thus also their personal interests as members of society, in an enlightened, medium- or long-term perspective, and they often have internalized that kind of societal calculus and simply perceive a certain law as necessary and thus binding.³¹

A constructivist model is much more helpful than an abstract “rational choice” model in explaining why specific actors act in certain ways, support identifiable legal rules (or try to evade them), or make use of some arrangements but not others.³² In particular, compliance with international norms definitively involves both instrumental choice and social learning, and argues in favor of a synthetic approach to compliance that emphasizes “argumentative persuasion,” a process that involves actors and institutions but takes seriously the possibility of preference change through deliberation and social interaction.³³ This means we must look to constructivist models if we want to come to a context-specific model explaining why a treaty was concluded in a very specific form and later implemented, or why actor *X* expresses one type of *opinio juris* and follows one pattern of practice, while actor *Y* adheres to another *opinio juris* and prefers another “consuetudo.”³⁴ Individual actor rationality is characterized by specific modes of “social constructions of reality,” specific “cognitive patterns,” and cannot be analyzed without

30. For abounding literature on “epistemic communities,” see Special Issue, *Knowledge, Power, and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (discussing the role of expert human actors in policy coordination).

31. On conceptions of legitimacy that often include factors of socialization, see Morris Zelditch, *Theories of Legitimacy*, in THE PSYCHOLOGY OF LEGITIMACY 33, 47–51 (John T. Jost & Brenda Major eds., 2001).

32. See WENDT, *supra* note 23, at 113–38.

33. See Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553, 581 (2001).

34. I have already made a comparable argument for a perspective of systems theory some years ago. See Stefan Oeter, *International Law and General Systems Theory*, 44 GERMAN Y.B. INT'L L. 72 (2001).

paying attention to these specific factors—factors which might also be phrased as expressions of “bounded rationality.”³⁵

Thus, I believe one needs both strands of theory in order to adequately analyze complex institutional arrangements. It is not even important whether the interactions and institutional arrangements are open to an analysis at the level of individual actors. In my opinion, Kenneth Abbott seems to be too cautious when he formulates that “[a]n enriched institutionalism should remain fundamentally actor centered and purposive in orientation.”³⁶ I do not see why the analytical tool should be limited so much in its reach. This criticism is due to a slightly different assessment of a point intimately linked with the actor-centered and purposive character of institutions in public international law. Abbott stresses that “[t]he institutions of most concern to international lawyers and policy makers are purposive creations, although they frequently have unanticipated effects.”³⁷ I agree completely—but up to what degree of unanticipated effects can you still call an institution a “purposive creation”? Taking into consideration the complexities of the process which finally leads to grand institutional arrangements, are we not more in a category of social evolution than of “actor-centered purposive interactions”? And what about customary international law? Abbott himself admits that customary law, with its *opinio juris* component, cannot be adequately analyzed in terms of a “purposive creation.”³⁸ The setting of a specific cornerstone, in the sense of a decision to opt for a specific expression of *opinio juris*, may be a purposive action. However, the discursive process, of which each individual expression of *opinio juris* is a part and parcel, cannot be modeled suitably in terms of an actor-centered, purposive creation. The resulting rules of customary law are the product of complex and protracted discursive processes, the result of which is difficult to foresee for each individual actor.

It may be easy—at least in certain cases—to explain the behavior of individual actors, and their opting for specific forms of *opinio juris*, in terms of rational choice. Preferences for certain legal positions often will be closely interlinked with interests and incentive structures, and will reflect a utility calculus. Even this must not always be the case—it is not that rare that actors will simply opt for a specific *opinio juris* because

35. On the concept of bounded rationality, see BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selton eds., 2002); COGNITIVE ECONOMICS (Paul Bourgin & Bernard Walliser eds., 2004); EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 4–5 (1997); BRYAN D. JONES, POLITICS AND THE ARCHITECTURE OF CHOICE: BOUNDED RATIONALITY AND GOVERNANCE (2001); THOMAS J. SARGENT, BOUNDED RATIONALITY IN MACROECONOMICS (1993); Herbert A. Simon, *Bounded Rationality*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 266–68 (John Eatwell et al. eds., 1987); 3 HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY: EMPIRICALLY GROUNDED ECONOMIC REASON (1997).

36. Abbott, *Towards*, *supra* note 4, at 28.

37. *Id.*

38. *Id.* at 28 n.99.

they have internalized certain norms and values and simply think that practice must conform to these norms and values. But such actor-specific behavior is suited, at least in principle, to rational choice-type explanations. The interaction between individual expressions of *opinio juris* and the discursive process that results from such interaction, however, belongs to a different category. What Abbott says in his paper at another point is even more true here—namely that “actors are motivated not only by self-interest, but also by values and principled beliefs. They pursue law through normative persuasion, rational argument, and bargaining, depending on the audiences they address. They view law both as an instantiation of values and norms and as an instrumental tool.”³⁹ Such ambivalence is definitely visible with the customary law process, although normative beliefs still play an often stronger role than mere instrumental calculations. Framing positions in *opinio juris* language forces actors to argue primarily in terms of normative beliefs and values, and not in terms of interests. Such encoding may first serve as an instrumental tool, but it develops its own dynamic and shifts the entire discursive process. Interests are, in the course of this process, not only translated in terms of normative beliefs, but to a certain degree also transcended in norms and values.

Nevertheless, such institutions might still be analyzed in rational choice terms, although the actor-specific interactions upon which they are based definitely will need an analysis in constructivist terms, because normative beliefs and values tend to dominate the discursive process led in legal code. Actors largely lose control of the side effects when exposing themselves to such processes of translation—with the ensuing results perceived as “unintended side effects.” A comparable process of loss of discursive control may also occur with treaty regimes, because the complexity of modern treaty regimes makes it difficult, if not impossible, to foresee and control all the side effects of certain institutional designs. However, at least in principle, treaty regimes will be perceived by the actors concerned much more as purposive creations than customary regimes, even if such perception may constitute an illusion.

In addition, I agree with Professor Abbott that we should devote increased attention to actor-centered processes of norm creation and diffusion that unfold before norms have been fully internalized, with the ensuing phenomena of strategic social construction, where persuasion, socialization, and internalization play at least as much a role as coercion in the forms of shaming and political pressure.⁴⁰ This is again, at least to a certain degree, more a constructivist than a rational choice argument—but the crucial role of persuasion, socialization, and internalization in the

39. *Id.* at 27.

40. On internalization as a crucial part of norm creation and diffusion, see Harold Hongju Koh, *Why Do Nations Obey?*, 106 YALE L.J. 2599 (1997); see also Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

operation of the law is undeniable and appeals to the intuition of every lawyer, an intuition nourished by experience. Without these mechanisms, law simply could not operate—coercion is too cumbersome and costly to be applied in daily routine. Socialization and internalization stabilize an institutional arrangement that often will be favorable in macroeconomic terms because it keeps a certain cluster of interactions functioning while saving transaction costs. In terms of individual utility calculus, loyalty to normative beliefs, based on persuasion, socialization, and internalization, might often seem to constitute an expression of bounded rationality—but perhaps such bounded rationality preserves an institutionally optimal arrangement that puts individual members in a far better position than a society of radical benefit maximizers that always end up in opportunism—eroding any legal arrangement.

Coupled to this there is a final point which I would like to raise, a question which definitely deserves further analysis: the competition between short-term individual (and group) preferences and long-term collective interests.⁴¹ A kind of naïve realism that entrusts definition of collective interests of a nation unreservedly to a running administration risks sacrificing its long-term interests to the short-term interests of specific political elite groups. We know from Public Choice scholarship that politics at national and international levels is caught in immense “Principal-Agent” problems.⁴² Tying the hands of political elites in favor of certain long-term interests of societies, be it by constitutional arrangements or by international legal arrangements, makes a lot of sense under this perspective. The wish to be reelected is a legitimate concern for a leadership in a democracy, and thus also the need to mobilize support, to serve crucial lobbies, and to pursue certain ideological objectives. But the space given to these concerns must be limited. A pattern of abiding to the law because it is a law may be very efficient in economic terms and save significant transaction costs because it avoids the trap of opening an endless discourse concerning the “real” interests of a nation, not only the short-term preferences of a specific administration. In this sense, a crude form of realism may in reality resemble more a phenomenon of bounded rationality than constitute an enlightened rational calculus in a genuine sense. Here we are at the crucial point where a seemingly rationalist argumentation in traditional realist terms (like that of Goldstein and Posner⁴³) might prove to be overly naïve. In analyzing the modes of operation of international law, we must pierce the veil of statehood and link national politics to international relations (and international law). International law is to a large degree a mechanism to ensure consistent poli-

41. Regarding the issue of long-term collective interests and the way they can best be pursued, see *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY* (Inge Kaul et al. eds., 1999); *PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION* (Inge Kaul et al. eds., 2003).

42. See DENNIS C. MUELLER, *PUBLIC CHOICE III* 359–85 (2003).

43. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

cies over time, despite all the volatilities of national politics and the constant shifts of short-term preferences.

If one leaves that out of consideration, one cannot build an adequate model that demonstrates the *modus operandi* of international law. Much can be learned by applying the tools of economic and social science institutionalism to problems of international law. This should not result in a simplistic rational choice model where every actor in the international legal process is modeled as a perfectly rational maximizer of his personal benefit, a political *homo oeconomicus*. Undoubtedly political actors (and actors in international law) will also often act instrumentally in the sense of maximizing benefits. They are, however, not persistently acting in this mode. Law depends on the internalization of normative beliefs through persuasion and socialization. Without such internalization, legal institutions would not function. All too easily dismissing such legal practice guided by normative beliefs as bounded rationality would not do justice to the internal dynamics of law. There is reason to believe that legal arrangements and institutional systems based on values and principled beliefs are not aberrations due to limitations in the rationality of individual actors, but constitute and preserve a state of social order that maximizes the benefits of members of such societal arrangements. Further research probably will demonstrate this not only for institutional arrangements of national law, but also for international law. In order to achieve such insights, institutionalist scholars will have to merge, to a certain degree, classical institutionalist tools with constructivist models. Filling bounded rationality with the insights of constructivism on the role of normative beliefs and values, of socialization and internalization, would be an obvious candidate for such a mutual enrichment.

As a scholar of international law, much could be learned from such a line of research on a path of “refined” institutionalism. Unfortunately, economic institutionalism, rational choice, and constructivism show great difficulties in joining forces. Without such joining of forces, however, some of the most interesting questions of international law will be beyond the outreach of institutionalist scholarship.