

Paper for presentation at the ‘What is Realist Foreign Policy?’ Conference
Mershon Center for International Security Studies
The Ohio State University
1-2 March 2019

The Norms Anarchy
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Introduction

Anarchy is a central assumption of realist theories of international relations. Not only does it demarcate international relations as a discrete field of study, it also serves as a principal variable that explains and predicts state behavior. While theorists had already been describing the international system as anarchic, it was Kenneth Waltz’s *Theory of International Politics* that brought anarchy front-and-center of international relations theory.¹

Anarchy is the cornerstone of Kenneth Waltz’s structural theory of international relations. According to Waltz, the structure of the international system is composed of three elements. The first is the ordering principle of anarchy that is defined as the “absence of agents with system-wide authority,”² which means that the units within the international system recognize no authority superior to themselves. The second element is the functional differentiation of the units that make up the system, while the third is the distribution of capabilities among those units.³ Since the constituent units of the system are states that, in Waltz’s view, perform identical functions, the second element of the structure is irrelevant, which leaves anarchy and the distribution of capabilities as the operative elements of the structure.⁴

Waltz hypothesized that as long as the system remains anarchic, all states, whatever the identity or ideology of their leaders and regardless of their domestic politics, are subjected to the “constraining and disposing force” of the structure of the international system.⁵ The cumulative effect of the structure is that international affairs is a realm of *realpolitik* in which states selfishly pursue their individual interests, especially “preserving and strengthening the state,”⁶ even if to the detriment of other states.

Waltz’s structural theory, his identification of anarchy as the ordering principle of the international system, and his understanding of the impact of structural forces on state behavior has been hugely influential in international relations generally, and realist theory especially. Indeed, Jack Donnelly recently argued that following the publication of Waltz’s *Theory of International Politics*, anarchy was “unthinkingly accepted as the structural ordering principle of international

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¹ KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

² *Id.*, at 88.

³ *Id.*, at 93, 97.

⁴ John Barkdull, *Waltz, Durkheim, and International Relations: The International System as an Abnormal Form*, 89 *AM. POL. SCI. REV.* 669, 670 (1995).

⁵ *Id.*, at 69.

⁶ *Id.*, at 117.

systems ... By the mid-1990s, anarchy had become ‘naturalized’ across much of the discipline; treated as a taken-for-granted foundational assumption.”⁷

In this paper, I argue that anarchy is not the ordering principle of the international system. Instead, the structure of the international system is determined by a set of constitutive principles. These principles, which I call the Constitutive Regime of the International System, identify the members of the international system, establish the basic parameters of their interaction, and articulate the lawmaking and law-enforcement mechanisms of the international system. Anarchy, therefore, is not, as leading international relations theorists suggest, the “deep structure” of the international system.⁸ Rather, anarchy is a surface-level manifestation or symptom of deeper constitutive principles.

Anarchy, Ordering Principles and the “Big and Important Things”:

An “ordering principle,” according to Kenneth Waltz, determines “the arrangement of the parts of the system.”⁹ It is an “organizational concept” that establishes the pattern according to which the units within a system are juxtaposed and combined.¹⁰ Anarchy, however, does not and cannot perform the function of an ordering principle. In fact, anarchy is not a *principle* at all.¹¹ Rather, anarchy is a descriptor that denotes the absence of a central authority that monopolizes lawmaking, law-enforcement, and dispute resolution in the international system.¹² To Waltz and most scholars of international relations, “the parts of international-political systems stand in relations of coordination. Formally, each is the equal of all others.”¹³ This means that the parts of the system, i.e., the states inhabiting the system, are juridically equal and, therefore, arranged horizontally. Anarchy, however, cannot be the source of either the equality of states or their horizontal alignment. It is tautological to posit that the origin of the horizontality of the system and the formal equality of states, and thus, the reason that the international system is anarchic, is anarchy itself. The horizontal distribution of authority, which generates the anarchic structure of the system, must, therefore, result from some deeper, broader norm or principle.

Similarly, other structural forms, such as hierarchy and heterarchy that scholars have proposed as alternatives to anarchy,¹⁴ cannot serve as the ordering principles of the system. Like anarchy, these terms are descriptive labels that express either the centralization of authority – i.e. hierarchy, or, the uneven distribution of authority among entities that are neither super- nor subordinate to each other – i.e. heterarchy. In any case, an anarchic, hierarchic, or heterarchic arrangement of the parts of a system must emanate from elsewhere.

⁷ Jack Donnelly, *The Discourse of Anarchy in IR*, 7 INT’L THEORY 393, 401-402 (2015).

⁸ John Gerard Ruggie, *Review: Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 WORLD POLITICS 261, 281 (1983).

⁹ KENNETH WALTZ, *supra* at 88.

¹⁰ *Id.*, at 89.

¹¹ A principle is “a basic rule, law, or doctrine; esp., one of the fundamental tenets of a system.” BRUAN GARNER ED. BLACK’S LAW DICTIONARY 1386 (10th ed. 2014).

¹² See Silviya Lechner, *Anarchy in International Relations*, Oxford Research Encyclopedia of International Studies.

¹³ This is distinguished from the hierarchical relations of super- and sub-ordination that, according to Waltz, are the hallmark of domestic political systems. KENNETH WALTZ, *supra* at 88.

¹⁴ DAVID LAKE, HIERARCHY IN INTERNATIONAL RELATIONS (2009) is an example of the use of hierarchy as an ordering principle, while Jack Donnelly, *Rethinking Political Structures: From Ordering Principles to Vertical Differentiation – and Beyond*, 1 INT’L THEORY 49 (2009) proposes using heterarchy as an ordering principle.

This paper posits that the structure of the international system is generated by a set of intersubjective assumptions that provide the ordering principles of the system and that constitute its “deep structure.” I call these assumptions the Constitutive Regime of the International System. This regime is composed of three elements.¹⁵ The first is the *principle of differentiation*, which identifies the constituent units of the system – i.e. the actors authorized to engage in international affairs, and determines the distribution of authority between those units. By determining the distribution of authority, the principle of differentiation generates the structure of the system. If authority is decentralized and the units are co-equals, the system is anarchic, but if authority is concentrated with some actors that are entitled to dominate other actors, the system becomes hierarchic, while if authority is shared and multilayered the system becomes heterarchic. The principle of differentiation could also generate systems that exhibit combinations of these patterns of authority. The second component is the *theory of world order*, which is a worldview that prescribes principles and policies that are considered necessary for maintaining order in the system and that determine the parameters governing the interactions of the units operating within the system. The third component is the *secondary rules of international law*, which are the rules and processes of lawmaking and law-enforcement in the international system. In short, the Constitutive Regime, to borrow Stanley Hoffmann’s phrase, is the “law of the political framework.”¹⁶ It is the normative foundation that structures the system and establishes the ground rules for interaction between its members.

Before proceeding, it is necessary to outline the intellectual ambitions of this paper and to clarify the theoretical function that the Constitutive Regime of the International System performs. In response to criticism that the *Theory of International Politics* failed to explain a wide range of events in international affairs, Kenneth Waltz clarified that his objective was to identify “a small number of big and important things” that shape state behavior.¹⁷ The Constitutive Regime of the International System is not dissimilar. It is not a theory of everything. It does not explain the content of every rule of international law, or the structure of every international institution. Nor does it account for every act of every state, nor does it predict every event in international politics. It is, however, “one big thing that explains a small number of important things.” The Constitutive Regime is an heuristic instrument that explains the structure of the international system. It identifies and conceptualizes the norms that generate the structure of the international system and provides an account of how the system is structured by intersubjective assumptions that allocate authority between the constituent units of the system. It also shows that the structure of the international system is not static, but a historically contingent construct that is determined by deeper intersubjective assumptions.¹⁸

¹⁵ The term *regime* used here is borrowed from Regime Theory. A Constitutive Regime functions like a regime. It is a set of norms that are broadly accepted and that perform a governing function. Unlike a functional regime that regulates a specific area of global governance, however, the Constitutive Regime is constitutive not regulative, and its scope is systemic not issue-specific.

¹⁶ Stanley Hoffmann, *International Systems and International Law*, 14 *WORLD POLITICS* 205, 212 (1961).

¹⁷ Kenneth Waltz, *Reflections on Theory of International Politics*, in *NEOREALISM AND ITS CRITICS* 322, 329 (Robert Keohane ed. 1986).

¹⁸ Richard Ashley, *supra* note ***, at 229 (Anarchy is “not as a necessary condition that the realistic conduct of politics must take to be beyond question, but as an arbitrary political construction that is always in the process of being imposed”).

The Constitutive Regime is also an instrument of systematization. It uncovers the background worldview – or what I call the theory of world order – that shapes and justifies the rules, institutions, and practices of international politics. It shows that underlying these rules, institutions, and practices that often appear unrelated and fragmented are coherent (or, at times, competing) worldviews. The Constitutive Regime, therefore, functions like DNA; it embodies the genetic code of the international system.

The Constitutive Regime of the International System is not a theory of foreign policy. A theory of foreign policy explores the processes of articulating national interests and priorities and devising strategies to deploy national resources to promote those interests and achieve those priorities at the international level.¹⁹ The Constitutive Regime of the International System is relevant to theories of foreign policy in two respects. First, the Constitutive Regime sets the parameters of permissible foreign policy objectives. By embodying a particular theory of world order, it promotes particular policies and demotes others; it justifies certain practices and condemns others; it determines which ideas are mainstream and which are radical. This all affects the process of foreign policy formulation for Great Powers and peripheral players alike. Second, the Constitutive Regime is, occasionally, a site of political contestation. Whenever the global balance of power shifts or normative commitments evolve, the international system experiences constitutional crises. These are periods when the normative architecture and foundational assumptions of the international system are challenged and revised. During these periods, the objectives of foreign policy are not limited to promoting state interests regarding quotidian matters of international affairs. Rather, foreign policy objectives, especially for the Great Powers, expand to include the reengineering of the normative foundation of the international system.

The Constitutive Regime of the International System is not a *normative theory* of international relations.²⁰ It does not espouse specific substantive values nor does it advocate a preferred vision of world order or any particular conception of justice. It is an ethically neutral construct. It is flexible enough to encompass systems as diverse as the Sino-Centric system of the seventeenth century,²¹ Napoleon’s revolutionary, republican, and imperial systems, and the conservative post-Napoleonic system,²² and the post-World War II liberal order. The Constitutive Regime identifies the ordering principles of international systems without passing normative judgment on those principles. This is because a morally pernicious system predicated on racialized

¹⁹ I base this definition of foreign policy on Hans Morgenthau’s understanding of the functions of diplomacy, which he conceived as “comprising the whole range of foreign policy,” which include: “(1) Diplomacy must determine its objectives in the light of the power actually and potentially available for the pursuit of these objectives. (2) Diplomacy must assess the objectives of other nations and the power actually and potentially available for the pursuit of these objectives. (3) Diplomacy must determine to what extent these different objectives are compatible with each other. (4) Diplomacy must employ the means suited to the pursuit of its objectives.” HANS MORGENTHAU, *POLITICS AMONG NATIONS* 539-540 (1960).

²⁰ A normative theory, as Mervyn Frost explains, asks “one central question: ‘What in general is a *good reason* for action by or with regard to states?’” In other words, a normative theory problematizes the *ethical justifications* for state (or non-state) policy. See MERVYN FROST, *TOWARDS A NORMATIVE THEORY OF INTERNATIONAL RELATIONS* 86 (1986). This Article neither asks that question nor does it posit ethical justifications for policy.

²¹ See: Erik Ringmar, *Performing International Systems: Two East-Asian Alternatives to the Westphalian Order*, 66 *INT’L ORG.* 1 (2012).

²² See: Paul Schroeder, *The 19th-Century International System: Changes in Structure*, 39 *WORLD POLITICS* 1 (1986-1987).

or colonial principles of differentiation or that operates on the bases of an ethically reprehensible worldview is no less “systemic” than a morally laudable system.²³

Systems, Structures, and Constitutions: Surveying the Scholarly Terrain

The claim that the international system operates on the bases of foundational or constitutive norms is not entirely novel. Therefore, it is necessary to highlight how this paper contributes to, builds on, and differs from scholarship that has investigated the normative foundations of the international system. After all, in proposing the Constitutive Regime of the International System, my intention is not to contribute to the terminological confusion and conceptual congestion that often afflicts international relations scholarship, but to offer a theoretical construct that synthesizes and simplifies existing scholarship and introduces unexplored elements of the normative substructure of the international system.

This paper builds on two core contributions of constructivist scholarship. The first is the claim that the structure within which international affairs occurs is the product of shared meanings and social understandings, while the second is the importance of problematizing the constitutive, as opposed to the causal, impact of rules and norms in international affairs.²⁴ Constructivists, however, generally accept the neorealist presumption of anarchy as the ordering principle of the international system;²⁵ a proposition that I reject. Where constructivists diverge from realists on anarchy is in their powerful and persuasive critique of the realist claim that “international anarchy is the principal force shaping the motives and actions of states.”²⁶ Instead, Alexander Wendt argues that “political culture is the most fundamental fact about the structure of an international system, giving meaning to power and content to interests, and thus the thing we need most to know to explain a ‘small number of big and important things’.”²⁷ I disagree. Before problematizing “political culture,” it is necessary to determine *whose* political culture matters. This requires identifying the constituent units – i.e. the principal players – of the international system. The “most fundamental fact” about the international system, therefore, is not “political culture,” but the identity of the constituent unit. Hence, for example, the emergence of *raison d'état* as the dominant approach to conducting foreign policy – or, to use Wendt’s vernacular, the prevalent political culture – can only be examined and understood as part of the displacement of religious and

²³ This explains my choice of the term “*constitutive*” to describe this regime as opposed to constitutional. Especially when used by scholars of international law writing on Global Constitutionalism, terms such as constitutional, constitutionalism, and constitutionalization express a normative agenda that seeks to promote individual autonomy, human rights, and the rule of law in a globalized, interdependent, and institutionally fragmented international system. The term “constitutive” on the other hand is not normatively weighty. It makes no normative prescription.

²⁴ Alexander Wendt, *On Constitution and Causation in International Relations*, 24 REV. INT’L STUDIES 101 (1998) (Constitutive theories “account for the properties of things by reference to the structure in virtue of which they exist”); Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 397 (1992) (“It is collective meanings that constitute the structures which organize our actions”).

²⁵ Aaron Beers Sampson, *Tropical Anarchy: Waltz, Wendt, and the Way We Imagine International Politics*, 27 ALTERNATIVES 439 (2002) (On their acceptance of anarchy as an ordering principle, “Waltz and Wendt present flip sides of the same coin”).

²⁶ Joseph Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 488 (1988).

²⁷ ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 249 (1999).

personalized forms of governance and the rise and consolidation of the territorial state as the constituent unit of the European, and later, the international, system.²⁸

This paper is also influenced by the English School of International Studies which, as Andrew Hurrell explains, generated a large body of scholarship based on the insight that “central to the ‘system’ is a historically created, and evolving, structure of common understandings, rules, norms, and mutual expectations.”²⁹ English School theorists have not, however, contested the neorealist assumption that anarchy is the fundamental structural feature of the system. Indeed, the English School’s canonical tome, Hedley Bull’s *magna opus*, is titled *The Anarchical Society*. The “central motif” of the English School is the claim that, despite its anarchic structure, order is maintained in the system because its units are organized into what has been alternately called the “society of states,” the “international society,” or the “system of states.”³⁰ What makes the system a society is, first, that states share “common interests in the elementary goals of social life,”³¹ and second, the existence of “primary institutions” (war, diplomacy, the Great Powers, balance of power, international law) that facilitate relations between states and contribute to maintaining order.³²

This paper recognizes the utility of these insights, but takes a theoretical step-back. It argues that preceding any consensus on elementary goals and underlying the primary institutions of society are a set of the intersubjective assumptions embodied in the Constitutive Regime of the International System. These constitutive norms are essential for the existence and operation of an international society because they identify the constituent units of an anarchical society, determine the distribution of authority among those members, and establish the lawmaking and law enforcement mechanisms. These constitutive norms, in other words, empower and authorize actors to partake in diplomacy, to act as great powers, to wage war, and to make international law. In a sense, therefore, the Constitutive Regime is, to use English School terminology, *the* primary institution of international society. This constitutive dimension of the normative architecture of the international system is largely ignored by the English School. Indeed, Hedley Bull alludes, virtually *en passant*, to “the complex of rules that states what may be called the fundamental or constitutional normative principle” which he identified as “the idea of a society of states ... as the supreme normative principle of the political organization of mankind.”³³ Neither Bull nor later English School theorists expanded on or elaborated this insight. This paper addresses this blind-spot by constructing a theoretical account of those constitutive norms.

This paper also builds on the work of scholars of both international law and international relations who have theorized that the international system is based on constitutive or foundational norms.³⁴ Jack Donnelly, for example, discussed what he called the “constitutional structure of an

²⁸ See JAMES NATHAN, SOLDIERS, STATECRAFT, & HISTORY 15-16 (2002)

²⁹ ANDREW HURRELL, ON GLOBAL ORDER 16 (2007).

³⁰ Bruno Vigezzi, *The British Committee and International Society*, in GUIDE TO THE ENGLISH SCHOOL IN INTERNATIONAL STUDIES 37, 43 (Cornelia Navari & Daniel Green eds. 2013).

³¹ HEDLEY BULL, *supra* note *** at 67.

³² Laust Schouenborg, *The English School and Institutions: British Institutionalists?*, in GUIDE TO THE ENGLISH SCHOOL IN INTERNATIONAL STUDIES 77, 81 (Cornelia Navari & Daniel Green eds. 2013).

³³ HEDLEY BULL, *supra* note *** at 67-68.

³⁴ As Nicholas Onuf noted, “it is hardly novel to speak of the constitution of international society.” However, Onuf does not engage in an in-depth discussion of the nature of this constitution, what its content is and how it is articulated.

international society,” which is “an ensemble of fundamental, society-wide rules, practices, and roles that enable, prohibit, constrain, permit, facilitate, or encourage particular kinds of action and interaction among the participants in international relations.”³⁵ Using terms analogous to Donnelly’s, Thomas Müller similarly defines “constitutional structures” as a “set of fundamental and prioritized principles and rules that serves as a framework for the self-ordering of international societies, or more abstractly relations between polities.”³⁶

Writing along similar lines, Christian Reus-Smit theorized that the international system is based on “meta-values defining legitimate statehood and rightful state action.”³⁷ In a highly instructive study, Ian Clark also suggested that “core principles of legitimacy constitute international society ... legitimacy defines both rightful membership and rightful conduct, it specifies the key requirements for international society.”³⁸ Writing separately, Alec Stone and Samantha Besson highlighted another function of constitutional norms in the international system which Reus-Smit and Clark do not discuss. According to Stone, “a constitution denotes a body of metanorms, rules that specify how legal norms are to be produced, applied, and interpreted. Metanorms are thus not only higher-order but prior, organic norms – they constitute a polity.”³⁹ Similarly, Besson defined a “thin constitution” as an “ensemble of secondary rules that organize the law-making institutions and processes in a given legal order.”⁴⁰

John Ikenberry further contributed to scholarly thinking about constitutional foundations of the international system. His focus has primarily been on examining the political and historical circumstances in which constitutional norms are formed and on identifying the incentives that drive Great Powers to articulate a constitutional framework for the international system.⁴¹ As part of his inquiry, Ikenberry categorized constitutional norms as a form of *institutional*, as opposed to *substantive*, bargaining. The latter involves bargaining “over distributive outcomes, where states struggle over the distribution of benefits in specific relationships.”⁴² Constitutional norms, however, are not issue-specific agreements. Rather, they are agreements on “the rules of the game – that is the parameters within which states will compete and settle disputes over specific issues.”⁴³

He merely asserts that “in constructivist terms, the international system must be a society insofar as it is constituted by the deeds of many individuals, themselves constituted as agents. This process of constitution depends on rules, without which deeds have no social meaning, and some of these rules form what can only be called a constitution.” Nicholas Onuf, *The Constitution of International Society*, 5 EURO. J. INT’L L. 1, 8 (1994).

³⁵ Jack Donnelly, *The Constitutional Structure of International Societies* 5 (July 13, 2006) (unpublished manuscript)

³⁶ Thomas Müller, Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories, 3 GLOBAL CONSTITUTIONALISM 71, 79 (2014).

³⁷ Christian Reus-Smit, *Constitutional Structure of International Society*, 51 INT’L ORG. 555, 559 (1997).

³⁸ IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 6 (2007).

³⁹ Alec Stone, *What is a Supranational Constitution? An Essay on International Relations Theory*, 56 REV. OF POLITICS 441, 444 (1994). [emphasis in original]

⁴⁰ Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 381, 385 (Jeffrey Dunoff & Joel Trachtman eds. 2009).

⁴¹ See G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2000); G. JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER (2011).

⁴² G. JOHN IKENBERRY, LIBERAL ORDER & IMPERIAL AMBITION 118 (2008)

⁴³ *Id.*, at 119.

The Constitutive Regime of the International System proposed in this paper refines and develops these understandings of the constitutional or foundational norms.

First, as a semantic matter, referring to these norms, as Reus-Smit does, as determining “legitimate *statehood*” creates the misimpression that states are the only conceivable constituent unit of international systems. Instead, I prefer the theoretically capacious concept of the principle of differentiation as an instrument that could identify states or any other form of organizing human communities as the constituent units of the international system.

Second, existing scholarship does not provide a satisfactory account of the nature of the norms that determine the membership of the international system. Simply stating that the constitutional, foundational, or, according to Ian Clark, the legitimacy norms of the international system determine the membership of the international system does not shed sufficient light on the nature of those norms. Therefore, this paper highlights the role of “authority” in determining the composition of the international system and shaping its structure. The composition of an international system and its structure are, in essence, determined by decisions about the allocation of authority. Any international system is populated by various types of actors and entities that engage, to varying degrees, in international affairs. The principle of differentiation, which is one of three components of the Constitutive Regime of the International System, codifies a social consensus regarding the types of actors or entities that are endowed with the authority to engage in international affairs. The principle of differentiation also determines the structure of the international system by codifying a social consensus about the distribution of authority among the units authorized to engage in international affairs. If it adopts a centralized distribution of authority between the actors or entities entitled to engage in international affairs, the system becomes hierarchic, while if it adopts a decentralized distribution of authority, the system becomes anarchic.

Third, the phrase “rightful conduct” that Reus-Smit and Clark use is insufficiently precise. It conflates the constitutive and regulatory norms that govern international affairs. All of the rules of international law determine the limits of rightful conduct. Constitutive rules, however, do not simply regulate conduct. They designate the constituent units of the system and define their authority. Thus, in a state-centric international system these constitutive rules generate the basic attributes of statehood, establish the legal competences of states, and outline the basic rights of states that flow from their membership in the system, thereby giving meaning and content to the concept of statehood.

Fourth, Donnelly’s claim that the constitutional norms of the international system “enable, prohibit, constrain, permit, facilitate, or encourage particular kinds of action and interaction among the participants in international relations” and Müller argument that “constitutional structures” serve as a “framework for the self-ordering of international societies” are unduly broad. All international law and all international regimes can be described in these terms. In addition to the principle of differentiation, the Constitutive Regime of the International System includes a theory of world order. This theory of world order regulates state behavior, not by prescribing or proscribing policy in specific areas, such as security or trade, but by articulating a coherent worldview or an overarching ideological vision that provides a justificatory narrative for policies and practices in every area of global governance.

Fifth, existing discussions of the constitutional foundation of the international system do not include an account of the origins of international law. The third component of the Constitutive Regime of the International System is the secondary rules of international law. These rules, like the principle of differentiation and the theory of world order, reflect a social consensus on the methods of lawmaking and law-enforcement in the international system.

Sixth, while discussions of the constitutional foundations of the international system have considered some of the functions of the Constitutive Regime of the International System, a principal weakness of these discussions is that these functions have been kept separate. A main contribution of the concept of the Constitutive Regime is that it combines these functions into a single theoretical construct. It highlights the connection, symbiotic relationship, and causal priority between, on the one hand, identifying the constituent units of the system and articulating a theory of world order and, on the other hand, elaborating the rules of international lawmaking and law-enforcement. Specifically, as discussed below, I argue that the principle of differentiation, which identifies the constituent units of the international system, and the theory of world order, which prescribes the policies and principles necessary for order within the system, ultimately determine the content of the secondary rules of international law.

Seventh, the Constitutive Regime of the International System provides a theoretical vocabulary to conceptualize the different forms of change that occur in international systems. This paper distinguishes between change *within* a system and change *of* a system. The latter occurs when the constituent unit of an international system – which, as discussed below, is the dominant method of organizing human societies and controlling territory – is replaced. On the other hand, change *within* a system occurs when the extant theory of world order is challenged or when new units and actors exercise authority within a system without replacing the established constituent units of an international system. This is particularly relevant given current developments in the contemporary international system. Today’s world is witnessing a confluence of phenomena that challenge the structure and operation of the international system. These include the shifting balance of global power, the appearance of novel lawmaking processes, and the rise of various actors that exercise different forms of authority within a system that continues to be dominated by territorial states. The Constitutive Regime provides an intellectual tool that conceptualizes and explains how these developments affect the structure and operation of the international system.

The Constitutive Regime of the International System:

The Constitutive Regime is logically antecedent to the international system.⁴⁴ Without background norms that identify the members of the system, determine their rights and competences, and establish the mechanisms of international lawmaking, any examination of the system would be incomplete and incomprehensible. In other words, underlying the flags, anthems, embassies, honor guards, and the pomp and pageantry of statehood, is an intersubjective assumption that designates states – as opposed to empires, tribes, the Catholic Church, the Islamic *Ummah*, or some other form of organizing human societies – as the constituent units of the international system. It is the Constitutive Regime of the International System that endows Germany, Gambia, and Georgia, but not Google, Greenpeace or the U.S. State of Georgia, with

⁴⁴ Jeffrey Dunoff & Joel Trachtman, *supra* note 18, at 18 (The “basic decisions about the fundamental structure of society precede and determine the structure of legal constitutions”).

the authority to establish embassies, issue passports, fly ensigns on airplanes and ships, wage war, make peace, achieve détente and maintain entente, and practice the balance of power. Moreover, the elementary rule that international law emanates from state consent, is merely an expression of the intersubjective assumption that states, and not, for instance, international organizations, NGOs, corporations, or individuals, are the primary lawmakers of the international system and that their consent is necessary for the creation of valid rules of international law.

Constitutive Regimes are creations of Great Powers. Throughout history, every power that succeeded in establishing hegemony over an international system has configured the basic norms that govern that system – i.e. the Constitutive Regime of that system – in a manner that served the values and interests of that hegemonic power.⁴⁵ Therefore, while every international system is predicated on a Constitutive Regime, the normative content and ethical orientation of Constitutive Regimes will vary depending on the interests and values of the Great Powers of that particular system. Once its content is articulated by the Great Powers and accepted, either by acquiescence or coercion, by the other actors in the system, it performs the function of constituting the international system and becomes the dominant approach to governing the system.

The relationship between a Constitutive Regime and the units that inhabit an international system, including the Great Powers, is one of constant constitution and reconstitution. As the units within the system operate on the bases of the principle of differentiation, theory of world order, and secondary rules of international law underlying the system, the authoritativeness of the Constitutive Regime of that system is reasserted, which in turn, reconfirms the standing, rights, and competences of those units. Simultaneously, the continued adherence of the constituent units of an international system to the terms of a Constitutive Regime means that its content is constantly being reproduced and reconfirmed.⁴⁶ In other words, as constructivist theorists have insisted the ordering principles of the international system and its constituent units are locked in a relationship of mutual dependence and constant reconstitution.⁴⁷

Constitutive Regimes are not static constructs. As the balance of power shifts and as new participants engage in international affairs, the content of the Constitutive Regime is revisited to reflect new realities in international politics. New actors and new entities periodically emerge and challenge the established configuration of the international system. As these actors and entities acquire more power and exercise more influence, they could gradually be accepted as centers of legitimate authority in the international system thereby reconfiguring its structure. Anarchic systems, therefore, might evolve into hierarchic or heterarchic systems; theories of world order might be revisited to reflect the emergence of new hegemonies or evolutions in systemic normative commitments.

I define the Constitutive Regime of the International System as: *A set of intersubjective assumptions that provide the normative foundation of the international system. It is composed of the dominant principle of differentiation, a theory of world order, and the secondary rules of*

⁴⁵ ROBERT KAGAN, *THE WORLD AMERICA MADE* 5 (2012) (“Every international order in history has reflected the beliefs and interests of its strongest powers”).

⁴⁶ Stacie Goddard and Daniel Nexon, *Paradigm Lost? Reassessing Theory of International Politics*, 11 *EURO J. INT’L RELATIONS* 9, 35 (2005)

⁴⁷ Alexander Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 *INT’L ORG.* 335, 359 (1987).

international law. The constitutive regime, thus, consists of three components. The first two are the principle of differentiation and the theory of world order, while the third is the secondary rules of international law. The next three sections define these components and discuss their functions.

a. The Principle of Differentiation

International politics is often imagined as a competition for power.⁴⁸ That is not inaccurate. Before the pursuit of power can commence, however, the actors that are engaged in power politics must be identified. As John Ruggie presciently notes, this involves determining who is the “constitutive unit of the new collective political order. The issue here is not who has how much power, but who could be designated *as* a power.”⁴⁹ That is the function of the principle of differentiation.⁵⁰ It determines *who* the members of the system are, *how* these units qualify for membership, and *what* rights and competences are entailed by virtue of membership in the system.

The principle of differentiation fulfills this function by determining the distribution of authority in the international system.⁵¹ It identifies the units that are endowed with the authority to participate in international affairs and establishes the extent of that authority. Accordingly, the principle of differentiation determines the structure of the system. If authority is decentralized and divided equally, the system is anarchic. If, on the other hand, authority is centralized and certain actors are endowed with the right to subordinate other actors, the system becomes hierarchic or imperial.⁵² If, however, the system is composed of, not only many actors, but multiple *forms* of actors that are not subordinate to each other and that exercise different types and degrees of authority, the system becomes heterarchic.⁵³ In short, anarchy, hierarchy, heterarchy, or whatever other typology is employed to describe the structure of the international system, is generated by the principle of differentiation which establishes the distribution of authority in the system.⁵⁴

⁴⁸ See: JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS*, 48-50 (2000).

⁴⁹ JOHN RUGGIE, *CONSTRUCTING THE WORLD POLITY* 188 (2002). [Emphasis in original]

⁵⁰ Differentiation is a theory of systems’ structure. It was developed by sociologists as a theoretical tool to identify and classify different forms of social organization and to analyze how the structure of authority in human societies evolves. See JEFFREY ALEXANDER & PAUL COLOMY ed., *DIFFERENTIATION THEORY AND SOCIAL CHANGE* (1990); Niklas Luhmann, *Globalization or World Society? How to Conceive of Modern Society*, 7 *INT’L REV. SOCIOLOGY* 67, 69 (1997). International relations scholars use differentiation theory as a heuristic instrument to describe the composition and structure of the international system and to analyze how its composition and structure change over time and space. See Barry Buzan and Mathias Albert, *Differentiation: A Sociological Approach to International Relations Theory*, 16 *EURO. J. INT’L RELATIONS* 315, 318 (2010).

⁵¹ The meaning of “authority” is the subject of a voluminous literature spanning several disciplines. I will not attempt to define authority here, but suffice it to say that I use it to mean the legitimate and recognized right of individuals or political actors to rule over other individuals or political actors. See generally Jerome Hall, *Authority and the Law*, 1 *NOMOS* 58 (1958).

⁵² ALEXANDER MOTYL, *REVOLUTIONS, NATIONS, EMPIRES: CONCEPTUAL LIMITS AND THEORETICAL POSSIBILITIES* 126 (1999) (An imperial or hierarchical systems are “structurally centralized political systems within which core states and elites dominate peripheral societies”).

⁵³ Sanjeev Khagram, *Possible Future Architectures of Global Governance: A Transnational Perspective/Prospective*, 12 *GLOBAL GOVERNANCE* 97, 101 (2006) (Heterarchy is “a world of multiple types, forms, and levels of authoritative political organizations and units and various types and levels of governance”).

⁵⁴ This argument challenges an assumption shared by some international relations scholars that, as Ian Hurd writes, “the traditional understanding of anarchy in international relations is the absence of ‘legitimate authority’.” This assumption leads him to assert that “to the extent that a state accepts some international rule or body as legitimate, that rule or body becomes an “authority”: and the characterization of the international system as an anarchy is unsustainable.” Ian Hurd, *Legitimacy and Authority in International Politics*, 53 *INT’L ORG.* 379, 381 (1999). An

The principle of differentiation could also generate a system combining multiple structural forms. The current international system, for example, exhibits elements of anarchy, hierarchy, and heterarchy. Regardless of size or strength, the international system operates on the basis of the juridical equality of all states, which is a relatively recent innovation of the post-colonial era.⁵⁵ In other words, formally, anarchy prevails between states, which are the principal members of the international system. Other actors, such as international organizations, are subordinate to states. The UN, AU, EU, OAS, OSCE, and the other international organizations that populate the international system are creations of states, they are endowed with legal personality by states, and are granted the right to exercise varying degrees of authority by states.⁵⁶ The relationship between international organizations and states, therefore, is hierarchic. In parallel, heterarchic relations have emerged in recent years as a range of non-state and hybrid actors, such as private ordering entities, NGOs, and networks of experts and bureaucrats,⁵⁷ have acquired and exercised increasing authority that is not directly delegated from states or any other super-ordinate actors.⁵⁸

Whatever the structure of the international system, a particular type of unit will constitute the principal participant in the system. The identity, nature, and authority of those units, which are the constitutive units of the international system, is expressed by the principle of differentiation. The constituent unit of an international system will be the dominant “conflict group” of that particular historical era.⁵⁹ Conflict groups are modes of organizing human society.⁶⁰ They are collectivities, such as tribes, clans, racial groups, religions, states, kingdoms or empires that establish and exercise political authority over individuals and territory. These collectivities are dubbed “conflict” groups because human beings are loyal to these groups, organize their lives around membership in these groups, and are prepared to fight and die for these groups. As patently apparent from the historical record, the type of conflict groups that constitute international systems is variable.⁶¹ A single international system may also be composed of multiple forms of conflict groups that exercise various degrees and different forms of authority.⁶² Whatever their form, number, or nature of their authority, the signal characteristic of conflict groups is that they establish and exercise the authority to govern a human collectivity that inhabits a territorial space.⁶³ That

anarchic realm is not devoid of authority. Rather, it is a system in which authority is decentralized and distributed evenly among co-equal units. Therefore, the determinant of the structure of an international system is not the presence or absence of authority, but the distribution of authority among the units inhabiting the system.

⁵⁵ See BRAD ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT* 55 (2011)

⁵⁶ JAN KLABBERS, *INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW* 46 (2015) (Discussing the “will theory,” which posits that “it is the will of the founders of the organization which decides on the organizations’ legal personality. Thus, if the founders intend to endow their creation with personality under international law, then such will be the case”).

⁵⁷ For a typology of the diverse range of actors engaged in the current international system, see EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014).

⁵⁸ See Rainer Baumann and Klaus Dingwerth, *Global Governance vs Empire: Why World Order Moves Towards Heterarchy and Hierarchy*, 18 J. INT’L RELATIONS & DEV. 104 (2015).

⁵⁹ See Ralf Dahrendorf, *Toward a Theory of Social Conflict*, 2 J. CONFLICT RESOLUTION 170 (1958).

⁶⁰ Similar to the concept of “conflict groups,” Jack Donnelly proposed the term “terminal polities” to refer to “the most extensive standard political units in a system.” Jack Donnelly, *supra* note, at 73.

⁶¹ See BARRY BUZAN & RICHARD LITTLE, *INTERNATIONAL SYSTEMS IN WORLD HISTORY* (2000).

⁶² Medieval Europe with its “plurality of hierarchical bonds” is the most cited example of a system composed of multiple actors and overlapping centers of authority. See John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 Rev. Int’l Pol. Econ. 53, 60 (1994).

⁶³ As Mervyn Frost explains

authority need not be exclusive or complete; it could be shared among multiple layers and actors and various centers of authority that are functionally differentiated.⁶⁴ Ultimately, however, the dominant conflict groups that constitute an international system will represent a political arrangement that exercises authority over individuals occupying a territorial locale.⁶⁵

The emergence of a conflict group and its ascendance as the dominant mode of organizing human society is rarely peaceful. In this process, which often occurs over an extended period, preexisting modes of organizing human society are challenged and dismantled, often by force. The history of statehood is a testament to the physical coercion and ideational compulsion that accompanies the creation of a conflict group and its consolidation of power.⁶⁶ As a particular type of conflict group amasses greater power over other types of conflict groups, the most powerful of these ascendant conflict groups will formulate the principle of differentiation that will govern the international system. These leading powers will design the principle of differentiation in their own image, thereby legitimizing their newfound power and securing their status as the principal participants in international affairs, and denying their competitors the ability to legitimately engage in international relations.⁶⁷ The principle of differentiation, in other words, ratifies the realities of power. It consecrates the victory of a particular *type* of conflict group and legitimizes its position as the dominant mode of organizing human society.⁶⁸

The principle of differentiation also furnishes the justification for exclusion, subordination, or even oppression within an international system. Because it identifies the constituent units of an international system, the principle of differentiation creates insiders and outsiders.⁶⁹ The former are those units that fit the model designed by the dominant conflict groups. These insiders are accepted as full members of the system and are endowed with the rights and capacities appertaining thereto. The outsiders, on the other hand, are different types of conflict groups that do not meet the

[C]onsider the following different types of basic political arrangements: a nomadic tribe, a dynasty, a republic, a kingdom, an empire, a federation, a confederation, a communist society, a socialist state. (The list could easily be extended). Any of the above mentioned social orders, if it is to be an order at all ... must provide ways of coping with violence, contract and property. The precise way in which the different social arrangements deal with these common concerns will obviously vary, but what is not open to doubt is that they must provide *some* solution to the problems mentioned. MERVYN FROST, *ETHICS IN INTERNATIONAL RELATIONS* 116 (1996).

⁶⁴ See Ruggie, *Continuity and Transformation* *supra* note ***.

⁶⁵ As Alexander Murphy argues, “territory is so important to political governance in part because it provides a locus for the exercise of political authority over a range of interests and initiatives ... Political authority can be exerted over sets of issues or institutions, but it is difficult to construct an enduring system without a territorial base.” Alexander Murphy, *The Sovereign State System as Political Territorial Ideal: Historical and Contemporary Considerations*, in *STATE SOVEREIGNTY AS A SOCIAL CONSTRUCT* 81, 110 (Thomas Biersteker & Cynthia Weber eds. 1996).

⁶⁶ See KENNETH DYSON, *THE STATE TRADITION IN WESTERN EUROPE* 29-30 (2009).

⁶⁷ See Jack Donnelly, *Differentiation: Type and Dimension*, in *BRINGING SOCIOLOGY TO INTERNATIONAL RELATIONS: WORLD POLITICS AS DIFFERENTIATION THEORY* 97-99 (Mathias Albert, Barry Buzan, and Michael Zürn, eds., 2013).

⁶⁸ As James Brierly recognized, “the fundamental rights of states were born of the needs of a cause, rather than of reflection on the nature of the juridical relations of states. They were invented because the post-Renaissance prince, himself a successful rebel against the claims of pope and emperor, sought in a new juridical order a system to consecrate his hardly won independence.” JAMES BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 4 (Hersch Lauterpacht ed. 1958).

⁶⁹ Tanja Aalberts, *Rethinking the Principle of (Sovereign) Equality as a Standard of Civilization*, 42 *MILLENNIUM: J. INT’L STUDIES* 767, 769 (2014) (“[T]he politics of legal subjecthood” have a productive power through inclusion and exclusion into the international system”).

prerequisites of membership in the system, and accordingly, are denied the rights and capacities enjoyed by the constituent units of the system. Conflict groups that do not qualify for membership of an international system may, especially if they possess sufficient material capabilities, retain their independence and avoid being incorporated or subordinated into the system. Those conflict groups may even constitute a system that exists separately from other systems. Indeed, history provides numerous examples of parallel coexisting regional systems composed of a wide variety of conflict groups.⁷⁰ On the other hand, as the history of colonialism and the expansion of the European international system demonstrate, conflict groups that are brought into an international system, but that are denied full membership of the system, become shunned as illegitimate forms of political authority that may be conquered, controlled, governed, or simply allowed to exist beyond the pale of the international system.⁷¹

As the element of the Constitutive Regime that determines the membership of the international system and the distribution of authority within the system, the principle of differentiation includes two axes of systemic change: change *of* a system, and change *within* a system.⁷² The former – change *of* a system – refers to the transformation of a system that occurs when the dominant form of conflict group is replaced.⁷³ Decolonization is an example of a change *of* a system. It marked the demise of one form of conflict group – Empire – that dominated the international system for several centuries and signaled the rise of the territorial state as the principal mode of organizing human societies throughout the world. Decolonization also restructured the international system: the hierarchic relationships between metropolises and colonies were replaced by an anarchic, horizontal relationship between coequal states. Change *within* a system, on the other hand, occurs when authority is redistributed among the units of the system without challenging the status of the dominant conflict group as the principal unit of the system. The contemporary allocation of different degrees of authority to international organizations and to non-state actors, such as corporations or civil society organizations, is an instance of change *within* a system. As long as states remain the dominant mode of controlling territory and governing human societies, the fundamental state-centric nature of the system remains unchanged and it retains its anarchic form. However, as authority is devolved to non-state actors, the system becomes multi-structural; while inter-state relations remain anarchic, relations between other non-state actors exhibit the features of hierarchy and heterarchy.

The identity of the conflict group chosen as the primary actor in the international system could be codified in a legal instrument or it could be manifested in political practices. Whether enshrined in a legal instrument or displayed in political practice, the principle of differentiation

⁷⁰ Barry Buzan and Richard Little, *The Idea of 'International System': Theory Meets History* 15 REVUE INTERNATIONALE DE SCIENCE POLITIQUE 231, 237-241 (1994).

⁷¹ WILLIAM GREWE, THE EPOCHS OF INTERNATIONAL LAW 548 (2000) (In the 19th century, “the application of the law of occupation to territories located outside Europe and inhabited by “savages” was founded on the assumption that “barbarians have no rights as a nation” as John Stuart Mill wrote”).

⁷² This echoes the distinction between “changes within the framework of well-established conventions” and “a more fundamental type of change occurs when the practices and constitutive conventions of a social system are altered.” Rey Koslowski and Friedrich Kratochwil, *Understanding Change in International Politics: The Soviet Empire's Demise and the International System*, 48 INT'L ORG. 215, 222-223 (1994).

⁷³ As John Ruggie noted: “modes of differentiation are nothing less than the focus of the epochal study of rule.” John Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 152 (1993).

determines which actors or entities are endowed with international legal personality,⁷⁴ thereby identifying who has the right to have rights and the obligation to bear duties under international law.⁷⁵

The 1933 Montevideo Convention on the Rights and Duties of States is a prime example of the legal expression of the principle of differentiation.⁷⁶ It stipulates that states are the principal actors in international affairs, outlines the criteria of statehood, and enunciates their basic rights, obligations, and competences. It is logically implausible and historically inaccurate, however, to assume that the Montevideo Convention was the originator of the concept and criteria of statehood or that it established states as the main actor in international affairs. After all, the convention is a treaty that was concluded by states that already existed and enjoyed the full legal competence to contract treaties. It is similarly flawed to assume that the criteria for statehood originated in customary international law and that the Montevideo Convention merely codified preexisting customary rules. This is because that necessarily presumes the preexistence of states and presumes that these preexisting states already enjoyed the capacity to create rules of customary international law, including criteria for statehood. In short, while the definition and criteria of statehood are codified in conventional and customary international law, the content of these rules emanates from preexisting intersubjective assumptions that identify states as the constituent unit of the international system, establish the prerequisites for statehood, and endow states with legal personality.

The principle of differentiation also articulates the basic rights and obligations of the constituent units of the international system. By virtue of their membership in the system, states, or whichever actors are recognized as the constituent units of the system, enjoy fundamental rights and are bound by basic obligations. The words “rights” and “obligations” are, of course, ubiquitous in international law, which might create the misimpression that the Constitutive Regime of the International System includes the entire corpus of regulatory rules of international law. However, the adjectives “basic” and “fundamental” are intended to indicate that these rights and obligations are not simple regulatory rules that are generated by the normal lawmaking processes. Indeed, these rights and obligations precede international law. These rights and obligations are essential characteristics of the constituent units of the international system. They do not emanate from legal instruments; rather, these rights and obligations are inherent to the status of these entities as the constituent units of the system.

To clarify this claim, consider the current state-centric international system. States enjoy certain basic rights and obligations such as the independence of states, the exclusive competence of states in matters falling within their domestic jurisdiction, and the juridical equality of states.⁷⁷ These rights and obligations are codified in instruments such as the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

⁷⁴ ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 1 (2010) (“Legal personality is a concept ... employed to distinguish between those social entities relevant to the international legal system and those excluded from it”).

⁷⁵ See JEAN-MARC COICAUD, *LEGITIMACY AND POLITICS: A CONTRIBUTION TO THE STUDY OF POLITICAL RIGHT AND POLITICAL RESPONSIBILITY* 234 (2002).

⁷⁶ Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

⁷⁷ MALCOLM SHAW, *INTERNATIONAL LAW* 153-157 (7th ed. 2014).

States.⁷⁸ These rights and obligations do not, however, owe their existence to these documents. Rather, these rights and obligations are part of the principle of differentiation. They express an intersubjective assumption regarding the nature of statehood and the basic rights and obligations of states that predates the legal instruments in which these rights and obligations are enunciated. Indeed, these basic rights and obligations are corollaries of statehood.⁷⁹ They are an intrinsic part of what it means to be a state and constitute an integral element of the concept of statehood.

The competences of states are similarly defined by the principle of differentiation. For instance, the principle codified in Article 6 of the Vienna Convention on the Law of Treaties (VCLT) that “[e]very State possesses capacity to conclude treaties”⁸⁰ is a legal expression of an intersubjective assumption that states, by virtue of their status as the constituent units of the international system, are empowered to participate in international affairs and have the legal capacity to generate international law. This is what James Crawford calls the “plenary competence” that enables states to “perform acts, make treaties, and so on, in the international sphere.”⁸¹ This competence is *codified* in international legal instruments, but is not *derived* from these instruments. These competences, like the basic rights and obligations of states, are *a priori* to international law. The Vienna Convention could not have *created* that capacity of states to contract treaties, because the Vienna Convention is itself a treaty, which means that the capacity of states to contract treaties must have predated the Vienna Convention. Nor could the origin of the capacity to contract treaties be a rule of customary international law that was simply codified in the Vienna Convention. This is because, as a matter of logical necessity, that customary rule that endowed states with the capacity to contract treaties must be based on an antecedent rule that empowered states to create rules of customary international law, including the rule that states may contract treaties. Therefore, the next logical question becomes: what rule of international law bestowed upon states the capacity to create rules of customary international law.⁸²

The answer, this paper posits, is the intersubjective assumptions that are constitutive of the entire international system, including international law. These assumptions are the Constitutive Regime of the International System, which includes the principle of differentiation that identifies the constituent units of the system and outlines the basic rights and competences of these units.

b. The Theory of World Order

The principle of differentiation generates “a positional picture, a general description of the ordered arrangement of a society written in terms of the placement of the units.”⁸³ The second component of the Constitutive Regime of the International System, which is the *theory of world order*, sets the parameters of how these units relate to and engage with each other. Without a theory of world order, an international system and the units inhabiting it remain lifeless, motionless.

⁷⁸ UN General Assembly resolution 2625 (XXV), A/Res/25/2625

⁷⁹ See: Daniel Joyner and Marco Roscini, *Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?* 4 CAMBRIDGE J. INT'L & COMP. L. 467 (2015).

⁸⁰ 1969 Vienna Convention on the Law of Treaties, Article 6.

⁸¹ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40 (2007).

⁸² This is a “validity regress” which is “a series of questions along the lines of: ‘Why is a norm valid, what is its basis of validity?’” Jorg Kammerhofer, *Hans Kelsen in Today's International Legal Scholarship*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* 81, 95 (Jorg Kammerhofer & Jean D’Aspermont eds. 2014).

⁸³ WALTZ, *supra* note *** at 99.

Anarchy, hierarchy, heterarchy, or however else the units of a system are arranged, does not determine how and on what terms these units interact. That is the function of the theory of world order. It is, to use a term coined by Adam Watson, the *raison de système*.⁸⁴ It outlines a set of principles and policies, that are assumed necessary to maintain order within the system.

The theory of world order is analogous to what Laurence Tribe calls the “dark matter” of the US Constitution.⁸⁵ These are political axioms, fundamental postulates, and foundational propositions about the nature of the American republic that underlie the written Constitution and that shape the practice of politics and law in America.⁸⁶ Although they are echoed in the text and structure of the Constitution, in court decisions, and in political parlance, the ultimate source of these principles is a social consensus regarding the basic principles and values of America’s body politic.⁸⁷ The international system operates on the bases of principles that perform a similar function. These principles – which I call a theory of world order – are articulated by the Great Powers of the international system and are assumed to be necessary for preserving stability in the system. These principles are, in essence, a worldview; a lens through which the Great Powers understand the world, interpret history, and layout a normative roadmap for how international life ought to be managed and governed.⁸⁸

The theory of world order is an under-explored element of the normative foundations of the international system. Although some scholars have discussed concepts that approximate what I call the theory of world order, this aspect of the norms that govern the international system and structure the practice of politics within the system has not been the subject of systematic study. One scholar whose early writings indicate a recognition that the international system operates on the basis of norms that correspond to what I call the theory of world order is Henry Kissinger. In *A World Restored* he posited that a stable system is founded on the balance of power *and* an accepted “concept of legitimacy,” which is a political understanding among the Great Powers regarding “the nature of workable arrangements and about the permissible aims and methods of foreign policy.”⁸⁹ Building on Kissinger’s insights, later scholars argued that relations between the constituent units of the international system are governed by widely shared definitions of legitimacy that determine the limits of rightful conduct.⁹⁰

⁸⁴ ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY* 14 (1992).

⁸⁵ LAURENCE TRIBE, *THE INVISIBLE CONSTITUTION* 37-38 (2008).

⁸⁶ These include precepts such as that the US government is a “government of the people, by the people, for the people,” that it is “a government of laws, not men,” that the US society is “committed to the rule of law,” and that “no state may secede from the Union.” *Id.*, at p. 28.

⁸⁷ These are “legal norms and principles that form fundamental underlying precepts for our polity – background norms that contribute to and result from the moral development of our community. Public values appeal to conceptions of justice and common good, not to the desires of one person or group.” William Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PENN. L. REV. 1007, 1008 (1989).

⁸⁸ Martin Griffiths, *Worldviews and IR Theory: Conquest or Coexistence?*, in *INTERNATIONAL RELATIONS THEORY FOR THE TWENTY-FIRST CENTURY 1* (Martin Griffiths ed. 2007) (“A worldview is a broad interpretation of the world and an application to the way in which we judge and evaluate activities and structures that shape the world ... Worldviews contain fundamental assumptions and presuppositions about the constitutive nature of IR”).

⁸⁹ HENRY KISSINGER, *A WORLD RESTORED 1* (1959).

⁹⁰ For a review of the literature on legitimacy in international relations, see IAN CLARK, *INTERNATIONAL SOCIETY*, *supra* note 28, at 1-30.

The theory of world order is similar, but not identical, to this notion of legitimacy. The theory of world order does not merely establish the permissible aims of foreign policy or set the limits of rightful conduct. The theory of world order is normatively denser. It is, as aforementioned, a holistic worldview or ideology that formulates substantive policies and principles that are considered essential to maintaining order in an international system. The theory of world order, in other words, determines the normative orientation of the system, it embodies a vision for justice and provides a moral compass to guide the practice of politics. It articulates a “master narrative” that justifies the means and methods of managing and governing the international system.⁹¹ The theory of world order, therefore, furnishes the “generative grammar of international authority.”⁹² It provides ideological justification for the rules and institutions of international law; it offers a moral vernacular that legitimizes the political practices of the members of the international system, and rationalizes the distributive outcomes that result from the operation of the rules, institutions, and policies of the system.

The theory of world order is, therefore, the source of adjectives like *liberal*, *neoliberal*, *illiberal*, *imperialist*, *communist*, *fascist*, *Islamist*, or *Sino-centric* that are used to describe international systems. Indeed, in many historical instances, the distinguishing feature of an international system was not the identity of its constituent units – i.e. whether those systems were composed of tribes, empires, or states – but the values underlying those systems and the policies that were implemented to govern relations between the constituent units. Hence, while Napoleon, Metternich, Lenin, and Hitler, all sought to establish European or world-wide orders, the distinguishing feature of these projects of continental or global hegemony was the worldview (whether tyrannical or benevolent) that animated these projects – i.e. their theories of world order.⁹³ Similarly, the designation of the post-World War II international system as a “liberal world order” reflects a theory of world order adopted and propagated by the US that assumed that maintaining systemic order and stability required establishing a rules-based system that operated through multilateral organizations that were open to all states.⁹⁴

Like the principle of differentiation, the theory of world order is determined by the Great Powers of each historical era. These powerful actors will articulate a theory of world order that reflects their normative commitments and their perceptions regarding the prerequisites of maintaining systemic order and stability. One factor that influences the content of the theory of world order is the domestic governance structure of the Great Powers.⁹⁵ The values that underlie social relations within the Great Powers – in other words, the “dark matter,” ideology, philosophy, or religion animating their domestic polities – will supply the worldview according to which the Great Powers will govern the international system. Great Powers, in other words, will seek to construct the international system in their own image. These powers may also articulate a theory

⁹¹ G. John Ikenberry, *The Plot Against American Foreign Policy*, 96 FOR. AFFAIRS 2, 8 (2017).

⁹² JOHN RUGGIE, *supra* note 35, at 64 and 66-67.

⁹³ ROBERT GILPIN, WAR & CHANGE IN WORLD POLITICS 35-37 (1985) (“Rome and Great Britain each created a world order, but the often oppressive rule of *Pax Romana* was in most respects different from the generally liberal rule of *Pax Britannia*. Napoleonic France and Hitlerite Germany gave very different governance to the Europe they each united”).

⁹⁴ As John Ruggie wrote in classic phrase: “it was less the fact of American *hegemony* that accounts for the explosion of multilateral arrangements than it was the fact of *American* hegemony.” John Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561, 568 (1992)

⁹⁵ See G. JOHN IKENBERRY, AFTER VICTORY, *supra* note 24; PHILIPP BOBBITT, THE SHIELD OF ACHILLES (2002).

of world order that reflects their formative national experiences, their geographic realities, their strategic interests, or the history of their engagement with the international system. As a theoretical construct, the Constitutive Regime of the International System is, therefore, a normatively ‘empty’ vessel. It has no predetermined moral orientation. Its normative content will vary depending on the interests and values of the Great Powers.

Also like the principle of differentiation, the theory of world order is an axis of systemic change. Changes in the theory of world order, which is caused either by a realignment of the systemic balance of power or by a shift in the values and interests of the established Great Powers, will lead to a change *within* an international system. Although the composition of a system may remain constant, changes in the theory of world order significantly affect the instruments of policy and the patterns of relations between the units within an international system. For instance, Metternich’s theory of world order that posited that European stability required preserving conservative monarchical rule justified multiple interventions to abort popular uprisings.⁹⁶ Similarly, as the influence of the Papacy receded and the power of religion as an overarching worldview waned in seventeenth century Europe, *raison d’état*, as opposed to religious affiliation, became a principal justification for the policies of states.⁹⁷

The incentive driving Great Powers to articulate a theory of world order is their desire to transform their preponderant power into legitimate authority. Legitimacy is a valuable commodity in both domestic and international politics.⁹⁸ All politically dominant actors seek to maintain their supremacy by ensuring that their dominance and exercise of power are perceived as legitimate. This is because controlling a polity solely by coercion is unsustainable. It “imposes heavy costs on the controllers ... The efficiency advantages of authority probably motivate the commonly observed impulse of the powerful to try to legitimate their power.”⁹⁹ Therefore, like a domestic political elite that justifies its power and privilege by invoking broader moral principles, thereby perpetuating its dominance,¹⁰⁰ a hegemonic power will articulate a theory of world order that legitimizes its leadership of the international system and justifies the policies and practices it implements, thus preserving its hegemony.¹⁰¹

c. The Secondary Rules of International Law

The third component of the Constitutive Regime of the International System is the secondary rules of international law. Legal systems, as H.L.A. Hart wrote, are composed of primary rules of obligation and secondary rules.¹⁰² The former are prescriptions and proscriptions, while the latter are rules about rules. They “specify the ways in which the primary rules may be

⁹⁶ See MARK JARRETT, *THE CONGRESS OF VIENNA AND ITS LEGACY* (2014).

⁹⁷ ADAM WATSON, *supra* note ***, at 191 (Arguing that “*raison d’état* replaced religion as the determining principle of alliances ... the alliance structures became secularized”).

⁹⁸ DAVID BEETHAM, *THE LEGITIMATION OF POWER* 3 (1991).

⁹⁹ Ian Hurd, *Legitimacy and Authority*, 53 INT’L ORG. 379, 388 (1999).

¹⁰⁰ In his seminal work on legitimacy, Max Weber spoke of the “generally observable need of any power, or even any advantage of life, to justify itself.” MAX WEBER, *ECONOMY AND SOCIETY*, VOL. 3, 953 (1968).

¹⁰¹ See Jens Steffek, *Legitimacy in International Relations: From State Compliance to Citizens Consensus*, in *LEGITIMACY IN THE AGE OF GLOBAL POLITICS* 175 (Achim Hurrelmann et al eds. 2007); Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT’L L. 1, 5 (2010-2011).

¹⁰² H.L.A. HART, *THE CONCEPT OF LAW* 94 (2nd ed., 1997).

conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively ascertained.”¹⁰³ Secondary rules, therefore, confer lawmaking authority, establish law-enforcement powers, and institute dispute resolution mechanisms.

Law is a social necessity. The coexistence and interaction of individuals in society, even the most primitive societies, generates a need to devise rules to govern relations among these individuals.¹⁰⁴ International systems are no different. As independent conflict groups engage in regular contact, it becomes necessary for these conflict groups to articulate rules to manage their manifold relations.¹⁰⁵ Indeed, as Arthur Nussbaum remarked in his seminal history of international law, the “phenomena of [international] law have been conspicuous since the dawn of documentary history, that is, from the fourth millennium B.C.”¹⁰⁶ Obviously, the term “international law” was not known in ancient international systems; that term is a European innovation of 18th century vintage. Nonetheless, even if not called “international law,” all international systems operated on the bases of rules that regulated relations between their constituent units.¹⁰⁷ Historians of international law have shown that ancient civilizations, including in Egypt, Mesopotamia, Greece, the Indian subcontinent, and China, engaged in organized relations with allies and rival powers on the bases of a system of legal rules.¹⁰⁸ In short, all international systems, whatever the nature of their constituent units, function on the bases of some set of rules however substantively simple, rudimentary in nature, or religious in origin.

Secondary rules are essential for the existence and operation of the rules that regulate relations between the members of the international system. Any set of primary rules requires a set of secondary rules to enable the creation of the primary rules. The secondary rules determine how (and by whom) the primary rules of the system are made, how disputes are settled, and how the rules are enforced and by whom. Like the principle of differentiation and the theory of world order, the secondary rules of international law are designed by the Great Powers of the international system. These powers recognize a particular process as law-creating, agree to some method of dispute resolution, and accept some method of law enforcement. In other words, like H.L.A. Hart’s rule of recognition, the secondary rules of international law are a matter of social fact. They are articulated by the leading powers of each historical period and accepted as authoritative by the constituent units of the international system. The foundation of international law, in other words, is the broad acceptance by the constituent units of the international system of the secondary rules of international law. Secondary rules can take an infinite variety of forms.¹⁰⁹ They can be nothing more than the belief that the edicts of a Pharaoh, Emperor, or Czar shall count as law, or that a breach of a treaty shall be punished by the gods.¹¹⁰ However simple or superstitious, the signal

¹⁰³ *Id.*

¹⁰⁴ ANDREW CLAPHAM, *BRIERLY’S LAW OF NATIONS* 1 (7th ed. 2014).

¹⁰⁵ Carlo Focarelli, *In Quest of Order and Capturing the Complexity of International Law*, 11 J. HIST. INT’L L. 187, 191 (2009).

¹⁰⁶ ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 1 (1954).

¹⁰⁷ Heinhard Steiger, *From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of International Law*, 3 J. HIST. INT’L L. 180, 181 (2001).

¹⁰⁸ Wolfgang Preiser, *History of International Law, Ancient Times to 1648*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 722 (Rudolph Bernhardt ed. 1995).

¹⁰⁹ H.L.A. HART, *supra* note 66, at 100. (“The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument”).

¹¹⁰ ARTHUR NUSSBAUM, *supra* note 70, at 3.

feature of the secondary rules of international law is that they provide a mechanism for the “conclusive identification of the primary rules” in the international system.¹¹¹

The secondary rules of international law are ontologically subsequent to the principle of differentiation and the theory of world order. The identity of the lawmakers and the prerogatives of the law-enforcers of the international system are dependent on the principle of differentiation and the theory of world order.¹¹² The international system of the early-twentieth century illustrates this determinative relationship between the principle of differentiation and the theory of world order on one side and the secondary sources of international law on the other. Because states are the primary participants and beneficiaries of the international political process, the secondary rules of international law were designed with a heavy state-centric emphasis.¹¹³ States were the primary authors of treaties, and it was up to states to grant other actors, such as international organizations, the power to contract treaties. The acts of states and the statements of state representatives carried more weight in generating customary international law than the positions and policies of other actors, even those wielding greater material power. The state-centric nature of the principle of differentiation also explains the crucial role of state consent in generating the primary rules of international law. A system composed of co-equal sovereign states that recognize no supreme authority generated the rule that the validity of legal rules is dependent on the consent of those sovereign states.¹¹⁴ Thus, the President of Palau, a tiny pacific island state, enjoys, at least formally, greater lawmaking authority, than the CEO of the vastly richer Wal-Mart with its over two million employees. This capacity to engage in lawmaking, which is enjoyed by all states, regardless of power, size, or wealth, is a reflection of a statist principle of differentiation that accords plenary competences to states, and states alone.

The principle of differentiation and the theory of world order also determine the content of the concept of sovereignty, which is the cornerstone of international law.¹¹⁵ By identifying the constituent units of the system, the Constitutive Regime determines the beneficiaries and bearers of sovereignty, and by articulating theory of world order, it generates the corollary prerogatives and powers of sovereignty. In other words, the Constitutive Regime tells us *who* is sovereign and *what* they can and cannot do with sovereignty. Without these background assumptions that are provided by the Constitutive Regime of the International System, sovereignty remains an inchoate concept; an empty shell.¹¹⁶

¹¹¹ H.L.A. HART, *supra* note 66, at 96.

¹¹² Denis Galligan and Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 3, 11 (Denis Galligan & Mila Versteeg eds. 2013) (Noting that the broad normative commitments of a constitution will “permeate other, more substantive provisions concerning the nature and structure of government and institutions, the limits on their powers”).

¹¹³ Samantha Besson, *Theorizing the Sources of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 163, 164 (Samantha Besson & John Tasioulas eds. 2010).

¹¹⁴ Randall Lesaffer, *Peace Treaties and the Formation of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 71, 93 (Bardo Fassbender & Anne Peters eds., 2012).

¹¹⁵ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed. 2008) (“Sovereignty ... represents the basic constitutional doctrine of the law of nations”).

¹¹⁶ Christian Reus-Smit, *Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT’L ORG. 555, 565 (1997).

Constitutional Crises and Constitutional Foreign Policy

The Constitutive Regime of the International System is a living concept. The success of a particular conflict group or specific Great Power in dictating the content of the Constitutive Regime never spells the end of history. Every system includes the disenfranchised, the disenfranchised, and the dissatisfied. Every polity includes actors espousing alternative visions and competing worldviews that challenge the established orthodoxy. At certain historical junctures pressure mounts to revisit the normative foundations of the international system. This pressure may originate from the emergence of a new conflict group that seeks to establish itself as the dominant mode of organizing human society. This pressure may also emanate from a shift in the balance of power among existing conflict groups. As the topography of power shifts and as normative winds change, opposition to the dominant Constitutive Regime will gain traction. These are periods of constitutional crises.

During international constitutional crises, foreign policy resembles what Mark Tushnet called constitutional hardball. This is a form of political contestation in which domestic actors challenge the deep “pre-constitutional” conventions or the “go without saying assumptions” that “underpin working systems of constitutional government.”¹¹⁷ The objective of actors playing constitutional hardball is not simply to achieve political gains, but to reconfigure the rules of the game and restructure the political system to ensure that it permanently promotes actor’s values and interests. The objective of foreign policy during an international constitutional crisis, or what may also be called a crisis of world order, is similar. States, especially the Great Powers, are not only concerned with the specific outcomes of specific crises or issues. Rather, political contestation relates to the very normative foundation of the international system. Status quo powers will defend their entrenched positions of dominance and resist changes to the established Constitutive Regime, while rising or revolutionary powers will seek to revise or overturn the existing normative foundation of the international system. If rising or revolutionary powers succeed, they will transform their historically contingent and normatively subjective preferences into universal, self-evident, necessary conditions for the effective functioning of the international system.¹¹⁸ Foreign policy during an international constitutional crisis is, in other words, a bid to shape the “political common sense of a new era.”¹¹⁹

The contemporary international system is experiencing a period of constitutional crisis. The Constitutive Regime of the current international system was designed by the US in the post-Cold War years. The theory of world order of this Constitutive Regime was based on the Liberal Peace Theory. This theory, which is a mainstay of American foreign policy, is predicated on the presumption that democratic states that are economically interdependent are less likely to wage war against each other. Therefore, to preserve order and prevent war, Liberal Peace Theory prescribes promoting the democratization of states and the liberalization and integration of their economies.¹²⁰ Accordingly, the principle of differentiation of the post-Cold War Constitutive

¹¹⁷ Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2003-2004).

¹¹⁸ Robert Ashley, *Imposing International Purpose: Notes on a Problematic of Governance*, in GLOBAL CHANGES AND THEORETICAL CHALLENGES 251, 259 (Ernst-Otto Czempiel & James Rosenau eds. 1989).

¹¹⁹ Karen Oren and Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 POLITICAL SCIENCE QUART. 689, 693-694 (1998-1999).

¹²⁰ Michael Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463 (2005).

Regime was configured to identify liberal democratic states as the constituent units of the international system. The legitimacy of states increasingly depended on the democratic credentials and human rights record of their governments.¹²¹ States that failed to fulfill this standard of legitimate statehood risked losing the privileges of membership in the international system.¹²²

This Constitutive Regime of the post-Cold War years is currently in crisis. It is being challenged by a tectonic shift in the global balance of power the manifestations of which include China's reemergence, Russia's resurgence, India's growing prosperity, and the economic success of states like Brazil, South Africa, South Korea, and Turkey.¹²³ These non-western powers do not adhere to the Liberal Peace Theory. These states espouse a traditional state-centric Westphalian image of the international system and reject attempts to adopt a principle of differentiation and a theory of world order that identifies liberal democratic states as the sole legitimate constituent units of the international system.¹²⁴ The Constitutive Regime of the post-Cold War order is also being challenged by the rise of nativist, pseudo-nationalist, and populist parties in western societies. This populist revolt has demonstrated the depth of the discontent towards the ideas and values embodied in the post-Cold War Constitutive Regime, including free trade, environmental protection and combatting climate change, pro-immigration policies and multiculturalism, and multilateralism. The importance of this ongoing populist backlash is that it has afflicted the very heart of the western world. Many within the societies that articulated the post-Cold War Constitutive Regime appear to be rejecting the normative foundation of the international system they sponsored and led.

Given the current state of world politics, it is reasonable to predict that the international system will experience an extended constitutional crisis. One of the principal arguments of this Article is that determining the content of the Constitutive Regime of the International System is an act of elite engineering. Today's international system, however, is *No One's World*.¹²⁵ Power is dispersed to the extent that there is no clear center of political gravity in the system. In this politically weightless world it is unlikely that any single state or coalition of states will wield sufficient power to wholly determine the content of the Constitutive Regime of the International System. Instead, for the foreseeable future, our world will be governed by a decaying Constitutive Regime that is no longer accepted by either its creators or consumers, but to which no clear constitutive alternative has emerged.

¹²¹ See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). See also: JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW* (2013).

¹²² Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EURO. J. INT'L L. 504 (1995).

¹²³ Michael Cox, *Power Shifts, Economic Change, and the Decline of the West?* 26 INT'L RELATIONS 369, 371 (2012).

¹²⁴ See William Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L. J. (2015).

¹²⁵ CHARLES KUPCHAN, *NO ONE'S WORLD* (2012).